NORTH CAROLINA REPORTS

Vol. 262

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1964
FALL TERM, 1964

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1964

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Rule 46 of the Supreme Court is as follows:

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

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1 Murphey	"	5	"	13 " "	"	35	"
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5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
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				Phillips Law	"	61	"
				" Eq.	"	62	"

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1964
FALL TERM, 1964

CHIEF JUSTICE:

EMERY B. DENNY.

ASSOCIATE JUSTICES:

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

EMERGENCY JUSTICE:

J. WALLACE WINBORNE.

ATTORNEY-GENERAL:

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DEPUTY ATTORNEYS-GENERAL:

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ASSISTANT ATTORNEYS-GENERAL:

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SUPREME COURT REPORTER:

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BERT M. MONTAGUE.

JUDGES
OF THE
SUPERIOR COURTS OF NORTH CAROLINA

FIRST DIVISION

Name	*District*	*Address*
CHESTER R. MORRIS	First	Coinjock.
ELBERT S. PEEL, JR.	Second	Williamston.
WILLIAM J. BUNDY	Third	Greenville.
HOWARD H. HUBBARD	Fourth	Clinton.
R. I. MINTZ	Fifth	Wilmington.
JOSEPH W. PARKER	Sixth	Windsor.
GEORGE M. FOUNTAIN	Seventh	Tarboro.
ALBERT W. COWPER	Eighth	Kinston.

SECOND DIVISION

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WILLIAM A. JOHNSON	Eleventh	Lillington.
E. MAURICE BRASWELL	Twelfth	Fayetteville.
RAYMOND B. MALLARD	Thirteenth	Tabor City.
C. W. HALL	Fourteenth	Durham.
LEO CARR	Fifteenth	Burlington.
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EUGENE G. SHAW	Eighteenth-A	Greensboro.
FRANK M. ARMSTRONG	Nineteenth	Troy.
JOHN D. MCCONNELL	Twentieth	Southern Pines.
WALTER E. JOHNSTON, JR.	Twenty-First	Winston-Salem.
JOHN R. MCLAUGHLIN	Twenty-Second	Statesville.
ROBERT M. GAMBILL	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

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FRANCIS O. CLARKSON	Twenty-Sixth-B	Charlotte.
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W. K. MCLEAN	Twenty-Eighth	Asheville.
J. WILL PLESS, JR.	Twenty-Ninth	Marion.
GEORGE B. PATTON	Thirtieth	Franklin.

SPECIAL JUDGES.

H. L. RIDDLE, JR.	Morganton.	WALTER E. BROCK	Wadesboro.
HAL HAMMER WALKER	Asheboro.	JAMES F. LATHAM	Burlington.
HARRY C. MARTIN	Asheville.	EDWARD B. CLARK	Elizabethtown.
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EMERGENCY JUDGES.

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W. H. S. BURGWYN	Woodland.	WALTER J. BONE	Nashville.
Q. K. NIMOCKS, JR.	Fayetteville.	HENRY L. STEVENS, JR.	Warsaw.
ZEB V. NETTLES	Asheville.	HUBERT E. OLIVE	Lexington.
F. DONALD PHILLIPS	Rockingham.		

[1] Died 7 September 1964.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
ROY R. HOLDFORD, JR.	Second	Wilson.
W. H. S. BURGWYN, JR.	Third	Woodland.
ARCHIE TAYLOR	Fourth	Lillington.
LUTHER HAMILTON, JR.	Fifth	Morehead City.
WALTER T. BRITT	Sixth	Clinton.
WILLIAM G. RANSDELL, JR.	Seventh	Raleigh.
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LESTER G. CARTER, JR.	Ninth	Fayetteville.
JOHN B. REGAN	Ninth-A	St. Pauls.
DAN K. EDWARDS	Tenth	Durham.
THOMAS D. COOPER, JR.	Tenth-A	Burlington.

WESTERN DIVISION

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

SUPERIOR COURTS, SPRING TERM, 1965

FIRST DIVISION

First District—Judge Parker.

Camden—Apr. 5.
Chowan—Mar. 29; Apr. 26†.
Currituck—Jan. 25†; Mar. 1.
Dare—Jan. 11†(2); May 24.
Gates—Mar. 22; May 17†.
Pasquotank—Jan. 4†; Fab. 15*(2); Mar. 15†; May 3†(2); May 31*; June 7†.
Perquimans—Feb. 1†; Mar. 8†; Apr. 12.

Second District—Judge Fountain.

Beaufort—Jan. 18*; Jan. 25; Feb. 15† (2); Mar. 15*; Apr. 12†; May 3†(2); June 7†; June 21.
Hyde—May 17.
Martin—Jan. 4†; Mar. 8; Apr. 5†; May 24†(2); June 14.
Tyrell—Apr. 19.
Washington—Jan. 11*; Feb. 8†; Apr. 26.

Third District—Judge Cowper

Carteret—Mar. 8†(2); Mar. 29; Apr. 26† (A)(2); June 7(2).
Craven—Jan. 4(2); Feb. 1†(3); Mar. 1† (A); March 8(A); Apr. 5; May 3†(2); May 24(2); June 14†(A)(2).
Pamlico—Jan. 18(A); Apr. 12.
Pitt—Jan. 18†; Jan. 25; Feb. 22†(2); Mar. 15(A); Mar. 22; Apr. 12†(A); Apr. 19; May 17; May 24†(A); June 21.

Fourth District—Judge Morris.

Duplin—Jan. 18*; Mar. 1*(A); Mar. 8† (2); May 10*; May 17†(2).
Jones—Jan. 11†; Mar. 1.
Onslow—Jan. 4; Feb. 22; Mar. 22†(2); May 17(A).
Sampson—Jan. 25(2); Feb. 22†(A); Apr. 5†(2); Apr. 26*; May 3†; May 31†(2).

Fifth District—Judge Peel.

New Hanover—Jan. 11*; Jan. 18†(2); Feb. 8†(2); Feb. 22*(2); Mar. 8†(2); Apr. 5*; Apr. 12†(2); May 3†(2); May 17*; May 24†(2); June 7*; June 14†(2).
Pender—Jan. 4; Feb. 1†; Mar. 22; Apr. 26†.

Sixth District—Judge Bundy.

Bertie—Feb. 8(2); May 10(2).
Halifax—Jan. 25(2); Mar. 1†; Apr. 26; May 24†(2); June 7*.
Hertford—Feb. 22; Apr. 12(2).
Northampton—Jan. 18†; Mar. 29(2).

Seventh District—Judge Hubbard.

Edgecombe—Jan. 18*; Feb. 8†(A); Feb. 22*; Apr. 19*; May 17†(2); June 7.
Nash—Jan. 4*(A); Jan. 25†; Feb. 1*; Mar. 1†(2); Mar. 29*; May 3†(2); May 31*.
Wilson—Jan. 4†(2); Feb. 8*(2); Mar. 15*(2); Apr. 5†(2); May 3*(A)(2); June 14†(2).

Eighth District—Judge Mintz.

Greene—Jan. 4†; Feb. 22; June 14(A).
Lenoir—Jan. 11*; Jan. 18†(A); Feb. 8† (2); Mar. 15(2); Apr. 12†(2); May 17† (2); June 14*(2).
Wayne—Jan. 18*(2); Feb. 1†; Mar. 1† (2); Mar. 29*(2); May 3†(2); May 31†(2).

SECOND DIVISION

Ninth District—Judge Hall.

Franklin—Feb. 1*; Feb. 22†; Apr. 19† (2); May 10*.
Granville—Jan. 18; Jan. 25†(A); Apr. 5(2).
Person—Feb. 8; Feb. 15†; Mar. 22†(2); May 17; May 24†.
Vance—Jan. 11*; Mar. 1*; Mar. 15†; June 7†; June 21*.
Warren—Jan. 4*; Jan. 25†; May 3†; May 31*.

Tenth District—Judge Carr.

Wake—Jan. 4†(A); Jan. 4*(2); Jan. 11 †(A)(2); Jan. 18*(2); Jan. 25†(A)(2); Feb. 1†(2); Feb. 8†(A)(2); Feb. 15*(2); Feb. 22†#(A); Mar. 1*(A)(2); Mar. 1†(2); Mar. 15†(A)(2); Mar. 15*(2); Mar. 29†# (A); Mar. 29†(A); Apr. 5*(A)(2); Apr. 5† (2); Apr. 19†#(A); Apr. 19†(2); Apr. 26* (A)(2); May 3†(2); May 10†#(A); May 17*(A)(2); May 17†(2); May 31†(A)(2); May 31*(2); June 14†#(A); June 14†(2); June 21*(A).

Eleventh District—Judge McKinnon.

Harnett—Jan. 4*; Jan. 11†(A); Feb. 8† (A); Feb. 14†(2); Mar. 15*; Apr. 5†(A) (2); Apr. 19†(2); May 17*; May 24†(A) (2); June 7†(2).
Johnston—Jan. 11†(2); Jan. 25†(A)(2); Feb. 8; Feb 15(A); Mar. 1†(2); Mar. 29† (2); Apr. 12*(A); May 3†(2); May 31; June 21*.
Lee—Jan. 25; Feb. 1†; Mar. 1†(A); Mar. 22*; May 3†(A); May 24*.

Twelfth District—Judge Hobgood.

Cumberland—Jan. 4†(A); Jan. 4*(2); Jan. 18†(2); Feb. 1†(A)(2); Feb. 1*(2); Feb. 15*(A)(2); Feb. 15†(2); Mar. 1†(A) (2); Mar. 8*(2); Mar. 29*(A)(2); Mar. 29† (2); Apr. 12*(2); Apr. 19†(A)(2); May 3† (2); May 17†(A)(2); May 17*(2); May 13†(2); June 14†(A)(2); June 14*(2).
Hoke—Jan. 25(A); Mar. 1†; Apr. 26.

Thirteenth District—Judge Bickett.

Bladen—Feb. 15; Mar. 15†(2); Apr. 19; May 17†.
Brunswick—Jan. 18; Feb. 22†; Apr. 26†; May 10; May 21†(2).
Columbus—Jan. 4†(2); Jan. 25*(2); Mar. 1†(2); Apr. 12†; May 3*; May 24†; June 21.

Fourteenth District—Judge Johnson.

Durham—Jan. 4†(A)(2); Jan. 4*(2); Jan. 18†; Jan. 25†(A); Jan. 25*(3); Feb. 15†(A)(2); Feb. 15*(2); Mar. 1†(2); Mar. 8*(A)(3); Mar. 15†; Mar. 29†; Apr. 5†(A) (2); Apr. 5*(2); Apr. 19*(A); Apr. 19† (2); May 3*(2); May 10†(A); May 17†(2); May 24*(A); May 31*; June 7*(A)(2); June 7†(3).

Fifteenth District—Judge Braswell.

Alamance—Jan. 4†(2); Jan. 18*(A); Feb. 1†(2); Mar. 1*(2); Mar. 29†(A); Apr. 12†(2); May 3*; May 17†(2); June 7*(2).
Chatham—Jan. 25†(A); Feb. 15; Mar. 15†; May 10; May 31†.
Orange—Jan. 18†(2); Feb. 22*; Mar. 22 †(2); Apr. 26*; June 14†(A)(2).

Sixteenth District—Judge Mallard.

Robeson—Jan. 4*(2); Jan. 18†(2); Feb. 22†(2); Mar. 8*; Mar. 22†(2); Apr. 5*(2); Apr. 19†; May 3*(2); May 17†(2); June 7*(2).
Scotland—Feb. 1†; Mar. 15; Apr. 26† (A); June 21.

THIRD DIVISION

Seventeenth District—Judge Johnston.

Caswell—Feb. 22†; Mar. 22(A).

Rockingham—Jan. 18*(2); Feb. 15†(A); Mar. 1†(2); Mar. 15*(A); Apr. 19†(2); May 17†(2); June 14(2).

Stokes—Feb. 1; Apr. 5(2); June 21(A).

Surry—Jan. 4*(2); Feb. 8†(2); Mar. 22†(2); May 3*(2); May 31†(2).

Eighteenth District—Guilford.

Schedule A—Judge McLaughlin.

Greensboro—Jan. 4†(2); Jan. 18†(2); Feb. 1*(2); Feb. 22†(2); Apr. 12†(2); May 10*(2); May 31†#; June 7†(2).

High Point—Feb. 15†; Mar. 8*; Mar. 15†(2); Mar. 29*; Apr. 26†; May 3*; May 24*.

Schedule B—Judge Gambill.

Greensboro—Jan. 4*(2); Feb. 1†(2); Feb. 15†; Feb. 22*(2); Mar. 8†(2); Mar. 29†(2); Apr. 12*(2); Apr. 26†(2); May 10*; May 24†(2); June 7*(2).

High Point—Jan. 18*; Jan. 25†; May 17†; June 21†.

Schedule C—Judge to be Assigned.

Greensboro—Jan. 11†#; Jan. 18*; Feb. 15†; Mar. 8*; Mar. 22*(2); Apr. 26†#; May 24*; June 7*.

High Point—Jan. 4†; Feb. 8*; Feb. 22†(2); June 14†.

Nineteenth District—Judge Gwyn.

Cabarrus—Jan. 4*; Jan. 11†; Feb. 1†(A)(2); Mar. 1†(2); Apr. 19(2); May 24(A); June 7†(2).

Montgomery—Jan. 18*; Apr. 5(A); May 24†.

Randolph—Jan. 4†(A)(2); Jan. 25*; Feb. 1†(2); Mar. 1†(A)(2); Mar. 25*(A); Apr. 5†(2); May 3†(A)(2); May 31†(A)(2); June 21*.

Rowan—Jan. 18†(A)(2); Feb. 15*(2); Mar. 15†(2); May 3(2); May 17†; May 31*.

Twentieth District—Judge Shaw.

Anson—Jan. 11*; Mar. 1†; Apr. 12(2); June 7*; June 14†.

Moore—Jan. 18†; Jan. 25*; Mar. 8†; Apr. 26*; May 17†.

Richmond—Jan. 4*; Feb. 8†; Mar. 15†(2); Apr. 5*; May 24†(2); June 21†.

Stanly—Feb. 1†; Mar. 29(A); May 10†.

Union—Feb. 15(2); May 3.

Twenty-First District—Judge Crissman.

Forsyth—Jan. 4†#(A); Jan. 4(2); Jan. 11†(A); Jan. 18†(3); Feb. 1(A)(4); Feb. 8†(3); Mar. 1†(A)(3); Mar. 1(2); Mar. 22†(2); Apr. 5†(A); Apr. 5(2); Apr. 12†#(A); Apr. 19†(3); May 10†(A)(2); May 10(2); May 24†(2); June 7†(A)(3); June 7(3).

Twenty-Second District—Judge Armstrong.

Alexander—Mar. 8; Apr. 12.

Davidson—Jan. 18†(A); Jan. 25; Feb. 15†(2); Mar. 8†(A); Mar. 15; Mar. 29†(2); Apr. 26; May 17(A); May 31†(2); June 21.

Davie—Jan. 18*; Mar. 1†; Apr. 19(A).

Iredell—Feb. 1(2); Mar. 15†(A); Mar. 22*; May 3†; May 17(2).

Twenty-Third District—Judge McConnell.

Alleghany—Jan. 25; Apr. 19.

Ashe—Mar. 29*; May 24†.

Wilkes—Jan. 11; Jan. 18†; Feb. 15†(2); Mar. 8*(2); May 3†; May 31; June 14†(2).

Yadkin—Feb. 1(2); May 10.

FOURTH DIVISION

Twenty-Fourth District—Judge McLean.

Avery—Apr. 26(2).

Madison—Feb. 22; Mar. 22†(2); May 24*(2); June 21†.

Mitchell—Apr. 5(2).

Watauga—Jan. 18*; Apr. 19*; June 7†(2).

Yancey—Mar. 1(2).

Twenty-Fifth District—Judge Pless.

Burke—Feb. 15; Mar. 8; Mar. 15(A); May 31(2).

Caldwell—Jan. 18†(2); Feb. 22(2); Mar. 22†(2); May 17(2).

Catawba—Jan. 4†(2); Feb. 1(2); Apr. 5(2); Apr. 19†(2); June 14†(2).

Twenty-Sixth District—Mecklenburg.

Schedule A—Judge Patton.

Jan. 4*(2); Jan. 18†(2); Feb. 1†(2); Feb. 15†(3); Mar. 8*(2); Mar. 22†; Mar. 29†(A); Apr. 5*(2); Apr. 19†(2); May 3†(2); May 17†(2); May 31†(2); June 14*(2).

Schedule B—Judge Huskins.

Jan. 4†(2); Jan. 18†(2); Feb. 1*(3); Feb. 22†(2); Mar. 8†(2); Mar. 22†(A); Mar. 29†; Apr. 5†(2); Apr. 19†(2); May 3*(2); May 17†(2); May 31†(2); June 14†(2).

Schedule C—Judge to be Assigned.

Jan. 4†(2); Jan. 18†(2); Feb. 1†(2); Feb. 15†(2); Mar. 8†(2); Mar. 22†(2); Apr. 5†(2); Apr. 19†(2); May 3†(2); May 17†(2); May 31†(2); June 14†(2).

Schedule D—Judge to be Assigned.

Jan. 4†(2); Jan. 18†(2); Feb. 1†(2); Feb. 15†(2); Mar. 8†(2); Mar. 22†(2); Apr. 5†(2); Apr. 19†(2); May 3†(2); May 19†(2); May 31†(2); June 14†(2).

Twenty-Seventh District—Judge Farthing.

Cleveland—Jan. 25; Mar. 22†(2); Apr. 26(2).

Gaston—Jan. 4†(A); Jan. 4*; Jan. 11†(A)(3); Feb. 1*(A)(2); Feb. 1†; Feb. 8†(2); Feb. 22*(2); Mar. 1†(A); Mar. 8†(2); Mar. 22†(A); Mar. 29*(A)(2); Apr. 5†(A); Apr. 12†(2); Apr. 26*(A)(2); May 3†(A); May 10†(A)(2); May 24†; May 31†(A); May 13*(3); June 7†(A).

Lincoln—Jan. 11(2); May 10(2).

Twenty-Eighth District—Judge Campbell.

Buncombe—Jan. 4†(A)(2); Jan. 4*(2); Jan. 18†(3); Feb. 8*(2); Feb. 15†#(A); Feb. 22†(3); Mar. 15†(A)(3); Mar. 15*(2); Apr. 5†; Apr. 12†(A)(2); Apr. 12*(2); Apr. 26†(2); May 10†(A)(2); May 10*(2); May 24†(2); June 7†#(A); June 7*; June 14†(2).

Twenty-Ninth District—Judge Clarkson.

Henderson—Feb. 8(2); Mar. 15†(2); May 3*; May 24†(2).

McDowell—Jan. 4*; Feb. 22†(2); Apr. 12*(A); June 7(2).

Polk—Jan. 25; Feb. 1†(A)(2); June 21.

Rutherford—Jan. 11†*(2); Mar. 8*†; Apr. 19†*(2); May 10*†(2).

Transylvania—Feb. 1; Mar. 29(2).

Thirtieth District—Judge Froneberger.

Cherokee—Mar. 29(2); June 21†.

Clay—Apr. 26.

Graham—Mar. 15; May 31†(2).

Haywood—Jan. 4†(2); Feb. 1(2); May 3†(2).

Jackson—Feb. 15(2); May 17; June 14†.

Macon—Apr. 12(2).

Swain—Mar. 1(2).

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. JOYCE W. TODD, 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

HENRY MARSHALL SIMPSON, GREENSBORO, N. C.
HENRY E. FRYE, GREENSBORO, N. C.
R. BRUCE WHITE, JR., GREENSBORO, N. C.

U. S. Marshal

E. HERMAN BURROWS, GREENSBORO, N. C.

Clerk U. S. District Court

HERMAN AMASA SMITH, GREENSBORO, N. C.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1964

PAUL McNAIR, A MINOR REPRESENTED HEREIN BY CHANNIE McNAIR, HIS NEXT FRIEND V. MARION COLE GOODWIN, ORIGINAL DEFENDANT, AND JOSEPH FORTE, ADMINISTRATOR OF THE ESTATE OF CLINTON FORTE, ADDITIONAL DEFENDANT.

(Filed 20 May, 1964.)

1. Torts § 7—

Since there can be only one recovery by the injured party for a single tort, a release of one tort-feasor releases all.

2. Same—

A covenant not to sue does not extinguish a cause of action for tortious injury, and therefore a covenant not to sue one joint tort-feasor does not release the others, although the others are entitled to a credit for the amount paid as consideration for the covenant on any judgment thereafter obtained against them by the injured party.

3. Same—

A judgment against one of two or more joint tort-feasors, followed by an acceptance of satisfaction, bars any further legal proceeding against the other tort-feasors even though the judgment attempts to reserve the rights of the injured party against them.

4. Same—

In a proceeding to obtain authorization of the court for the execution by the guardian *ad litem* for a minor of a covenant not to sue one joint tort-feasor, the order of the court approving the amount and authorizing the guardian *ad litem* to execute the covenant is not a judgment extinguishing the cause of action and barring further proceedings against the other tort-

feasors, notwithstanding the order recites the minor's "claim" and "compromise and settlement of the claim."

5. Judgments § 4—

The effect of an order or judgment is not determined by its recitals but by what may or must be done pursuant thereto.

6. Torts § 8; Compromise and Settlement—

Compromise agreements are governed by legal principles applicable to contracts generally, and must be mutually binding.

7. Same—

Where the language of a release is clear and explicit the courts must declare the plain meaning irrespective of what either party thought the contract to be.

8. Same—

A contract releasing any and all causes of action whatsoever which the releasor has, or which may thereafter in any way grow out of the accident specified, bars the payee-releasor as well as the payor-releasee from thereafter maintaining a cross-action against the other for contribution pursuant to G.S. 1-240, and further provisions of the release that payment made thereunder should not be construed as an admission of liability and that it was understood that the injuries for which the release was given might be permanent and recovery therefrom uncertain, etc., clarifies rather than restricts the coverage of the release.

APPEAL by defendant, Marion Cole Goodwin, from *Cowper, J.*, September 1963 Civil Session of WAYNE.

James N. Smith for plaintiff.

Braswell & Strickland for defendant Marion Cole Goodwin.

Taylor, Allen & Warren, and John H. Kerr, III, for Additional Defendant Forte, Administrator.

MOORE, J. This is an action to recover damages for personal injury suffered by plaintiff as a result of a collision of automobiles. This is the collision described in *Forte v. Goodwin,* 261 N.C. 608.

About 6:30 P.M. on 9 September 1961, on secondary road No. 1235 in Wayne County, a Chevrolet owned and operated by Clinton Forte collided with a Ford owned and operated by Marion Cole Goodwin. Clinton Forte died as a result of injuries received in the collision and Joseph Forte qualified as administrator of his estate.

On 8 September 1962 Goodwin, in consideration of $3595 paid him by or on behalf of the Forte estate, executed and delivered to the Forte estate a paper writing entitled "Release of all Claims."

Paul McNair, a resident of New York, was a passenger in Clinton Forte's Chevrolet at the time of the collision and was allegedly injured thereby. He was a minor. By the authority and approval of an order of the Supreme Court of King's County, State of New York, Paul McNair and his mother, Channie McNair, acting as his guardian *ad litem* (his father is dead), in consideration of $5000, executed and delivered to the Forte estate an instrument entitled "Covenant not to Sue," dated 2 March 1963.

On 20 March 1963 Paul McNair, by next friend, instituted the present action against Goodwin. Goodwin, answering, denies that he was negligent or in any way responsible for McNair's alleged injuries, and, further answering (1) pleads the order of the New York court and the "Covenant not to Sue" as a complete bar to the action, asserting that they constitute a release of joint tort-feasor Forte, and (2) alleges that Clinton Forte was concurrently negligent and jointly responsible for the collision and his administrator should be made an additional defendant for the purpose of contribution, pursuant to G.S. 1-240.

The administrator of the Forte estate was made an additional party defendant and filed answer to defendant Goodwin's cross-action for contribution, setting up Goodwin's "Release of all Claims" as a bar to the cross-action.

The court heard and considered the pleas in bar preliminary to a trial of the issues raised upon the allegations of the complaint. The facts with respect to the pleas in bar were stipulated and agreed. It was adjudged that the order of the New York court and the "Covenant not to sue" *do not bar* plaintiff McNair's action against defendant Goodwin, and that the "Release of all Claims" *bars* defendant Goodwin's cross-action for contribution against the Forte estate. Defendant Goodwin appeals.

(1). Defendant Goodwin contends that the order of the New York court and the "Covenant not to Sue," considered together, constitute a release of the Clinton Forte estate by plaintiff, and he, Goodwin, is thereby released.

A valid release of one of several joint tort-feasors releases all and is a bar to a suit against any of them for the same injury. This is true for the reason that the injured party is entitled to but one satisfaction, the cause of action is indivisible, and the release operates to extinguish the cause of action. *Simpson v. Plyler*, 258 N.C. 390, 128 S.E. 2d 843; *King v. Powell*, 220 N.C. 511, 17 S.E. 2d 659; *Howard v. Plumbing Co.*, 154 N.C. 224, 70 S.E. 285. But a covenant not to sue does not release and extinguish the cause of action, and the cause of action may be maintained against the remaining tort-feasors notwithstanding the

covenant. *Simpson v. Plyler, supra; Slade v. Sherrod,* 175 N.C. 346, 95 S.E. 557. The remaining tort-feasors are entitled, however, to have the amount paid for the covenant credited on any judgment thereafter obtained against them by the injured party. *Ramsey v. Camp,* 254 N.C. 443, 119 S.E. 2d 209; *Holland v. Utilities Co.,* 208 N.C. 289, 180 S.E. 592.

The question for decision is whether the instrument executed and delivered by plaintiff to the Forte estate is what it purports to be, a covenant not to sue, or a release.

The order of the Supreme Court of King's County, New York, recites that plaintiff and his mother, as his guardian *ad litem,* applied "for approval of a settlement of a claim . . . against Clinton Forte for damages for personal injuries" resulting from the collision in question, and that from a hearing of oral and documentary evidence and a full examination of all the facts it appeared satisfactorily to the court "that the acceptance of the aforementioned settlement of the said infant's claim would be in his best interests. . . ." Thereupon, it was "ordered that the compromise and settlement of the said claim for the sum of $5000" be approved, and it was further "Ordered, that the Guardian *ad Litem* execute a covenant not to sue the said Clinton Forte or his estate in conformity with the laws of North Carolina so as to preserve the rights of the said infant to prosecute a claim against Marion Goodwin . . ."

Thereafter, on 2 March 1963, plaintiff and his mother, as guardian *ad litem,* executed the "Covenant not to Sue," which is in pertinent part as follows: ". . . I, Paul McNair, . . . for the sole consideration of . . . $5000 . . . do hereby covenant and agree . . . that I will not institute any suit against the estate of the said Clinton Forte . . . on account of the injuries and damages sustained by me resulting or to result from an accident which occurred on or about September 9, 1961" (the collision in question is here referred to). The instrument further recites that the estate of Clinton Forte does not admit liability, "but expressly denies all negligence and responsibility for the accident."

The "Covenant not to Sue," considered alone, is clearly what its caption implies; it is not a release. By its terms plaintiff surrenders only his right to sue the Forte estate upon his cause of action. We do not understand that appellant contends otherwise. Appellant's position is that the New York court was dealing with the "settlement of plaintiff's claim" against the Forte estate, "compromise and settlement of the claim," that plaintiff's "claim" and cause of action are one and the same thing, and that the order was in effect a judgment satisfying the claim and extinguishing the cause of action. With this interpretation

we do not agree. The rule is that where there has been a judgment against one of two or more joint tort-feasors, followed by an acceptance of satisfaction, all other joint tort-feasors are thereby released, and the judgment and satisfaction may be successfully pleaded by them as a bar to the maintenance of the same or another suit by the same plaintiff involving the same cause of action; this is true even if the judgment attempts to reserve the rights of the injured party against the other tort-feasors. *Simpson v. Plyler, supra.* The order of the New York court is not a judgment against the Forte estate, the estate was not a party to the proceeding. The order was not a judgment against anyone; no payment could have been enforced pursuant thereto. Without the subsequent execution of the "Covenant not to Sue" it would have been of no effect. The effect of an order or judgment is not determined by its recitals, but by what may or must be done pursuant thereto. The only purpose of the proceeding and order was to obtain and grant authority for the execution of the covenant by and on behalf of plaintiff, he being a minor. The court approved the amount he was to receive and authorized his guardian *ad litem* to execute on his behalf "a covenant not to sue . . . in conformity with the laws of North Carolina so as to preserve the rights of the said infant to prosecute a claim against Marion Goodwin." Before a valid release, binding upon the minor, could have been executed a further order would have been necessary. The actual instrument executed pursuant to the order is the controlling factor in this situation. Had the order authorized a release and the parties, upon the consideration approved, executed a covenant not to sue, instead of a release, it would seem that the result would be, as to third parties, a covenant not to sue.

(2). In consideration of the receipt of $3595 defendant Goodwin executed and delivered to the Forte estate an instrument entitled "Release of all Claims." Goodwin contends that the intent and effect of the instrument is to acquit the Forte estate of all claims, demands and causes of action he, Goodwin, had on account of any and all personal injuries and property damage he suffered or might suffer by reason of the collision, but that it does not release his right of cross-action, pursuant to G.S. 1-240, for contribution. The administrator of the Forte estate insists, on the contrary, that it releases all manner of claims and causes of action accruing to Goodwin on account of the collision, including claim for contribution.

The release, omitting formalities and nonessentials, is as follows:

> ". . . (T)he undersigned . . . does hereby . . . release, acquit and forever discharge the Estate of Clinton Forte, deceased, . . .

of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of services, expenses and compensation whatsoever, which the undersigned now has . . . or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequences thereof resulting or to result from the accident (here describing the collision) . . .

". . . (T)his settlement is the compromise of a doubtful and disputed claim, and . . . the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released, and . . . said releasees deny liability therefor and intend merely to avoid litigation and buy their peace.

"The undersigned hereby declares and represents that the injuries sustained are or may be permanent and progressive and recovery therefrom is uncertain and indefinite and in making this release it is understood and agreed that the undersigned relies wholly upon the undersigned's judgment . . ."

We have had no occasion heretofore to consider a case involving the exact factual situation here presented. We have construed the effect of a general release, between defendants, in a cross-action for contribution, but in those cases the original defendant was payor-releasee and the additional defendant was payee-releasor. *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805; *Herring v. Coach Co.*, 234 N.C. 51, 65 S.E. 2d 505. In these cases it was held that the release barred the cross-action. But it is suggested that these cases are not decisive of the instant case because here the original defendant is payee-releasor and the additional defendant is payor-releasee. It is true that the opinion in the Snyder case employs the following language: "The adjustment of said claim by the payment of the amount agreed constituted an acknowledgment, as between the parties, of the liability of the oil company (original defendant) and the nonliability, or at least the waiver of the liability, of the defendant Dixon (additional defendant)." (Parentheses added). Considered alone, this language seems to indicate that the decision rests on the admission of liability on the part of the original defendant which precludes it from claiming contribution as against the additional defendant (payee-releasor). This, however, is a strained construction. The opinion states further: "By said compromise settlement each party *bought his peace* respecting *any liability created by the collision . . . Neither party* thereafter had any right to pursue the other in respect to *any liability* arising out of alleg-

ed negligence proximately causing the collision which is the subject matter of this suit. 'A concluded agreement of compromise must, in its nature, be as obligatory as any other, and *either party* may use it whenever its stipulations or statements of fact become material evidence for him'." (Emphasis added). In other words, the opinion states that both parties are bound and, as between them, each has bought his peace.

In the instant case the additional defendant (payor-releasee) does not admit any liability. On the contrary, the release stated that "said releasees deny liability . . . and intend merely to avoid litigation and buy their peace." In *Forte v. Goodwin,* 261 N.C. 608, the jury found that both parties (to the release in the instant case) were liable. We do not suggest that that result settles the matter, but we do emphasize that there is nothing to justify the assumption that there is any admission of liability on one part and of nonliability on the other.

Appellant states in his brief that "under the facts in the case now before the Court, it has been pretty well established that the estate of Clinton Forte (additional defendant and payor-releasee) could not join Marion Cole Goodwin (original defendant and payee-releasor) for purposes of contribution." If this be true, Goodwin cannot join the Forte estate for contribution. If the contract binds the Forte estate, it also binds Goodwin. Contracts are mutually binding; a contract of release may be pleaded by each party as a bar to suit by the other with respect to the subject matter of the release.

In the instant case there was only one collision, but several distinct causes of action grew out of the one collision, including Goodwin's cause of action against the Forte estate and McNair's cause of action against Goodwin. But where the subject matter of the release is all damages growing out of the collision giving rise to causes of action affecting the parties to the release, the release is not limited in coverage to the single cause of action of one of the parties alone for damages suffered by him directly. *Houghton v. Harriss,* 243 N.C. 92, 89 S.E. 2d 860. "Compromise agreements are governed by the legal principles applicable to contracts generally. As a consequence, a compromise agreement is conclusive between the parties as to matters compromised. . . . But it does not extend to matters not included within its terms." *Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410.

Insofar as its terms apply to the facts of the instant case the contract releases "any and all actions, (and) causes of action . . . *whatsoever,* which the undersigned (Goodwin, original defendant) now has . . . or which may hereafter accrue on account of or *in any way growing out of . . . bodily and personal injuries and property damage*

. . . resulting or to result from the *accident.*" (Emphasis added). The personal injuries to plaintiff McNair resulted from the *accident* referred to in the release. His action against Goodwin is based thereon. By reason of McNair's injuries in said accident and his action to recover therefor from Goodwin, the latter's cross-action for contribution accrued. The "cause of action" for contribution certainly is embraced within the term, "causes of action *whatsoever.*" The terms of the release clearly include the cross-action for contribution. Where a written agreement is explicit, the court must so declare, irrespective of what either party thought the effect of the contract to be. *Howland v. Stitzer,* 240 N.C. 689, 84 S.E. 2d 167. The plain provisions of the release are sufficient to bar any manner of claim or action, arising out of damages caused by the collision in question, which Goodwin may assert against the Forte estate.

In the argument in this Court counsel for appellant conceded that the first paragraph of the release (the language referred to in the next preceding paragraph) is probably broad enough to bar the cross-action, and appellant's brief states, "This is very broad language and is the language used in general releases." Appellant insists, however, that the second and third paragraphs of the release restrict the meaning of the first paragraph and show that it was the intent of the parties to contract only with respect to damages suffered directly by Goodwin.

We find nothing in the second and third paragraphs of the release which restricts the scope and effect of the first paragraph. The second paragraph purports only a denial of liability by the payor. The third paragraph makes it clear that releasor is relying solely upon his own judgment and realizes that injuries caused by the accident may be permanent and progressive and may be of a nature and extent not apparent at the date of the release. These paragraphs clarify rather than restrict the first paragraph.

The judgment below is

Affirmed.

JAMES W. (JIMMIE) LANE v. CHARLIE S. COE AND WIFE, LORA V. COE.

(Filed 20 May, 1964.)

1. Frauds, Statute of § 2—

In order to be sufficient to overcome the plea of the statute of frauds, the writing signed by the party to be charged must contain, expressly or

by necessary implication, all features of an agreement to sell, and contain a description of the lands certain in itself or capable of being reduced to a certainty by something extrinsic to which it refers. G.S. 22-2.

2. Same; Boundaries § 9—

A description which leaves the identity of the land absolutely uncertain and refers to nothing extrinsic by which it may be identified with certainty is patently ambiguous and may not be aided by parol; a description which, although insufficient in itself to identify the property, refers to something extrinsic by which identification may be possible is latently ambiguous, in which case plaintiff may offer evidence *dehors* the instrument to identify the property and defendant may offer evidence tending to show impossibility of identification and thus show a fatal ambiguity.

3. Same—

The memorandum of the contract in suit described the subject lands as a house and lots on a specified highway where the seller's residence is located. *Held:* The description is not, as a matter of construction, patently ambiguous, and evidence *dehors* the memorandum is competent to identify the lands provided such evidence does not tend to substitute a new and different contract in contradiction of the writing.

4. Same; Evidence § 27—

In this action to recover damages for breach of contract to convey, plaintiff introduced in evidence the memorandum signed by defendant. *Held:* Testimony of declarations of defendant with respect to the boundaries, descriptions and areas of the lands, made prior to or contemporaneously with the execution of the writing, is properly excluded as tending to substitute a new and different contract from that evidenced by the writing.

5. Boundaries § 9; Vendor and Purchaser § 3—

Where, in an action for damages for breach of contract to convey, the purchaser introduces a memorandum signed by defendant describing the lands as house and lots where the vendor's residence is, and the vendor's answer identifies the property by lot numbers with reference to recorded deeds and a recorded map, and there is competent evidence tending to show that the lots were one connected body of land and that defendant had no other property on the highway specified, *held*, the identity of the land was sufficient as against the vendor's motion for nonsuit.

6. Pleadings § 29; Evidence § 20—

Admissions in the pleadings of the adverse party obviate proof.

7. Appeal and Error § 51—

On appeal from a judgment of involuntary nonsuit, competent evidence offered by plaintiff will be considered notwithstanding it was excluded in the court below.

8. Vendor and Purchaser § 7—

The measure of damages for breach of contract to convey is the difference between the contract price and the market value of the lands.

9. Vendor and Purchaser § 1; Evidence § 27—

In the purchaser's action for damages for breach of contract to convey, the vendor may set up the defense that the contract was subject to a condition precedent, since such condition does not contradict the written instrument but only postpones its effectiveness.

10. Vendor and Purchaser § 1—

Where, in the purchaser's action for damages for breach of contract to convey, plaintiff makes out a *prima facie* case, defendant's contention that he delivered the contract subject to the condition that he could get his wife to "sign the papers" is a matter of defense and cannot justify nonsuit.

11. Trial § 27—

Where plaintiff makes out a *prima facie* case, defendant's affirmative defense cannot justify nonsuit when plaintiff has made no admissions in regard to the defense and has offered no evidence to establish it.

12. Vendor and Purchaser § 1—

Where the husband enters into a contract to sell certain lands, a portion of which is owned by his wife individually and the remainder by him and his wife as tenants by the entireties, the fact that the purchaser may not compel specific performance does not bar the purchaser's right of action for damages for breach of the contract if the lands are not conveyed to him.

13. Contracts § 20—

The fact that the promisor's ability to perform is dependent upon the cooperation of a third person does not relieve the promisor from liability for damages if he cannot get the third person to act, since he, himself, contracted to procure the cooperation of such third party.

APPEAL by plaintiff from *McLaughlin, J.*, September 30, 1963, Civil Session of DAVIE.

William E. Hall for plaintiff.
No counsel contra.

MOORE, J. This is a civil action for damages arising from an alleged breach of a contract to convey land. At the close of plaintiff's evidence the trial judge entered a judgment of involuntary nonsuit.

On 23 March 1963, after discussion on this and prior dates, plaintiff and defendant Charlie Coe signed the following memorandum or receipt:

> "3-23-63. Received of Jimmie Lane One Hundred Dollars as a binder on house and lots on 601 highway where his residence is Bal. Eight Thousand and Nine Hundred Dollars and 1963 Pont. Conv. or 1963 Pont. Grand Prix eather one Perfered. Bal. due when clear deed is maid if possible 3-26-63. S/Charlie Coe
> S/Jimmie Lane."

On 27 March 1963 defendants, Charlie Coe and wife, Lora V. Coe, conveyed the subject property to one Armand Daniel. Plaintiff instituted this action on 6 May 1963.

The complaint alleges in substance: On 23 March 1963 defendants owned certain lots (specified by number) of the "Jacob Eaton Sub-Division" as shown on recorded map. On said date Charlie Coe "for himself and as agent" for his wife signed the receipt or contract (set out above) and at that time was paid $100. In breach of the contract defendants conveyed the land to Armand Daniel. In apt time plaintiff offered on his part to comply with the contract, and was and still is ready, willing and able to comply. Plaintiff has been damaged in the sum of $2400.

Defendant Charlie Coe, answering, admits signing the receipt and thereafter conveying the land to Daniel, and avers: Certain of the lots were owned solely by Lora V. Coe and the rest by defendants as tenants by the entirety. He signed the receipt on condition that his wife would thereafter agree to convey on the terms stated. The action is barred by the statute of frauds for that the purported contract does not contain a sufficient description of the land.

Defendant Lora V. Coe filed a separate answer setting up the same defenses asserted by Charlie Coe and, additionally, denying that her husband was her agent in signing the contract, and declaring that she had no knowledge of the contract at the time of its execution.

Plaintiff testified that he operated a second hand car lot on U. S. Highway 601 about ¾ of a mile south of Mocksville, defendants on 23 March 1963 lived "across the street" from the car lot, he (plaintiff) prepared the receipt and male defendant signed it, and was paid $100. The contract (receipt) was admitted in evidence.

The following testimony of plaintiff was excluded over his objection: He (male defendant) said he would sell me "all the land that he owned down there, which was a field behind the Phillips 66 station and his house and lots. He said there was 300 feet" of frontage on 601. "I don't know how many feet" it goes back; "I do know where the line is; he has showed me before." He pointed it out to me. The field joins the lots the house is on; "he said there was a 75-foot strip that he had sold off all but that which joined into the lot to the field and the lot. He said (there were) approximately 11 acres more or less." He pointed out the boundaries to me. "I saw him again on . . . Monday night (March 25). He came into my office and said, 'I have been offered more money for my property; I won't let you have it unless you want to give me more money. I am going to give you your money back.' I said, 'Mr. Coe, as far as my part is concerned, I have already

bought it.' . . . I saw him again on Tuesday and he told me I was not getting the property and that it had already been sold. . . . I was ready, willing and able to fulfill my part of the paper writing. Mr. Coe never offered to give me the One Hundred Dollars back again. On one occasion, I asked him for it and he just turned around and smiled and said 'Sue me.' I asked him for the One Hundred Dollars on other occasions and each time he refused."

Evidence corroborative of the plaintiff's excluded testimony was ruled out. Testimony as to damages was also excluded. J. D. Furches testified: ". . . Mr. Coe said that neither he nor his wife owned any other property on #601 other than that which is contained in the paper writing." This was also excluded, as was other evidence to the same effect.

Plaintiff concedes that the evidence offered by him, including that excluded by the court, fails to make out a *prima facie* case against defendant Lora V. Coe. He contends, however, that the court erred in its rulings on the admission of evidence and in allowing defendant Charlie Coe's motion for nonsuit.

It is apparent that the trial judge was of the opinion that the description in the written contract is insufficient as a matter of law and that it could not be aided by parol testimony.

The statute of frauds, G.S. 22-2, provides that "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . ." A memorandum or note is, in its very essence, an informal and imperfect instrument. *Phillips v. Hooker*, 62 N.C. 193. But it must contain expressly or by necessary implication the essential features of an agreement to sell. *Elliott v. Owen*, 244 N.C. 684, 94 S.E. 2d 833; *Keith v. Bailey*, 185 N.C. 262, 116 S.E. 729; *Hall v. Misenheimer*, 137 N.C. 183, 49 S.E. 104. It must contain a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Searcy v. Logan*, 226 N.C. 562, 39 S.E. 2d 593; *Timber Co. v. Yarbrough*, 179 N.C. 335, 102 S.E. 630; *Bateman v. Hopkins*, 157 N.C. 470, 73 S.E. 133; *Farmer v. Batts*, 83 N.C. 387. If the description is sufficiently definite for the court, with the aid of extrinsic evidence, to apply the description to the exact property intended to be sold, it is enough. *Lewis v. Murray*, 177 N.C. 17, 97 S.E. 750; *Simmons v. Spruill*, 56 N.C. 9.

The most specific and precise descriptions require some proof to complete the indentification of the property. More general descriptions require more. The only requisite in evaluating the written contract, as

to the certainty of the thing described, is that there be no patent ambiguity in the description. *Norton v. Smith,* 179 N.C. 553, 103 S.E. 14. There is a patent ambiguity when the terms of the writing leaves the subject of the contract, the land, in a state of absolute uncertainty, and refer to nothing extrinsic by which it might possibly be identified with certainty. *Gilbert v. Wright,* 195 N.C. 165, 141 S.E. 577; *Bryson v. McCoy,* 194 N.C. 91, 138 S.E. 420. When the language is patently ambiguous parol evidence is not admissible to aid the description. *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759. The descriptions considered in the following cases are patently ambiguous and could not be aided by parol evidence: *Boone v. Pritchett,* 259 N.C. 226, 130 S.E. 2d 288,—boundary description, but no designation of township, county, state or other geographical location; *Manufacturing Co. v. Hendricks,* 106 N.C. 485, 11 S.E. 568,—"thirty acres of land, being a portion of a tract formerly owned by Reuben Deaver", a designation by subsequent survey did not supply the deficiency; *Murdock v. Anderson,* 57 N.C. 77—"one house and lot, in the town of Hillsborough." See also *Baldwin v. Hinton,* 243 N.C. 113, 90 S.E. 2d 316; *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723.

A patent ambiguity raises a question of construction; a latent ambiguity raises a question of identity. If the ambiguity is latent, evidence *dehors* the contract is both competent and necessary. A description is said to be latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. In such case plaintiff may offer evidence, parol and other, with reference to such extrinsic matter tending to identify the property, and defendant may offer such evidence with reference thereto tending to show impossibility of identification, i.e., ambiguity. *Gilbert v. Wright, supra.* The following cases are illustrative: *Carson v. Ray,* 52 N.C. 609—"My house and lot in the town of Jefferson, in Ashe County, North Carolina" (it is not presumed that vendor had more than one lot, and if it be shown that he had more than one, it must be by extrinsic proof, and the case is then one of latent ambiguity, which may be explained by similar proof); *Phillips v. Hooker, supra*—"her house and lot north of Kinston"; *Norton v. Smith, supra*—"his entire tract or boundary of land consisting of 146 acres." See also *Lewis v. Murray, supra; Craven County v. Parker,* 194 N.C. 561, 140 S.E. 155.

In the instant case the subject property is "house and lots on 601 highway where his (Charlie Coe's) residence is." In our opinion this description is not, as a matter of construction, one of patent ambiguity. It admits of the possibility of identification by evidence *dehors* the con-

tract. If it be shown that Charlie Coe, at the time of the execution of the contract, resided in a house situate on lots located on highway 601, the lots are contiguous and compose the land and premises on which the house is, and the lots are defined and described by reference to a map, deed or fixed monuments, the description is sufficient. Descriptions in contracts referring to land as the place of residence of a specified person have been upheld in many cases: *Searcy v. Logan, supra* — "home place where he (vendee) now lives which he has no deed for"; *Manufacturing Co. v. Hendricks, supra* — "on his land where he now resides"; *Bateman v. Hopkins, supra* — "The farm on which I now live." The word "lots," plural, does not require the construction that the description is patently ambiguous. When used in connection with "house" it will not be presumed, in construing the contract, that the "lots" are not contiguous and do not form the premises on which the house is located, or that the house is not located on more than one lot. We have found no case in this jurisdiction involving the word "lots" in a general description, and only two cases from other jurisdictions. *Lemmon v. Lemmon,* 47 Pa. Super 604; *Thayer v. Luce & Fuller,* 22 Ohio St. 62. In those cases the descriptions were ruled insufficient, but not because of the descriptive word "lots." In the case at bar evidence, including parol evidence, was admissible to identify the subject land.

This brings us to a consideration of the evidence. The burden was upon the plaintiff to identify the property referred to in the contract. The description, "house and lots on 601 highway where his residence is," must be fitted to the land and the land fully identified by competent evidence. *Bateman v. Hopkins, supra.*

The plaintiff gave testimony as to what Charlie Coe said prior to and contemporaneously with the execution of the contract with respect to the boundaries, description and area of the land. Plaintiff also offered in evidence the testimony of others who were present at the time the contract was signed as to the declarations of Charlie Coe. The court properly excluded all such testimony. ". . . the written agreement is a merger of any parol agreement between the parties, and any and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract than the one evidenced by the writing is incompetent." 49 Am. Jur., Statute of Frauds, § 617, p. 923.

Nevertheless, we are of the opinion that the evidence of the identity of the land was sufficient on the question of nonsuit. Charlie Coe's answer identifies the property "on which was located their (Mr. and Mrs. Coe's) home" by lot numbers with reference to recorded deeds

and a recorded map of the "Jacob Eaton lands." Material evidence may be supplied by admissions in the pleadings. *Phillips v. Hooker, supra.* Plaintiff testified, without objection, that at the time of the execution of the contract Charlie Coe lived in a house on Highway 601 about three-fourths of a mile south of Mocksville and "across the street" from the used car lot operated by plaintiff. The court excluded competent evidence tending to show that the lots were one connected body of land and the defendant had no other property on Highway 601. On appeal from a judgment of involuntary nonsuit competent evidence offered by plaintiff which was excluded in the court below will be considered in passing upon the sufficiency of the evidence. *Powell v. Deifells, Inc.,* 251 N.C. 596, 112 S.E. 2d 56; *Pinnix v. Griffin,* 219 N.C. 35, 12 S.E. 2d 667.

Plaintiff offered competent evidence tending to show: Plaintiff paid Charlie Coe $100 at the time the contract was signed; on the second day following the signing of the contract Charlie Coe told plaintiff he had been offered more money and would not let plaintiff have the property unless he was willing to pay more, and on the next day stated that the land had been sold to another party; Charlie Coe has not returned the $100 and has refused to do so; plaintiff was at all times "ready, willing and able" to fulfill his part of the contract; the market value of the property at the time of the execution of the contract was between $13,000 and $14,000; the Grand Prix automobile had cost plaintiff $3,250, the convertible $3,550. The measure of damages for breach of contract to convey land is the difference between the contract price and the market value of the land. *LeRoy v. Jacobosky,* 136 N.C. 443, 48 S.E. 796; *Rodman v. Robinson,* 134 N.C. 503, 47 S.E. 19.

Charlie Coe in his answer avers that he signed and delivered the contract on the condition that "he could get his wife . . . to sign the papers." A parol agreement of the conditional delivery of a written contract for the conveyance of land is valid, and it does not contradict the written instrument, but only postpones its effectiveness until after the condition has been performed or the event has happened. *Lerner Shops v. Rosenthal,* 225 N.C. 316, 34 S.E. 2d 206. That there was such agreement and the condition was not performed is a matter of defense and may not be considered on motion for nonsuit where, as here, plaintiff has made no admission with respect thereto and has offered no evidence establishing it.

Charlie Coe's answer states that a portion of the subject property (specifying) was owned by his wife individually, and the remainder by him and his wife as tenants by the entirety. If this be true, plaintiff could not have compelled specific performance even if the land had

not been conveyed to a third person, but such facts, if true, do not bar the maintenance of an action for damages for breach of the contract. *LeRoy v. Jacobosky, supra.* The impossibility of performance on Charlie Coe's part is not such as to excuse him. ". . . the inability to control the actions of a third person, whose cooperation is needed for the performance of the undertaking, is ordinarily not to be regarded as an impossibility avoiding the obligation." 12 Am. Jur., Contracts, § 370, p. 941. "When a contract is to do a thing which is possible in itself, the promisor will be liable for a breach thereof notwithstanding it was beyond his power individually to perform it, for it is his own fault if he undertakes to do a thing which to him is an impossibility." *Ibid,* § 378, p. 954.

When all of the facts with respect to the cause of action have been presented, it may appear that there is a latent ambiguity with respect to description or a parol condition precedent attached which will defeat the action. But upon the record before us judgment of involuntary nonsuit was improvidently entered.

Reversed.

CHARLES S. NORBURN AND WIFE, HELEN J. NORBURN v. PAUL E. MACKIE, RUTH M. MACKIE, AND HORACE J. ISENHOWER, SR.

(Filed 20 May, 1964.)

1. Pleadings § 29; Evidence § 20—

An admission in a pleading is a judicial admission establishing the facts admitted for the purpose of the case and obviating the necessity of proof by the adverse party.

2. Husband and Wife § 3—

A husband is not the agent of his wife solely by reason of the relationship, and no presumption of agency arises therefrom.

3. Same—

Agency of a husband to act for his wife in a particular transaction may be established by direct or circumstantial evidence, and only slight evidence of agency is necessary when the wife receives and retains the benefits of the contract negotiated by him.

4. Same—

Admissions in the joint answer of the husband and wife that they owned the lands in question, that the husband verbally authorized a broker to sell the lands, that the purchase money was paid to the husband alone but

that "defendants" paid the broker's commission for the sale, permits the inference that the wife received or obtained the benefit of a part of the purchase price and is sufficient to be submitted to the jury on the question of the husband's agency.

5. Principal and Agent § 5; Brokers and Factors § 3—

Declarations by a broker as to the quantity and condition of the land, made in negotiations with a prospective purchaser, are within the scope of his employment and are competent in evidence against his principals.

6. Appeal and Error § 51—

On appeal from compulsory nonsuit, evidence erroneously excluded in the lower court is to be considered.

7. Principal and Agent § 9—

As a general rule, the principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority, even though the principal did not know of or authorize the commission of the fraudulent acts.

8. Principal and Agent § 11—

A person is personally liable for a fraud committed by him notwithstanding that he was acting as agent for another.

9. Brokers and Factors § 5; Fraud § 11—

Evidence that the broker, in negotiating with a prospective purchaser, knew that the purchaser, because of his physical condition, was unable to inspect the land personally, that the broker represented that he knew the land well and made a positive and grossly erroneous statement as to the number of acres of pasture in the tract, and that the purchaser in reliance on the representation paid a purchase price computed on the number of acres of pasture land in the entire tract, *is held* sufficient to be submitted to the jury in an action for fraud.

10. Principal and Agent § 8—

As a general rule, a principal is chargeable with and bound by the knowledge of or notice to his agent while the agent is acting within the scope of his authority and in reference to matters over which his authority extends, although the agent does not in fact inform his principal thereof.

11. Appeal and Error § 51—

Where a new trial is awarded, the Supreme Court will refrain from discussing the evidence except to the extent necessary to pass upon the exceptions.

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

APPEAL by plaintiffs from *Martin, S. J.*, September 1963 Civil Session of BUNCOMBE.

Civil action to recover actual and punitive damages for false and fraudulent representations made by the defendants in connection with the sale of land owned by the Mackie defendants to plaintiffs.

From a judgment of compulsory nonsuit of plaintiffs' action, entered at the close of plaintiffs' evidence, they appeal.

Williams, Williams & Morris by Robert R. Williams, Jr., for plaintiff appellants.

Williams and Pannell for Paul E. Mackie and Ruth M. Mackie, defendant appellees.

Sigmon and Sigmon by Jesse Sigmon, Jr., for Horace J. Isenhower, Sr., defendant appellee.

PARKER, J. Plaintiffs' evidence, considered in the light most favorable to them, *Scott v. Darden,* 259 N.C. 167, 130 S.E. 2d 42, shows the following facts:

For several years prior to 14 September 1961, defendants Paul E. Mackie and wife, Ruth M. Mackie, owned a large tract of land in Ashe County, which is described by metes and bounds in the complaint. Sometime prior to 14 September 1961 Paul E. Mackie verbally authorized and empowered his co-defendant, Horace J. Isenhower, Sr., to aid him in finding a buyer for this land he and his wife owned at the price of $65 an acre; this is admitted in the joint answer of the Mackie defendants and in the separate answer of defendant Isenhower, which admissions were introduced in evidence by plaintiffs.

In July or August 1961 Isenhower ran the following advertisement in the Charlotte Observer, a newspaper published in Charlotte, North Carolina, in respect to the Mackie defendants' land: "696 ACRES, near West Jefferson, Mountain grazing land, 500 acres excellent improved pasture, best of fence. Plenty water. Write Box X-12 Observer."

At this time there lived in Buncombe County Dr. Charles S. Norburn, an elderly, retired doctor of medicine, who owned and operated two small dairy farms. His two farms were too small to be profitable. and he had decided to sell them and to buy a large tract of land, where land was cheaper, to raise beef cattle. Upon reading the above advertisement in the Charlotte Observer, he wrote to "Box X-12 Observer," Charlotte, asking for a description of the land and its price.

Dr. Norburn received a letter from defendant Isenhower, dated 9 August 1961, which is in part as follows:

> "The 696 acre farm that I advertised in the Charlotte Observer is located on top of Pond Mountain and contains 500 acres of ex-

cellent, improved pasture and is fenced with the best of fencing as well as gates, loading platforms, truck scales and scale sheds for weighing cattle.

* * *

"* * * The remaining 196 acres are in timber on the border of the farm and are lower than the pasture which covers the top of the mountain. The grass is waist high now since there have been no cattle on it this season. The pasture has been kept up by the recommendation of the North Carolina Agriculture Department. Therefore, tons of fertilizer have been applied each year.

"Fescue, blue grass, and clover make up the pasture * * *.

"We will sell this land for $65.00 per acre. The county tax is $120.00 per year, terms can be arranged.

"Since I just completed 7½ years as State Director of the Farmers Home Administration of North Carolina, I know farms in all sections of this State; and this farm has good possibilities for the investment."

Upon objection of the Mackie defendants, the court excluded the letter as to them, and plaintiffs excepted and assign this as error.

Isenhower's letter to Dr. Norburn described the location of the land and the way to go to it. Several days after receiving this letter, Dr. Norburn had J. M. Crawford, who worked for him on one of his farms, to drive him to the Mackie land. Upon reaching it, they drove into the pasture, and ahead of them was a steep bluff about 200 feet high. A steep, washed road ran up this bluff, which they could not drive up with their car. They walked up this bluff. They came to the top of a narrow ridge, where there was some very fine pasture land, just as it had been described. They walked along this ridge a short distance. Several years before, Dr. Norburn had been seriously injured, his neck was in a cast, and this was the first trip he had made after being in bed about three and one-half years. Dr. Norburn began to have pain in his neck and had to lie down on the grass. Crawford walked on beyond a little knoll that blocked the way. He saw grass ahead for some distance. He then turned and went to the left and on around until he came to the edge of the woods, and then went back to Dr. Norburn. He was gone 15 or 20 minutes. He told Dr. Norburn: "Well, I don't know where the fence is but it is bound to be 500 acres of grass I could see up on the ridge * * *. It is awful good grass what I have seen of it." They went back to the car and left.

Ten days or two weeks after this trip Dr. Norburn drove to the town of Conover and saw Isenhower about the purchase of this land.

Their conversation was in substance: Isenhower said he had been on this land a number of times; he knew it well. He repeated what he had said in his letter about 500 acres in grassland; he said he had been a State representative and knew. Dr. Norburn told him he had been very ill and would have to rely entirely on what he said, and that he could not go to the land again soon. Isenhower told him he could rely on everything he said, that it was the truth. Being of the opinion that 500 acres of pasture land was worth $65 an acre and the 196 acres of woodland worth $10 an acre, he offered $35,000 cash for the land. Isenhower telephoned the Mackies, and they said the offer was not acceptable. The day he returned home, Isenhower telephoned him his offer of $35,000 had been accepted. Upon objection of the Mackies, the conversation was excluded as to them, and plaintiffs excepted and assign this as error.

On 15 September 1961 Dr. Norburn and all the defendants met in the office of Mr. Austin, a lawyer, in the town of Jefferson to consummate the purchase and sale of this land. There Isenhower and Paul E. Mackie told him the land had in its boundaries 500 acres of improved pasture land. Paul E. Mackie took a pencil and drew on a map or plat of the land "two curved lines, one the northeastern section of the plat and one down at the southeastern section and he said that the woods lay between the boundary and these two lines and that that was all the woods there was on the boundary, and that all the rest was in improved pasture." Mr. Austin went to the courthouse, returned, and said the title was all right. Whereupon, Dr. Norburn delivered to Paul E. Mackie his cheque payable to him in the sum of $35,000 in payment of this land, which cheque has been paid. Then the Mackie defendants executed and delivered to him a warranty deed conveying this land in fee to Dr. Norburn and his wife. This deed recites the land contains 696 acres.

The Mackie defendants in their joint answer admit that they paid Isenhower the sum of $1,500 for his services and expenses; and Isenhower admits in his answer that Paul E. Mackie paid him the sum of $1,500 for his services and expenses. These admissions were introduced in evidence by plaintiffs.

A few days later Dr. Norburn obtained a TVA contour map of the section and the land he bought, showing open land in white and woodland in green. Looking at this map he saw at a glance that this land had far less cleared land than had been represented to him. Dr. Norburn then employed civil engineers and surveyors to ascertain the amount of improved pasture land and woodland on this land. Lawrence B. Tyson, who is a civil engineer and surveyor and was employ-

ed by Dr. Norburn, went on the land and computed the total acres to be 666 acres, of which 108 acres is improved pasture land, 68 acres unimproved pasture land, and 490 acres of woodland. Melvin Carter, who is a civil engineer and land surveyor in Asheville and was employed by Dr. Norburn, went on this land. He surveyed the grassland and found it consisted of 147 acres. He made the pasture land as big as he could, stretching the cleared area as far into the woods as he could.

Bryan Kirby, who is 66 years old, lives in Ashe County. His business is farming and cattle raising, and he has had considerable experience as a real estate appraiser in Ashe County. At Dr. Norburn's request he went on this land purchased by him from the Mackies to make an appraisal of its fair market value. He is familiar with the land. In his opinion, from an examination of the land, the fair market value of this land in September 1961 was $14,000. He based his opinion on these factors: He found 100 acres which seemed to have had some lime or fertilizer on it, which he valued at $75 an acre for pasture purposes. He found 40 to 50 acres of pasture land that had grown up with wild strawberries and bushes, which he valued at about $30 an acre. He considered the rest of the land worth $10 an acre.

The Mackie defendants in their joint answer admit "that sometime prior to September 14, 1961 the defendant, Paul E. Mackie, through a verbal conversation, authorized and empowered his co-defendant, Horace J. Isenhower, Sr., to assist him in finding a buyer for and in selling the lands described in paragraph 3 of the plaintiffs' complaint." Plaintiffs alleged in paragraph 6 of their complaint: "That in the month of July or August 1961, the defendant, Horace J. Isenhower, Sr., ran, or caused to be run, an advertisement in the Charlotte Observer, a newspaper published in Charlotte, North Carolina, advertising the sale of the aforesaid property, said advertisement being as follows: '696 ACRES, near West Jefferson, Mountain grazing land. 500 acres excellent improved pasture, best of fence. Plenty of water. Write Box X-12 Observer'." The Mackie defendants in their joint answer in paragraph 6 state: "That the allegations contained in paragraph 6 of the plaintiffs' complaint are admitted upon information and belief." Plaintiffs alleged in paragraph 7 of their complaint: "That said advertisement was run in said paper in furtherance of the aforesaid agency or brokerage and for the purpose of marketing the aforesaid property." The Mackie defendants in their joint answer in paragraph 7 state: "It is admitted that the said advertisement was run in said paper for the purpose of marketing the aforesaid property." Plaintiffs alleged in paragraph 13 of their complaint on information and be-

lief "that as a result of said sale the defendant, Horace J. Isenhower, Sr., received from the defendants, Paul E. Mackie and Ruth M. Mackie, compensation or commission for promising *(sic)* and negotiating said sale in an amount of at least $1,500.00." The Mackies in their joint answer in paragraph 13 state: "It is admitted that these defendants paid the defendant, Horace J. Isenhower, Sr., the sum of $1500.00 for his services and expenses." The Mackie defendants in their joint answer admit that they owned the land sold by them to plaintiffs for a cash price of $35,000.

Indubitably, the joint answer of the Mackie defendants contains judicial admissions that Horace J. Isenhower, Sr., was acting as agent for Paul E. Mackie in the sale of the land owned by him and his wife to plaintiffs, and such judicial admissions conclusively established such fact for the purposes of this case. Stansbury's North Carolina Evidence, 2d Ed., § 177.

A question, not without difficulty, is presented as to whether the judicial admissions in the joint answer of the Mackie defendants and plaintiffs' evidence show and would permit a jury to find that Paul E. Mackie was also acting as agent for his wife, Ruth M. Mackie, when he verbally "authorized and empowered his co-defendant, Horace J. Isenhower, Sr., to assist him in finding a buyer for and in selling the lands" owned by him and his wife, and to further find that Isenhower was acting in the transaction as agent of both Paul E. Mackie and Ruth M. Mackie. In our opinion, the answer to the question is, Yes.

"A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven." *Pitt v. Speight,* 222 N.C. 585, 24 S.E. 2d 350. No presumption arises from the mere fact of the marital relationship that the husband is acting as agent for the wife. *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828.

The joint answer of the Mackie defendants admits that they owned the land they sold to plaintiffs for $35,000, and that Paul E. Mackie verbally authorized and empowered Isenhower to assist him in finding a buyer for and in selling their land. Plaintiffs' evidence shows that Dr. Norburn's cheque in the sum of $35,000 given in payment of their land was made payable to Paul E. Mackie. However, the joint answer of the Mackie defendants admits "that these defendants paid the defendant, Horace J. Isenhower, Sr., the sum of $1500.00 for his services and expenses" in finding a purchaser and negotiating a sale of their land to plaintiffs. These judicial admissions permit the fair inference that Ruth M. Mackie received and retains part of the purchase price of this land and received the benefit of Isenhower's services, for their joint answer admits that the *defendants* paid Isenhower $1,500 for his services and expenses.

"The agency of the husband for the wife may be shown by direct evidence or by evidence of such facts and circumstances as will authorize a reasonable and logical inference that he was empowered to act for her * * *. Slight evidence of the agency of the husband for the wife is sufficient to charge her where she receives, retains, and enjoys the benefit of the contract." 41 C.J.S., Husband and Wife, § 70, pp. 548-49. The last sentence in the above quotation is repeated verbatim in the dissenting opinion by *Barnhill, J.*, in *Young v. Lucas*, 212 N.C. 194, 193 S.E. 25, in which dissenting opinion *Clarkson* and *Devin, JJ.*, joined. See also *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785; *Smith v. Kappas*, 218 N.C. 758, 12 S.E. 2d 693; *Realty Co. v. Rumbough*, 172 N.C. 741, 90 S.E. 931.

Plaintiffs' evidence shows that the letter, dated 9 August 1961, written by Isenhower to Dr. Norburn, and the declarations by Isenhower made in respect to the Mackies' land to Dr. Norburn in the town of Conover after sending Dr. Norburn his letter, were both made and done during the agency of Isenhower and within the scope of his agency or employment, and, therefore, were admissible in evidence to bind against his principals Paul E. Mackie and Ruth M. Mackie. *Hubbard v. R. R.*, 203 N.C. 675, 166 S.E. 802; *Hughes v. Enterprises*, 245 N.C. 131, 95 S.E. 2d 577; Stansbury's North Carolina Evidence, 2d Ed., § 169; 26 Am. Jur., Husband and Wife, § 228, p. 839. The trial court improperly excluded this evidence of the letter and of the declarations by Isenhower as against the Mackie defendants, and plaintiffs' assignments of error to the exclusion of both are good.

In passing on an appeal from a judgment of compulsory nonsuit, evidence erroneously excluded is to be considered with other evidence offered by plaintiff. *Powell v. Deifells, Inc.*, 251 N.C. 596, 112 S.E. 2d 56.

The general rule is that a principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority from the principal, even though the principal did not know or authorize the commission of the fraudulent acts. *Thrower v. Dairy Products*, 249 N.C. 109, 105 S.E. 2d 428; *King v. Motley*, 233 N.C. 42, 62 S.E. 2d 540; *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446; 3 C.J.S., Agency, § 257; 3 Am. Jur. 2d, Agency, §§ 261 and 264.

It is thoroughly settled that a person is personally liable for a fraud committed by him, notwithstanding that he acted as agent for another. *Mills v. Mills*, 230 N.C. 286, 52 S.E. 2d 915; 23 Am. Jur., Fraud and Deceit, § 185, p. 1010.

When Dr. Norburn was negotiating in the town of Conover with Isenhower to purchase this land, Isenhower told him he had been on this land a number of times; he knew it well. He repeated what he had said in his letter about 500 acres in grassland; he said he had been a State representative and knew. Dr. Norburn told him he had been very ill and he would have to rely entirely on what he said, and that he could not go to the land again soon. Isenhower told him he could rely on everything he had said, that it was the truth. Plaintiffs' evidence plainly shows that the parties dealt at arm's length, and that Dr. Norburn, by reason of his prior serious injury and physical condition, was unable to go over the land to see how much was pasture land and how much was woodland, and that Isenhower during such negotiations was fully aware of Dr. Norburn's inability, due to his physical condition, to go over this land to see how much was pasture land and how much was woodland. This presents an entirely different factual situation from that in *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881, relied on by defendants.

The general rule, which is subject to certain qualifications and exceptions set forth in 3 Am. Jur. 2d, Agency, §§ 275-286, and in *Furniture Co. v. Bussell*, 171 N.C. 474, 480, 88 S.E. 484, 486, and which are not relevant on this appeal, is that a principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends, although the agent does not in fact inform his principal thereof. *Jenkins v. Renfrow*, 151 N.C. 323, 66 S.E. 212; *Furniture Co. v. Bussell, supra; Williams v. Lumber Co.*, 176 N. C. 174, 96 S.E. 950; 3 Am. Jur. 2d, Agency, § 273; 3 C.J.S., Agency, § 262.

The essential elements of actionable fraud are thoroughly established by our decisions and need not be restated. See *Keith v. Wilder*, 241 N.C. 672, 86 S.E. 2d 444; *Roberson v. Williams*, 240 N.C. 696, 83 S.E. 2d 811; *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131; *Whitehurst v. Insurance Co.*, 149 N.C. 273, 62 S.E. 1067. Since there must be a new trial, we refrain from a discussion of the evidence presently before us, as we did in *Bass v. Roberson*, 261 N.C. 125, 134 S.E. 2d 157; *Whitaker v. Wood*, 258 N.C. 524, 128 S.E. 2d 753; *Tucker v. Moorefield*, 250 N.C. 340, 108 S.E. 2d 637; *Goldston v. Tool Co.*, 245 N.C. 226, 95 S.E. 2d 455. Suffice it to say, the Court is of opinion that in considering plaintiffs' evidence in the light most favorable to them, they are entitled to have their case submitted to a jury.

Defendant Isenhower's demurrer *ore tenus* to the complaint, which is set forth in his brief, is without merit and is overruled.

The judgment of compulsory nonsuit dismissing plaintiffs' action is Reversed.

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

NORTH CAROLINA STATE HIGHWAY COMMISSION, PETITIONER v. JYLES J. COGGINS AND WIFE, FRANCES L. COGGINS; ARCH T. ALLEN, TRUSTEE; MARY E. TUCKER, ANNETTE T. ALLEN AND SUSANNE T. BEAUDRY, CESTUIS QUE TRUST; GORDON W. PATTERSON, TRUSTEE, AND FIRST CITIZENS BANK AND TRUST COMPANY, CESTUI QUE TRUST; COUNTY OF WAKE; AND ALL UNKNOWN PERSONS HAVING OR CLAIMING ANY RIGHT, TITLE, INTEREST OR ESTATE IN AND TO THE LANDS EMBRACED AND DESCRIBED IN THE PROCEEDING, RESPONDENTS.

(Filed 20 May, 1964.)

1. Eminent Domain § 6—

Whether property involved in a voluntary sale is sufficiently similar in nature, location and condition to property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion.

2. Same—

Where, as between the property condemned and other properties along the same highway, there is evidence before the court of substantial dissimilarities in size, topography, nearness to a developed business district of a municipality, available services and zoning, the discretionary determination of the trial judge that the sale prices of such other properties were not competent in fixing the value of the property condemned will not be disturbed.

3. Appeal and Error § 46—

A discretionary ruling of the trial court is conclusive on appeal in the absence of abuse or arbitrariness or some imputed error of law or legal inference.

4. Eminent Domain § 6—

Where land is taken by condemnation, its value within a reasonable time before the taking is competent on the question of its value at the time of the taking, provided the evidence relates to its value sufficiently near the time of taking as to have a reasonable tendency to show its value at that time.

5. Same—

Evidence of the sale and sale price of the property less than a year and a half before the property was condemned *held* competent as some evidence

of its value at the time of the taking, changes in condition occurring prior to the sale being irrelevant to the question of the required similiarity of conditions, and there being no evidence of other changes in conditions of the property or of the area of sufficient import to render the evidence incompetent. Further, in this case, defendants' contentions that the charge of the court limited the jury's consideration to changes in the physical condition of the subject property alone without consideration of changes in the area generally, are untenable.

6. Same—

The evidence disclosed that the owner had purchased the property condemned less than a year and a half prior to the taking. The evidence further tended to show that the seller had offered the property for sale at the sale price some four years prior to obtaining a purchaser at that price. *Held:* The court correctly referred to the sale price on the date of the sale rather than the date the property was first offered for sale, since it is the actual sale by a seller willing to sell but not obliged to sell to a buyer willing to buy but not obligated to buy that renders evidence of the sale price competent upon the question of market value.

APPEAL by respondents from *Mintz, J.*, January 6, 1964, Regular Civil Session of WAKE.

Attorney General Bruton, Assistant Attorney General Lewis, and Trial Attorney Melvin for Petitioner.

Poyner, Geraghty, Hartsfield & Townsend for Respondents.

MOORE, J. This is a proceeding to determine fair compensation for a tract of land appropriated in fee by the North Carolina State Highway Commission, petitioner herein, for highway purposes. The date of taking was 8 February 1960. The land taken is generally triangular in shape, is situate at the southeast intersection of U. S. Highway 70 and Ridge Road (now generally referred to as the Raleigh Beltline), fronts 1371.65 feet on Highway 70 and 1060 feet on Ridge Road, and is a part of State Highway Project No. 8.14905, Wake County.

Petitioner and respondents were unable to agree upon the amount of compensation to be paid. This proceeding was instituted before the clerk of superior court and commissioners were appointed to appraise the land. On 26 April 1961 the clerk entered judgment confirming the commissioners' report awarding respondents $160,000 compensation. Petitioner excepted and appealed to superior court. Pursuant to the verdict of the jury, judgment was entered in superior court awarding respondents $84,000 compensation and $20,034 interest for the period from 8 February 1960, date of taking, to 9 January 1964, date of judgment. From this judgment respondents appeal.

Respondents assign as error the exclusion and admission of certain evidence and a portion of the judge's charge.

(1). Respondents offered the testimony of William R. Rand, expert real estate appraiser, concerning three sales transactions, involving properties the witness regarded as comparable to a portion of the subject property. In the absence of the jury the judge heard detailed testimony of the witness with respect to the three properties and ruled that they were not comparable to the subject property. Thereafter, witness Rand, in the presence of the jury, was permitted to describe the three properties with regard to location, size, topography and condition at the time of the sales, but he was not allowed to give the sales prices in the hearing of the jury. Respondents contend that the three properties were comparable to subject property and the exclusion of evidence of the sales prices is error.

The subject land contains 18.46 acres. At the time of taking it was undeveloped cut-over woodland and had a thin growth of scrub oaks and small pines. There were no buildings on it. It had a branch running through the southwest corner. It had a variation in altitude of about 75 feet from the low to the high point, a mean grade of about 5%. The witness characterized it as "gently sloping." The first 200 feet in depth on Highway 70 was zoned Residential 6 (6 families per acre), the remainder Residential 4 (4 families per acre). Water and sewer lines were not available. The witness was of the opinion that the highest and best use of Highway 70 frontage, to a depth of 400 feet, would have been "Office and Institutional," and of the remainder of the property, "Group Housing" (residential 10), that rezoning upon request was a reasonable probability.

The three sales of supposedly comparable property were made to Northwestern Mutual Insurance Company 11 March 1960, North Carolina Congress of Parents and Teachers, Inc., 29 April 1958, and Southern Bell Telephone and Telegraph Company 31 July 1961. These properties were on the same side of Highway 70 as subject property and closer to downtown Raleigh, they were 2540, 2840 and 2980 feet distant, respectively, from subject property, and contained 2.7, 1.39 and .529 acres in area, respectively. The sales prices were $50,000, $21,000 and $22,000 respectively. Water and sewer were available to them at the time of the sales. Between these properties and subject property the land was either vacant or residential on both sides of the highway. The three properties were level along the highway and sloped slightly upward to the rear. The Southern Bell lot required no rezoning for building a substation. The Northwestern Mutual lot had been rezoned "Office and Institutional." The P. T. A. lot had, upon request, been rezoned "Office and Institutional" at the time of sale.

Whether property involved in a voluntary sale is sufficiently similar in nature, location and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion. *Highway Commission v. Pearce,* 261 N.C. 760, 136 S.E. 2d 71; *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219. In the *Barnes* case we stated:

> "It is held in most jurisdictions that the price paid at voluntary sales of land similar to condemnee's land at or about the time of the taking is admissible as independent evidence of the value of the land taken. But the land must be similar to the land taken, else the evidence is not admissible on direct examination. 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. Nichols on Eminent Domain (3rd Edition), Vol. 4, section 12.311(3), pp. 55, 59; *Belding v. Archer,* 131 N.C. 287, 315, 42 S.E. 800.
>
> "It is within the sound discretion of the trial judge to determine whether there is a sufficient similarity to render the evidence of the 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. Anno.: 118 A.L.R. 904."

In our opinion there is enough evidence of dissimilarity between the subject property and the three tracts involved in the sales transactions to support the court's ruling that the prices paid for the three tracts are not admissible as a guide for establishing a fair compensation for the subject property. There were substantial dissimilarities in size, topography, location with respect to the developed business districts of Raleigh, available services and zoning. A discretionary ruling of a trial court is conclusive on appeal in the absence of abuse or arbitrariness, or some imputed error of law or legal inference. 1 Strong: N. C. Index, Appeal and Error, § 46, p. 131.

(2). Respondents Jyles J. Coggins and wife, Frances L. Coggins, purchased the subject property on 19 September 1958, less than a year and a half before the taking by petitioner on 8 February 1960. Mr. Coggins negotiated for purchase of the land with Mr. Arch T. Allen, agent for the then owners. Over the objection of the respondents, Mr. Allen was permitted to read into the record a letter from Mr. Coggins dated 22 August 1958 which contained an offer of $48,000 for the prop-

erty, and was also allowed to read his reply dated 9 September 1958 containing an acceptance of the offer. The property was conveyed to Mr. Coggins and wife for the price of $48,000. Respondents moved to strike the testimony of witness Allen "on the ground that it has *(sic)* not been established whether the conditions which would affect the sales price of the subject property were similar on the date of sale September 19, 1958, and the date of taking February 8, 1960."

"It is accepted law that when land is taken in the exercise of eminent domain, it is competent as evidence of market value to show the price at which it was bought if the sale was voluntary and not too remote in point of time." *Palmer v. Highway Commission,* 195 N.C. 1, 141 S.E. 338. When land is taken by condemnation evidence of its value within a reasonable time before the taking is competent on the question of its value at the time of the taking. But such evidence must relate to its value sufficiently near the time of taking as to have a reasonable tendency to show its value at the time of its taking. The reasonableness of the time is dependent upon the nature of the property, its location, and the surrounding circumstances, the criterion being whether the evidence fairly points to the value of the property at the time in question. *Highway Commission v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314. Evidence of the price paid by the owner was held incompetent in *Redevelopment Commission v. Hinkle,* 260 N.C. 423, 132 S.E. 2d 761, where it appeared that approximately ten years had elapsed between the purchase and the taking and there had been enlargements and additions to buildings.

In the instant case the evidence tends to show that the sale to respondents Coggins covered the exact property taken by petitioner, the sale was voluntary and occurred less than a year and a half before the taking, there was no change in the condition of the property from the time of the sale to the time of the taking except that possibly some timber had been cut and removed.

Respondents contend that several significant changes in conditions occurred in the area that affected the value of the subject property. These changes are listed in respondents' brief as (1) nearby Brewer property zoned for shopping center on 17 February 1958, (2) P. T. A. property sold on 29 April 1958, (3) P. T. A. property rezoned "Office and Institutional" 20 May 1958, and (4) Lyon Equipment Company (property adjoining subject property) application for rezoning to "Office and Institutional" at public hearing.

The first three alleged changes in condition are irrelevant because they occurred before the subject property was purchased by respondents. It is a fair assumption that these changes influenced respon-

dents to some extent in deciding to purchase the property at the price of $48,000. The last so-called change in condition was the *application* by Lyon Equipment Company for rezoning at a meeting of the City Planning Commission on 21 December 1959. It was referred for further study. The application was not granted until 15 February 1960, after subject property had been taken by petitioner. In our opinion the changes listed by respondents were not of sufficient substance and effect to render the purchase price paid by respondents inadmissible. The court did not err in overruling respondents' objections and motion to strike. After all, the jury awarded respondents almost double the amount they had paid for the land.

(3). Respondents contend that the following portion of the judge's charge is erroneous:

> "The Court instructs you that when land is taken in the exercise of eminent domain it is competent as evidence of market value for you to consider the price at which it was bought if the sale was voluntary and not too remote in time. It is in evidence, and it has been stipulated, that the land was condemned on February 8, 1960, and that it was purchased a year and five months previous to that. If you should find from the evidence that this sale was made by sellers willing but not obliged to sell, to a buyer willing but not obligated to buy and that all parties being reasonably competent to deal in such a matter, then, as of September 19, 1958, you would have evidence which would support but not compel a finding that the purchase price paid on that date was the fair market value of the property as of that date, and you would be permitted to consider $48,000 as of September 19, 1958, as a fair market price on that date, the proximity of this date, that is, the date of September 19, 1958, to February 8, 1960, unless you should find some condition or circumstances had come about to materially influence the price between September 19, 1958 and February 8, 1960, and to the extent such condition or circumstances influenced the price would be the measure you would give, that is, either no consideration or substantial consideration, depending upon what conditions you found had influenced the price."

Respondents challenge the instruction on two grounds. First, they insist that the court did not make it clear that the changes of condition which would affect value relate not only to changes in the physical condition of the subject property but also to changes in the area generally. Second, they contend there was evidence that the former

owners had offered the property for sale at the price of $48,000 as early as 1954 and had kept the offer open and sold at that price in September 1958, that the judge in charging the jury referred only to the date of actual sale and erroneously failed to instruct the jury that it should consider the effect of any changes in conditions which took place between 1954 and the date of taking.

The contentions are without merit. The instruction does not limit the jury, in considering changes affecting value, to the effect only of physical changes in the subject property. Respondents suggest that the jury was given the impression that the matter was so limited in comments by the judge in the course of the trial, and therefore it should have been fully and specifically clarified in the charge. A careful examination of the record does not disclose any comment by the judge which would have left the impression suggested. Respondents' attorney, addressing the judge in the presence of the jury, objected to the testimony of Mr. Allen with respect to the letters and the price paid by respondents Coggins, and said, "I make the further point that what changes have been made in the market itself in that area would affect sales price . . . it is not merely a question of what was done with or on the land." Counsel for petitioner interposed, "I do not feel that we are called upon to show any change with respect to economic conditions." The judge answered, "But *any change* that is favorable or adverse that would affect it substantially would be competent at this time, whichever way it affected it." (Emphasis ours). This is the only comment we find bearing upon the question. It cannot be interpreted as imposing the limitation suggested.

According to the evidence subject property was optioned to one Richards in August 1954 at the price of $48,000 and the time for exercise of the option was once extended, but the option was not exercised. Mr. Allen had conversations with Mr. Coggins concerning the property "from time to time over a perior of years" before the sale was made in September 1958. It is not the offering of property at a given price that furnishes evidence of market value; it is the actual sale by "a seller willing but not obliged to sell, to a buyer willing but not obligated to buy." An owner may and frequently does place a higher price on his property than it will bring in the market. It is not until a voluntary buyer is willing to take the property at the stated price that the transaction becomes an indication of market value. The court correctly referred to the date of sale rather than the date the property was first offered at the price in question.

No error.

C. C. MANGUM, INC. v. WILLIAM AARON GASPERSON AND GEORGE MATEJA.

(Filed 20 May, 1964.)

1. Appeal and Error § 41—

Where taking plaintiff's evidence as true and considering it in the light most favorable to plaintiff nonsuit is proper, the exclusion of testimony tending to establish facts already in evidence cannot be prejudicial.

2. Negligence § 26—

Nonsuit for contributory negligence is proper when this is the sole reasonable conclusion that can be drawn from plaintiff's own evidence.

3. Highways § 7—

Where a contractor for the improvement of an airport is granted permission by the Highway Commission to construct a dirt ramp over the highway to protect it from heavy equipment, the Commission's requirements with reference to signs and flagmen are primarily for the protection of the users of the highway and do not confer on the contractor special privileges in respect to right of way. G.S. 136-26, G.S. 136-18(5), G.S. 136-18(18).

4. Same—

Irrespective of G.S. 20-156(a), a contractor for the improvement of an airport who is granted permission to maintain a dirt ramp across a highway is under duty, before operating its earth moving equipment onto and across the ramp, to exercise due care to see that such movement can be made with safety and without injury to users of the highway.

5. Same—Evidence held to show contributory negligence causing collision between truck and plaintiff's equipment crossing highway on dirt ramp.

The collision in suit occurred between plaintiff's earth mover traveling west immediately after it had entered upon a dirt ramp, maintained across the highway with the permission of the Highway Commission, and defendant's truck which was traveling south on the highway. The evidence disclosed that plaintiff's flagman attempted to flag the truck driver, but notwithstanding he saw the truck driver was watching equipment to his right, and was inattentive to his signals, made no effort to signal the earth mover to stop or reduce speed, and that the operator of the earth mover, notwithstanding he had seen the truck when it was some distance away, did not observe the truck as it approached the ramp and did not apply his brakes until he saw the truck "coming up on the ramp." *Held:* The evidence discloses contributory negligence on the part of plaintiff's agents constituting a proximate cause of the collision, and nonsuit was proper.

APPEAL by plaintiff from *Walker, Special Judge,* November 1963 Assigned Civil Session of WAKE.

On May 8, 1961, there was a collision between plaintiff's earth mover, operated by Sam Harris, and defendant Mateja's dump truck, operated by defendant Gasperson. The collision occurred on a dirt ramp

plaintiff had constructed across Rural Paved Road #1002 between the Raleigh-Durham Airport and Morrisville. In each instance, the owner admitted the operator was its (his) agent.

Plaintiff instituted this action to recover for the damage to its earth mover and for loss of its use, alleging the collision and its damages were proximately caused by the negligence of Gasperson.

Defendants, by joint answer, denied negligence and conditionally pleaded contributory negligence. In addition, defendant Mateja alleged a counterclaim for the damage to his truck, alleging the negligence of plaintiff's agents was the sole proximate cause of the collision and his damage.

At the conclusion of plaintiff's evidence, the court allowed defendants' motion for judgment of involuntary nonsuit and dismissed plaintiff's action. (Note: The judgment, reciting that defendant Mateja had elected to take a voluntary nonsuit on his counterclaim, dismissed said counterclaim "as of voluntary nonsuit.") Plaintiff excepted and appealed.

Bunn, Hatch, Little & Bunn, Dupree, Weaver, Horton & Cockman and Jerry S. Alvis for plaintiff appellant.

Smith, Leach, Anderson & Dorsett for defendant appellees.

BOBBITT, J. Plaintiff assigns as error (1) the exclusion of certain testimony of J. P. Brown and (2) the judgment of involuntary nonsuit.

Rural Paved Road #1002, referred to hereafter as the highway, is "a blacktop road," approximately 18 feet wide, with two driving lanes. It runs generally north and south.

On and prior to May 8, 1961, plaintiff had a contract with "Raleigh-Durham Airport" with reference to constructing an extension of the airport runways. Under its contract, plaintiff was engaged in hauling fill dirt "to raise the grade up to usable level." Plaintiff's earth movers crossed the highway on the dirt ramp referred to below.

The ramp, running generally east and west, was constructed by plaintiff and was "from 14 to 16 feet" wide. It was "wide enough for them pans to go across." The dirt was piled up about 16 inches in the middle and sloped off. The ramp was to protect the highway from damage "when crossed by the heavy equipment operated by plaintiff." On the highway approaches to the ramp, these signs had been erected and were in place: "25 MPH," "SLOW," and "CONSTRUCTION."

The Chief Engineer of the State Highway Commission testified: "The ramp placed across the Morrisville-Airport Road was so plac-

ed with the permission of the North Carolina Highway Department. It existed with permission on May 8, 1961."

Mr. J. P. Brown testified he was District Engineer for the State Highway Commission during May, 1961; that the Morrisville-Airport area was under his supervision; that "our supervisor and foreman" checked on the work out there at least twice a day "to see if proper signs and flagmen were being maintained"; and that he personally checked on it periodically. Mr. Brown testified further that, "(o)nce a ramp would be established across a highway by the proper authority," he "had the right to police it."

A portion of the excluded testimony of Mr. Brown relates to whether the State Highway Commission had authorized the placing of the ramp across the road. In view of the Chief Engineer's testimony, the exclusion of Mr. Brown's testimony concerning this subject is without significance in passing upon whether plaintiff's action should have been nonsuited.

Other excluded testimony of Mr. Brown was to the effect he had observed the ramp, the signs and the flagmen prior to and on May 8, 1961; that they were adequate so far as he could see; and that, on May 8, 1961, when he was in the vicinity of the ramp, "the flagman was flagging traffic." Mr. Brown was not present when the collision occurred. There is ample evidence as to the ramp, the signs and the presence of a "flagman" on the occasion of the collision. Hence, the exclusion of Mr. Brown's testimony is without significance in passing upon whether plaintiff's action should have been nonsuited.

The earth mover involved in the collision was a large, twin-engine Euclid scraper. It was mounted on four large (seven feet high) rubber tires. The pan, which carried 33 yards of dirt, was approximately 14 feet wide. The earth mover, when empty, weighed approximately 80,000 pounds. When loaded, it weighed approximately 166,000 pounds. Harris was the regular operator.

The collision occurred on the ramp. Harris, operating the loaded earth mover, was proceeding in a westerly direction. Gasperson, operating the truck (loaded with gravel), was proceeding in a southerly direction along the highway in the (right) lane for southbound traffic. Thus, the earth mover approached the highway and proceeded onto the ramp from Gasperson's left. Gasperson was attempting "to go up over" the portion of the ramp in the truck's line of travel when the left side of the truck, "between the back of the cab and the body," was struck by the right front of the earth mover.

As to what occurred on the occasion of the collision, the evidence consists of the testimony of Glenn Russell, the investigating State

Highway Patrolman, and of Sam Harris and C. S. Dampier, both agents of plaintiff.

Dampier was employed by plaintiff as a flagman and also to keep a record of the number of loads hauled by each earth mover across the ramp. He kept this record by making notations on a sheet of paper fastened to a "clip-board." The clip-board was made of plywood, painted red and was "something similar to 13 or 14 inches long and 6 or 7 inches wide." A red flag, "10 to 12 inches by 7 or 8 inches," was attached to the end of the clip-board by a piece of wire. Dampier testified: "When you waved the board, the flag would flop back and forth. It was loose at the ends so the ends would come around like that when you would wave it."

Dampier, on direct examination, testified: He was standing, facing north, in the highway lane for southbound traffic. The truck was coming straight toward him. When the truck was approximately 500 feet away, he started signaling the truck to stop and did not stop signaling until he "threw the flag down." He saw the earth mover "coming by." As the truck approached, "he (Gasperson) had his head turned to the right watching the equipment work out there." He (Dampier) "ran up partly on the mount of this dirt and hollered." There was so much noise he (Dampier) did not know whether Gasperson "heard that or not." When he (Dampier) thought the truck and earth mover were going to collide, he "threw the flag down and ran." He heard but did not see the collision. Gasperson was "about 8 or 10 feet from the ramp or to the place where the vehicles collided when he turned his head back towards the road." When he (Dampier) last saw the two vehicles, both were coming up on the ramp.

Dampier, on cross-examination, testified: When he first saw the truck, "about 500 feet away," he "didn't give any signal." He testified: "I don't give a signal if there is no earth mover coming towards me. The dump truck was maybe 100 feet away when I first saw the earth mover. I had no occasion to give the dump truck a signal until then. When he got within good vision, about 75 or 50 feet, I saw he was turned to his right." Dampier testified further: "First time I saw him I started flagging him about 100 feet away; he was then looking off to his right. I knew he was looking to his right. I could see him doing that. I did not then try to flag the earth mover. I am positive the dump truck slowed up just before he went up on the dirt there. Actually it slowed down and almost stopped. I imagine one of these ten-wheel dump trucks loaded with gravel would bust wide open if it hit that ramp at 20 mph. All dump trucks loaded would have come in low gear almost to a stop to get over there. In the meantime, the Euclid

kept on coming. I never turned toward the earth mover at all. The dump truck was on its right-hand side of the paved highway."

Dampier testified further on cross-examination that the truck and the earth mover were approaching at approximately the same speed, "probably 15 or 20 mph," and that there was no obstruction of Gasperson's view to his left or of Harris' view to his right as the vehicles approached the ramp.

Harris, on direct examination, testified: He could and did first see the highway when "about 150 or 200 yards from it." He then saw the truck. It was going south, "going about 20 or 25 miles per hour." He observed nothing unusual "about its operation." He (Harris) "kept on approaching toward the ramp." He (Harris) observed Dampier. Dampier was standing on "the left-hand side," facing north, "flagging the flag like that." He saw Dampier "run." Harris testified: "After I saw Mr. Dampier run, I seen the truck was going up on the ramp and I seen I was going to hit him, so I applied my brakes and turned right short to the left as far as I could, tried to miss him. The vehicles collided. My right front end of the earth mover hit the truck about right at the end of the body and the door, my right-hand side hit the left-hand side."

Harris, on cross-examination, testified: The maximum speed of the earth mover was "about 28 mph." Approaching the dirt ramp, he had the earth mover "in high gear" and "was going 20 mph." When he first saw the truck, the earth mover and the truck were approximately the same distance (150 to 200 yards) from the ramp. Harris testified: "I won't say whether he (Gasperson) slowed up and almost stopped at the crossing. I won't say because I had my mind on my business. I do not know whether he slowed up and almost stopped or not. At that particular time I was not watching him close enough to tell whether he almost slowed up or stopped. The first time I put on brakes was when the truck was coming up on the ramp . . . The front of my vehicle when I put on brakes was just before I went onto the ramp. I would say the front of my vehicle was about 20 feet from the edge of the pavement when I first put on brakes." Again: "The front of my vehicle was still on the ramp when I hit him." Again: "The front of the dump truck was not off the ramp at the time of the impact. I don't actually know what the dump truck did when it came on the ramp." Again: "He (Dampier) was facing the dump truck all the time. When he was facing the dump truck he was looking straight ahead at the dump truck; kept looking that way and facing that way. Not that I recall did he ever turn his head or body toward me."

Unquestionably, there was ample evidence to support a finding that negligence on the part of Gasperson was a proximate cause of the

collision and resulting damage. The crucial question is whether plaintiff's evidence discloses contributory negligence as a matter of law. Decision requires that the evidence be considered in the light of the well-established and oft-stated rule that judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, and only when, the evidence, when taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom.

In *Equipment Co. v. Hertz Corp.* and *Contractors, Inc. v. Hertz Corp.*, 256 N.C. 277, 123 S.E. 2d 802, stressed by plaintiff, a similar ramp was used as a crossing by the earth movers of the State Highway Commission's contractor. This Court held, where travel on the highway was closed temporarily by means of warning signs and flagmen's signals, it was the duty of the motorist to stop and yield the right of way to the contractor's earth movers. In the cited case, decision was based on G.S. 136-26, a statute authorizing the State Highway Commission, through "its officers or appropriate employees, or its contractor," to close the highway to public travel while such ramp is in use by its contractor's equipment. The exercise of this authority, which relates to a highway "in process of construction or maintenance," is for the public benefit. In the cited case, *Moore, J.*, speaking for this Court, said: "The closing or temporary closing of highways or portions thereof during construction and repair operations is designed to avoid interruptions and delays in the prosecution of the work. If the earth movers in the instant cases were required to stop and yield the right-of-way to travelers on the highway, the expense of construction and the time required to complete the project would be greatly increased."

Here, no highway project was involved. While the Commission granted *permission* for the construction by plaintiff of the ramp and the use thereof by plaintiff as a crossing for its earth movers, neither the Commission nor the users of the highway derived any benefit from such construction and use. The permission granted was for the benefit of plaintiff in performance of its contract with "Raleigh-Durham Airport." Under the circumstances, we think the Commission's requirements with reference to signs and flagmen were primarily for the protection of users of the highway rather than for the protection of plaintiff's equipment and operations. In short, the permission granted by the Commission did not confer on plaintiff special privileges in respect of right of way. We find nothing in G.S. 136-18(5) or in G.S. 136-18(18), cited by plaintiff, inconsistent with this view.

G.S. 20-156(a), stressed by defendants, provides: "The driver of a vehicle entering a public highway from a private road or drive shall

yield the right-of-way to all vehicles approaching on such public highway." We deem it unnecessary to determine whether plaintiff's conduct constituted a violation of this statutory provision. Under the circumstances disclosed by this record, we are of opinion, and so decide, that plaintiff, before operating its earth mover onto and across the ramp, was under the legal duty to exercise due care to see that such movement could be made in safety and without injury to users of the public highway.

When considered in the light of the foregoing legal principles, the conclusion is inescapable that the evidence discloses that (contributory) negligence on the part of plaintiff's agents was a proximate cause of the collision and resulting damage. Dampier, the flagman, notwithstanding he saw Gasperson was looking to his right (away from Dampier and away from the approaching earth mover), "watching the equipment work out there," made no effort whatever to signal the earth mover to stop or to reduce speed so as to bring and have the earth mover under control when it reached the highway. Harris, the operator of the earth mover, notwithstanding he had seen the truck, could have observed the truck, but did not do so, as it proceeded on the highway toward the ramp. Harris, approaching the ramp on level ground, continued to operate a vehicle weighing 166,000 pounds in high gear at "20 mph." He did not apply his (air) brakes until he saw the truck "coming up on the ramp." The earth mover was then "about 20 feet from the edge of the pavement."

There is no evidence that Gasperson looked straight ahead or reduced his speed until he was "about 8 or 10 feet from the ramp or to the place where the vehicles collided." According to the evidence, when Gasperson did slow down he did so in the manner customary for trucks reaching and going over the ramp.

In our view, the only reasonable inference and conclusion to be drawn from plaintiff's evidence is that plaintiff operated its earth mover onto and partially across the ramp without first exercising due care to see that such movement could be made in safety and without injury to users of the public highway.

It is noted: According to Russell, the patrolman, after the collision Dampier told Russell that he (Dampier) "was flagging the earth mover on,"—"to come on across the road or the ramp that was built up around there." Russell was the first witness and said testimony was admitted only as it might tend to corroborate the testimony Dampier would thereafter give. Actually, it did not corroborate but was in conflict with Dampier's testimony. In any event, it was not substantive

evidence. Hence, whether it was favorable or adverse to plaintiff is an academic question.

For reasons stated, the judgment of the court below is affirmed.

Affirmed.

A. GLENDON JOHNSON v. WILLIAM W. JOHNSON.

(Filed 20 May, 1964.)

1. Appeal and Error § 49—

Findings of fact supported by competent evidence are conclusive on appeal.

2. Estoppel § 3—

Where a partner accepts without objection the accounting rendered by a referee appointed on his own motion, participates without objection in the sale of the partnership assets by the receiver appointed to liquidate the partnership, and accepts his share of the proceeds of the sale by the receiver of the partnership as a going concern, such partner waives any rights to thereafter maintain an action against his co-partner to specifically enforce an agreement to sell the partnership assets to him.

3. Pleadings § 19—

Where the allegations of an amended complaint and the amendment to the amended complaint are so vague and contradictory that facts sufficient to constitute a cause of action cannot be deduced therefrom, demurrer is properly allowed.

APPEAL by plaintiff from *Copeland, Special Judge,* January Civil Session 1964 of WAKE.

This case was here on appeal at the Spring Term 1963 and a comprehensive statement of facts will be found in the Court's opinion which is reported in 259 N.C. 430, 130 S.E. 2d 876.

No facts other than those deemed necessary to the disposition of the present appeal will be restated.

When this action was originally instituted on 31 March 1961, the plaintiff, acting as his own counsel, filed a request in the office of the Clerk of the Superior Court of Wake County for an extension of time to file complaint. The purpose of the action was stated as follows: "To formally terminate the existing partnership and/or readjust certain personal financial responsibilities for or of the operation of the partnership business, as requested by the defendant herein; and agreed to in principle by both parties hereto, made respectively plaintiff and defen-

dant herein." The time for filing complaint was extended to 20 April 1961. Subsequent thereto, on 18 April 1961, Lois F. Johnson, as trustee, who held a 20 per cent interest in the partnership involved, was made a party defendant.

On 12 May 1961, William W. Johnson and Lois F. Johnson instituted an action against A. Glendon Johnson, the plaintiff herein, seeking (1) dissolution of the partnership, (2) appointment of a receiver, (3) an accounting, (4) disposition of the partnership by the receiver as a going concern, and (5) distribution of the proceeds from the sale of the partnership assets.

On 16 June 1961, an order was entered dissolving the partnership and appointing a temporary receiver. On 28 July 1961, an order was entered making the receivership permanent. These two orders were made without prejudice to the rights of the parties in the present action.

Plaintiff herein (defendant in the receivership proceeding), appealed from the order making the receivership permanent. This Court affirmed the ruling of the lower court in a *per curiam* opinion reported in 255 N.C. 719, 122 S.E. 2d 676.

Plaintiff did not file a complaint until 18 September 1961. This complaint was stricken in its entirety on 15 November 1961, with leave to file an amended complaint within 30 days. An amended complaint was filed on 14 December 1961 seeking specific performance, which represented a complete departure from the purpose of the original action as stated by plaintiff in his application to the court for an order granting him an extension of time in which to file a complaint.

It appears in the receivership proceeding that on 18 January 1962 the court below entered an order allowing the motion of William W. Johnson and Lois F. Johnson for judgment on the pleadings. It was ordered that the partnership be sold as a going concern, with all parties having the right to bid on the property. On motion of A. Glendon Johnson, a referee was appointed to state an account between the parties. The report of the referee was filed, purporting to adjust withdrawals by the parties. No exception was entered to the report of the referee. However, this report does not purport to make any adjustments other than with respect to withdrawals based on the respective percentages of ownership. There is no dispute as to the percentage of the respective interests, which were: William W. Johnson, 55 per cent; Lois F. Johnson, as trustee, 20 per cent; A. Glendon Johnson, 25 per cent.

On 25 January 1962, plaintiff filed an amendment to his amended complaint, attaching an alleged partnership agreement, and alledging further an oral agreement between the plaintiff and the male defendant

to buy or sell their respective interests in the partnership; that plaintiff had elected to buy and defendant had agreed to sell on the terms set out in paragraph nine of the amended complaint.

The assets of the partnership were sold by the receiver on 6 February 1962. The receiver's report shows that William W. Johnson and Lois F. Johnson, as trustee, became the last and highest bidder; that all parties attended the sale, either in person or through their duly authorized representatives. The order of confirmation, signed on 9 February 1962, states that, "A. Glendon Johnson made the penultimate bid which was in the amount of $100,000; and that * * * William W. Johnson and Lois F. Johnson, trustee, became the last and highest bidder in the sum of $102,000 * * *."

The defendant, on 13 February 1962, filed an answer to the amended complaint in which he denied any agreement to sell his interest to the plaintiff. Defendant admitted that he had procured the appointment of a receiver, the sale by the receiver, and that he and Lois F. Johnson had purchased the partnership assets at the receiver's sale.

On 12 November 1962 the defendant filed an amendment to his answer, setting up three further answers and defenses: (1) that the receivership proceeding was *res judicata* of the issues in the present action; (2) that the plaintiff is estopped by reason of his participation in and acceptance of benefits of the sale by the receiver; and (3) that the defendant has no partnership interest which could be made the subject of a decree for specific performance. Attached as exhibits to the amendment were the pleadings, orders, reports and other documents in the receivership proceeding.

On 24 January 1964, the defendant demurred to the amended complaint and all subsequent amendments thereto filed herein by the plaintiff, for the reason that the same do not state facts sufficient to constitute a cause of action against this defendant, it appearing upon the face of the record herein, "That this defendant has not at any time made an unqualified acceptance of any offer of purchase made by the plaintiff.

"That the alleged offer to purchase contemplated a sale of the interest of Lois F. Johnson, trustee, in the partnership property, but that this action has been dismissed as to Lois F. Johnson, trustee, in a judgment affirmed by the Supreme Court of North Carolina in this action by decision filed May 22, 1963, and reported in 259 N.C. p. 430.

"That the subject matter of this action, namely the partnership business known as Standard Homes Company, has been sold since the issuance of the summons in this action by a receiver appointed in another action between the parties, and that the former partnership property is not held by this defendant."

Among the various facts found, the court below found as a fact that after paying the costs of receivership, the receiver distributed the balance of the proceeds of the sale of the partnership assets to the former partners as their interests then appeared and in accordance with the statement of account among the partners as determined by the referee.

It was further found as a fact that A. Glendon Johnson accepted his share of the proceeds of the receivership sale and, so far as the records in said receivership proceedings show, he accepted his share of the proceeds from said sale without protest.

The court further found as a fact that A. Glendon Johnson did not perfect any appeal from the various orders entered in the receivership proceeding subsequent to his appeal from the orders appointing the receiver, and that the time for appealing has long since expired.

The court below concluded as a matter of law that, "the participation without objection of the plaintiff in this action in the sale of the assets of the partnership and his acceptance without objection of the accounting rendered by the court and his share of the proceeds of the sale in accordance therewith constituted a waiver of any rights which he may have had with respect to the matters alleged in his pleadings in this action."

Based upon the facts found and the conclusions of law, the court below entered the following judgment: "ORDERED, ADJUDGED AND DECREED, that the pleas in bar of the defendant William W. Johnson and his demurrer to the amended complaint and all subsequent amendments thereto be and the same are hereby sustained; that this action be and the same is hereby dismissed; and that the plaintiff be taxed with the costs."

From the signing of the foregoing judgment, the plaintiff appeals, assigning error.

Lake, Boyce & Lake for plaintiff appellant.
Dupree, Weaver, Horton & Cockman for defendant appellee.

DENNY, C.J. The appellant has excepted to findings of fact Nos. 3, 11, 13, 15 and 17 and brings forward assignments of error based on these exceptions. An examination of the record supports the view that each one of these findings of fact is supported by competent evidence; consequently, we are bound thereby. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486, and cited cases. Therefore, these assignments of error are overruled.

It clearly appears in the record on this appeal that the plaintiff in this action moved in the receivership proceeding for the appointment

of a referee for the purpose of stating an account as between the parties to the action as partners in the partnership of Standard Homes Company. The court below allowed this motion, appointed a referee with the instructions to examine the audit theretofore obtained by the receiver pursuant to the orders of the court, and to hear "such additional evidence as the parties may desire to offer concerning the status of the account between them, making such adjustments as may be necessary to bring the account into agreement with the respective partnership interests of the parties as shown in the complaint and admitted in the answer * * *."

The report of the referee revealed that for the period over which withdrawals were to be adjusted as of 16 June 1961, the date the temporary receiver was appointed, that William W. Johnson and Lois F. Johnson, owning 75 per cent of the partnership, had withdrawn $112,550.25, and A. Glendon Johnson, owning 25 per cent of said partnership, had withdrawn $34,080.23. The referee's report further stated that in order to bring the withdrawals into the proper proportion the partnership should pay to A. Glendon Johnson the sum of $3,436.52. No objection or exception was entered to the report of the referee.

Moreover, it was found as a fact by the court below that after paying the costs of the receivership, the receiver distributed the balance of the proceeds of the sale of the partnership to the former partners as their interests then appeared and in accordance with the statement of account among the partners as determined by the referee. No exception was taken to this finding of fact.

The appellant's pleadings, motions, and exhibits have been vague and contradictory in many respects from the very outset of this litigation. For example, in the appeal from the orders appointing a temporary and permanent receiver and dissolving the partnership, the record discloses that the plaintiff herein, the defendant therein, filed a motion in opposition to the appointment of a receiver and the dissolution of the partnership on the ground that he had already instituted an action "specifically predicated upon a mutually agreed, or completely understood and accepted, dissolution of the formerly existing partnership; that no decree of this court is required or necessary to establish that accomplished fact." He further quoted *verbatim*, in his motion, the statement hereinabove set out with respect to the nature and purpose of this action filed with the Clerk of the Superior Court of Wake County on 31 March 1961, for the purpose of obtaining additional time in which to file his complaint. He then placed his interpretation upon the nature and purpose of this action in the following language: "That an accounting and distribution of the residual partnership assets were

the approximate reasonably-to-be-assumed, and legally-to-be-inferred, end results suggested by the language used." However, eight and one-half months after this action was instituted, the appellant changed his mind with respect to the nature and purpose for which his suit was instituted and filed an amended complaint for specific performance, alleging a verbal agreement with the defendant, William W. Johnson, to buy his interest in the partnership on the terms set out in paragraph nine of said amended complaint, abandoning altogether the nature and purpose he had theretofore stated to be the nature and purpose of the action.

In our opinion, the question which is determinative of this appeal is whether or not the participation without objection by the plaintiff herein in the sale of the assets of the partnership, and his acceptance without objection of the accounting rendered by the referee, who was appointed on his motion, and by the acceptance of his share of the proceeds received from the sale of the partnership, as a going concern, constituted a waiver of any rights which the plaintiff had with respect to his action for specific performance.

In 31 C.J.S., Estoppel, section 109 (a), page 559, it is said: "Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent with it. A party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations. Courts of equity proceed on the theory that there is an implied condition that he who accepts a benefit under an instrument shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it."

In the case of *Dawkins v. Dawkins*, 104 N.C. 301, 10 S.E. 307, it appears that certain lands were sold pursuant to an irregular order and the heirs of the decedent received their share of the purchase money. In a later action attacking the former proceeding, the lower court dismissed the action. Upon appeal, this Court said: "What is thus said rests upon the grounds that, if the heirs of George Dawkins, who, in his lifetime, purchased the land in question, each received his share of the purchase money therefor, he must, on that account, be deemed and held to have impliedly assented to, and acquiesced in, the irregular order complained of, directing the title to the land to be made to Randolph McDonald, who paid the purchase money as surety for George Dawkins, the purchaser; * * *."

In *Stansbury v. Guilford County*, 226 N.C. 41, 36 S.E. 2d 719, Guilford County had theretofore accepted the benefits of a judgment entered in a suit by taxpayers against the plaintiff to recover excess com-

pensation paid to him. It was held that acceptance of the benefits of the judgment in the taxpayers' action estopped the county from asserting a counterclaim based on matters litigated in the former action.

In the case of *Corbett v. Corbett,* 249 N.C. 585, 107 S.E. 2d 165, it was held that the grantee of a mortgagor, who acquiesced in a foreclosure and the execution of a deed of trust by the purchaser by accepting the major portion of the proceeds of the loan secured by the purchaser's deed of trust, was estopped from attacking the title of the purchaser at the foreclosure sale. *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602; *Clark v. Homes,* 189 N.C. 703, 128 S.E. 20.

Furthermore, in our opinion, the amended complaint, the amendment to the amended complaint, and the various and sundry exhibits attached thereto, are so vague and contradictory with respect to the terms of the alleged oral agreement on the part of the defendant, William W. Johnson, to sell and the agreement of the plaintiff to buy the interest of defendant in the partnership, that no valid cause of action for specific performance is alleged.

In fairness to plaintiff's counsel, they did not draft the pleadings herein. In fact, they moved in the Superior Court in April 1963 to file a substitute complaint in lieu of all the plaintiff's present pleadings. However, the motion was denied.

The judgment of the court below is

Affirmed.

STATE v. WILLIAM GRAHAM STEPHENS.

(Filed 20 May, 1964.)

1. Criminal Law § 71—

Defendant's intoxication does not render his confession incompetent unless the law enforcement officers furnish him the liquor or he is so drunk that he is unconscious of the meaning of his words, but evidence relating to the degree of his intoxication is proper to be considered by the jury on the question of the weight to be given his declarations.

2. Automobiles § 72—

Evidence tending to show that defendant's automobile was standing partly on the tracks at a grade crossing, that defendant got in and out of the car several times in attempting to back it off the tracks, together with defendant's statement after his car had been struck by a train that he had driven the car on the tracks, *is held* sufficient to be submitted to the jury on the question of whether defendant had driven the car, notwithstanding that at the time of making the statements defendant was so drunk that his

conversation was incoherent and the witness could understand little of what he was saying except that he had driven the car.

3. Same—

Testimony that defendant was drunk is sufficient to be submitted to the jury in a prosecution under G.S. 20-138, since if a person is "drunk" he is perforce "under the influence."

4. Criminal Law § 97—

Any inference in the solicitor's argument in regard to defendant's failure to testify in his own behalf *held* cured by the court's immediate instruction upon objection that defendant had the right not to testify and his failure to do so should not prejudice him, and by the court's instruction to the same effect in the charge to the jury.

APPEAL by defendant from *Gwyn, J.*, 9 December 1963 Criminal Session of ROCKINGHAM.

On 19 February 1963 defendant was tried in the Reidsville recorder's court on a warrant charging him on 3 February 1963 with unlawfully operating a motor vehicle upon the public highway while under the influence of intoxicating liquor, a violation of G.S. 20-138. He pleaded not guilty, was found guilty, and from the judgment imposed, he appealed to the superior court. In the superior court he was tried *de novo*. He pleaded not guilty. The jury verdict was, "Guilty as charged." From the judgment imposed, he appeals.

Attorney General T. W. Bruton and Assistant Attorney General Richard T. Sanders for the State.

Bethea & Robinson by Norwood E. Robinson for defendant appellant.

PARKER, J. The State introduced evidence; defendant did not. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of the State's case.

The State's evidence, considered in the light most favorable to it, *S. v. Haddock*, 254 N.C. 162, 118 S.E. 2d 411, shows the following facts:

About a mile north of the corporate limits of Reidsville, Highway 2552 crosses the tracks of the Southern Railway Company, and about 40 feet in a westerly direction from the railway tracks it intersects Highway 29. This is a grade crossing. At this point the railway tracks run approximately in a north and south direction. A little past 12 a.m. on 3 February 1963, Henry Strader drove his automobile up to this grade crossing and saw the defendant's automobile standing still on the railway tracks headed north with its rear end at the north edge of

Highway 2552 as it crosses the railway tracks. Defendant was sitting on the front seat under the steering wheel. No other person was in his automobile. Strader drove his automobile off the railway tracks, got out, and walked back to where defendant was. Defendant was "cranking" his automobile and trying to back off the railway tracks, but his automobile sat there spinning. He saw the defendant get out of his automobile two or three times and then get back in it and try to back it off the railway tracks. Strader saw a train coming and went to his automobile. A train struck defendant's automobile. Defendant was not in his automobile when the train hit it. Strader did not stay, but drove away. Strader got within a few feet of defendant. In his opinion, he was drunk. He based his opinion upon the fact that defendant staggered in getting in and out of his automobile.

G. F. Conrad, a member of the State Highway Patrol, arrived at the scene about 12:30 a.m. and saw the defendant standing with the conductor of the train beside the railway crossing. Defendant's automobile was on the railway track about 1,500 feet north of the grade crossing and under the front end of the railway engine. Defendant's automobile was struck by the engine of the train directly in the rear and was demolished. In Conrad's opinion, defendant was very drunk and unable to walk without aid. Conrad testified on direct examination: "The only statement I could get out of him was that he was driving the car and it was his car and I couldn't find out where he came from or which way he was going or anything. Every time I asked him a question, he would mutter John Price's name. I didn't know who John Price was and about a week later I finally located John Price." Conrad was asked this question: "Well, did he tell you who had driven the car up on the railroad track?" He replied, "He stated that he had." Conrad testified on cross-examination: "He was so drunk it was hard to understand him. I understood what I stated that he said. Even though he was so drunk I couldn't understand what he was saying I understood him enough to where I understood him to say he was driving his car." Conrad testified further on cross-examination: "When I arrived at the scene of the accident there was no one helping him [defendant], he was standing still there in the presence of Mr. C. M. Ferrill and some other trainmen. No one was holding on to him to keep him standing up. It was only when I walked him to the car that it was necessary for me to hold on to him."

Conrad turned the defendant over to Deputy Sheriff Duke Setliff to carry him to the police station in Reidsville. Setliff testified on cross-examination: "The defendant rode with me from approximately one

mile north of Reidsville to the city jail and at no time did I have any conversation with him. He walked by himself from my car into the police station. In order to get from my car into the police station, it was necessary for the defendant to walk up a short flight of steps. When he came into the police station he was what we call 'booked in.' At that time he had a rather large sum of money and cash on his person. * * * The desk sergeant counted the money himself. He counted it after the defendant counted it." Setliff smelled a strong odor of alcohol on the defendant's breath, and in his opinion the defendant was drunk.

The factual situation in *State v. Isom,* 243 N.C. 164, 90 S.E. 2d 237, 69 A.L.R. 2d 358, is quite similar to the factual situation in the instant case, but the State's evidence in the *Isom* case is not as strong as the State's evidence in this case. Isom was tried upon an indictment charging him with the operation of a motor vehicle on the public highway while under the influence of intoxicating liquor. In the *Isom* case the State's evidence, as stated in the Court's opinion, tended to show:

"An automobile wreck occurred on East Salisbury Street, Asheboro, on 14 August, 1954, at about 12:30 a.m. When the officers arrived at the scene, defendant was not there.

"The officers found defendant about two blocks from the scene of the wreck. He was leaning against his 1950 Plymouth car. The car was sitting on the edge of a dirt road, the back wheels some three feet from the paved highway. The front of the Plymouth was knocked in against the wheels and the wheels would not turn. Three or four 'other fellows' were with defendant. All had been drinking.

"Two officers testified that defendant stated that he had been driving the car.

"One officer testified: 'The defendant was very drunk.' 'He lay down a while.' 'He was not passed out but he was in a pretty drunken condition, obviously he was very clogged up.' 'I don't know whether he knew what I was referring to.'

"Another officer testified: 'He (defendant) was very much intoxicated. He would have to hold to something in order to move.' 'I do not know whether he knew what he was talking about or not.'

"Another officer, who saw defendant some twenty minutes later, testified: 'He was intoxicated, and talking slow and incoherently. I think he had judgment enough to know what he was talking about.' 'I do not know whether he realized what place he was talking about.'

"Apart from the statement attributed to defendant, there was no testimony that the defendant was driving the car at the scene of the wreck or elsewhere.

"The court overruled defendant's motion for nonsuit and submitted the case to the jury on the State's evidence. Defendant offered no evidence."

The jury returned a verdict of guilty. Judgment was pronounced thereon and the defendant appealed to the Supreme Court. *Bobbitt, J.*, writing the opinion for a unanimous Court, with the exception of *Higgins, J.*, who took no part in the consideration or decision of this case, stated:

"The evidence, considered in the light most favorable to the State, was sufficient to survive defendant's motion for nonsuit. Hence, assignment of error directed to the court's ruling in this respect cannot be sustained.

* * *

"Ordinarily, intoxication of an accused person does not render inadmissible his confession of facts tending to incriminate him. But the extent of his intoxication when the confession was made is relevant; and the weight, if any, to be given a confession under the circumstances disclosed is exclusively for determination by the jury. 20 Am. Jur., Evidence sec. 525; 22 C.J.S., Criminal Law sec. 828; Annotation: 74 A.L.R. 1102 *et seq.*, and supplemental decisions. See, *S. v. Bryan*, 74 N.C. 351."

In an annotation to the *Isom* case in 69 A.L.R. 2d, § 3, p. 364, it is stated: "The courts are agreed that proof that one who has confessed to crime was intoxicated at the time of making a confession goes to the weight and credibility to be accorded to the confession, but does not require (at least where the intoxication does not amount to mania, and the intoxicants were not furnished the accused by the police or other government officials) that the confession be excluded from evidence." The annotation cites cases from twenty-one states (including our case of *S. v. Isom*), the District of Columbia, England, and Canada, which are authority, either express or clearly implied, for the rule stated.

The State's evidence that defendant was sitting on the front seat under the steering wheel of his automobile, which was standing still on the railway tracks with its rear end at the north edge of Highway 2552 as it crosses the railway tracks at a grade crossing, and was "cranking" his automobile and trying to back off the railway tracks, and that he got out two or three times and got back in it and tried to back it off

the railway tracks; that he was not in his automobile when the train hit it; and that he counted a large sum of money he had on his person at the police station in Reidsville would permit a jury to find that defendant's intoxication did not amount to "mania" or a condition in which he was unconscious of the meaning of his words when he told State Highway Patrolman Conrad about 12:30 a.m. at the scene that it was his car and he was driving it, but that defendant was capable of knowing the meaning and effect of his words when he told Conrad that it was his car and that he was driving it.

A person, when drunk, is, of necessity, under the influence of intoxicating liquor within the intent and meaning of G.S. 20-138. *S. v. Painter,* 261 N.C. 332, 134 S.E. 2d 638, *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

The State's evidence was sufficient to carry the case to the jury. Defendant's assignment of error to the denial of his motion for judgment of compulsory nonsuit is overruled.

When the solicitor for the State was making his argument to the jury, defendant's counsel objected to it and asked that the jury be instructed not to consider it, and further asked for a new trial. Whereupon, the trial judge instructed the jury as follows:

> "During the progress of the argument by the Solicitor, the defendant, through counsel, objects to the argument of the Solicitor and asks that the jury be instructed not to consider it and further asks for a new trial. Now, Gentlemen of the Jury, the law presumes every defendant charged to be innocent until he is proved guilty beyond a reasonable doubt. The law does not require him to give testimony against himself or to go on the stand and testify. The fact that he does not testify in his own behalf is not a circumstance to be considered against him. Any reference to what the defendant personally may know must not be considered by you as an inference that he should have testified, so do not consider any circumstance or any statement or any argument on the part of the Solicitor as an obligation on his part or the part of the defendant to testify because he is not prejudiced and should not be prejudiced in his case by his failure to go on the stand. Now, if any argument like that will affect your verdict, then, of course, that would be improper.
>
> "The Court will instruct you upon the law which is applicable to this case, if you Gentlemen can follow it and will follow it, then you may continue to sit; otherwise, I'll let the case be tried again. Now, is there any juror who cannot follow the instruction

of the Court, that is, upon the law as is applicable to this case? He is not required to testify. The Solicitor did not say that he was required to testify or that he should have gone upon the stand. The Solicitor didn't say that, but from his argument, if you should draw any inference that that was what he intended, then that would be improper. Go ahead."

After the judge gave this instruction to the jury, the jury was sent to its room, and a long colloquy took place between the judge, the solicitor, and defendant's counsel. The substance of what the solicitor said to the judge of what his argument was is this: That if any witnesses could help defendant, he had nothing to prevent him from getting the witnesses to help him in his case. Counsel for the defendant told the judge in substance that he had no objection to that argument, but what he was objecting to was that the solicitor in his argument was clearly inferring to the jury that the defendant was the only man who could go on the witness stand and tell the jury anything. The judge said in substance that it was his impression from what the solicitor was saying that if there were any witnesses that could help the defendant he knew where they were; that he did not get the impression that the solicitor was suggesting that defendant go on the stand and tell who they were.

The court overruled defendant's motion to withdraw a juror and declare a mistrial because of the solicitor's argument to the jury, and defendant excepted and assigns this as error.

After the argument of the solicitor and the counsel for defendant, the judge began his charge as follows:

"At the outset, the Court instructs you that the defendant is presumed to be innocent and may not be convicted until he is proved guilty beyond a reasonable doubt and the defendant is not required to give evidence against himself. The fact that he did not testify in his own behalf is not a circumstance to be considered against him. It may not be contended that he should testify in his own behalf because of anything peculiar within his knowledge or otherwise. If any such inference may arise from any argument made by the Solicitor, then you will disregard it and you will not permit your verdict to be influenced by that. If you can do that, we will proceed with the case. If you cannot, then say so at this time. (No reply from the jury.)"

Later on in the charge the judge instructed the jury again: "The defendant did not testify in his own behalf and, as I have heretofore instructed you, that is not a circumstance against him."

Defendant's counsel objected to the solicitor's argument to the jury when it was being made. His argument was interrupted, and the trial judge carefully instructed the jury that defendant's failure to testify in his own behalf should not be construed in any way to his prejudice, that the solicitor had made no such argument, but that if the jury should draw any inference that the solicitor intended that, it was improper argument and the jury should not consider it. Later, after the argument of counsel and at the very beginning of the charge, the judge instructed the jury again to that effect. We feel that under the circumstances as disclosed by the record, the trial judge properly and effectively removed any prejudicial effect that might have resulted from the solicitor's argument to the jury, and that he correctly denied defendant's motion to withdraw a juror and order a new trial. G.S. 8-54; *S. v. Lewis,* 256 N.C. 430, 124 S.E. 2d 115; *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536; *S. v. McIver,* 175 N.C. 761, 94 S.E. 682.

All defendant's assignments of error are overruled. In the trial we find

No error.

STATE v. CLARENCE WHITE.

(Filed 20 May, 1964.)

1. Criminal Law § 173—

A new trial awarded under the Post Conviction Hearing Act is a retrial of the whole case, verdict, judgment, and sentence.

2. Robbery § 6—

Defendant may be sentenced to imprisonment not to exceed thirty years upon conviction of armed robbery. G.S. 14-87.

3. Criminal Law § 131—

Where defendant petitions and obtains a new trial under the Post Conviction Hearing Act, G.S. 15-217 *et seq.*, he must accept the hazards as well as the benefits and may not complain if sentence imposed upon conviction in the second trial for the same offense exceeds that imposed at the first.

4. Same—

A defendant convicted the second time upon a new trial obtained under the Post Conviction Hearing Act is not entitled as a matter of law to credit for the time he has served on the sentence imposed at the first

trial, there being no statutory requirement in this State that he should be given such credit.

APPEAL by defendant from *Latham, S. J.*, October 1963 Special Criminal Session of DURHAM.

Criminal prosecution on an indictment charging defendant and one Carlton M. Jones on 1 November 1960 with the robbery of Ernest Carlisle of $27 in money and of keys of the value of $30 by the use and threatened use of firearms and other dangerous weapons, a violation of G.S. 14-87.

Plea by Clarence White, defendant: Not guilty. Verdict as to Clarence White: Guilty as charged in the indictment. There is nothing in the record before us to indicate as to whether or not Carlton M. Jones was tried with him at the October 1963 Special Criminal Session.

From a judgment of imprisonment of not less than 12 years and not more than 15 years, defendant appeals.

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

Wade H. Penny, Jr., for defendant appellant.

PARKER, J. Since the citizens of North Carolina in the General Election of 6 November 1962, by a majority of the votes cast, amended Article IV of the State Constitution, Terms of the superior court are now designated in this Article of the Constitution as Sessions of court. At the May 1961 Criminal Term of Durham County superior court, Williams, J., presiding, defendant here was tried on the same indictment as in the instant case. There is nothing in the record before us to indicate as to whether or not Carlton M. Jones was tried with him at the May 1961 Criminal Term. He, Clarence White defendant here, entered a plea of not guilty. The jury returned against him a verdict of guilty as charged in the indictment. Williams, J., sentenced him to imprisonment for a term of ten years. He did not appeal and began to serve his sentence.

Subsequently—the date is not set forth in the record—defendant Clarence White filed a petition, by virtue of the provisions of G.S. Ch. 15, Art. 22, entitled "Review of the Constitutionality of Criminal Trials," requesting a new trial of his case which was tried at the May 1961 Criminal Term, for the reason that he requested the presiding judge at that trial to appoint counsel to represent him, stating that by reason of his poverty he was unable to employ counsel to represent him, and that the court refused to do so, and that he did not waive his

right to be represented by counsel. At the July 1963 Criminal Session, Hall, J., heard his petition, and by reason of the decision in *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799—filed 18 March 1963—and acting under the power vested in him by G.S. Ch. 15, Art. 22, vacated the verdict of guilty as charged in the indictment returned against petitioner at the May 1961 Criminal Term and the judgment of imprisonment imposed upon petitioner at that term, and ordered a new trial for petitioner on the ground that he had been denied the right of counsel to represent him at his trial at the May 1961 Criminal Term.

Defendant has two assignments of error, both to the judgment. His first assignment of error is that Judge Latham "erred in imposing upon the defendant a sentence greater than that imposed upon the defendant at his first trial when the defendant was convicted of the same identical offense."

Defendant contends that the State in meeting its "due process" duty of providing ways for a defendant after conviction to obtain a review of the constitutionality of his criminal trial cannot "inhibit or clog" his right of review of the constitutionality of his trial by forcing him to accept the hazard of receiving a greater sentence than was imposed on him at his first trial, if he is successful in obtaining a new trial and is convicted again on the same indictment of the same offense; that this is a violation of his rights under the Fourteenth Amendment to the United States Constitution.

Defendant at his request was granted a new trial of his case tried at the May 1961 Criminal Term in which he was found guilty as charged in the indictment, which under our decisions results in a retrial of the whole case, verdict, judgment, and sentence. *S. v. Chase,* 231 N.C. 589, 58 S.E. 2d 364; *S. v. Correll,* 229 N.C. 640, 50 S.E. 2d 717, *cert. den.* 336 U.S. 969, 93 L. Ed. 1120; *S. v. Beal,* 202 N.C. 266, 162 S.E. 561; *S. v. Stanton,* 23 N.C. 424.

The indictment upon which defendant was convicted at both trials charges a violation of G.S. 14-87, which statute provides that any person convicted of a violation of this section "shall be punished by imprisonment for not less than five nor more than thirty years." Nothing in the provisions of G.S. Ch. 15, Art. 22, or in any other statute of this State, limited the power of Judge Latham from imposing a heavier sentence on defendant than was imposed on him at the first trial, provided Judge Latham's sentence did not exceed thirty years, the maximum set forth for a violation of G.S. 14-87.

Defendant having been convicted of the same offense on the second trial on the same indictment a heavier sentence may be imposed than was imposed on the first trial. *S. v. Williams,* 261 N.C. 172, 134 S.E.

2d 163; *Hobbs v. State,* 231 Md. 533, 191 A. 2d 238, *cert. den.* 375 U.S. 914, 11 L. Ed. 2d 153; *Sanders v. State,* 239 Miss. 874, 125 So. 2d 923, 85 A.L.R. 2d 481; *Bohannon v. District of Columbia,* Mun. Ct. of Appeals of the District of Columbia, 99 A. 2d 647; 24 C.J.S., Criminal Law, § 1426.

In *Hobbs v. State, supra,* a case directly in point, the Court of Appeals of Maryland correctly stated: "In asking for and receiving a new trial, appellant must accept the hazards as well as the benefits resulting therefrom."

In *Bohannon v. District of Columbia, supra,* a case directly in point, the Court accurately said: "We readily appreciate appellant's feeling that the obtaining of a new trial after the first conviction was a hollow victory, since it resulted in a second conviction and a fine ten times as much as the one first imposed. This, however, was a risk he took and the second judge was not bound to impose the same fine given by the first judge."

No transcript of the evidence in either trial is in the record. There is nothing in the record to suggest that Judge Latham imposed upon defendant a heavier sentence than he received at the first trial merely because he obtained a new trial. When defendant, at his request, obtained a new trial, hoping to be set free or obtain a lighter sentence, he accepted the hazard of receiving a heavier sentence, if convicted at the new trial of the same identical offense, and this is not a denial to him of any constitutional right as contended by him. Defendant's first assignment of error is without merit and is overruled.

Defendant's second and last assignment of error is that the trial court, in failing to give him credit for the time he had served under his first sentence, deprived him "of his life, liberty and property in violation of due process of law and equal protection of the law as guaranteed to the defendant" by the Federal and State Constitutions. Defendant has favored us with no citation of authority to support his contention.

No statute of this State provides that when a defendant in a criminal case, at his request, obtains a new trial, and he is convicted again of the same offense, he shall be given credit for the time he has served on the sentence imposed on him at the first trial. Judge Latham could have sentenced defendant to imprisonment for thirty years. Defendant at his first trial received a sentence of ten years, and at his retrial, obtained at his request, he received a sentence of not less than twelve nor more than fifteen years. There is nothing in the record to indicate whether or not Judge Latham in imposing sentence in the instant case gave or failed to give defendant credit for the time he had served under the original sentence in the first trial.

We are not concerned here with the resentencing of a defendant necessitated by the invalidity of the original sentence, but not involving a new trial between the first and second sentence, or in other words, a case where the verdict of guilty is valid and stands, and the only error is in the sentence. Where such is the case, which is not the case here, the courts are not in agreement whether time served under the first sentence is to be credited against time to be served under the second sentence. Annotation 35 A.L.R. 2d 1283; Wharton's Criminal Law and Procedure, by Ronald A. Anderson, 1957, Vol. 5, § 2216.

A large majority of the Courts generally seem to agree that, absent a statute to the contrary, if a defendant, at his request, obtains a new trial at a time when he is serving the sentence imposed, and, following a retrial obtained at his request and a second conviction of the same offense, a new sentence is imposed, he is not entitled as a matter of law to credit against the second sentence for time served under the original sentence. The rationale of the decisions seems to be that the defendant in seeking and obtaining a new trial must be deemed to have consented to a wiping out of all the consequences of the first trial. This is not a denial of defendant's constitutional rights not to be deprived of life, liberty and property without due process of law or of equal protection of the laws under the Fourteenth Amendment to the United States Constitution and under Art. I, Sec. 17, of the North Carolina Constitution. *S. v. Williams, supra; McDowell v. State,* 225 Ind. 495, 76 N.E. 2d 249; *Lewis v. Commonwealth,* 329 Mass. 445, 108 N.E. 2d 922, 35 A.L.R. 2d 1277; *In re Doelle,* 323 Mich. 241, 35 N.W. 2d 251; *In re De Meerleer,* 323 Mich. 287, 35 N.W. 2d 255, *cert. den.* 336 U.S. 946, 93 L. Ed. 1102; *People v. Trezza,* 128 N.Y. 529, 28 N.E. 533; *People ex rel. Lenefsky v. Ashworth* (1945, Sup.), 56 N.Y.S. 2d 5, affirmed without opinion 270 App. Div. 809, 60 N.Y.S. 2d 283; *Ex parte Wilkerson* (1943), 76 Okla. Crim. 204, 135 P. 2d 507 (compare *Ex parte Williams* (1938) 63 Okla. Crim. 395, 75 P. 2d 904); *Ogle v. State,* 43 Tex. Crim. 219, 63 S.W. 1009, 96 Am. St. Rep. 860; *State ex rel. Drankovich v. Murphy,* 248 Wis. 433, 22 N.W. 2d 540; Annotation 35 A.L.R. 2d pp. 1285-1287; Wharton's Criminal Law and Procedure, *supra.* See *Commonwealth v. Murphy,* 174 Mass. 369, 372, 54 N.E. 860, 48 L.R.A. 393, affirmed *sub nomine Murphy v. Com. of Massachusetts,* 177 U.S. 155, 44 L. Ed. 711, 715. Defendant's second assignment of error is overruled.

Defendant concedes that both questions presented by him have been decided adversely to him in our recent decision of *S. v. Williams, supra.* But he contends that this is a *per curiam* decision that does not reveal the contentions made by the defendant or the reasoning of the Court,

and he earnestly and strenuously requests us to reconsider this decision. We have done so and adhere to our decision in this case.

Defendant in his brief makes no contention that he is not guilty of the felony of which he was convicted. The judgment below is

Affirmed.

ANNE WOLFE LONG v. NATIONAL FOOD STORES, INC., A CORPORATION (ALSO KNOWN AS BIG BEAR SUPER MARKETS, INC.)

(Filed 20 May, 1964.)

1. Negligence § 37a—

A customer entering a store during business hours to purchase goods therein is an invitee.

2. Negligence § 37b—

A proprietor of a store is not an insurer of the safety of its customers but is under duty to exercise ordinary care to keep the aisles and passageways of the store where customers are expected to go in a reasonably safe condition so as not to unnecessarily expose customers to danger and to give warning of hidden dangers or unsafe conditions of which the proprietor has knowledge or of which, in the exercise of reasonable supervision and inspection, he should have knowledge.

3. Same—

A proprietor is charged with notice of an unsafe condition, arising from dangerous substances on the floor of the aisles of its store, if the unsafe condition is created by an employee acting within the scope of his employment or if the condition has remained for sufficient time for the proprietor to know, or by the exercise of reasonable care to have known, of its existence.

4. Negligence § 37f—

Res ipsa loquitur does not apply in an action by a customer to recover for a fall in a store, and no inference of negligence arises solely by reason of the injury.

5. Same—

Evidence tending to show that plaintiff in walking along the aisle of a self-service grocery store fell when her foot slipped on grapes lying in the aisle and that the grapes were full of lint and dirt, *is held* sufficient to overrule nonsuit in the customer's action to recover for the fall.

6. Negligence § 26—

On motion to nonsuit on the ground of the contributory negligence of plaintiff, the evidence must be considered in the light most favorable to her.

7. Negligence § 37g—

In plaintiff's action to recover for injuries sustained when she fell when her foot slipped on grapes in the aisle of defendant's store, nonsuit on the ground that plaintiff's evidence establishes contributory negligence as a matter of law is properly denied when plaintiff's evidence discloses that the grapes were dark and full of lint and dirt and were nearly the same shade or color as the floor and that there was heavy dirt on the floor, since the evidence fails to disclose that the dangerous condition of the aisles was patent and obvious so that plaintiff, in the exercise of reasonable care for her own safety, should have seen and avoided the danger.

APPEAL by plaintiff from *Shaw, J.*, 7 October 1963 Civil Session of GUILFORD—Greensboro Division.

Civil action to recover damages for personal injuries caused by a fall in defendant's store.

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

Cahoon & Swisher for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Beverly C. Moore; Morgan, Byerly, Post, Van Anda & Keziah by W. B. Byerly, Jr., for defendant appellee.

PARKER, J. Plaintiff's evidence, considered in the light most favorable to her, *Powell v. Deifells, Inc.*, 251 N.C. 596, 112 S.E. 2d 56, shows the following facts:

On and prior to 13 February 1960 defendant operated a self-service retail grocery store in the city of Greensboro. Defendant's grocery store was so arranged as to have throughout the store rows of merchandise upon shelves of solid construction which were higher than a person's head, with aisles four or five feet wide between the shelves for customers to walk along to select merchandise for purchase.

Plaintiff and her husband were regular customers of this store. About 6 p.m. on 13 February 1960, a day of sleet and snow, they entered the store to buy groceries. After selecting their groceries, they went to the cash register at the front of the store to check them out and pay for them. While they were there, her husband said he had forgotten his shaving soap. Whereupon, she started to the drug shelf where the shaving soap was, which is on Aisle 13, to get it for him. While she was walking down this aisle to the drug shelf, her feet slid out from under her, and she fell to the floor. She remained there a few minutes and looked around to see what caused her to fall. She testified: "* * *

there were grapes all around my left foot and part of them were mashed. It was dark and dusty and full of lint. The grapes that I had fallen on were, and there was a long wet place where my foot had slid, and around it were the grapes. In the wet place, there were mashed grapes and seeds. As I walked down the aisle, I could not see those grapes. I didn't see them. The color of the grapes at that point was very near the same shade and color as was the floor. When I stood up, I brushed the lint and dirt off my clothes and went back up to the cash register. Other than the grapes there at the point, there was dust and lint on the floor. The grapes that were not mashed were dirty and juicy, full of lint and dirt." She does not know the color of the floor; it was dusty and dirty and looked dark. The grapes she fell on were a dark color, purple.

When she returned to the cash register, she told the clerk there she had fallen on some grapes in the aisle and pointed to the aisle. Her husband testified: "* * * the clerk called to the manager, Mr. Smith, which was across over from her, and about two aisles over, I think, in his office and advised him that she had fallen. He called on someone to clean up Aisle 13."

On Tuesday after her fall she went back to defendant's store and told Mr. Smith, the manager, she had been to see Dr. W. J. Reid about the injury she had sustained in falling in the store on the previous Saturday evening. She testified: "* * * Mr. Smith told me that he was very sorry that it had happened, and that it should have been cleaned up * * *. He said the aisle should have been cleaned up. I told him about what I fell over. It was then that he made that remark."

It seems to have been universally held that a customer who enters during business hours a store kept open for public patronage to purchase goods therein has invitee status. Anno., 62 A.L.R. 2d p. 16.

That a store proprietor is not an insurer of the safety of such customers on his premises, and liability for injury to such customers attaches only for injuries resulting from actionable negligence on his part is a principle of the law of negligence so familiar and so firmly established as almost to obviate the necessity of citing supporting authority. *Waters v. Harris*, 250 N.C. 701, 110 S.E. 2d 283; *Copeland v. Phthisic*, 245 N.C. 580, 96 S.E. 2d 697; Annotations 61 A.L.R. 2d, p. 14 and 62 A.L.R. 2d, p. 15.

Plaintiff's evidence shows that she entered defendant's store during business hours as a customer and selected goods therein for purchase. Under such circumstances, the law imposes upon defendant the legal duty to exercise ordinary care to keep its aisles and passageways where

she and other customers are expected to go in a reasonably safe condition, so as not unnecessarily to expose her and them to danger, and to give warning of hidden dangers or unsafe conditions of which it knows or in the exercise of reasonable supervision and inspection should know. *Raper v. McCrory-McLelland Corp.*, 259 N.C. 199, 130 S.E. 2d 281; *Powell v. Deifells, Inc., supra; Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33.

In *Raper v. McCrory-McLellan Corp., supra,* it is said:

> "The standard is always the conduct of the reasonably prudent man. The rule is constant, while the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occasion. *Bemont v. Isenhour,* 249 N.C. 106, 105 S.E. 2d 431; *Diamond v. Service Stores,* 211 N.C. 632, 191 S.E. 358. For instance, what would constitute such care in a country non-service store would seem not to be adequate in a city self-service store through which passes a steady flow of customers who, because of the nature of the business, are constantly handling the merchandise."

The inviter is charged with knowledge of an unsafe or dangerous condition on his premises during business hours created by his own negligence or the negligence of an employee acting within the scope of his employment, or of a dangerous condition of which his employee has notice. In such cases the inviter is liable if injury to an invitee proximately results therefrom, because the inviter is deemed to have knowledge of his own and his employees' acts. *Raper v. McCrory-McLellan Corp., supra; Waters v. Harris, supra; Hughes v. Enterprises,* 245 N.C. 131, 95 S.E. 2d 577; 65 C.J.S., Negligence, § 51, Knowledge of Defect or Danger, p. 545. But where the unsafe or dangerous condition is created by a third party, or where there is no evidence of the origin thereof, an invitee proximately injured thereby may not recover, unless he can show that the unsafe or dangerous condition had remained there for such length of time that the inviter knew, or by the exercise of reasonable care should have known, of its existence. *Waters v. Harris, supra; Hughes v. Enterprises, supra; Fox v. Tea Co.,* 209 N.C. 115, 182 S.E. 662.

It seems to be universally held that the *res ipsa loquitur* doctrine is inapplicable in suits against business proprietors to recover for injuries sustained by customers or invitees in falls during business hours on floors and passageways located within the business premises and on which there is litter, debris, or other substances. *Raper v. McCrory-McLellan Corp., supra; Powell v. Deifells, Inc., supra; Copeland v. Phthisic, supra;* Annotation 61 A.L.R. 2d, p. 59.

No inference of negligence on the part of defendant arises *merely* from a showing that plaintiff, a customer in defendant's store during business hours, fell and sustained an injury in the store. *Skipper v. Cheatham,* 249 N.C. 706, 107 S.E. 2d 625; Annotation 61 A.L.R. 2d, p. 56.

Plaintiff's evidence would permit, but not compel, a jury to find the following facts: That in defendant's store during business hours grapes "full of lint and dirt" were on the floor of Aisle 13, that this created an unsafe and dangerous condition, which an ordinarily prudent person in the exercise of reasonable care should have foreseen was likely to cause injury to customers in its store, and that by reason of the grapes being "full of lint and dirt," this dangerous and unsafe condition was created by an employee of defendant who in the scope of his employment had swept the grapes and lint and dirt there. Further, if a jury should find that this unsafe and dangerous condition was not created by defendant or one of its employees acting within the scope of his employment, plaintiff's evidence would permit a jury to find that this unsafe and dangerous condition in Aisle 13 was created by a third person or that its origin was unknown, and that this unsafe and dangerous condition in Aisle 13 had remained there for a sufficient length of time so that defendant knew of it, because Mr. Smith, the manager of defendant's store, when told by the clerk at the cash register about two aisles from him that plaintiff had fallen, called on someone to clean Aisle 13. When plaintiff's evidence is measured by the standard of the established relevant law in this State, and considered in the light most favorable to her, it makes out a case of *prima facie* actionable negligence on defendant's part.

Defendant in its answer conditionally pleaded contributory negligence of plaintiff as a bar to any recovery by her. Plaintiff's evidence is that the floor was dusty and dirty and looked dark, that the grapes she fell on were a dark color, purple, and that "the color of the grapes at that point was very near the same shade and color as was the floor." She testified on cross-examination: "As to whether I would have seen the grapes before I fell, if I had looked, I did look. I always look where I am going. I didn't see them. * * * As to whether there was plenty of light there, I can't answer that. I don't know exactly the lighting arrangement there. There was heavy dust or dirt all over the floor."

Defendant's contention that, even if defendant was guilty of actionable negligence, plaintiff was guilty of contributory negligence as a matter of law thereby barring any recovery by her necessitates an appraisal of her evidence in the light most favorable to her. *Short v.*

Chapman, 261 N.C. 674, 136 S.E. 2d 40; *Beasley v. Williams,* 260 N.C. 561, 133 S.E. 2d 227; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. Measuring her evidence by this standard, it is our opinion that her evidence, that the dark grapes full of lint and dirt were nearly of the same shade and color as the floor and there was heavy dirt on the floor, does not show so clearly that no other conclusion can be reasonably drawn therefrom that this unsafe and dangerous condition on the floor of Aisle 13 was a patent and obvious danger which plaintiff in the exercise of reasonable care for her safety should have seen and avoided. Plaintiff has not proved herself out of court. *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601.

The judgment of compulsory nonsuit was improvidently entered.

Reversed.

IDA BLAKE v. STEVE HODGES MALLARD.

(Filed 20 May, 1964.)

1. Automobiles § 33—

Evidence that plaintiff left a clubhouse on the east side of a highway seventy-five feet north of an intersection with a dirt road and that she crossed the highway and was struck on the western edge of the highway some twenty feet north of the intersection, discloses that plaintiff crossed the highway diagonally in a southwesterly direction and not at a crosswalk, and therefore she was required to yield the right of way to vehicular traffic. G.S. 20-174(a).

2. Automobiles § 42k—

While the failure of a pedestrian to yield the right of way to a motorist at a point other than a crosswalk is not contributory negligence *per se* but only evidence of contributory negligence, nevertheless when all of the evidence establishes his failure to yield the right of way as one of the proximate causes of his injury so clearly that no other reasonable conclusion is possible, nonsuit is proper.

3. Automobiles § 33—

It is the duty of a pedestrian in exercising ordinary care for his own safety to look for approaching traffic before attempting to cross a highway, and if the highway is a six-lane highway or the traffic heavy, to exercise vigilance commensurate with the danger.

4. Same—

Where a pedestrian crosses a highway at a place not a crosswalk and there is nothing to put a motorist on notice that the pedestrian is under

disability or oblivious to danger, the motorist is entitled to assume that the pedestrian will stop and yield the right of way, and is not required to anticipate negligence on the part of the pedestrian in deliberately stepping into his lane of travel.

5. Automobiles § 42k—

Evidence tending to show that plaintiff pedestrian was walking in a southwesterly direction across a four-lane highway at a place other than a crosswalk, and that defendant motorist, traveling south, struck the pedestrian in his outside or westerly lane, and that the lights on defendant's car were burning and the road straight and unobstructed so that they could be seen for a mile, *is held* to disclose contributory negligence on the part of the pedestrian barring recovery as a matter of law.

APPEAL by plaintiff from *Stevens, E. J.*, September-October 1963 Session of DUPLIN.

Earlie C. Sanderson for plaintiff.
Poisson, Marshall, Barnhill & Williams for defendant.

SHARP, J. Plaintiff, a pedestrian, was injured about 10:00 p.m. on May 28, 1962 when she was struck by the defendant's automobile as she attempted to cross U. S. Highway No. 117 from east to west near the northern limits of the Town of Wallace. She appeals from the judgment of nonsuit entered at the close of her evidence which tended to show these facts:

U. S. 117 runs generally north and south through Wallace. At the place where plaintiff was struck the highway is straight for a mile in both directions. It is sixty-six feet wide from curb to curb and consists of six lanes. A center line separates two lanes for traffic in each direction with an additional lane on each side for parking. The area is a thirty-five mile per hour speed zone and is without street lights. A dirt street, known as the Labor Camp Road, intersects U. S. 117 from the west. Fifty feet north of its northern margin, an unnamed dirt street enters U. S. 117 from the east. Each street forms a T intersection where it meets the highway. Fifteen feet north of the unnamed street on the east side of the highway is the Nightingale Clubhouse, also known as Cary's Place.

Plaintiff, a sixty-five year old colored woman wearing dark clothing, left the clubhouse with a nineteen year old girl named Queen Ella James. They stood near the highway in front of the clubhouse and talked for a while before plaintiff left Queen Ella and started across the highway "walking normally" towards the Labor Camp Road. At that

time Queen Ella observed the defendant's automobile approaching from the north about two hundred yards away at a speed which she estimated at sixty miles per hour. Plaintiff testified that while she was crossing she "observed the traffic on the highway on the right and left." She also said, "I saw a car coming pretty fast, and I started to run. . . . When I first observed it, I reckon it was 45 feet from me." Plaintiff did not fix her location in the highway at that time but, according to Queen Ella, she started to run when she was in the fourth lane for traffic. Both the investigating officer and Queen Ella testified that plaintiff was hit approximately thirty-five feet north of the Labor Camp Road in the fourth traffic lane (outside lane for traffic going south) at the edge of the parking lane. Queen Ella said that she "did not go flying through the air when she got hit. She didn't get knocked too far . . . (she imagined) about 4 or 5 feet." When the investigating officer arrived at the scene at 10:10 p.m. he found plaintiff in the street about twenty feet north of the northern margin of the Labor Camp Road. Her right leg was broken; she was wildly hysterical and unable to talk. Upon an examination of defendant's automobile, the officer found a slight dent near the headlight in its right front fender and a brush mark on the right bumper. The night was clear and defendant's car was equipped with headlights which were burning at the time of the accident. Both plaintiff and Queen Ella testified that defendant never sounded his horn, slackened his speed, nor turned his car until he struck plaintiff.

Plaintiff alleges that her injuries were proximately caused by defendant's negligence in that he operated his automobile at an illegal rate of speed, without keeping it under proper control, without keeping a proper lookout, and in that he failed to sound his horn or turn from his line of travel to avoid striking her as she attempted to cross the highway *at a pedestrian crosswalk*. Defendant denied any negligence on his part and, in the alternative, pled the contributory negligence of the plaintiff. He alleged that plaintiff, dressed in dark clothing, was standing in the center of the highway as he approached; that without any warning she suddenly darted into his lane of travel at a time and in a manner which made it impossible for him to avoid striking her.

The only question raised by this appeal is whether the court below erred in granting defendant's motion for nonsuit. If it be assumed that plaintiff's evidence makes out a *prima facie* case of actionable negligence against the defendant, the crucial question remains: Does plaintiff's evidence establish her own contributory negligence as a matter of law?

The record does not disclose the width of the unnamed dirt street which intersects U. S. 117, but since plaintiff began her trip across the highway from the Nightingale Clubhouse she must have started at least seventy-five feet north of the northern edge of the Labor Camp Road. She was struck twenty feet north of it near the western margin of the highway. Obviously, plaintiff was crossing the highway diagonally in a southwesterly direction and not at a crosswalk as she alleged. She was, therefore, required to yield the right of way to all vehicles upon the roadway. G.S. 20-174(a). Had she crossed in the vicinity of the Nightingale where the unnamed dirt street joined the highway she would have had the right of way over a motorist approaching that intersection, G.S. 20-173(a), but this she did not do.

The failure of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right of way to a motor vehicle is not contributory negligence *per se;* it is only evidence of negligence. *Landini v. Steelman,* 243 N.C. 146, 90 S.E. 2d 377. However, the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. *Gamble v. Sears,* 252 N.C. 706, 114 S.E. 2d 677; *Barbee v. Perry,* 246 N.C. 538, 98 S.E. 2d 794; *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246.

The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury. It was plaintiff's duty to look for approaching traffic before she attempted to cross the highway. Having started, it was her duty to keep a lookout for it as she crossed. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499. Having chosen to walk diagonally across a six-lane highway, vigilance commensurate with the danger to which plaintiff had exposed herself was required of her. According to plaintiff's evidence, defendant was two hundred yards away, approaching at a speed of sixty miles per hour when she started "walking normally" into his path on a southwesterly course. It behooved her to keep his approaching vehicle under constant surveillance. Instead, she continued into the path of an automobile which had been approaching on a thoroughfare, straight for a mile in the direction from which it came. Apparently she paid it no heed until she entered its lane of travel when it was only forty-five feet away. Had defendant been going twenty miles per hour when plaintiff stepped into his path, he could not have stopped in time to avoid the accident. Plaintiff by simply standing still in the inside lane could have done so.

Plaintiff is an adult woman. So far as this record discloses she was under no disability, and there was nothing to put defendant on notice

that she was oblivious to his approach or that she would fail to stop and yield him the right of way. Under those circumstances he was not required to anticipate negligence on her part. *Griffin v. Pancoast,* 257 N.C. 52, 125 S.E. 2d 310; *Tysinger v. Dairy Products, supra.*

In *Jenkins v. Thomas,* 260 N.C. 768, 133 S.E. 2d 694, the plaintiff was struck by defendant's automobile while walking at night diagonally across U. S. Highway 321 in Gastonia. The court's comment in affirming a judgment of nonsuit in that case is applicable here:

> "Plaintiff elected not to cross at a point where he had the right of way, but elected to cross at a point where the motorist had the right of way. Defendants, having the right of way, had the right to assume, until put on notice to the contrary, that the pedestrian would obey the law and yield the right of way. The mere fact that the pedestrian is oblivious to danger does not impose a duty on the motorist to yield the right of way. That duty arises when, and only when, the motorist sees, or in the exercise of reasonable care should see, that the pedestrian is not aware of the approaching danger and for that reason will continue to expose himself to peril."

Assuming, for the purpose of passing upon the motion for nonsuit, that defendant was operating his vehicle at sixty miles per hour and that he failed to sound his horn, nevertheless he was travelling in the proper lane for southbound traffic and if plaintiff had looked she would have seen his automobile, the lights of which were visible for a mile. Its speed did not suddenly bring it into her range of vision after she had looked when it was not visible. The observation of *Denny, J. (now C.J.)* in *Garmon v. Thomas, supra,* is pertinent in this regard:

> "Conceding, however, that the defendant should have seen the plaintiff and given him warning of his approach, the plaintiff was at all times under the duty to see the defendant and to yield the right of way to him. In our opinion, both parties were negligent. The defendant was negligent in failing to exercise due care to avoid colliding with the plaintiff on the highway, . . . and the plaintiff was negligent in failing to exercise reasonable care for his own safety in that he failed to keep a timely lookout to see what he should have seen and could have seen if he had looked. . . . The facts compel the view that the defendant's truck was near the plaintiff and plainly visible to him if he had looked at the time he walked into its path. 'There are none so blind as those who have eyes and will not see'."

Incidentally, it is noted that the same witness who estimated defendant's speed at sixty miles per hour said that she did not "go flying through the air" after the impact which, she imagined, "knocked plaintiff only 4 to 5 feet." These two estimates would seem to be incompatible and "contrary to human experience." *Tysinger v. Dairy Products, supra.*

It is manifest from the plaintiff's evidence, which is all the evidence, that her own negligence was at least a proximate cause of her injuries, if indeed it were not the sole proximate cause. No other conclusion can reasonably be drawn. Therefore, the judgment of nonsuit must be affirmed. *Rosser v. Smith, supra.*

The nonsuit in this case might have been sustained because of a material variance between plaintiff's allegations and her proof. *Hall v. Poteat*, 257 N.C. 458, 125 S.E. 2d 924. However, in disposing of the motion we have preferred to do it upon the plaintiff's evidence.

Affirmed.

CHRISTINE CARPENTER BUNN v. HAROLD BUNN.

(Filed 20 May, 1964.)

1. Husband and Wife § 11; Divorce and Alimony § 21—

Where a judgment merely approves a separation agreement between the parties the agreement remains only a contract, sanctioned by the court, and its provisions for support of the wife do not amount to alimony and may not be enforced by contempt proceedings or altered by the courts without the consent of the parties except for fraud or mistake, although the provisions for support of the children of the marriage may not withdraw the children from the supervision of the court.

2. Same—

Where a judgment decrees that the husband make payments for the support of the wife and children in accordance with a deed of separation executed by them, provisions for the support of the wife are alimony and may be enforced by contempt proceedings or modified by the court for change of condition, and the provisions for the support of the children always remain subject to the protective supervision of the court.

3. Same—

Where a separation agreement provides for final settlement of property rights and also for payments for the support of the wife, a consent judgment decreeing payment in accordance with the agreement may not be thereafter modified by the court insofar as a division of property is con-

cerned, although provisions for alimony may be modified unless inseparable from the provisions for the property distribution.

4. Appeal and Error § 19—

Where it does not appear that the court was requested to pass upon the question of attorney's fees, an exception to his failure to do so, appearing nowhere in the record except in a purported assignment of error, does not present the matter for review.

APPEAL by plaintiff from *Bone, E. J.*, January 1964 Civil (A) Session of WAKE.

Plaintiff instituted this action on November 13, 1961 under G.S. 50-16 to secure support for herself and the two minor children of her marriage to defendant. In addition, she asked for the exclusive custody of the children. The defendant duly filed his answer and the matter came on to be heard before the Honorable W. Jack Hooks, Judge Presiding at the November 1961 (A) Civil Term. After finding as a fact that "the parties hereto consent to the entering of this judgment," Judge Hooks ordered, adjudged, and decreed that: (1) During the lifetime of the plaintiff, or until her remarriage, defendant should pay plaintiff $62.50 on the first and fifteenth day of each month for her support; (2) until the children "become 21 years of age, or until they marry," defendant should pay plaintiff the sum of $50.00 on the first and fifteenth day of each month for their support; (3) plaintiff should have exclusive custody of the two children and defendant permission to visit them in plaintiff's home at reasonable times and after notice; and (4) defendant should convey to the plaintiff his interest in the home which they owned by the entireties. To evidence the consent of the parties, the attorneys for both signed the judgment.

On August 13, 1962, upon motion of the plaintiff, the defendant was cited for contempt for failing to make the payments specified in the judgment. The defendant then moved for a reduction in the payments because of a change in his financial condition. Judge Clark, presiding at the September 1962 term, heard both motions and entered an order reducing the total bi-weekly payments for the support of plaintiff and the two children to ninety dollars.

On December 13, 1963 the defendant, having remarried, once more moved the court to reduce the support payments "to a sum less *(sic)* in conformity" with his present financial situation. The plaintiff answered this motion and moved that the order of Judge Clark be set aside as null and void, that the judgment of Judge Hooks be reinstated, and that the defendant be required to comply with it. When these two motions came on to be heard before Judge Bone at the January 1964 (A) Civil Term, the defendant withdrew his motion for a further re-

duction in his payments, but plaintiff pressed her motion to set aside Judge Clark's judgment and to reinstate that of Judge Hooks. Judge Bone denied plaintiff's motion and she appealed.

Alfonso Lloyd and R. P. Upchurch for plaintiff.
No counsel contra.

SHARP, J. "Alimony, as that term is used in the law, is an allowance made for the support of the wife out of the estate of the husband by order of court in an appropriate proceeding, and is either temporary or permanent." *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118. Consent judgments for the payment of subsistence to the wife are of two kinds. In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony.

A contract-judgment of the first type is enforceable only as an ordinary contract. It may not be enforced by contempt proceedings and, insofar as it fixes the amount of support for the wife, it cannot be changed or set aside except with the consent of both parties in the absence of a finding that the agreement was unfair to the wife or that her consent was obtained by fraud or mutual mistake. *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487; *Howland v. Stitzer,* 236 N.C. 230, 72 S.E. 2d 583; *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Stanley v. Stanley, supra; Davis v. Davis,* 213 N.C. 537, 196 S.E. 819. Of course, neither agreements nor adjudications for the custody or support of a minor child are ever final. Parties may never withdraw children from the protective supervision of the court. *Fuchs v. Fuchs, supra; Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721; *Holden v. Holden, supra.*

A judgment of the second type, being an order of the court, may be modified by the court at any time changed conditions make a modification right and proper. The fact that the parties have agreed and consented to the amount of the alimony decreed by the court does not take away its power to modify the award or to enforce it by attachment for contempt should the husband wilfully fail to pay it. *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882; *Smith v. Smith,* 247 N.C. 223, 100 S.E. 2d 370; *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d

576; *Davis v. Davis, supra, Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278. *Alimony* is subject to modification and to enforcement by contempt proceeding if the situation so requires.

When called upon to alter the terms of a consent judgment, or to enforce its provisions by contempt proceedings, the question for the court in each case is whether the provision for the wife contained therein rests only upon contract or is an adjudication of the court. If it rests on both, it is no less a decree of the court. As pointed out in a note in 35 N.C.L. Rev. 405, "the subleties in the form" of a consent judgment for support payments to the wife "play a major role in determining the subsequent rights of the parties" and, if the judgment is to be of "practical value to the wife other than as a judicial affirmation of the contract existing between the parties, . . . it is advisable that the attorney carefully word the form of the judgment so as to preserve in the court further rights in the cause." See also 40 N.C.L. Rev. 530.

Needless to say, a judgment which purports to be a *complete* settlement of all property and marital rights between the parties and which does not award alimony within the accepted definition of that term is not subject to modification even though it adjudges that the wife recover a specific money judgment. This is a consent judgment in its technical sense. *Armstrong v. Insurance Co.,* 249 N.C. 352, 106 S.E. 2d 515; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209. However, an agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. *Briggs v. Briggs,* 178 Or. 193, 165 P. 2d 772, 166 A.L.R. 666. However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. 2 A Nelson on Divorce and Alimony (2d ed. rev.) § 17.03; Annot., 166 A.L.R. 693-701.

Since the decision of this Court in *Stancil v. Stancil, supra,* it has been clear that, absent special circumstances, any judgment which awards alimony, notwithstanding it was entered by the consent of the parties, is enforceable by contempt proceedings should the husband wilfully fail to comply with its terms. If the judgment can be enforced by contempt, it may be modified and vice versa. This is only just. If a man in prosperous days consents that a judgment be entered against him for generous alimony and thereafter is unable to pay it because of financial reverses, the order should be altered to conform to his ability to pay.

The consent judgment which Judge Hooks entered on November 16, 1961 was not a mere contract-judgment; it was an adjudication, an order to pay alimony in an amount which the parties then agreed was proper. While not an issue here, it is clear that the agreement and decree that defendant convey to plaintiff, as a home for herself and the two minor children, the property which they owned as tenants by the entirety was separable from the support provisions. Plaintiff recognized the status of Judge Hooks' judgment as an adjudication of alimony when, in August 1962, she asked the court to enforce it by attaching the defendant for contempt for his failure to make the required payments. The disposition of this motion does not appear. Presumably the defendant paid the arrearage for, upon his motion on September 21, 1962, Judge Heman R. Clark reduced the payments which he had agreed to make and which Judge Hooks had decreed. Judge Clark had the authority to reduce these payments and plaintiff did not appeal from his order. Judge Bone therefore properly denied plaintiff's motion that Judge Clark's order modifying that of Judge Hooks be declared null and void.

The plaintiff also attempts to assign as error the failure of Judge Bone to make an order allowing fees to her attorneys for their services in contesting defendant's motion for a further reduction in his payments and in prosecuting her motion to reinstate Judge Hooks' judgment. It does not appear from the record that Judge Bone passed upon plaintiff's motion for fees or that the matter was ever brought to his attention. The subject of attorneys' fees and the exception to the judge's failure to allow them first appear in an assignment of error. An exception which appears nowhere in the record except under a purported assignment of error is worthless and will not be considered on appeal. *Holden v. Holden, supra.*

The judgment of the Superior Court is

Affirmed.

MRS. ROSA McPHERSON, PLAINTIFF v. DANIEL SLATER HAIRE, TRADING AND DOING BUSINESS AS DANIO'S DAIRY-O, AND NORMAN FLETCHER GUYTON (ORIGINAL) DEFENDANTS, AND MARVIN L. KINLAW, ADDITIONAL DEFENDANT.

(Filed 20 May, 1964.)

1. Appeal and Error § 41—

Even if it be conceded that plaintiff's evidence is insufficient to establish a permanent injury, the admission of the mortuary tables in evidence will

not be held ground for a new trial when there is nothing in the record or verdict to indicate prejudice to defendant resulting therefrom.

2. Trial § 34—

A charge that if the jury should "believe" by the greater weight of the evidence that certain facts existed to answer the issue in the affirmative will not be held for prejudicial error since the jury must have understood and treated the word "believe" to be synonymous with "find."

3. Appeal and Error § 42—

Where the court correctly defines the substantive common and statutory law involved and correctly places the burden of proof, exception to the charge will not be sustained when the charge construed as a whole is without prejudicial error.

4. Automobiles § 54f—

Where, in an action by a passenger against the drivers involved in a collision, plaintiff makes out a *prima facie* case of negligence on the part of the driver of the car, proof or admissions that the additional defendant was the registered owner of the car establishes *prima facie* that the driver was such owner's agent and was acting in the course and scope of the employment, and entitles the defendants to have the owner of the car joined for contribution.

5. Automobiles §§ 14, 41d—

While the failure of the operator of a motor vehicle passing another vehicle in open country to give audible warning of the intent to pass is not negligence *per se*, if there is evidence tending to show circumstances which would support a finding that a reasonably prudent person under similar conditions would not have attempted to pass without sounding his horn and that defendant driver failed to do so, and that such failure was a proximate cause of the accident, the issue of negligence is for the determination of the jury.

APPEAL by defendants from *Braswell, J.*, January 1964 Session of COLUMBUS.

Plaintiff, passenger in a Plymouth operated by Fleetie Kinlaw, was injured when the car collided with an ice cream truck operated by defendant Guyton, agent for the owner, defendant Haire. The collision occurred about Noon, June 6, 1962, on Highway 701, when the truck turned into the left lane preparatory to entering a private drive. The truck was ahead of the car.

Plaintiff alleged: The operator of the truck turned to his left without signalling his intent to turn; when the truck turned the driver of the car was in the act of passing and in the left hand lane having previously given notice of her intent to pass by audible signal; defendant, by proper lookout, could and should have seen the car in the left hand lane attempting to pass the truck.

Defendants denied plaintiff's allegations of negligence. Additionally, they allege: The automobile was owned by Marvin L. Kinlaw. It was, when it collided with the truck, being operated for the owner by his agent. The operator of the automobile was negligent. She attempted to pass after being notified by signal given by the operator of the truck of his intent to make a left turn. When the collision occurred, the front end of the truck was on the east shoulder of the road. Mrs. Kinlaw's negligence, if not the sole proximate cause of the collision, was at least a contributing cause. If the jury should find that the defendants were negligent and liable to plaintiff, they were entitled to contribution.

The owner of the automobile was made an additional defendant. He answered those allegations relating to his liability for contribution. He admitted he owned the automobile, but denied the remaining allegations.

The court at the conclusion of the evidence allowed the motion of the additional defendant for nonsuit.

The jury found plaintiff was injured by the negligence of defendants and assessed damages. Judgment was entered against the original defendants, in conformity with the verdict. Defendants appealed.

Edward L. Williamson and Benton H. Walton, III for original defendant appellants.

D. Jack Hooks for Marvin L. Kinlaw, additional defendant appellee.

Powell, Lee and Lee for plaintiff appellee.

RODMAN, J. Defendants do not contend the evidence is insufficient to support the verdict and the judgment awarding plaintiff damages. Their assignments of error, with respect to plaintiff's cause of action, are directed to the admission of the mortuary tables in evidence and to the charge.

Plaintiff's foot was broken; her head was injured when thrown against the sun visor; she had "bruises on other parts of my body." Her foot was in a cast for a month. After the cast was removed she wore a rubber stocking to prevent the leg from swelling, "but it did not, and even today (January 1964) my leg swells at times, especially when I am up on it much * * * I still have pain in my head and the place where it was hit feels numb. The pain starts in the place where I was hit and runs into the back of my head."

The physician who treated plaintiff expressed the opinion that pain in the plaintiff's head could be relieved by blocking the nerve, a relatively simple procedure requiring the injection of alcohol in the nerve

by means of a needle. This would afford relief for about eight months, then the process would have to be repeated, or the nerve taken out by the roots.

Plaintiff put in evidence over defendants objection the mortuary tables. This is assigned as error. If it be conceded that the evidence is insufficient to establish a permanent injury, and plaintiff's life expectancy of no moment, it does not follow that defendants are entitled to a new trial. "The admission of evidence which is immaterial or not prejudicial does not entitle appellant to a new trial." 1 Strong's N.C. Index, p. 119, and cases cited in note 409. We find nothing in the record or in the verdict to indicate prejudice to the defendants resulting from the evidence objected to.

Plaintiff gives this description of the events leading to the collision: "We were traveling south and I saw this truck about 25 yards ahead parked * * * on the right-hand shoulder of the road going south. This truck pulled onto the highway in front of us and my daughter slowed down and followed it. After my daughter followed him for about 40 or 50 yards, at a distance of at least two car-lengths, she started to pass him. She got up within a car-length of him and blew the horn and then got into the left hand lane to go around him, when he cut right short ahead of us, and she hit him * * * I had watched the truck and he gave no indication that he was going to turn. At the time that he turned, we were in the passing lane and at that moment he had not given any signal of his intention to turn to the left * * * The front end of our car hit the left-hand rear fender of the truck."

Guyton, operator of the truck, testified he was "a door to door peddler of ice cream," implying slow speed because of frequent stops. He was parked on the right shoulder when he saw the Plymouth coming from the north. It was then half a mile away. This distance enabled him to enter the southbound lane in safety. He intended to turn into a road on the east and 250-300 yards south of the point where he entered the highway. When he was 50 yards north of the point where he intended to turn, the Plymouth was 25-50 yards behind him. When 20 yards north of the intersection, he pulled into the left lane preparatory to making his intended turn at the intersection.

Defendants' assignments of error, as they relate to the charge, do not comply with our rules. *Lowie & Co. v. Atkins*, 245 N.C. 98, 95 S.E. 2d 271; *Hunt v. Davis*, 248 N.C. 69, 102 S.E. 2d 405; nonetheless, we have examined the charge. The court defined the terms "negligence," "proximate cause," and "burden of proof." He told the jury the burden was on plaintiff to establish actionable negligence of defendants and the amount of damages to which she would be entitled. In one instance

he said, "if you believe by the greater weight of evidence," the jury should answer "yes," Certainly the jury could not have misunderstood and treated the word "believe" as other than "find."

The conflicts and divergent inferences which the jury might draw from the testimony called for an explanation of the various statutes enacted to promote safety on the highways. The court called attention to G.S. 20-146, 149, 150, 153 and 154. He explained the effect of a violation of these statutory provisions. Read as a whole, as a charge should be, *Flintall v. Insurance Co.*, 259 N.C. 666, 131 S.E. 2d 312, we find nothing in the charge which, in our opinion, can be regarded as prejudicial to defendants.

Did defendants offer any evidence to support their claim for contribution? The admission that additional defendant was the registered owner of the Plymouth established *prima facie* the fact that the driver was owner's agent, acting in the course and scope of her employment, G.S. 20-71.1(b). If defendants (plaintiffs as to the additional defendant) have also made a *prima facie* showing of negligent operation of the Plymouth proximately causing the collision and resulting damage to the plaintiff, the court erred in nonsuiting their claim for contribution.

G.S. 20-149(b) directs the operator of a motor vehicle intending to pass another vehicle traveling in the same direction to give audible warning of the intent to pass unless the vehicles are in a business or residential district. The collision, causing plaintiff's injuries, occurred in the open country. Did the driver of the Plymouth give notice of her intention to pass the truck? The evidence is conflicting. Defendants' evidence would support a negative answer, plaintiff's an affirmative answer. Whether the warning was or was not given was a question for the jury. A failure to give the statutory warning would not be negligence *per se;* but would, when coupled with the other testimony of the witnesses, suffice to support a finding that a reasonably prudent person under similar circumstances would not have attempted to pass without sounding the horn. If the jury should so find; and further find that such negligence was one of the proximate causes of the collision, it would follow as a matter of law that the drivers of the vehicles were joint tort-feasors. If it should further find on the *prima facie* evidence of ownership that the driver of the Plymouth was the agent for the owner, acting in the scope of her employment, the additional defendant would be liable for contribution. The Court could not resolve the factual controversy.

In the judgment for plaintiff: No error.

The judgment of nonsuit is: Reversed.

MRS. MARGARET DOWDY FERRELL, WIDOW, FAYE ELIZABETH FERRELL, DAUGHTER, BY HER NEXT FRIEND, EUGENE C. BROOKS, III, LEWIS E. FERRELL, DECEASED, EMPLOYEE v. MONTGOMERY & ALDRIDGE SALES CO., EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 20 May, 1964.)

Master and Servant § 65—

Where the evidence does not disclose that the employee was doing work essentially different from that which had been customarily performed by him over the years, his death as a result of a coronary thrombosis is not the result of an accident within the meaning of the North Carolina Workmen's Compensation Act.

APPEAL by defendants from *Latham, S. J.*, October, 1963 Session, DURHAM Superior Court.

This proceeding originated as a workmen's compensation claim for death benefits before the North Carolina Industrial Commission. Hearing Commissioner Thomas made findings of fact, stated conclusions of law, and entered an award denying the claim upon the ground the evidence was insufficient to show that Lewis E. Ferrell, employee, was injured by accident arising out of and in the course of his employment.

Upon review, the Full Commission vacated the Hearing Commissioner's findings, conclusions, and award; and made findings of its own that Lewis E. Ferrell suffered injury and death by accident arising out of and in the course of his employment. The Commission awarded payment of benefits.

On appeal to the Superior Court, Judge Latham entered judgment overruling the defendants' exceptions, affirmed the findings, conclusions, and award of the Full Commission. The defendants appealed.

Brooks & Brooks by Eugene C. Brooks, III, for plaintiff appellees.

Spears, Spears & Barnes by Marshall T. Spears, Jr., for defendant appellants.

HIGGINS, J. The evidence disclosed that Lewis E. Ferrell, on and prior to July 28, 1961, was service manager of the appliance and service department of Montgomery and Aldridge Sales Company—dealers in refrigerators, ranges, and other appliances. "He was approximately six feet tall and weighed about 180 to 190 pounds, and was a muscular man," age 50 years. He had worked for the same employer for 17 years and had been out for health reasons "from September 21 through October 19, 1959, for a back injury operation." Thereafter he lost no time from work until his final attack on July 28, 1961.

Mr. Ferrell's duties required him to supervise the unloading from railroad cars and from trucks of shipments of "refrigerators, ranges, laundry equipment, and home freezers." Mr. J. T. Gray succeeded Mr. Ferrell as service manager. As a witness for claimants, he testified:

"Mr. Ferrell had the right to fully participate in the activity of unloading and as a matter of fact he did fully participate. He and I were at the warehouse during the time of unloading these ranges, refrigerators and other items. This was being done at the main building. . . . During my employment at Montgomery & Aldridge, I have observed him from day to day over that eight-year period. Among the jobs that came to the service department there would be required certain moving of appliances to one place or another around the building. Mr. Ferrell had the right to either participate in it or have someone else do it. He frequently engaged in the moving of things himself, by himself. * * *

"Most frequently appliances come into Durham in a railroad car, and we then have occasion to do as we were doing on July 28 and transfer the appliances by truck from the railroad car to our place of business or to our warehouse. I would say that we probably have a railroad car a month and in the winter months every other month, with some shipments in between. We also have other shipments which are less than a carload. All shipments ultimately have to be unloaded by us in our place of business. The appliances come crated. In unloading an appliance from a pickup truck, you slide it off one end on the ground. Mr. Ferrell and I might slide an appliance several inches across the bed of the pickup truck and then roll a hand truck under it and just walk off with it. It was propelled by the hand truck to the place where we wanted to put it. This was the type of thing that Mr. Ferrell was engaged in doing on the afternoon of July 28, but he wouldn't do freezers in that manner.

* * *

"This is also generally the method in which we unloaded appliances on those occasions prior to July 28, 1961. On those occasions Mr. Ferrell took part in it as he did on July 28. * * *

"During the course of the evening, (July 28) it being so warm, we had placed two or three chairs up by the big entrance door of the ramp and in between the arriving and leaving, we would sit there in an attempt to cool ourselves off. As we sat there, I noticed Mr.

> Ferrell was slumped over in his chair and I asked him if he was hurting in any way and he pointed to his chest, sort of tapped himself up there and said, 'McKee,' and I immediately left to go into the office to get to the telephone and call Dr. McKee and they referred me to an answering service and they didn't know where he was and I come back out and said, 'It is time to take him to the hospital,' and I took him and put him in the truck and took him to the Watts Hospital."

Dr. Page, a medical expert, testified Mr. Ferrell died in the hospital three days after his admission as a result of "a coronary thrombosis that produced . . . a myocardial infarction. . . The autopsy shows that the causes of death of Lewis E. Ferrell were multiple, all wrapped up together, and being arteriosclerosis, . . . hypertrophy of the myocardium, thrombosis, recent, . . . He was admitted through the emergency room after the cardiogram showed changes that were compatible with . . . myocardium infarction. The patient has had vague or sharp pains of a similar nature over the past month. . . . My opinion would be that with the pre-existing disease that the labor would cause the heart attack . . . Referring to Mr. Ferrell, it would be equally fair to say that his myocardial infarction could have come about by reasons other than any exertion which he might have undergone. In a sense, it is a question of speculation as to exactly why this particular thing occurred."

Dr. Gentry, a specialist in pathology who performed the autopsy, testified: "I found that Mr. Ferrell had generalized arteriosclerosis with particular involvement of the coronary arteries. The coronary thrombus had occurred in his left ventricle descending coronary artery, and it completely occluded that artery. The anterior septum and the anterior and lateral walls of the left ventricle were infarcted by reason of this thrombus. I found that he had very old scarring diffusely throughout the myocardium with hypertrophy of the myocardium so that the heart was leaning to one side and the weight half the times of its normal weight, 540 grams, and in addition to these old changes and this recent change which I have described consisted of the infarct which had the characteristic of being of the same age of the thrombus."

In response to a question regarding Mr. Ferrell's activities of two or two and one-half hours prior to the onset of the chest pains, Dr. Gentry testified: "This is considered an unanswered question as to whether there is any real correlation between activity or emotion and the formation of a thrombus . . . It is well established that activity

and emotion can bring about an infarction . . . in the face of narrowed vessels. This is known, but it is not known whether the emotional or physical stress can precipitate the actual occlusion such as this man had. I would say it would be highly unlikely for this thrombus to have occurred in Mr. Ferrell if he had not been suffering from arteriosclerosis."

The sole question in this appeal is: Did the death of Lewis E. Ferrell result from "injury by accident within the meaning of the North Carolina Workmen's Compensation Act?" The claimants cite *Gabriel v. Newton*, 227 N.C. 314, 42 S.E. 2d 96, in support of their contention that Mr. Ferrell, because of his extra exertion immediately before his attack, suffered an injury by accident. The evidence fails to show he did any work essentially different from that which had been his custom over the years. This case, therefore, is controlled and governed by *Slade v. Hosiery Mills*, 209 N.C. 823, 184 S.E. 844; *Neely v. Statesville*, 212 N.C. 365, 193 S.E. 664; *West v. Department of Conservation and Development*, 229 N.C. 232, 49 S.E. 2d 398; and especially, by *Lewter v. Abercrombie Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410; and *Bellamy v. Stevedoring Co.*, 258 N.C. 327, 128 S.E. 2d 395.

The case was fully developed before the Industrial Commission, well briefed, and ably argued here. We conclude, however, the evidence is insufficient to show Mr. Ferrell suffered injury by accident within the meaning of our Workmen's Compensation Act. For that reason, the judgment entered in the Superior Court of Durham County is reversed. The cause will be remanded to the North Carolina Industrial Commission for the entry of an award denying compensation.

Reversed.

NATIONWIDE HOMES OF RALEIGH, N. C., INC. v. FIRST-CITIZENS BANK AND TRUST COMPANY.

(Filed 20 May, 1964.)

1. Banks and Banking § 10—

Where a bank admits the deposit of funds the burden is on the bank to show satisfaction of the debt so created.

2. Principal and Agent § 5—

A party relying upon the authority of an agent to act for his principal must ascertain the extent of such agent's authority, but the principal is liable not only for acts expressly authorized but also for acts within the

apparent scope of the authority with which the principal has clothed the agent. G.S. 55-36(e).

3. Banks and Banking § 10—

An agent making a deposit does not have implied authority to draw checks on the account.

4. Same—

Where a bank admits deposits and disbursements of the funds on checks drawn by the agent who made the deposits but offers no evidence of valid authority of the agent to draw checks on the account or of apparent authority of the agent by showing when the depositor first had notice of the payment of checks drawn by the agent so as to establish the depositor's failure to object within a reasonable time thereafter, nonsuit in the depositor's action against the bank is error.

5. Same.

G.S. 53-52 entitles a bank to credit for forged or unauthorized withdrawals by an agent of the depositor only for those checks received by the depositor in its bank statement for more than sixty days without giving notice to the bank that the withdrawals were not authorized.

APPEAL from *Olive, Emergency J.*, First November Regular Civil Session 1963 WAKE.

Plaintiff seeks to recover $8,663.69 wrongfully charged to its account. It alleges these charges were made on checks signed in its name by its agent, S. T. Currin, Jr., who was without authority to draw on funds deposited in plaintiff's name.

Defendant denied liability. It alleged: Currin was in full and complete charge of all of plaintiff's business in the Raleigh area. He had implied and apparent, if not actual, authority to draw checks on plaintiff's account. Plaintiff negligently failed to notify it that Currin was not authorized to draw checks on its account when it knew, or should have known, that he was doing so. It pleaded the provisions of G.S. 53-52 and a lapse of 60 days between the return of the checks and plaintiff's claim of forgery.

At the conclusion of plaintiff's evidence defendant's motion for nonsuit was allowed. Plaintiff excepted and appealed.

Yarborough, Blanchard & Tucker for plaintiff.
Mordecai, Mills and Parker for defendant.

RODMAN, J. Viewed in the light most favorable to plaintiff, the evidence is sufficient to establish these facts: Prior to August 7, 1961, plaintiff had no deposit with defendant. On that date S. T. Currin, Jr., plaintiff's agent, deposited with defendant $2,000. The deposit was

made in plaintiff's name. The funds deposited were plaintiff's. When the account was opened, Currin delivered to defendant a document captioned "AUTHORIZING RESOLUTION" which stated plaintiff's Board of Directors, on August 1, 1961, adopted a resolution authorizing S. T. Currin, Jr., its Vice-President, "to sign checks against funds of the corporation in First Citizens Bank & Trust Company." The document was signed by S. T. Currin, Jr. who affixed after his name the title "Vice-President." It purported to be signed by George Coleman, having the title of Secretary. Coleman was plaintiff's secretary, but his name purporting to certify the adoption of the resolution was a forgery. Currin from time to time made deposits to plaintiff's credit. The aggregate of the deposits between August 7, 1961 and December 20, 1961 was $13,956.45. Checks drawn by Currin on the account reduced it to $60.93 on December 28, 1961. Checks aggregating $5,292.76 drawn by Currin and charged to the account were for "the ultimate benefit of plaintiff." On February 22, 1962 the account had been reduced to thirty eight cents. Plaintiff first discovered that Currin had made deposits with, and drawn checks on, plaintiff's account the latter part of December 1961. Plaintiff then notified defendant that Currin had no authority to deposit or draw checks. The parties stipulated: "All checks drawn on the subject account are forgeries committed by S. T. Currin, Jr. and are not checks or drafts of plaintiff."

The admission that funds were deposited with defendant in plaintiff's name placed the burden on it to show payment of the debt so created. *Schwabenton v. Bank*, 251 N.C. 655, 111 S.E. 2d 856; *Finance Company v. McDonald*, 249 N.C. 72, 105 S.E. 2d 193; *Joyce v. Sell*, 233 N.C. 585, 64 S.E. 2d 837; *Arnold v. Trust Company*, 218 N.C. 433, 11 S.E. 2d 307; *Boney v. Bank*, 190 N.C. 863, 129 S.E. 583; *Bank v. Thompson*, 174 N.C. 349, 93 S.E. 849; *Yarborough v. Trust Company*, 142 N.C. 377, 55 S.E. 296.

One who deals with an agent must, to protect himself, ascertain the extent of the agent's authority. *Edgewood Knoll Apartments v. Braswell*, 239 N.C. 560, 80 S.E. 2d 653. The principal is of course bound when he expressly authorizes his agent to act. Here the stipulation that Currin forged the checks negates express authority to draw on the bank account; but a principal may be bound even though the agent has not been expressly authorized to act if the nature and extent of his duties fairly implies the authority to act; if the principal has invested the agent with the apparent authority to act he will be bound. G.S. 55-36(e); Robinson's North Carolina Corporation Law & Practice, p. 274.

The mere fact that an agent makes deposits to the credit of his principal is not of itself sufficient to imply authority to draw checks on the

account. *Boney v. Bank, supra; Pelican Well, Tool & Supply Company v. Sabine State Bank & Trust Company,* 138 So. 161; *Brown v. Daugherty,* 120 Fed. 526; 1 Morse on Banks and Banking, (6 Ed.) 723-4.

Defendant alleged, as justification for paying the checks, the fact that Currin had full and complete charge of plaintiff's affairs in the Raleigh area. Plaintiff alleged that Currin was not in fact its vice-president. It describes him as "an employee." No evidence was offered with respect to the kind of business which the plaintiff did, the scope of the business, the necessity for a bank account, Currin's title, if any, or the duties which he was to perform.

The descriptive words "employee" or "agent" are not, standing alone, sufficient to establish implied or apparent authority to draw checks on their employer's bank account. *Goodloe v. Bank,* 183 N.C. 315, 111 S.E. 516. The authority of a general agent is broader. *Lumber Company v. Elias,* 199 N.C. 103, 154 S.E. 54; *Strickland v. Kress,* 183 N.C. 534, 112 S.E. 30; *James H. Forbes Tea & Coffee Company v. Baltimore Bank,* 139 S.W. 2d 507; *Safeway Stores v. King Lumber Company,* 113 P. 2d 483.

Did the plaintiff lead defendants to believe Currin had authority to draw checks by failing to inform defendant when notice was brought home to it by the return of checks drawn by Currin in payment of admitted obligations of plaintiff? Defendant so alleges, but it offered no proof to support its allegation. None of the checks were in evidence. How many checks were drawn? When were they paid? When were they returned to plaintiff? There is no evidence on which to base an answer to these questions. The burden was on defendant to show plaintiff's recognition of Currin's authority to write checks.

Similarly the burden was on defendant, in order to avail itself of the provisions of G.S. 53-52, to show when the checks were returned to plaintiff. *Greensboro Ice & Fuel Company v. Security National Bank,* 210 N.C. 244, 186 S.E. 362; *Schwabenton v. Security National Bank of Greensboro, supra.* The evidence merely shows that some checks had been returned prior to December 28, 1961 when plaintiff challenged defendant's right to debit its account. Only those returned more than 60 days prior to the protest are proper credits under the statute.

The judgment of nonsuit is

Reversed.

THOMAS M. ISRAEL v. BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, CAROLINA COACH COMPANY, AND RONALD MICHAEL TEMPLE, SR.

(Filed 20 May, 1964.)

Process § 15—

Where, in an action against a nonresident bus owner to recover for the negligent operation of the bus in this State, service on the nonresident is had by service on the Commissioner of Motor Vehicles, G.S. 1-105, the nonresident's motion to quash the service should be denied when the nonresident offers no evidence in support of its allegations that it had leased the bus to be operated solely by and under the exclusive control of a resident corporation and under the resident corporation's franchise right.

APPEAL by plaintiff from *Olive, E. J.*, February 17, 1964 Civil Session, GUILFORD Superior Court, High Point Division.

The defendant Baltimore and Annapolis Railroad Company, a Maryland corporation, entered a special appearance and moved to quash the service of process and dismiss the action on the ground that the attempted service on the Commissioner of Motor Vehicles was ineffective to bring the movant into court. From the order allowing the motion and dismissing the action, the plaintiff appealed.

Schoch & Schoch by Arch K. Schoch for plaintiff appellant.

McNeill Smith, James G. Exum, Jr., and Smith, Moore, Smith, Schell & Hunter for defendant Baltimore and Annapolis Railroad Company, appellee.

Jordan, Wright, Henson & Nichols by Welch Jordan for defendants Carolina Coach Company and Ronald Michael Temple, Sr., appellees.

HIGGINS, J. The plaintiff instituted this civil action to recover personal injury and property damages proximately resulting from a motor vehicle collision between the plaintiff's automobile and trailer, and a 1961 GMC bus owned by the defendant Baltimore and Annapolis Railroad Company and driven by its employee, the defendant Ronald Michael Temple, Sr. The collision occurred at 9:20 A.M. on January 2, 1962, on U. S. Highway 29 near Reidsville, North Carolina, as the vehicles were proceeding southward. The bus collided with the rear of the trailer, resulting in plaintiff's injury and property damage.

The plaintiff alleged:

"6. At the time herein complained of defendants Baltimore and Annapolis Railroad Company and Carolina Coach Company, by agreement, were engaged in a joint enterprise for the transportation of passengers for hire. . . .

"9. At all times herein complained of defendant Ronald Michael Temple, Sr., was the agent and employee of defendant Baltimore and Annapolis Railroad Company, and was acting within the course and scope of his employment; and he received compensation in connection therewith from said defendant Baltimore and Annapolis Railroad Company.

"10. At all times herein complained of defendant Ronald Michael Temple, Sr., was the agent and employee of defendant Carolina Coach Company, and acting within the course and scope of such employment."

The plaintiff served process on Carolina Coach Company, a Virginia corporation, and on Ronald Michael Temple, Sr., a resident of Maryland. Both filed joint answers admitting allegation 9, but denying allegations 6 and 10. The plaintiff attempted to bring defendant Baltimore and Annapolis Railroad Company into court under G.S. 1-105, by service on the Commissioner of Motor Vehicles. The Baltimore and Annapolis Railroad Company entered a special appearance and moved to quash the service and dismiss the action on the ground the movant, though the owner of the bus, had leased it to the defendant Carolina Coach Company to be operated solely by the Carolina Coach Company under its exclusive direction, control, and supervision, and under its Interstate Commerce Commission franchise rights.

The Carolina Coach Company, while denying liability, conditionally alleged a cross action against the Baltimore and Annapolis Railroad Company, on the ground the Railroad's liability is primary and the Coach Company's liability, if any, is secondary.

The court heard the motion to quash upon affidavits and pleadings which disclosed the following: The Railroad Company leased its GMC bus, No. 1404, for a charter trip transporting 49 soldiers from Baltimore, Maryland, to Camp Jackson, South Carolina. The oral lease provided that the operator should pay the owner 55¢ per mile while carrying soldiers and 40¢ per mile while returning empty. The movant paid the driver, Temple, who expected to be relieved at Washington. For an undisclosed reason another driver was not provided.

Temple testified that when he arrived with the leased bus at Washington, he was instructed by *Safeway Bus Company's* dispatcher to proceed to Danville, Virginia, where a *Virginia Trailways* dispatcher instructed him to proceed to Charlotte, North Carolina. While following the last direction, he was involved in the collision with plaintiff's automobile and trailer. Whether these dispatchers were authorized to act for Baltimore and Annapolis Railroad Company or the Carolina

Coach Company, or both, or neither, does not appear from the evidence.

On the other hand, Otis A. Barnes, Director of Safety for Carolina Coach Company, testified the bus, at the time of the accident, carried a placard, "Chartered . . . Operated for *Safeway Trails, Inc.*, Washington, D. C., ICC—MC 84728." Mr. Barnes testified: "No employee, officer, or agent of Carolina Coach Company gave any instructions or orders whatsoever to Ronald Michael Temple, Sr., with respect to the January 1-2, 1962, trip of the bus, the operation of the same, or the manner in which it should be operated, or the route over which it should be operated."

The motion to quash the service was based on the affidavit of the Secretary for the Baltimore and Annapolis Railroad Company who stated its bus and driver were leased to Carolina Coach Company under an oral agreement. However, the placard in the bus showed "Operated for *Safeway Trails, Inc.*," under its ICC authority—MC 84728. Movant's driver received instructions from movant to proceed from Baltimore to Washington. There he received and followed instructions from *Safeway Bus Company* to proceed to Danville, Virginia. There he received instructions from *Virginia Trailways* to proceed to Charlotte, North Carolina. Movant's evidence, therefore, does not indicate that any agent of Carolina Coach Company at any time agreed to take any part in the transportation of the soldiers on movant's bus. The *conclusion* to that effect is unsupported by any factual averments in the movant's affidavits or motion. The order quashing the service and dismissing the action is

Reversed.

J. K. CROUCH v. LOWTHER TRUCKING COMPANY, A CORPORATION.

(Filed 20 May, 1964.)

1. Trover and Conversion § 2—

The owner of personalty may recover the value of the property at the time of its conversion with interest but may not recover in addition thereto damages for the loss of the use of the property subsequent to the conversion, and demurrer to the statement of the cause of action to recover for loss of use of the property should be sustained.

2. Torts § 1; Contracts § 25—

A plaintiff may not create several causes of action out of a single tortious act, nor may he create several causes of action out of a single failure to comply with a contract in its differing terms.

APPEAL by plaintiff from *Latham, S. J.*, September 9, 1963 Non-Jury Civil Term of MECKLENBURG.

This is an appeal from an order sustaining a demurrer for failure to state a cause of action in the last of seven statements. The order also directed plaintiff to re-frame the allegations of the first six causes of action so as to unite in one cause those claims based on breach of contract, with a separate statement of rights invaded by tortious conduct.

Welling, Welling & Meek for plaintiff.

Helms, Mulliss, McMillan & Johnston by James B. McMillan and E. Osborne Ayscue, Jr., for defendant.

RODMAN, J. Stripped of superfluous verbiage, the complaint alleges these facts: Plaintiff on January 31, 1963 purchased from defendant a Mack tractor for $6,500, and a Fruehauf trailer for $4,500. The tractor was to be paid for by installments of $236.00 per month; the trailer was to be paid for by installments of $30.00 per week. The plaintiff on the same day leased the vehicles to the defendant. The rental contract could after 30 days from its date be terminated by either party. Plaintiff, on proper notice, terminated the contract. On April 26, 1963 defendant wrongfully seized and took possession of the tractor. In the tractor at the time defendant seized it were a second hand tire, tire chains, and a spot light. Defendant has wrongfully refused to surrender the tractor, trailer, the spare tire, chains, or the spot light. When converted, the tractor was worth $6,500, the trailer $4,500, and the tire, chains, and spot light $135.00. The rental contract obligated plaintiff to pay insurance, taxes, driver's license, and other incidental expenses. To assure payment of these items, plaintiff deposited with defendant the sum of $1,000. Defendant properly deducted from the deposit $152.88 for taxes and insurance and $120.00 on one of the monthly payments for the tractor. It refuses to account for the unused portion of the deposit and refuses to account for rentals for the use of the tractor-trailer while the contract was in force.

Plaintiff, on the facts summarily stated, sought to create six causes of action: One for the conversion of the tractor; another for the conversion of the trailer; another for the conversion of the spare tire, tire chains, and spot light; another for failure to account for the $1,000 deposit, less the amount expended for taxes and insurance; another for failure to account for the deposit, less the amount applied on the monthly installments for the purchase of the tractor; and a sixth cause

of action for the failure to properly account for rentals accrued from the use of the property during the time the contract was in effect. To these six, he added a seventh for the amount he could have earned in the use of the tractor-trailer from the date of the conversion to the institution of the action. He prayed for the value of the property converted, for punitive damages for the conversion, for an accounting with respect to his deposit, and for the amount due under the contract for the use of the property.

Defendant, as a basis of its demurrer to the seventh cause of action, said plaintiff could not recover the value of the property converted and damage for the loss of the use of the property subsequent to the conversion. Plaintiff insists the demurrer is not sufficiently specific to meet the requirements of G.S. 1-128. We reach the opposite conclusion and hold that the court properly sustained the demurrer to the seventh cause of action. The correct measure of damage for the conversion of plaintiff's property is the value of the property taken with interest thereon. *Peed v. Burleson's, Inc.*, 244 N.C. 437, 94 S.E. 2d 351. That being true, the claim for additional compensatory damages fails to state a cause of action. Plaintiff does not seek compensation for the use of his property after he had terminated the rental contract. Manifestly, he could not claim benefits accruing under a contract after he had terminated it. *Lykes v. Grove*, 201 N.C. 254, 159 S.E. 360.

The complaint, as filed, is composed of 103 paragraphs or sections. Without caption or verification, it required more than nineteen pages of the record to reproduce it. Conceding a commendable desire to comply with the requirements of Rule 20(2) of the Rules of Practice in the Supreme Court, it is manifest that the complaint does not conform to the requirements of G.S. 1-122(2). Judge Latham's order did not dismiss the first six causes of action; it merely required plaintiff to make a plain and concise statement of the facts entitling him to relief.

A plaintiff may not create several causes of action out of a single tortious act, nor may he create several causes of action out of a single failure to comply with a contract in its differing terms. *Gaither Corporation v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909; *Allison v. Steele*, 220 N.C. 318, 17 S.E. 2d 339; *Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822; *Pemberton v. Greensboro*, 205 N.C. 599, 172 S.E. 196; *Elmore v. R. R.*, 189 N.C. 658, 127 S.E. 710; *Eller v. R. R.*, 140 N.C. 140, 52 S.E. 305.

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF Z. A. MORRIS, JR., SOLICITOR OF THE 19TH JUDICIAL DISTRICT OF NORTH CAROLINA v. GEORGE ALFRED SHINN AND WIFE VENNIE P. SHINN; AND LEWIS SHINN.

(Filed 20 May 1964.)

1. Costs § 4—

The recovery of costs is exclusively statutory.

2. Costs § 3; Nuisance § 12—

Upon the return of an affirmative verdict in an action to abate a public nuisance, the apportionment of costs rests in the discretion of the court, G.S. 6-20, and where the judgment directs that the costs of the action, including attorney's fees, be paid from the proceeds of the sale of the personal property seized, such judgment does not provide for personal liability of the defendants, and when the sale of the personal property brings a sum insufficient to pay the attorney's fees in full it is error for the court at a later term to impose a lien on the realty to provide for the discharge of the unpaid balance.

APPEAL by defendant, George Alfred Shinn and wife, Vennie P. Shinn, from *Walker, S. J.*, November 1963 Session of CABARRUS.

B. W. Blackwelder for appellants.
No counsel for appellee.

RODMAN, J. Are appellants personally liable for the unpaid portion of a fee allowed counsel for plaintiff? That is the question for decision. It arises on this factual situation: The Solicitor, acting under the authority of G.S. 19-2, instituted this action to abate a nuisance. G.S. 19-5. The complaint alleges: Appellants owned two lots in Kannapolis. A house is situate on these lots. This property was used by their co-defendant as "a bootlegging and gambling establishment." Appellants had knowledge of the immoral and illegal use of their property.

The prayer of the complaint is for an order: (1) forbidding the use of the land, or personal property situate thereon, in such manner as to constitute a public nuisance, and for the sale of the personal property; (2) padlocking the building for one year; (3) an allowance to the sheriff or officer selling the property equal to the sum fixed for selling personal property under execution; and (4) "That out of the proceeds of the sale of the fixtures, furniture, musical instruments and other movable property, the petitioner be allowed its costs and a reasonable attorney's fee, and the balance, if any, be paid to the defendants."

At the February Term 1962 a jury found defendants were "operating a public nuisance as alleged in the complaint." Based on the ver-

dict, a judgment was entered directing the sheriff to seize and sell the personal property, forbidding the use of the land for the period of one year, fixing compensation for plaintiff's attorneys at $1,000, "and that after the sale of the personal property the Sheriff of Cabarrus County shall pay from the proceeds thereof the costs of this action, including attorney's fees and the balance, if any, shall be paid to the defendants."

The sale was made. The sheriff reported receipts of $1,025.05. He paid $386.17 costs incurred in preserving and selling the property, $40.35 to the Clerk of the Superior Court as costs, $598.53 to plaintiff's counsel on account of the fee allowed them.

After the proceeds of the sale had been disbursed, appellants moved the court for an order declaring they were not personally liable for the unpaid balance on the fee allowed counsel for plaintiff. The court denied the motion and adjudged the costs of the action "to be a lien upon the real estate of the defendants which may be discharged by the payment of said costs."

Costs, as said by Furches, J., "are entirely creatures of legislation, and without this they do not exist." *Clerk's Office v. Commissioners,* 121 N.C. 29, 27 S.E. 1003. A party is not liable to his adversary for costs until the court so adjudges. *Harralson v. Pleasants,* 61 N.C. 365; *Gould v. Moss,* 111 P. 925; *McNelis v. Wheeler,* 73 N.E. 2d 339; *Kaufman v. Pacific Indemnity Co.,* 56 P. 2d 504; 20 C.J.S. 495. An award of costs is an exercise of the statutory authority; if the statute is misinterpreted, the judgment is erroneous. *Johnson v. Brothers,* 178 N.C. 392, 100 S.E. 582; *Bacot v. Holloway,* 105 So. 739; *Rogers v. Western Mutual Life Association,* 99 N.W. 589; *Bridgeport Gas Co. v. District 50, United Mine Workers of America,* 154 A. 2d 530.

The jury having found that the allegations of the complaint with respect to the maintenance of the nuisance were true, the court, when it ordered the personal property sold, had discretionary power with respect to the apportionment of the costs. G.S. 6-20. *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326. The court in the exercise of that discretion specifically directed the payment of the costs from the proceeds of the sale. Nowhere in the judgment is there anything suggesting personal liability of appellants for costs. That judgment could not at a later term be enlarged. *Johnson v. Brothers, supra.*

The judgment imposing a lien on the land of appellants to provide funds for the discharge of the unpaid balance of costs is

Reversed.

STATE v. GILBERT ACREY.

(Filed 20 May 1964.)

1. Larceny § 4; Robbery § 2; Indictment and Warrant § 9—

An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified a sum of money, charges the crime of larceny and not that of robbery, G.S. 14-72, the words "with force and arms" being merely a formal phrase traditionally included in bills of indictment and having no significance as an element of the specific crime charged.

2. Larceny § 8; Assault and Battery § 16; Criminal Law § 109—

Assault is not a less degree of the crime of larceny from the person, and therefore in a prosecution for larceny the court is not required to submit the question of defendant's guilt of assault, even though there be evidence thereof.

APPEAL by defendant from *Latham, J.*, October 1963 Criminal Session of DURHAM.

Criminal prosecution on the following bill of indictment:

"STATE OF NORTH CAROLINA SUPERIOR COURT
"DURHAM COUNTY October Term, A.D., 1963

"The Jurors for the State upon their oath present, that Gilbert Acrey & Gordon Cook late of the County of Durham, on the 2nd day of October, in the year of our Lord one thousand nine hundred sixty-three, with force and arms, at and in the County aforesaid, did wilfully, unlawfully and feloniously steal, take and carry away from the person of Russell Wheeler the sum of 35 Cents in Lawful U. S. Money, of the value of 35/100 . . . (35c) Dollars, of the goods, chattels and moneys of one Russell Wheeler then and there being found, feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Defendants pleaded not guilty. As to each defendant, the verdict was "guilty as charged." Judgments imposing prison sentences were pronounced. Defendant Acrey appealed.

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

Jerry L. Jarvis for defendant appellant.

PER CURIAM. The court held the bill of indictment charged the crime of larceny, to wit, the larceny of thirty-five cents from the per-

son of Russell Wheeler. See G.S. 14-72. We agree. Appellant's contention that the bill of indictment charges the crime of common-law robbery is untenable. The words, "with force and arms," constitute a formal phrase traditionally included in bills of indictment. See G.S. 15-155. They have no significance as an element of the specific crime charged in the bill of indictment.

The court charged correctly as to all essential elements of the crime of larceny. Appellant contends the court erred by failing to instruct the jury as to the additional elements necessary to constitute the crime of common-law robbery. Since the bill of indictment did not charge common-law robbery, appellant's said contention is without merit.

The State's evidence tended to show appellant obtained the thirty-five cents from Wheeler by seizing him, slapping him and putting him in fear. Under the court's instructions, the jury was required to so find as a prerequisite to a verdict of guilty as charged. These instructions may have placed too great a burden upon the State but were not prejudicial to appellant.

Appellant did not testify. Cook, appellant's codefendant, was the only witness for the defense. Cook's testimony tended to show appellant, a pedestrian, accused Wheeler of reckless driving; that a quarrel ensued in the course of which appellant slapped Wheeler; and that "about ten minutes" later, when relations were amicable, Wheeler freely and voluntarily loaned thirty-five cents to appellant. Thus, the slapping incident to which Cook's testimony refers did not occur on the occasion appellant got the thirty-five cents from Wheeler.

The court instructed the jury to return a verdict of guilty as charged or a verdict of not guilty. Appellant contends, citing G.S. 15-169 and G.S. 15-170, that the court should have instructed the jury that they might return a verdict of guilty of an assault. The contention is untenable. An assault is not a lessor degree of the crime charged in the bill of indictment.

We commend appellant's court-appointed counsel for his diligence and ingenuity in presenting this appeal. However, after careful consideration, we are of opinion, and so decide, that appellant's assignments do not disclose prejudicial error.

No error.

STATE v. JOE B. DRIVER.

(Filed 20 May 1964.)

1. Criminal Law § 134; Constitutional Law § 36—

The Legislature may require the courts to take into account in imposing punishment the persistence of an accused in a course of criminal conduct, and thus provide a more severe penalty for repeated violations by a person of the same statute.

2. Constitutional Law § 36; Disorderly Conduct and Public Drunkenness—

A jail sentence of two years imposed upon a defendant convicted in Durham County of public drunkenness constituting a fifth offense within a twelve month period is authorized by G.S. 14-335(12), and defendant's contention that such sentence is cruel and unusual punishment in view of the fact that he is an admitted alcoholic is not tenable.

APPEAL by defendant from *Mallard, J.*, January, 1964 Criminal Session, DURHAM Superior Court.

Criminal prosecution upon two charges of public drunkenness, each a fifth offense within a 12-months period. To each of the charges the defendant entered a plea of guilty. The defendant testified: "I am 58 years old and was first arrested for drunkenness at age 24. Since then I have spent two-thirds of my life on the roads for drinking. Yes sir, I consider myself an alcoholic. I want to do something about it but it don't look like I can. For seven years I have been rated totally disabled."

The court imposed a jail sentence of two years in each case, the sentences to run concurrently. The defendant appealed.

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

Brannon & Read by Anthony M. Brannon for defendant appellant.

PER CURIAM. The court-appointed counsel advanced this argument: "The present defendant is an alcoholic and this fact is acknowledged by all who have come into contact with him, from the arresting officer to the Court which sentenced him. This alcoholism, while not the reason for his imprisonment, is certainly the cause of it. His addiction has put him in jail. Yet he has not been assigned to a medical rehabilitation center but sent to the roads. As an impoverished inmate he cannot obtain outside medical aid. So for two years the State of North Carolina impounds the defendant, an acknowledgedly ill man, beyond the reach of medical and psychological treatment. Such imprisonment without treatment is certainly Cruel and Unusual Punishment."

The sentences imposed are authorized by G.S. 14-335(12), 1963 Cumulative Supplement, Vol. B-1. Undoubtedly, the Legislature may require the courts to take into account in fixing punishment the persistence of an accused in a course of criminal conduct. The prison authorities provide medical treatment for prisoners during their confinement. The argument of defense counsel in other matters addresses itself more properly to society and other agencies of government rather than to the criminal courts. The defendant's motion in arrest of judgment is denied. Defendant's attorney of record consents to the motion of the Attorney General suggesting diminution of the record. The motion is allowed.

No error.

STATE OF NORTH CAROLINA v. ALEXANDER BIVINS.

(Filed 20 May 1964.)

Obscenity—

The fact that a venetian blind lacks some six to ten inches of reaching the window sill is entirely irrelevant in a prosecution of defendant for peeping into a room occupied by a female. G.S. 14-202.

APPEAL by defendant from *Martin, S. J.*, October 14, 1963 Session of CUMBERLAND.

Defendant was charged with secretly peeping into a room occupied by a female, a misdemeanor, G.S. 14-202. The jury returned a verdict of guilty. A prison sentence of twelve months was imposed. Defendant appealed.

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

Arthur L. Lane and Earl Whitted, Jr., for defendant.

PER CURIAM. Defendant has expressly abandoned all of his assignments of error except those based on his motion for nonsuit.

The evidence for the State is sufficient for the jury to find these facts: Defendant had on July 16, 1963 partaken of alcoholic beverages. Between 8:30 and 9:00 p.m. he parked his car across the street from the home of Othol Jackson. He got out of the car, crossed the street, and went to a window in the bedroom of the Jackson home. The room was

occupied by Jackson and his wife. She was on the bed adjacent to the window. There was a wire screen in the window and on the inside of the window was a venetian blind. The slats in the blind were drawn shut, but the bottom of the blind lacked six to ten inches of reaching the window sill. Defendant's presence was discovered by the odor of alcohol which pervaded the bedroom. He was seen with his face pressed against the wire screen peering into the room.

Defendant contends that looking into the room when the blind was not tightly pressed against the window sill is not a "peeping" within the meaning of the statute. The word "peep" means to look cautiously or slyly—as if through a crevice—out from chinks and knotholes (Webster's Third International Dictionary). The conduct described constitutes a peeping, hence the court properly overruled the motion for nonsuit.

Affirmed.

STATE v. JACK W. FRANKS.

(Filed 12 June 1964.)

1. Criminal Law § 75— Corporate records held sufficiently identified and authenticated.

Where, concerning certain volumes of loose-leaf records, there is testimony of witnesses that they had seen the volumes in the office of the corporation of which defendant was an officer, that the books were records of debenture sales made by the corporation and that the witnesses were salesmen and had seen in the books records of sales made by them, that defendant signed the debentures, together with testimony by an employee of the office of the Secretary of State that he had requested that the records be delivered to him and that the books introduced in evidence were those delivered to him at his office in response to his request, and that the books were taken by the Highway Patrol to the preliminary hearing and there impounded by the court and kept under lock and key, the evidence *is held* to show defendant's connection with the records and to establish proper identification and authentication of the records, rendering them competent in evidence notwithstanding the absence of evidence as to who made or authorized the entries in the books, or that they were made in the regular course of business, since proof of the identity of the records raises the presumption that the entries therein were made by an authorized agent in the regular course of business.

2. Same—

The admission in evidence of corporate records before proper foundation has been completely laid will not be held for error when subsequent to their admission proper foundation is laid.

3. Criminal Law § 56—

An expert who has examined the records of a corporation may testify from his examination as to facts ascertained by him from a large number of separate entries, such as the total amount of debentures sold by the corporation as shown by the records for the period in question.

4. Same—

The security deputy in the office of the Secretary of State may testify that from a search of the books and records in the office the debentures in evidence were *not* registered in that office.

5. Criminal Law § 56.1; Corporations § 15—

It is competent for the security deputy in the office of the Secretary of State, who is shown to be an expert in the field, to testify that the debentures, which the evidence shows were sold to persons in this State, were not exempt from registration under G.S. 78-3 and that the sales of such debentures were not transactions exempt from the operation of the Securities Law by G.S. 78-4.

6. Criminal Law § 51—

Where defendant brings out on cross-examination that the witness in question was a lawyer with several years experience as a security deputy in the office of the Secretary of State in the administration of the Securities Law, the evidence is sufficient to show that such witness is an expert in his particular field.

7. Corporations § 15—

Any officers, directors, or agents of a corporation actively participating in the violation of G.S. 78-23 of the Securities Law in the conduct of the company's business, or which such conduct they have actively directed, may be held criminally liable individually therefor.

8. Same—

The evidence in this case *is held* amply sufficient to be submitted to the jury on the charge of unlawfully causing to be sold through the acts of designated agents and divers other persons certain debentures in violation of the Securities Law, and defendant's motion for nonsuit on this count was properly overruled, but as to the count charging defendant with causing to be sold certain debentures to named persons in violation of the Securities Law, nonsuit should have been allowed, there being no evidence to support the charge of sales to the persons named.

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

APPEAL by defendant from *Shaw, J.*, 4 November 1963 Regular "A" Criminal Session of GUILFORD, Greensboro Division.

The defendant was indicted for a violation of the "Securities Law" of the State of North Carolina, G.S. Ch. 78. The indictment has two counts. The first count charges that defendant Jack W. Franks, on 1 April 1957, and thereafter to and including 17 June 1963, at and in

Guilford County, unlawfully, knowingly and feloniously caused to be sold by and through the acts of one Emmett Fulk, one H. C. Tuck, and divers other persons, certain securities, to wit, certain debentures issued by Franks' Finance Company, a North Carolina corporation, purportedly bearing interest at the rate of 6% per annum, known as 6% debentures, without having registered said securities with the Secretary of State of North Carolina as required by G.S. Ch. 78, and without being registered with the said Secretary of State as a broker-dealer or salesman, in violation of G.S. Ch. 78. The second count charges that Jack W. Franks, on the days and years aforesaid, at and in the county aforesaid, did unlawfully, knowingly and feloniously cause to be sold 6% debentures of Franks' Finance Company and more specifically, to wit, did unlawfully cause to be sold on or about 1 April 1957, by and through the acts of one Emmett Fulk, certain debentures of said company to Vivian M. Fulk, 2017 Craig Street, Winston-Salem, North Carolina, and on 17 June 1963, by and through the acts of one H. C. Tuck, certain debentures of said company to Lidia Duncan Clayton, Route 1, Timberlake, North Carolina, which said securities were not registered with the Secretary of State of North Carolina, in violation of G.S. Ch. 78.

Plea: Not guilty. Verdict: Guilty of the two counts charged in the indictment.

On the first count in the indictment, the trial court sentenced defendant to be imprisoned for a term of three years and to pay a fine of $1,000. On the second count in the indictment, the trial court sentenced defendant to be imprisoned for a term of two years and to pay a fine of $1,000; the term of imprisonment on the second count to begin at the expiration of the term of imprisonment imposed on the first count. From the judgment, defendant appeals.

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

Butler, High & Baer by L. Sneed High for defendant appellant.

PARKER, J. Defendant assigns as error the admission in evidence, over his objection, of seven volumes containing a loose-leaf record of sales of debentures of Franks' Finance Company to certain persons, which were marked State's Exhibits 1 through 7, both inclusive. Defendant contends these volumes were improperly admitted in evidence, for the reason the State did not properly identify and authenticate them.

The first witness for the State was E. B. Rannells, Jr., who lives in Sanford, North Carolina, and was employed by Franks' Finance Company from the middle of June 1955 through September 1959. He testified in substance: He was employed as a salesman to sell burial lots from the beginning of his employment through the early part of 1957; after that he sold debentures. He was shown seven volumes by Mr. Rollins, a prosecuting officer for the State, which were marked for identification State's Exhibits 1, 2, 3, 4, 5, 6, and 7, and asked to look at them and state what they were, if he knew. He replied they were records of debenture sales for Franks' Finance Company, and that he had seen them before in the office of Franks' Finance Company on Davie Street in the city of Greensboro. That these volumes were loose-leaf records of debenture purchases from Franks' Finance Company by various individuals. The volume marked State's Exhibit 6, on page 142, contains a record of a $1,000 debenture sold by him to Mrs. Estelle Day Clayton; on page 122 of the same volume appears a record of a sale on 3 January 1958 by him of a $100 debenture to Dr. Ernest H. Reynolds; on page 278 of the volume marked State's exhibit 7 appears a record of a sale by him of a $2,000 debenture to Lloyd E. Watson; and on page 588 of the volume marked State's Exhibit 5 appears a record of a sale made by him to a Marshall B. McBryde. Jack W. Franks was the president of Franks' Finance Company during the period of his employment.

At this point in his testimony the State was permitted, over defendant's objection, to introduce these seven volumes in evidence. Immediately thereafter Rannells, after stating that Mrs. Jettie Franks was an officer of the company during his period of employment, testified: "Mr. Franks, the defendant, signed my compensation with the company and gave me instructions in reference to my employment; Mr. Franks was my boss."

This is the substance of his testimony on cross-examination, except when quoted: He never worked in the Greensboro office. "No records were kept under my supervision except my own personal records." He did not participate in the making of any of these records marked State's Exhibits 1 through 7 and did not make any entries in them. The only part of these records that he inspected were those that related specifically to him. He first inspected these volumes of records in their entirety in the municipal court in the city of Greensboro. "I had seen Jack W. Franks sign one of these debentures. I had stated in recorder's court that 'I have seen him sign a lot of checks, but, actually, I never saw him sign debentures'."

Rannells testified in substance on redirect examination: During the period of his employment he attended a sales meeting in the office

practically every Monday. Defendant Franks was always there. He waited to get signed debentures and carried them away and delivered them.

The next witness for the State was James Darrell Lemons, a debenture salesman with Franks' Finance Company from March 1961 to August 1963. He testified in part in substance: He frequently brought orders for the purchase of debentures of Franks' Finance Company to its home office at 807 Summit Avenue, Greensboro. Within a period of one year he saw defendant Franks sign probably a dozen debentures. Defendant Franks was president of Franks' Finance Company.

William W. Coppedge is employed as Security Deputy in the office of the Secretary of State of North Carolina. The record shows that Mr. Rollins handed Mr. Coppedge the volumes marked State's Exhibits 1 through 7. Immediately thereafter Coppedge testified in respect to these volumes: "I have seen them before; they were delivered to my office in Raleigh. I requested that they be delivered; the request was made on Mr. Franks, Mr. Joseph Franks, the attorney." Coppedge testified in substance: The records delivered in his office were the seven debenture books marked State's Exhibits 1 through 7.

On cross-examination Coppedge testified in respect to these volumes marked State's Exhibits 1 through 7 in substance, except when quoted: These books were delivered to him personally in a big box on 17 July 1963. They were not delivered to him by defendant or by an employee of Franks' Finance Company. They were delivered to him by a Mr. Starling, who identified them by telling him they were the records which he had requested from Franks' Finance Company, and which he had been asked to bring to his office. He could not find anyone in Franks' Finance Company who knew anything about them. "I had requested by telephone certain records from the gentleman (designating Mr. Joseph D. Franks who was sitting at Mr. High's left); they were not delivered for some time and then they were delivered by Mr. Starling; I only looked at the books and checked them against a list that I had been asked to sign, and no one has ever pointed out to me what these books are and I have never gone over these books with anyone who was charged with the preparing of the books." He gave Mr. Starling a signed receipt for the records he brought him. The books marked State's Exhibits 1 through 7 were in his possession until they were carried to Greensboro by the State Highway Patrol on the day of the preliminary hearing and were then turned over to the court. They were the same records delivered to him in Raleigh by Mr. Starling. The court impounded these records.

The State's evidence further shows that the defendant was given a preliminary hearing in August 1963 in the municipal county court of

Guilford County. The books marked State's Exhibits 1 through 7 were impounded by the court at that hearing and turned over to Mr. Rollins after the hearing. Mr. Rollins carried them to the office of the State solicitor where they were kept under lock and key until the trial.

James Lane Thomas, who lives in Greensboro, North Carolina, testified in substance: He bought some debentures from Jack W. Franks. He talked with him in his office several times. He bought a $1,000 debenture to start with, then a little later on in the same year he bought another $1,000 debenture, and the rest of the debentures were $100, $200, or $300 debentures; the debentures were on Franks' Finance Company. Mr. Franks was the president of the company. Mrs. Dolly Nichols Buckner, who lives in Winston-Salem, North Carolina, testified in substance: She bought $4,000 of debentures of Franks' Finance Company. She purchased these debentures after talking with Jack W. Franks, who told her he was the president of the company. The State further offered evidence to show that Ernest Oakley purchased $5,000 of debentures of Franks' Finance Company from Emmett Fulk, and the signature of Jack W. Franks on the debentures was in the handwriting of Jack W. Franks. Later he told Jack W. Franks he would like to have his money back and Franks told him they would probably be able to pay some of it back in 60 to 90 days, but he has never received any of it back. Mrs. Molly P. Cockerman, a widow, who lives in Winston-Salem, North Carolina, bought $800 of debentures of Franks' Finance Company, and the name of Jack W. Franks was on these debentures in his handwriting. Her check was made payable to Franks' Finance Company, and it has been paid.

That there is evidence of identity that the books marked State's Exhibits 1 through 7 were records of Franks' Finance Company of debenture sales seems not open to debate. E. B. Rannells, Jr., testified that he had seen these books in the office of Franks' Finance Company in Greensboro; that they were records of debenture sales for this company; and that the book marked State's Exhibit 6 contained a record of a $1,000 debenture sale by him to Mrs. Estelle Day Clayton and of a $100 debenture sale by him to Dr. Ernest H. Reynolds, and that the book marked State's Exhibit 7 contained a record of a $2,000 debenture sale by him to Lloyd E. Watson. Rannells further testified: "No records were kept under my supervision except my own personal records." William W. Coppedge, Security Deputy in the office of the Secretary of State, requested that Franks' Finance Company deliver to him in his office its records of debenture sales. On 17 July 1963 a Mr. Starling delivered to Coppedge in his office the seven debenture books

marked State's Exhibits 1 through 7 and said they were the records which Coppedge had requested from Franks' Finance Company. See *LeMaster v. People,* 54 Colo. 416, 131 P. 269.

Defendant contends that the State's evidence does not show by whom the entries in these books were made or authorized and does not show that they were made in the regular course of business, at or near the times of the transactions involved, and consequently the books were improperly admitted in evidence.

A similar contention was made by the defendant and rejected by the Court in *S. v. Rhodes,* 202 N.C. 101, 161 S.E. 722, a prosecution of a bank president on a charge of embezzlement, abstraction, and misapplication of the funds of the bank, and for making and causing to be made a false entry in the records of the bank. The Court said:

> "It is contended, however, that the evidence does not show by whom the entries in the books were made or authorized, and that the testimony of the accountant and the liquidating agent in explanation of the entries should have been excluded. The supporting argument proceeds on the theory that the records and books of a corporation may not be received in evidence for any purpose unless it is shown or admitted that the entries were made by an authorized servant or agent of the corporation. It is not doubted that cases apparently of such tenor may be cited, but the question of their application to given cases must be solved by reference to the matters in controversy—the object and scope of the litigation and the particular facts admitted or established.
>
> "The First Bank and Trust Company was created by statute; it was subject to public supervision; its rights, powers, and privileges were prescribed by law. It was presumed in the exercise of its powers to have appropriate books and to keep a correct record of its transactions. That it had such books is not denied. Proof of their identity as the property of the bank raised the additional presumption that the entries and records which they contain were made by an accredited clerk or agent of the corporation. *Glenn v. Orr,* 96 N.C. 413; *Turnpike v. McCarson,* 18 N.C. 306."

The State's evidence shows that James Darrell Lemons saw defendant, president of Franks' Finance Company, sign probably a dozen debentures of Franks' Finance Company in one year; that the $5,000 of debentures of Franks' Finance Company sold to Ernest Oakley and the debentures of the same company sold to Mrs. Molly P. Cockerman were signed Jack W. Franks in the handwriting of Jack W. Franks; and that Ernest Oakley later told Jack W. Franks he would like to

have his money back, and Franks told him they would probably be able to pay some of it back in 60 to 90 days, but he has never received any of it back. This evidence tends to show an actual connection between defendant and the contents of the debenture sales books of Franks' Finance Company marked State's Exhibits 1 through 7.

It seems to be the general rule under modern business conditions that entries or statements in corporate books or records are admissible in evidence against its officers in a criminal prosecution only if there is evidence tending to show that there exists some kind of actual connection between the officers and the contents of the books or records, predicated upon some facts other than their mere status as corporate officers. Annotation 154 A.L.R., p. 281. See 32 C.J.S., Evidence, § 699, p. 596, Admissions; Stansbury's N.C. Evidence, 2d Ed., § 155, p. 392; 20 Am. Jur., Evidence, § 977.

Even if we concede that the State had not laid the proper foundation for the introduction in evidence of the books marked State's Exhibits 1 through 7 at the time the trial court permitted them to be introduced in evidence, the error was harmless, for the reason that the State before it rested its case — defendant introduced no evidence — did lay a proper foundation for their admission in evidence. *Builders Supply Co. v. Dixon,* 246 N.C. 136, 97 S.E. 2d 767. Defendant's assignment of error to their admission in evidence is overruled.

William W. Coppedge, Security Deputy in the office of the Secretary of State of North Carolina was asked: "What was the total of debentures sold that you found from these Exhibits 1 through 7?" He replied: "I can tell you exactly if you'd like for me to look at my records, but I am sure it was more than $1,688,000." Defendant assigns the question and answer as error. Defendant also assigns as error the admission in evidence over his objection of the testimony of E. B. Rannells, Jr., that in certain of the books marked State's Exhibits 1 through 7 were entries of debenture sales by him to certain individuals, and that the books marked State's Exhibits 1 through 7 were loose-leaf records of debenture sales of Franks' Finance Company. Rannells testified that he had seen these books marked State's Exhibits 1 through 7 in the office of Franks' Finance Company in the city of Greensboro, and that he had inspected these books in respect to entries relating specifically to him. Even if they were permitted by the court over objection to testify as to the entries in these books before a proper foundation for their admission in evidence had been laid, the error was harmless, for the reason that the State before it rested its case had laid a proper foundation for their admission in evidence. All these assignments of error are overruled. In *S. v. Rhodes, supra,* it is said:

"They [T. R. Grubbs and H. G. Kramer] examined the books, made tabulations and calculations, and testified as to the results of their investigation. This mode of exemplifying the records of an insolvent bank has received the approval of this Court in *S. v. Hightower,* 187 N.C. 300. It is founded on considerations of policy and convenience, if not of necessity, and commendably results in relaxation of the rigid rule which would require the production of all the employees, who through an indefinite period had made entries in books of the corporation. Where a fact can be ascertained only by the inspection of a large number of documents made up of many detailed statements it would be practically out of the question to require the entire mass of documents and entries to be read by or in the presence of the jury. As such examination cannot conveniently be made in court the results may be shown by the person who made the examination. Wigmore on Evidence (2 ed.), sec. 1234; Chamberlayne on Evidence, sec. 2317. The production of the documents and the privilege of cross-examination and of the introduction of evidence afford ample protection of the defendant's rights."

Defendant further assigns as error the testimony of witnesses that debentures bought by them and which were introduced in evidence were debentures of Franks' Finance Company. These assignments of error are without merit.

Defendant assigns as errors that the trial court, over his objections, permitted William W. Coppedge, Security Deputy in the office of the Secretary of State of North Carolina to testify that a search of the books and records in the office of the Secretary of State disclosed that a number of debentures of Franks' Finance Company sold in this State to certain persons were required to be registered in this State pursuant to G.S. Ch. 78, and were not registered as required by our statute; that no application for their registration had been filed as required by our statute; that these debentures were not exempted securities as set forth in G.S. 78-3; that defendant Jack W. Franks had never made application for registration as a salesman or broker of securities in the office of the Secretary of State; and that the sales of debentures of Franks' Finance Company were not exempt transactions under our statute.

Coppedge testified on cross-examination:

"I am a lawyer. There are securities which are exempt under the North Carolina Securities Act, and whether a security is exempt or not is a matter of law and it does not depend upon

anyone's opinion as to whether they are exempt; if they comply with the law, they are exempt; one person must determine whether or not the law is applicable; the law itself cannot decide whether or not something is exempt; in a majority of the cases I am the individual who determines whether or not the law is applicable; there are securities transactions which are exempt under the North Carolina law; I am familiar with them; I am familiar with all the exemptions; it is a matter of law whether a transaction is exempt or not; a security might be non-exempt and the transaction itself exempt, or an exempt security can be sold under certain circumstances to persons other than by broker-dealers; if the transaction is exempt from the Securities Law, it may be sold under the North Carolina Securities Act."

After Coppedge had finished his testimony, the State called three witnesses to the stand. After these three witnesses had finished their testimony, Coppedge was recalled to the stand. On redirect examination he testified, over objection by the defendant, that the sales of debentures of Franks Finance Company to purchasers, shown by its debenture records marked State's Exhibits 1 through 7 were not exempt from the operation of the security laws of North Carolina requiring registration of securities. Then Coppedge on recross-examination testified as follows: "I am basing my answers on my opinion as to the interpretation of the security laws and as instructed by Mr. Eure, who has administered this law for many, many years. I base my answers on my own opinion and as I have been instructed by Mr. Eure."

G.S. 78-2, Definitions, in (g) states that "the term 'securities' or 'security' shall include any * * * debenture * * *." G.S. 78-13 provides: "The Secretary of State shall keep and maintain a permanent register of qualified securities and shall enter therein the names and amounts of all securities, the privilege of offering which to the public in the State of North Carolina has been granted by the Secretary of State, and the date thereof, and such other data as the Secretary of State may deem proper. All securities admitted to record and recorded in such register shall be deemed, for the purpose of this chapter, to have been fully qualified for sale in the State of North Carolina and thereafter any person may lawfully sell or offer for sale any part of such issue as recorded; subject, however, to the provisions of this chapter. Such register shall be open to inspection by the public." G.S. 78-19, so far as relevant here, provides: "No dealer or salesman shall carry on business in the State of North Carolina as such dealer or salesman, or sell securities, including any securities exempted under

the provisions of § 78-3, unless he has been registered as dealer or salesman in the office of the Secretary of State pursuant to the provisions of this section. Every applicant for registration shall file in the office of the Secretary of State, pursuant to the provisions of this section, an application in writing, duly signed and sworn to, in such form as the Secretary of State may prescribe, giving particulars concerning the business reputation of the applicant."

The testimony of William W. Coppedge, Security Deputy in the office of the Secretary of State of North Carolina to the effect that a search of the books and records in the office of the Secretary of State disclosed that a number of debentures of Franks' Finance Company sold to certain persons in North Carolina were not registered in the permanent register in the office of the Secretary of State and that a similar search disclosed that Jack W. Franks had never made application for registration as a salesman or broker of securities in the office of the Secretary of State, while of a negative nature, was admissible in evidence. *Duren v. Arkansas State Board of Optometry,* 211 Ark. 565, 201 S.W. 2d 578, *Reh. Den.* 19 May 1947; *Brown v. State,* 150 Tex. Crim. App. 285, 201 S.W. 2d 50; Wigmore on Evidence, 3d Ed., Vol. 5, § 1633(6), p. 519.

Defendant contends that the trial court erred in permitting Coppedge, over his objections, to express an opinion that the debentures of Franks' Finance Company sold in this State to certain individuals were required to be registered in the office of the Secretary of State by G.S. Ch. 78 and that such sales by Franks' Finance Company were not exempt transactions.

G.S. 78-3 recites a long list of securities to which our Securities Law does not apply. G.S. 78-4 recites a long list of transactions exempted from the operation of our Securities Law.

G.S. 78-5 reads as follows: "It shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment or proceeding laid or brought under this chapter in either a court of law or equity, or before the Secretary of State, in either a civil or a criminal action or suit. The sale, unless the transaction is exempted from the operation of this chapter, of any security not exempt from the provisions of this chapter as hereinbefore provided and not admitted to the record and recorded as hereinafter provided, shall be *prima facie* evidence of the violation of this chapter and the burden of proof of any such exemption shall be upon the party claiming the benefit thereof."

G.S. 78-6, so far as relevant here, reads: "No securities except of a class exempt under any of the provisions of § 78-3 or unless sold in any

transaction exempt under any of the provisions of § 78-4 shall be offered for sale or sold within this State unless such securities shall have been registered by notification or by qualification as hereinafter defined * * *."

G.S. 78-23 sets forth punishment for a violation of our Securities Law.

S. v. Hightower, 187 N.C. 300, 121 S.E. 616, was a criminal prosecution tried upon an indictment charging J. H. Hightower and one H. H. Massey, president and cashier, respectively, of Central Bank and Trust Company located in Raleigh, North Carolina, with feloniously receiving money, checks, drafts or other property as deposits in said bank on 13 January 1922, when they and each of them had knowledge of the fact that said bank was insolvent and unable to meet its depository liabilities as they became due in the regular course of business, in violation of chapter 4, section 85, Public Laws 1921. The jury acquitted Massey and convicted Hightower. From a judgment of imprisonment, Hightower appealed. The Court, speaking by Stacy, J., began its opinion by quoting the relevant parts of section 85 of the statute, which is headed "Insolvent banks, receiving deposits in." The opinion then states that one of the essential elements of the offense condemned by the statute, which the State must prove beyond a reasonable doubt to obtain a conviction, is "(2) that the bank in question was insolvent at the time the alleged deposits were received therein." The opinion then goes on to state in substance that the principal evidence offered by the State is that of Clarence Latham, State Bank Examiner, and W. S. Coursey, an expert accountant, or auditor employed by the banking department to make an audit of the bank, to the effect that, in the opinion of said witnesses, the Central Bank and Trust Company was insolvent on 13 January 1922. These opinions were based upon an examination and investigation of the affairs of the bank, made by the two witnesses in the discharge of their official duties. Defendant assailed the competency of this evidence upon two grounds: First. Because the witnesses were allowed to express their opinions upon one of the essential facts necessary to constitute the offense charged, and which the jury alone was impaneled to decide. Second. Because, as a prerequisite to the expression of such opinions, the witnesses were not required to state the facts upon which they based their conclusions. The Court in its opinion, 187 N.C., at p. 304, 121 S.E., at p. 619, speaking to the subject said: "The business of examining banks undoubtedly falls within the classification of trades or pursuits, requiring special skill or knowledge, and hence one versed in its intricacies, we apprehend, should be permitted to speak as an expert. It is not

questioned, on the instant record, but that the two witnesses offered by the State are competent to speak as experts in their field or in their line of work." At p. 307 of our Reports, and at p. 620 of the Southeastern report, the Court said: "Applying these principles to the instant case, we think the better practice would have been for Latham and Coursey to have stated the facts or to have detailed the data observed or discovered by them, before drawing their conclusions or giving their opinions in evidence, but we shall not hold it for legal or reversible error that such was not required as a condition precedent to the admission of their opinions in evidence before the jury. *S. v. Felter,* 25 Ia. 75; *S. v. Foote,* 58 S.C. 218. Speaking to a similar question, in *Commission v. Johnson,* 188 Mass., p. 385, Bradley, J., said: 'By this form of examination no injustice is done, for whatever reasons, even to the smallest details, that an expert may have for his opinion can be brought out fully by cross-examination'." The Court held that where an expert has made a proper examination of bank's assets, he may testify that bank was insolvent at a certain date.

This Court made a similar holding in *S. v. Brewer,* 202 N.C. 187, 162 S.E. 363.

In *Bank v. Crowder,* 194 N.C. 331, 139 S.E. 604, the Court held that the admission of the testimony of an expert witness as to the entries found in the books of a bank kept by the cashier and their meaning was not improper.

The administration of our Securities Law manifestly falls within the classification of pursuits, requiring special knowledge, and "hence one versed in its intricacies, we apprehend, should be permitted to speak as an expert." The sole reference to Coppedge's qualifications in defendant's brief is, "the State did not show what, if any, qualifications William W. Coppedge had." Defendant on cross-examination elicited from Coppedge that he came to the Secretary of State's office in August 1961, and elicited further the qualifications he had in administering the Securities Law of the State as set forth above in quotations from his cross-examination and recross-examination. It seems manifest from such evidence that Coppedge was competent to speak as an expert in his line of work as Security Deputy in the office of the Secretary of State. The questions of what securities are exempted securities under G.S. 78-3, and of what transactions are exempted from the operation of our Securities Law under G.S. 78-4, and of what securities cannot be offered for sale or sold unless registered under G.S. 78-6 are questions of law. The questions of whether the debentures of Franks' Finance Company sold to individuals in this State in the instant case are exempted securities under G.S. 78-3, and of whether

such sales were transactions exempted from the operation of our Securities Law under G.S. 78-4, and of whether the debentures sold to individuals in this State in the instant case were of a class that should have been registered under G.S. 78-6 before being offered for sale or sold within this State are questions of fact. To illustrate: We have held that what constitutes practicing law by unauthorized persons is a question of law, but whether the particular acts and methods of the defendants constituted a violation of the statute prohibiting the practice of law by unauthorized persons is a question of fact. *Seawell, Attorney General v. Carolina Motor Club*, 209 N.C. 624, 184 S.E. 540. See *S. v. Pledger*, 257 N.C. 634, 127 S.E. 2d 337, to the same effect. The trial court properly permitted Coppedge, because of his superior knowledge and of his manifest qualifications, to express an opinion that the debentures of Franks' Finance Company sold in this State to certain individuals were required to be registered in the office of the Secretary of State under our Securities Law, and that such debentures were not exempted securities under our Securities Law, and that the sales of the debentures of Franks' Finance Company were not transactions exempted from the operation of our Securities Law.

Our conclusion finds support in our decisions of *S. v. Hightower, supra*, and *S. v. Brewer, supra*.

All defendant's assignments of error to the admission of evidence are overruled.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence.

G.S. 78-23(b) provides: "Whoever shall sell or cause to be sold, or offer to sell or cause to be offered for sale, any security in this State, which is not exempt under any of the provisions of § 78-3, unless sold in any transaction exempt under any of the provisions of § 78-4, and which such securities so sold, or caused to be sold or so offered for sale or caused to be offered for sale shall not have been registered as provided in this chapter, shall be guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for a period of not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both." The word "whoever," used in this statute, is all embracive and includes within its terms corporations, officers and agents of corporations, and all other persons.

It seems to be settled law that any officers, directors, or agents of a corporation actively participating in a violation of the provisions of G.S. 78-23 of our Securities Law in the conduct of the company's business, or which such conduct they have actively directed, may be held

criminally liable individually therefor. *S. v. Agey,* 171 N.C. 831, 88 S.E. 726; *State v. Fraser,* 105 Ore. 589, 209 P. 467; 19 C.J.S., Corporations, § 931; 53 C.J.S., Licenses, § 78, 13 Am. Jur., Corporations, § 1100. The State's evidence is amply sufficient to carry the case to the jury on the first count in the indictment. The second count in the indictment charges sales of debentures of Franks' Finance Company to Vivian M. Fulk and Lidia Duncan Clayton, but the record is bare of any evidence to support such charge of sales in the second count. The trial court erred in denying defendant's motion for judgment of compulsory nonsuit in respect to the second count in the indictment; consequently, the verdict of guilty on the second count in the indictment and the judgment imposed upon such conviction on the second count are vacated.

Defendant has a number of assignments of error to the charge. A careful study of the judge's charge to the jury fails to disclose any errors sufficiently prejudicial to warrant a new trial on the first count in the indictment.

The result is this: In the trial as to the first count in the indictment, we find no error; in the trial as to the second count in the indictment, reversed.

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

S. A. SCHLOSS, JR., FLORETTE SCHLOSS WILE AND MARY JANE SILVERMAN, PARTNERS, TRADING AS SCHLOSS POSTER ADVERTISING COMPANY v. W. H. JAMISON, SUPERINTENDENT OF BUILDING INSPECTION FOR THE CITY OF CHARLOTTE, AND THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 12 June 1964.)

1. Constitutional Law § 15; Municipal Corporations § 25—

The original zoning power of the State reposes in the General Assembly, and municipalities can exercise such power only to the extent and within the limitations of statutes delegating to them the legislative power in this respect. G.S. 160-172 *et seq.*

2. Municipal Corporations § 25—

A zoning ordinance must bear a substantial relation to the public health, safety, morals or general welfare.

3. Same—

Municipalities have been delegated power to adopt comprehensive zoning ordinances, and where such an ordinance regulates all types of business advertising solely with reference to the various zones and not with regard to billboards or poster panels as such, the regulation relates to the zoning power and not to the power to regulate the erection of billboards, signs, and other structures under G.S. 160-200(9).

4. Municipal Corporations § 34—

A zoning ordinance duly enacted by a municipal corporation is presumed to be a valid exercise of the police power and the burden is upon a property owner asserting invalidity to establish it.

5. Same; Municipal Corporations § 25—

If a zoning ordinance is adopted in the proper exercise of the police power any resultant loss to property owners is a misfortune imposed upon them as members of society and does not affect the validity of the ordinance.

6. Municipal Corporations § 25—Zoning ordinance may prohibit signs advertising goods, services or entertainment not offered on premises.

Where a comprehensive zoning ordinance of a municipality permits in the main business district signs directing attention to businesses conducted and services or entertainment offered on the premises, but prohibits signs directing attention to commodities, services or entertainment sold or offered elsewhere, the fact that the ordinance results in prohibiting the operation of plaintiff's billboard advertising business in such zone does not constitute arbitrary and unlawful discrimination even though there is no physical difference in the types of signs, since the distinction is based upon a reasonable classification and the prohibition of the billboard advertising business within the zone is impartial, reasonable and valid because such business is inconsistent with and unrelated to the activities and businesses permitted in the zone, irrespective of any question of whether the signs and billboards are a menace to life or a detriment to the public safety.

APPEAL by defendants from *Riddle, Special Judge,* November 4, 1963, Schedule "C" Civil Session of MECKLENBURG.

Plaintiffs' action is for a permanent injunction. Order restraining defendants *pendente lite* was affirmed by this Court in *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590. At final hearing, upon waiver of jury trial, Judge Riddle heard the evidence and, after stating his findings of fact and conclusions of law, entered judgment permanently enjoining defendants "from enforcing Chapter 23 of the Code of the City of Charlotte against the plaintiffs, as said chapter relates to the plaintiffs' advertising signs as defined in said ordinance in the B-3 business district." Defendants excepted and appealed.

Hunter M. Jones and James O. Cobb for plaintiff appellees.

John T. Morrisey, Sr., for defendant appellants.

BOBBITT, J. Evidence was offered by plaintiffs and by defendants. The court's findings of fact cover sixteen pages of the record. Facts established by unchallenged findings may be summarized as follows:

On January 29, 1962, the City Council of Charlotte adopted a new and comprehensive zoning ordinance. This ordinance, which became effective January 30, 1962, is now identified as Chapter 23 of the Code of the City of Charlotte. It establishes within the corporate limits of the City of Charlotte and its "Perimeter Area" three "Residential Districts," two "Office Districts," three "Business Districts," and three "Industrial Districts."

The ordinance states the plan or purpose with reference to each district and defines the permitted uses therein. It provides that no building, structure or land shall be used "unless in conformity with all the regulations of this Ordinance for the District in which it is located, except as otherwise provided herein." It makes a violation of any of its terms a misdemeanor.

The ordinance prescribes the classes of signs *permitted* on premises in the various residential, office, business and industrial districts. Identification signs are permitted in *all* districts. Business signs are permitted in *all* (three) business and in *all* (three) industrial districts. Advertising signs are permitted in *all* (three) industrial districts and in "B-2 General Business District." Advertising signs are not permitted in "B-1 Neighborhood Business District" or in "B-3 Central Business District."

The "B-3 Central Business District," directly involved in this action, will be referred to hereafter as district B-3. It is defined in the ordinance (in part) as follows: "This District is located at the area of convergence of the main arterial thoroughfares and lines of public transportation. This District is primarily for retail and wholesale trade, and for business, professional and financial services for the metropolitan area and the outlying trade area of Charlotte."

Section 23-2(22) of the ordinance defines and classifies signs, insofar as pertinent to this action, as follows:

"(22) *Sign* — Any surface, fabric or device bearing lettered, pictorial or sculptured matter designed to convey information visually and exposed to public view; or any structure (including billboard or poster panel) designed to carry the above visual information.

(a) *Advertising Sign.* A sign which directs attention to a business, commodity, service or entertainment conducted, sold or offered:

(1) Only elsewhere than upon the premises where the sign is displayed, or

(2) As a minor and incidental activity upon the premises where the sign is displayed.

(b) *Business Sign.* A sign which directs attention to a business, profession or industry located upon the premises where the sign is displayed, to type of products sold, manufactured or assembled, and/or to service or entertainment offered on said premises, but not a sign pertaining to the preceding if such activity is only minor and incidental to the principal use of the premises.

(c) *Identification Sign.* A sign, used to identify only: the name of the individual, family, organization or enterprise occupying the premises; the profession of the occupant; the name of the building on which the sign is displayed."

Charlotte is a city of more than 200,000 in population. It is the business and commercial center of Mecklenburg County and of ten or more adjoining counties in North or South Carolina.

District B-3 extends in all directions from "The Square," the intersection of Trade and Tryon Streets. It is the heart of the downtown business and commercial district. It has 28.5 miles of street frontage. This is 5.5% of the total street frontage (514.8 miles) in the six business and industrial districts. It has an area of .529 square miles (339.09 acres). The business and industrial districts in which advertising signs are permitted comprise an aggregate area of 29.9 square miles or 91.8% of the total area of the six business and industrial districts. ". . . much of the I-1, I-2 and I-3 area includes forests, farms, open fields with few roads . . ."

The area now zoned as B-3 includes a highly developed business district, with fine office buildings, stores, etc., where the market value of property ranges from five thousand dollars to six thousand dollars per front foot. It also includes large areas in which are located "such land uses as slum dwellings, cheap beer joints, used car lots, vacant lots, light manufacturing plants, and many businesses in dilapidated buildings." At specified locations, the market value of property does not exceed fifty to seventy-five dollars per front foot.

Plaintiffs are, and have been for many years, engaged in the outdoor advertising business. The greater part (75%-85%) of their business consists of providing advertising by means of poster panels or billboards. They lease land and construct thereon structures of two standard sizes in general use in the outdoor advertising business throughout the United States. They sell space on these structures to their customers, including national and regional advertisers, and post and maintain thereon the customer's copy or advertising message. These structures are built and maintained in compliance with all safety requirements prescribed by the building codes. Plaintiffs comply with all legal requirements in respect of obtaining licenses and posting bonds. In all respects, plaintiffs conduct their business in a first-class manner.

When the 1962 ordinance became effective, plaintiffs, within the area covered by its terms, had built and owned "approximately 500 outdoor advertising signs . . . affixed to land and buildings on locations leased by the plaintiffs from the owners of the real estate." Approximately 83 of these signs were located in the area now zoned as district B-3. ". . . although some few of the plaintiffs' signs advertise a business located upon the premises, 90% to 95% of them do not."

The distinction between advertising signs and business signs is based solely upon the advertising message or copy placed thereon.

Ultimate findings of fact, to which defendants excepted, are to the effect that the challenged ordinance provisions, which prohibit advertising signs in district B-3 but permit business signs therein without any limitation as to number, size or location, (1) have no reasonable relation to the public safety, public health, public morals, general welfare, or "even to appearances or other aesthetic values," and (2) arbitrarily discriminate against plaintiffs and their business without any reasonable basis therefor.

The court's conclusions of law were as follows: (1) that G.S. 160-173 does not authorize or permit the challenged ordinance provisions; (2) that, if authorized by G.S. 160-173, the prohibition of plaintiffs' advertising signs in district B-3 "is arbitrary and capricious and violates the Constitution of North Carolina, Article I, Sections 1 and 17, and the Constitution of the United States, Amendments I and XIV"; and (3) that plaintiffs have no adequate remedy at law and are entitled to a permanent injunction.

There is no controversy with reference to the 83 sign structures in use in district B-3 prior to January 30, 1962. Defendants concede the ordinance provisions relating to "Nonconforming Signs" permit plaintiffs to continue to post advertising signs on these structures. As to

nonconforming use provisions, see *Stoner McCray System v. City of Des Moines (Iowa),* 78 N.W. 2d 843, 58 A.L.R. 2d 1304; *Grant v. Mayor and City Council of Baltimore (Md.),* 129 A. 2d 363.

The challenged ordinance provisions do not prohibit or restrict plaintiffs in district B-3 with reference to business signs. However, the evidence and findings indicate plaintiffs would not be called upon to provide a significant number of such signs. (Note: There was evidence to the effect that only twelve of the business signs in district B-3 were poster panel signs and that two of these were provided by plaintiffs.)

Plaintiffs own no real property in district B-3.

Unchallenged findings include the following: Plaintiffs, since January 30, 1962, have lost a number of their locations in district B-3 on account of lease cancellations due to change of use, new construction and urban renewal. In the area now zoned as district B-3, plaintiffs lose an average of 20% of their locations each year. If new sites cannot be leased for relocation of their sign structures, plaintiffs, with reference to advertising signs, will be completely out of district B-3 within four or five years.

Defendants except to findings of fact summarized as follows: (1) Plaintiffs' locations in district B-3 approximate only 20% of all their locations in Charlotte but provide greatly in excess of 20% of exposure to motor vehicle traffic. (2) Full coverage of the Charlotte market in competition with other advertising media, to wit, newspapers, radio, television, requires the location of advertising signs within district B-3. Plaintiffs' customers, particularly national and regional advertisers, want full coverage. Plaintiffs' business will be seriously impaired unless it can provide such full coverage. (3) On account of their inability to lease and build sign structures on other sites in district B-3, plaintiffs, in order to retain their present locations, must accede to the demands of landlords for increased rent.

Defendants contend there is no evidence to support the findings of fact summarized in the preceding paragraph. It is deemed unnecessary to consider this subject with particularity. In our view, unchallenged findings of fact as well as challenged findings supported by evidence are sufficient to support the legal conclusion that plaintiffs, if the challenged ordinance provisions are enforced, will suffer injury (pecuniary loss) for which they have no adequate remedy at law. For present purposes, the exact nature and extent of such loss are immaterial.

This Court, on former appeal, stated: "The right of plaintiffs to test the challenged provision of the Charlotte city code by injunction is not controverted. There is ample authority for the suit. (Citations)."

We consider now the crucial question, namely, the validity of the challenged ordinance provisions as related and applied to plaintiffs' outdoor advertising business.

The original zoning power of the State reposes in the General Assembly. *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880. It has delegated this power to the "legislative body" of municipal corporations. G.S. 160-172 *et seq.; In re Markham,* 259 N.C. 566, 131 S.E. 2d 329, and cases cited. Within the limits of the power so delegated, the municipality exercises the police power of the State. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897. Zoning ordinances are upheld when, but only when, they bear a "substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; *In re O'Neal,* 243 N.C. 714, 719, 92 S.E. 2d 189, and cases cited.

The power to zone, conferred upon the "legislative body" of a municipality, is subject to the limitations of the enabling act. *Marren v. Gamble, supra; S. v. Owen,* 242 N.C. 525, 88 S.E. 2d 832.

G.S. 160-172, in pertinent part, provides: "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

G.S. 160-173, in pertinent part, provides: "For any or all said purposes it may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. *All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts.*" (Our italics).

The cited statutes conferred upon the City Council of Charlotte legislative power to adopt a comprehensive zoning ordinance. *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706, and cases cited. In the 1962 ordinance, the regulations with reference to signs permitted in district B-3 are uniform throughout this district. See *Murphy v. Town of Westport (Conn.),* 40 A. 2d 177, 182, 156 A.L.R. 568. Subject to constitutional limitations, the City Council had authority to determine and define legislatively what signs would be permitted in each of the

respective zones or districts. The crucial question is whether the challenged ordinance provisions contravene constitutional limitations.

It is noted that the ordinance under consideration was not adopted in the exercise of the legislative power of municipal corporations "(t)o regulate the erection of fences, billboards, signs, and other structures, and provide for the removal or repair of insecure billboards, signs, and other structures." G.S. 160-200(9). It is a comprehensive zoning ordinance adopted in the exercise of legislative power conferred by G.S. 160-172 *et seq.* While a "billboard or poster panel" is a "Sign" within the ordinance definition, the prohibitory features of the challenged ordinance provisions are not directed toward billboards as such but to all types of advertising signs. In district B-3, no advertising sign, by billboard or otherwise, is permitted, with one exception, namely, "(a) sign which directs attention to a business, profession or industry located upon the premises where the sign is displayed, to type of products sold, manufactured or assembled, and/or to service or entertainment offered on said premises, but not a sign pertaining to the preceding if such activity is only minor and incidental to the principal use of the premises." This, of course, is the ordinance definition of "Business Sign."

There is a presumption that the City Council adopted the 1962 zoning ordinance in the proper exercise of the police power. *Raleigh v. Morand,* 247 N.C. 363, 367, 100 S.E. 2d 870, and cases cited. Under our decisions, a property owner who asserts the invalidity of such zoning ordinance has the burden of establishing its invalidity. *Helms v. Charlotte,* 255 N.C. 647, 651, 122 S.E. 2d 817. "When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare." *In re Appeal of Parker, supra,* p. 55; *Helms v. Charlotte, supra.* Here, the burden of establishing the invalidity of the challenged provisions of the ordinance rests on plaintiffs.

In *Kinney v. Sutton,* 230 N.C. 404, 411-412, 53 S.E. 2d 306, Ervin, J., in accordance with cited cases, said: "If the police power is properly exercised in the zoning of a municipality, a resultant pecuniary loss to a property owner is a misfortune which he must suffer as a member of society." If the ordinance was adopted in the proper exercise of the police power the resultant loss to plaintiffs on account of their inability to continue their business in respect of advertising signs in district B-3 is a misfortune they must suffer as members of society.

Plaintiffs direct our attention to decisions of this Court to the effect that an ordinance may not be based solely "on aesthetic considerations." *Restaurant, Inc. v. Charlotte,* 252 N.C. 324, 326, 113 S.E. 2d 422, and cases cited. Suffice to say, we find no basis for the suggestion that the challenged provisions of the 1962 zoning ordinance are based in whole or in part on aesthetic considerations. Defendants make no contention that permitted "Business Signs" are more attractive than prohibited "Advertising Signs."

It is noteworthy that plaintiffs do not attack the ordinance on the ground enforcement thereof with reference to specific locations in district B-3 in which plaintiffs are interested would contravene plaintiffs' constitutional rights. Plaintiffs seek to enjoin enforcement throughout the entire district. Hence, questions as to whether reasonable grounds exist for including particular locations in district B-3 are not presented.

The purposes for which a municipal corporation may adopt a comprehensive zoning ordinance are set forth in G.S. 160-174.

Section 23-3 of the ordinance, after setting forth a general purpose in accord with G.S. 160-174, continues: "The zoning Districts and maps have been made with due consideration of future growth, development and change in land development according to objectives expressed and mapped in the General Plan for the Development of the Charlotte Metropolitan Planning Area, as well as with due consideration of existing development and uses of land in the City of Charlotte and its Perimeter Area. The regulations and Districts contained herein thus represent reasonable consideration as to the character of the Districts and their peculiar suitability for particular uses of land and have been made with a view to preserving the existing environment and/or assuring the development of a future environment that realizes the greatest possible use and enjoyment of land on individual properties, balanced against the necessary protection of the values of buildings and land and the use and enjoyment of land on adjacent properties, with the objective of promoting and protecting the public welfare through the regulation of land use and the process of land development."

The ordinance provision defining "B-3 Central Business District," quoted above, discloses district B-3 "is primarily for retail and wholesale trade, and for business, professional and financial services for the metropolitan area and the outlying trade area of Charlotte." Obviously, the legislative intent was to establish a first-class business and commercial district in the heart of the downtown area. In our view, it was permissible for the City Council to determine that the accomplishment

of this purpose would serve the entire city and particularly the owners and occupants of property in district B-3. Moreover, we think it was permissible for the City Council to determine that it would be advantageous to the owners and occupants of property in district B-3 and would enhance its status as a first-class business and commercial district to limit advertising signs within the district to those defined in the ordinance as business signs. Evidently, the City Council took the view that advertising signs directing attention to products and services available elsewhere would tend to divert attention from products and services available within the district. It is noted that a photograph in evidence shows one of plaintiffs' nonconforming use structures in district B-3 on which there appears a poster advertising quite attractively the "Cotswold Shopping Center," "Randolph at South Sharon Amity Roads." It is quite clear the effect of such advertising sign, indeed its purpose, is to divert patronage from the downtown business and commercial district to the advertised surburban shopping center.

Plaintiffs contend, and the court below found, that the challenged ordinance provisions, which prohibit advertising signs in district B-3 but permit business signs therein without any limitation as to number, size or location, have no reasonable relation to the public safety, health, morals, general welfare, or "even to appearances or other aesthetic values." However, defendants do not contend that these specific ordinance provisions are related directly to the public safety, health, morals or general welfare. Defendants contend, and rightly so, that the comprehensive zoning ordinance, authorized and adopted in the proper exercise of the police power, does have a reasonable relation to the public safety, health, morals and general welfare. *Kinney v. Sutton, supra,* and cases cited.

The ultimate question is whether the provisions prohibiting advertising signs but permitting business signs in district B-3 arbitrarily discriminate against plaintiffs and their business without any reasonable basis therefor. We are of opinion, and so decide, that in respect of district B-3, the distinction is based on a reasonable classification and does not arbitrarily discriminate against plaintiffs.

Decisions in support of this view, all arising under provisions of *a zoning ordinance* excluding advertising signs from indicated districts, include the following: *United Advertising Corp. v. Borough of Raritan (N. J.),* 93 A. 2d 362 *(all districts); Landau Advertising Co. v. Zoning Board of Adjust. (Pa.),* 128 A. 2d 559 ("A" Commercial district); *Silver v. Zoning Board of Adjustment (Pa.),* 112 A. 2d 84 ("A" Commercial district); *Criterion Service v. City of East Cleveland (Ohio),* 98 N.E. 2d 300, appeal dismissed 89 N.E. 2d 475 (Retail

Store district); *Central Outdoor Adv. Co. v. Village of Evendale (Ohio)*, 124 N.E. 2d 189 ("B" Commercial district); *Murphy v. Town of Westport (Conn.)*, 40 A. 2d 177, 156 A.L.R. 568 (Business districts); *Rockingham Hotel Company v. North Hampton (N. H.)*, 146 A. 2d 253 (Rural district). Although no zoning ordinance was involved, the following cases relating to statutory or ordinance provisions are in accord: *General Outdoor Adv. Co. v. Department of Public Wks. (Mass.)*, 193 N.E. 799; *Kelbro, Inc. v. Myrick (Vt.)*, 30 A. 2d 527; *In re Opinion of the Justices (N.H.)*, 169 A. 2d 762.

In *United Advertising Corp v. Borough of Raritan, supra*, the plaintiff contended provisions of the ordinance, which excluded advertising signs *in all districts* but permitted signs directing attention to businesses on the premises, constituted unlawful discrimination. In rejecting this contention, the court, in opinion by Brennan, J., said: "The business sign is in actuality a part of the business itself, just as the structure housing the business is a part of it, and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard as in the case of this ordinance. Plaintiff's placements of its advertising signs, on the other hand, are made pursuant to the conduct of the business of outdoor advertising itself, and in effect what the ordinance provides is that this business shall not to that extent be allowed in the borough."

In *Rockingham Hotel Company v. North Hampton, supra*, the opinion of Duncan, J., in accordance with the cited cases, states: "According to well established principles, the separate classification, as a permitted use, of signs advertising businesses conducted upon the premises where the signs are located, as against a prohibited use of like signs advertising products or services available in other locations, is a reasonable classification which does not as a matter of law produce arbitrary discrimination or deprive the plaintiff of the equal protection of the laws."

In *Central Outdoor Adv. Co. v. Village of Evendale, supra*, the court held invalid an ordinance providing that "(n)o advertising sign or billboard shall hereafter be erected *within the limits of this village*, except to advertise the business or product of the owner or occupant of the premises on which the same is located." (Our italics). The court then considered the plaintiff's contention with reference to the provisions (Section 502.20) of a comprehensive zoning ordinance permitting in "B" Commercial district signs relating "only to services, articles and products offered on the premises." The following excerpt from the opinion of Weber, J., is pertinent and applicable to the case now before us, to wit:

"But a regulation or prohibition of billboards or any other business, which is part of a general zoning plan, may be found to stand upon some different ground than when contained in an ordinance which deals only with a particular business. Zoning divides the municipality into districts and the prohibition of a particular business in a particular zone may be impartial, reasonable and valid because that particular business is unrelated to and inconsistent with the activities permitted in that zone and which are the basis of establishing that zone. It is not necessary to repeat here, with respect to particular zones, the reasons for holding that the advertising in question is not necessarily a menace to life and a detriment to public safety.

"Zone 'B' Commercial, in the Evendale Zoning Ordinance, is devoted entirely to products and services offered on the premises. Accessory signboards, that is, signboards advertising only such products and services, are consistent with the principle upon which the establishment of such zone is based; they are in actuality a part of the business and both the advertising and the business are exclusively local. Signboards as used by the plaintiff, which advertise services and products other than those produced or sold on the premises on which the signboard is located, are not consistent with the principle which is the basis upon which that zone is established. The difference between signboards which advertise only the products made or offered on the premises and the kind of advertising offered by the plaintiff, is a determining factor where the zone is devoted exclusively to local business.

"Section 502.20, which excludes billboards from 'B' Commercial Zone of the Zoning Ordinance of 1953, except such as constitutes an accessory use, is constitutional and valid. *Criterion Service, Inc. v. City of East Cleveland,* Ohio App., 88 N.E. 2d 300."

In *Varney & Green v. Williams (Cal.),* 100 P. 867, 21 L.R.A. (N.S.) 741, cited by plaintiffs as a landmark case, the ordinance prohibited advertising signs within the corporate limits of East San Jose except those advertising merchandise for sale on the premises. Prior to the adoption of the ordinance, the plaintiff corporation, which conducted a general advertising business, had constructed and was maintaining three billboards for advertising within the corporate limits of San Jose. The ordinance was declared invalid and enforcement was enjoined. The basis of decision is indicated by the following excerpt from the opinion: "The single question for decision, therefore, is whether the enactment of this ordinance was within the legislative power of the town of East San Jose. Except for the limited exemption conferred by section 3, the effect of the ordinance is to absolutely prohibit the erection or main-

tenance of billboards for advertising purposes. There is no attempt to restrict the operation of the enactment to billboards that may be insecure or otherwise dangerous, or to advertising that may be indecent. The town trustees have undertaken to make criminal the maintenance of any billboard, however securely it may be built, and however unobjectionable may be the advertising matter displayed upon it." This California decision of 1909 is similar to the 1908 decision of this Court in *S. v. Whitlock,* 149 N.C. 542, 63 S.E. 123. These decisions antedate the era of zoning. In *Rockingham Hotel Company v. North Hampton, supra,* the court aptly said: "Unlike the ordinance considered in the cited case *(Varney & Green v. Williams, supra)* however, the ordinance before us is a comprehensive zoning ordinance; and the prohibition contained in the section complained of must be considered with reference to other provisions of the same ordinance."

Plaintiffs cite *Triborough Bridge & T. Authority v. B. Crystal & Son,* 153 N.Y.S. 2d 387, and *Sunad, Inc. v. City of Sarasota (Fla.),* 122 So. 2d 611; *Abdo v. City of Daytona Beach (Fla.),* 147 So. 2d 598. Suffice to say, these cases do not involve comprehensive zoning ordinances and are otherwise factually distinguishable.

Plaintiffs call attention to *O'Mealia Outdoor Adv. Co. v. Mayor and Council (N.J.),* 27 A. 2d 863, decided some ten years prior to *United Advertising Corp. v. Borough of Raritan, supra.* In *O'Mealia,* the ordinance related to billboards or other structures for the outdoor display of advertising within the Borough of Rutherford. Subsequent to *United Advertising Corp. v. Borough of Raritan, supra,* it was decided in *United Advertising Corp. v. Borough of Metuchen (N.J.),* 172 A. 2d 429, that the plaintiff was not entitled to *summary judgment.* However, on remand, the superior court after full hearing entered final judgment for defendant. *United Advertising Corp. v. Metuchen (N.J.),* 184 A. 2d 441. It is noted that the zoning ordinance under consideration provided: "No advertising signs shall be permitted in any district in the Borough of Metuchen." Our impression is that the law as stated in *United Advertising Corp. v. Borough of Raritan, supra,* continues in full vigor as the prevailing rule in New Jersey.

As stated above, the 1962 ordinance under consideration permits advertising signs in an aggregate area of 29.9 square miles or 91.8% of the total area of the six business and industrial districts.

For the reasons stated, the judgment of the court below is reversed.

Reversed.

S. E. WILSON v. G. GAY McCLENNY, D. F. McDAVID, WALTER G. MASON AND WILLIAM M. McCLENNY.

(Filed 12 June 1964.)

1. Corporations § 1; Contracts § 6—

The preincorporation agreement between certain promoters that they would vote their stock and use their influence to secure the election of each of them as a director and the election of one of them as president and another of them as vice president for a period of five years at a specified salary, etc., is not void as contrary to public policy, G.S. 55-24(a), G.S. 55-73(a), G.S. 55-73(c), and the contract will be upheld when it does not violate any express charter or statutory provision, contemplate an illegal object, or involve any fraud or wrong against other stockholders.

2. Contracts § 19—

A novation is a substitution of another agreement for a pre-existing one so that the old contract is extinguished in accordance with the intent of the parties.

3. Contracts § 12—

A contract must be construed to ascertain the intent of the parties, and where the agreement is in writing this must be ascertained from the language used construed with regard to the purpose to be accomplished, the situation of the parties at the time the agreement was entered into, and the subject matter of the contract.

4. Corporations § 1; Estoppel § 4—

Where a preincorporation agreement among promoters provides that the parties will vote their stock and use their influence to have one of their number elected president for a period of five years, and at the first directors' meeting the term of the corporate officers is fixed at one year, the acceptance of the one-year term, without evidence that the incumbent intended to release the other promoters or that the other promoters thought they were released, does not constitute a novation, or estop the incumbent from suing for damages for breach of the agreement upon his failure to be reelected.

5. Master and Servant § 10—

A contract of employment is subject to the implied condition that the employment may be terminated at any time for cause, and the use of alcohol to the extent that it interfers with the proper discharge of the duties of the employment is cause for discharge.

6. Same; Corporations § 1; Trial § 27—

In a suit for breach of provisions of a preincorporation agreement that defendant promoters would use their votes and influence to have plaintiff promoter elected president for a period of five years, nonsuit on the ground that plaintiff's addiction to alcohol justified the termination of the agreement for cause may not be properly entered when plaintiff denies that he used alcohol to the extent that it interfered with the proper discharge of

his duties, since nonsuit may not be entered upon a controverted affirmative defense.

7. Corporations § 4—

Directors owe the duty of fidelity to the corporation and to use due care in the management of its business. G.S. 55-35.

8. Corporations § 3; Contracts § 31—

The right of action for interference with contractual obligations by a stranger to the contract exists where such interference is wrongful, and does not obtain where the interference is exerted by officers or directors of the corporation in terminating the employment of third persons by the corporation provided they act in good faith to protect the interests of the corporation, since officers and directors of the corporation are under duty to act in its interests and no liability can attach from the *bona fide* exercise of this duty, even in the event of an error of judgment.

APPEAL by plaintiff from *Fountain, J.*, September 16, 1963 Session of NASH.

The complaint alleges two causes of action against the defendants named in the caption. The first is for the breach of a contract entered into between the plaintiff and defendants wherein they agreed to promote the incorporation of Gateway Life Insurance Company (Gateway) and thereafter to promote the interests of each other in that corporation. The allegations specify the failure of the defendants to promote the interests of the plaintiff as therein agreed. For his second cause of action, plaintiff alleges a tortious interference by the defendants with the contractual relationship between himself and Gateway, and he asks for both compensatory and punitive damages. Although plaintiff instituted this action against the four named defendants, Walter G. Mason was never served with summons. Therefore, the only defendants are G. Gay McClenny, D. F. McDavid, and William M. McClenny.

The three defendants filed a joint answer in which they deny all the material allegations of the complaint. As affirmative defenses, they allege that even if the instrument upon which plaintiff bases his first cause of action is a contract he still cannot recover because: (1) it was void as against public policy; (2) it has been superseded by a contract between plaintiff and Gateway (novation); (3) plaintiff has waived his rights under the contract and is estopped to claim under it; and (4) plaintiff has not performed his duties under the contract because of alcoholism.

Plaintiff's evidence, taken in the light most favorable to him, was sufficient to establish these facts:

For thirty-five years prior to October 1, 1958, plaintiff had been engaged in the insurance business. He had worked for four insurance companies and had participated in the organization and establishment of two of them. From 1947 to September 30, 1948, he had been president of the Coastal Plain Life Insurance Company. At age sixty he had retired as its president and, under an oral contract, had become vice-chairman of the Board to serve in an advisory capacity for an indefinite period at a salary of five hundred dollars a month. In October 1958, the four named defendants, being desirous of organizing an insurance company, sought out plaintiff because of his knowledge and experience in the field and importuned him to join them in the promotion and organization of the Gateway Life Insurance Company. As a result, plaintiff resigned his position with Coastal Plain and entered into the following contract with defendants:

> THIS AGREEMENT made and entered into this 21st day of November, 1958, by and between S. E. Wilson, G. Gay McClenny, D. F. McDavid, Walter G. Mason and Wm. M. McClenny, by and between each other.
>
> WHEREAS, the parties hereto are associated together for the purpose of establishing a Stock Insurance Company, with capital and surplus of Four Hundred Thousand ($400,000.00) Dollars to handle all types of insurance on the lives of people, and each party hereto is endeavoring to promote said business by the procuring of stock subscriptions and business for the proposed insurance company; and the parties hereto expect to take a prominent part in the conduct and operation of said business and deem it advisable that the respective positions to be held by them be agreed upon among themselves as parties hereto:
>
> NOW, THEREFORE THIS AGREEMENT WITNESSETH:
>
> That in consideration of the premises, the mutual promises to each other and efforts on behalf of each other, herein, it is mutually agreed that the parties hereto shall work together with each other, use their influence and stock votes under their direct and indirect control for the following purposes on behalf of each other.
>
> 1. That each party shall become director of said company;
>
> 2. That S. E. WILSON shall become President of said company;
>
> 3. That G. GAY McCLENNY shall become Vice-President of said company;

4. That Wm. M. McClenny shall be Vice-President and General Counsel for said company with retainer fee of $200.00 the first year with a proportionate increase for future years in accord with the increase of duties as such and customary fees incidental to the office of General Counsel of an insurance company.

5. That DANIEL McDAVID shall become Asst. Vice-President and SPECIAL ACCOUNTS (*sic*) of said company.

6. That contracts for the services of S. E. Wilson and G. Gay McClenny as officers of said company for a five year period be secured with first year salary of Ten Thousand ($10,000.00) Dollars each with an increase thereof for the next successive four years, contingent upon the progress of the company.

That this Contract which is made in duplicate is of a confidential nature and is not to be exposed or disclosed in any manner to anyone other than the signers hereof for any reason, cause, or purpose, except in the case of bad faith on the part of any party hereto toward any party or parties hereto in the accomplishment of the purposes hereinabove set forth in this contract.

Witness the following signatures and seals.

s/ S. E. Wilson	(SEAL)
s/ G. Gay McClenny	(SEAL)
s/ D. F. McDavid	(SEAL)
s/ William M. McClenny	(SEAL)
s/ Walter G. Mason	(SEAL)

This agreement was prepared by the defendant William M. McClenny, an attorney practicing in the State of Virginia. He informed the five signatories that its purpose was to keep any one of them from getting "kicked out" of the company after he had expended time and money in its organization, and that the agreement was "perfectly legal and would hold up in anybody's court." Thereafter, plaintiff devoted his time to promoting and organizing the corporation and, along with the defendants, invested his money in its stock. He solicited stock subscriptions from others, collected necessary funds, secured licenses to operate in both North Carolina and Virginia, and prepared the usual forms required in the operation of an insurance company. The corporate charter was issued in May 1959. At crucial periods plaintiff lent the corporation the money it had to have to begin business and to continue operation.

Gateway had thirteen initial directors. They held their first meeting on October 23, 1959. None of the directors, other than the parties to this action, knew anything about the foregoing contract of November 21, 1958 and it was never discussed among them. At that meeting the duration of the officers' employment was the subject of considerable discussion, and a number of directors objected to any term longer than one year. Plaintiff and G. Gay McClenny expressed themselves as favoring a longer term. However, bylaws were adopted which provided that the officers should hold office for one year only.

Plaintiff was elected president of the new corporation at a salary of ten thousand dollars a year payable at $833.33 a month. Defendant G. Gay McClenny was elected vice-president at the same salary, and defendant William M. McClenny was elected general counsel. They all signed contracts of employment for one year. There was never any discussion between the signatories as to the effect of the bylaws and the one-year contracts upon their agreement. According to the plaintiff, employment for one year was "the usual practice." He testified:

> "After the Gateway Life Insurance Company was organized and the by-laws were adopted and I was elected president of the company to serve for one year, I never mentioned to Mr. McDavid and the McClennys and Mr. Mason about furthering this contract to get me a contract of employment for five years. I have never heard of a five-year contract. I was supposed to have been re-elected every year for five years. That's all I was looking for. I would have been re-elected with the help of these folks here, the defendants. That contract right over there told me that I was supposed to be re-elected."

During the month of January 1960 plaintiff committed himself as an inebriate to the State Hospital in Raleigh where he remained for twenty-one days. From the time of his return on January 25, 1960 until April 10, 1961, there was no other occasion when he was incapacitated and unable to attend to the affairs of the corporation. He did not take a drink for six to eight months. During the time plaintiff was president of Gateway, his dealings with the lending institutions for which Gateway wrote credit insurance were satisfactory. All of the directors of Gateway knew that plaintiff had a drinking problem and all were concerned about it.

At a directors' meeting on February 11, 1961, which the defendants attended, plaintiff was instructed to procure and mail out to the stockholders the proxies for the annual stockholders' meeting on April 10, 1961, naming himself, Young A. Pully, and defendant G. Gay Mc-

Clenny as attorneys-in-fact for the absent stockholders. This plaintiff did. At that time there were forty thousand shares of stock outstanding.

At no time prior to the meeting on April 10th did the defendants or anyone else have any conversation with the plaintiff concerning his continued employment by the company. A few minutes before the stockholders' meeting, Mr. E. W. Duffner and Mr. C. B. Hines came to his office and told him that they had been selected by a group of eleven directors, including the defendants, to ask him to resign. The five directors living in Rocky Mount had not been informed of this plan. When plaintiff refused to resign, Duffner told him that they had enough proxies to do anything they wanted to do. The group had obtained proxies representing 21,561 shares.

When the stockholders' meeting convened, defendant William M. McClenny was elected chairman of the meeting. Duffner nominated a slate of directors which did not contain plaintiff's name and there were no other nominations. Before the election, Marshall Spears, Henry Johnson, and John W. Lewis, three of the directors residing in Rocky Mount, objected because plaintiff had not been nominated. They argued that the company should retain him as a director and president "and put him on a period of probation with the understanding that he would do or not do these things as prescribed by the Board." The three defendants opposed this recommendation. At one time defendant McDavid informed plaintiff's proponents that plaintiff was out because they had the votes. In the stockholders' meeting plaintiff did not nominate himself or attempt to vote the eighteen hundred shares which he controlled in any manner. He testified, "I did not object to the form or manner of election of these directors at this meeting because it appeared, and I had been informed, that they had enough to do whatever they wanted to."

The directors nominated by Duffner were elected and they held a meeting immediately after the stockholders adjourned. Messrs. Lewis, Spears, and Johnson recommended that Mr. Wilson be retained as chairman of the Board but the defendants opposed this recommendation. Mr. Shirley Mitchell was elected president and plaintiff was notified that he was no longer an officer of the company. At that time plaintiff was sixty-two years old.

Thereafter, in discussing the ouster of plaintiff, defendant G. Gay McClenny stated that the directors wanted to replace plaintiff because they felt he had been negligent and that he, McClenny, had obtained many of the proxies which had enabled them to control the stockholders' meeting and depose the plaintiff. Each of the three defendants

was examined adversely. In effect, each testified that he did not use his influence or his stock votes to keep plaintiff as a director or president of the company and, had plaintiff been nominated, his obligation to the stockholders and the welfare of the company would have required him to vote against plaintiff. Defendant W. M. McClenny said that the three defendants had agreed among themselves to oust the plaintiff if they could get the necessary votes to do it.

At the close of plaintiff's evidence, the defendants moved for a judgment as of nonsuit as to both causes of action. The motions were allowed and plaintiff appealed.

Battle, Winslow, Merrell, Scott & Wiley for plaintiff.
Bridgers, Horton & Britt and Dill and Fountain for defendants.

SHARP, J. The first question presented by this appeal is whether the agreement of November 21, 1958 was void as against public policy. This preincorporation contract between the parties was intended to serve as a stockholders' agreement after incorporation. Such agreements are governed by the general principles of contract law. 13 Am. Jur., *Corporations* § 127. The signatories bound themselves "to use their influence and stock votes" to secure the election of each as a director and the election of plaintiff by the directors as president of the corporation for a five-year period at a beginning salary of ten thousand dollars with indefinite annual increases during the succeeding four years "contingent upon the progress of the company." Whatever may have been the legal status of such an agreement prior to the enactment of the Business Corporation Act of 1955, (see *Harvey v. Improvement Co.*, 118 N.C. 693, 24 S.E. 489; *Bridgers v. Staton*, 150 N.C. 216, 63 S.E. 892; Annot. 45 A.L.R. 2d 799, 821), it is clear that this contract is not now prohibited by law. Under G.S. 55-24(a) the board of directors is given the right to manage the affairs of the corporation "subject to the provisions of the charter, the bylaws *or agreements* between the shareholders otherwise lawful. . . ." (Italics ours). G.S. 55-73(a) permits two or more shareholders of a North Carolina corporation to enter into a written agreement to vote the shares held by them as a unit for the election of directors. This section provides:

> "An otherwise valid contract between two or more shareholders that the shares held by them shall be voted as a unit for the election of directors shall, if in writing and signed by the parties thereto, be valid and enforceable as between the parties thereto, but for no longer than ten years from the date of its execution. Nothing herein shall impair the privilege of the corporation to

> treat the shareholders of record as entitled to vote the shares standing in their names, as provided in G.S. 55-59 nor impair the power of a court to determine voting rights as provided in G.S. 55-71."

Likewise, the contract to elect plaintiff president of the corporation at a specified salary is not subject to the usual objection that it interferes with the discretion of the directors in view of the provisions of G.S. 55-73(c), to wit:

> "An agreement between all or less than all of the shareholders, whether solely between themselves or between one or more of them and a party who is not a shareholder, is not invalid, as between the parties thereto, on the ground that it so relates to the conduct of the affairs of the corporation as to interfere with the discretion of the board of directors, but the making of such an agreement shall impose upon the shareholders who are parties thereto the liability for managerial acts that is imposed by this chapter upon directors."

Thus, the Business Corporation Act clearly aligns North Carolina with the majority of jurisdictions which hold that a contract entered into between corporate stockholders by which they agree to vote their stock in a specified manner — including agreements for the election of directors and corporate officers — is not invalid unless it is inspired by fraud or will prejudice the other stockholders. The cases are collected in an annotation: Validity and Effect of Agreement Controlling the Vote of Corporate Stock, 45 A.L.R. 2d 799, 802. See also 18 C.J.S., *Corporations* § 551(b); 19 C.J.S., *Corporations* § 716(d); 17 C.J.S., *Contracts* § 199. The modern view is stated in Fletcher, *Private Corporations,* §§ 191 and 208: "No public policy forbids contracts for promoting and managing a corporation according to law and for lawful purposes, or for determining among themselves (the promoters) what the stock shall be and how it shall be divided, *or for election of themselves as officers and employment by the corporation when formed.*" (Italics ours). "A contract for employment of a promoter as a corporate officer, made among the promoters, is not necessarily against public policy or in fraud of the corporation. . . ." Accord: *King v. Barnes,* 109 N.Y. 267, 16 N.E. 332.

The rationale of this rule is aptly stated in *Mansfield v. Lang,* 293 Mass. 386, 200 N.E. 110, a case involving facts very similar to those here: ". . . (S)uch agreements as the one in the case at bar, even if regarded as open to the objection that they pledge in advance the action of officers or stockholders, may be sustained on the ground of the

practical necessity that it would be impossible to organize a corporation if its proper management were not assured."

A competent person gainfully employed in his chosen field, will not ordinarily give up a secure position to take another with a new enterprise without some assurance as to his future. No corporation could ever be created without a preliminary agreement between the parties proposing to form it as to the mode and manner of doing so. However, when such agreements providing for the future management and control of a corporation violate the express charter or statutory provision, contemplate an illegal object, involve any fraud, oppression or wrong against other stockholders, or are made in consideration of a private benefit to the promisor, the courts will declare them invalid. Annot. 45 A.L.R. 2d 799, 811; 12 A.L.R. 1070; 45 A.L.R. 795. The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries. *Goodman v. White,* 174 N.C. 399, 93 S.E. 906; 13 Am. Jur., *Corporations* §§ 126, 127. Both G.S. 55-24 and G.S. 55-73 require that the contemplated agreements be "otherwise lawful."

There is no evidence here that the contract between the plaintiff and defendants was not made in good faith or that, at the time it was made, it was not in the best interest of the corporation. *Prima facie,* it was a valid exercise of the promoters' right to contract. 13 Am. Jur., *Corporations* § 127. Since the organization of the corporation, the defendants have not owned a majority of its stock. Therefore, they could not have forced their will upon either the stockholders or the other eight directors. To remove plaintiff from the board of directors and the presidency of the corporation they ultimately required the proxies and votes of other stockholders.

The defendants' contention that the agreement was void as against public policy is not sustained. Furthermore, as parties to the agreement and recipients of the benefit of plaintiff's knowledge, experience, work, financial support, and voting support under it, they are in a poor position to assert the invalidity of the contract on the ground that it is contrary to public policy. *Bonta v. Gridley,* 78 N.Y.S. 961.

The defendants' second defense is that plaintiff's acceptance of a contract with Gateway for one year's employment instead of five was in legal effect a novation. In *Tomberlin v. Long,* 250 N.C. 640, 109 S.E. 2d 365, this Court explained the meaning of novation:

> "In this connection 'Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby

extinguished * * * The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract * * *.' 66 C.J.S. Novation Secs. 1 and 3.

"'Novation implies the extinguishment of one obligation by the substitution of another.' (Citations omitted).

"'Ordinarily,' as stated in *Growers Exchange v. Hartman,* 220 N.C. 30, 16 S.E. 2d 398, in opinion by *Devin, J.*, later C.J., 'in order to constitute a novation the transaction must have been so intended by the parties'."

The agreement of November 28, 1958 must receive that construction which will best effectuate the intention of the parties. *Faust v. Rohr,* 166 N.C. 187, 81 S.E. 1096. "Where an instrument is wholly in writing and the intention of the writer must be ascertained from the document itself, the intention of the writer as well as the effect of that intention is a question of law." *Strigas v. Insurance Co.,* 236 N.C. 734, 73 S.E. 2d 788.

"'An elementary rule invoked in the construction of contracts requires the court to ascertain the intention of the parties, and to do this note must be taken of the purpose to be accomplished, the situation of the parties when they made (the contract), and the subject-matter of the contract'." *DeBruhl v. Highway Commission,* 245 N.C. 139, 95 S.E. 2d 553.

It is difficult to follow defendants' contention that, when the corporate directors declined to give plaintiff an employment contract for longer than one year, and he accepted the one-year appointment as the best bargain he could make at the time, such acceptance released them from any further obligation to work for his election as a director and appointment as president for the ensuing four years. As it applied to the plaintiff, the obvious purpose of their agreement was to insure, as nearly as possible, his prospective position with Gateway for a five-year period before he severed his connection with Coastal Plain Life Insurance Company. When the directors declined to give him a contract for a longer period than twelve months, the only way in which the parties could then accomplish the end they had in view was to secure from the corporation four additional one-year terms for the plaintiff. There is no evidence from which it can be inferred that plaintiff ever intended to release defendants from their obligation to support him for president of the company until he had served five years, or

that defendants themselves ever thought they were released. The evidence in this case fails to establish a novation whereby Gateway's employment contract with plaintiff was substituted for his voting agreement with defendants.

The defendant's third defense is that plaintiff, by accepting the one-year contract, waived his rights under the agreement and is estopped to claim under it. The mode of performance was not the essence of the agreement, and plaintiff did not waive his rights or estop himself merely because he took from the corporation the only contract of employment obtainable. If defendants are to be released from their obligations under the agreement they must establish their fourth defense, *i.e.*, that plaintiff failed to perform his duties as president because of alcoholism.

Any agreement to employ an individual, or to promote his continued employment, contains the implied condition that the agreement may be terminated at any time for cause. *Mansfield v. Lang, supra.* An employer undertakes to pay an employee only so long as he performs his duties with reasonable care, diligence, and attention. He may discharge an employee for just cause at any time without incurring liability therefor. This rule protects him in the efficient conduct of his business, and employment contracts thus impliedly conditioned are not against public policy. *Mt. Pleasant Coal Co. v. Watts,* 91 Ind. App. 501, 151 N.E. 7. See also 45 A.L.R. 2d 799, 820.

As justification for the abandonment of their agreement, defendants alleged that plaintiff's addiction to alcohol had caused him to neglect the business of Gateway. Plaintiff denied the allegation. It therefore became a question for the jury whether plaintiff used alcohol to an extent which would justify his discharge.

> "Confirmed habits of intoxication on the part of an employee are necessarily inconsistent with the duties of any employment and justify discharge, but the extent to which drinking of liquor or occasional excess may disqualify an employee depends upon the character of the employment." 4 Williston on Contracts, (rev. ed.) 1020; 35 Am. Jur., *Master and Servant* § 43.

The rule is well stated in 56 C.J.S., *Master and Servant* § 43(i):

> "Independently of any agreement to that effect, the master may discharge the servant when, by intoxication, he unfits himself for the full and proper discharge of his duties, and it is immaterial that at the time of the discharge the employee had quit drinking, and discharge is justifiable even when the employee is not incapacitated thereby, if his intoxication is or may be prej-

udicial to the master's interests; and this is especially true when the employment, in its very nature, requires sobriety. The fact that liquor was drunk as medicine is no excuse for gross intoxication."

If plaintiff used alcohol to the extent that it interfered with the proper discharge of his duties as a director and president of Gateway, defendants were justified in withdrawing the support which they had agreed to give him. However, as to the first cause of action, this is an affirmative defense interposed by defendants in a suit on their individual contract with plaintiff. It is, therefore, for the jury to determine the validity of that defense. The granting of defendants' motion to nonsuit the plaintiff's first cause of action was erroneous and that ruling must be reversed.

Plaintiff's second cause of action is in tort for the wrongful interference by defendants with the contractual relation existing between him and Gateway. It is based upon *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176, wherein it is stated:

". . . (T)he overwhelming weight of authority in this nation is that an action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party. . . .

"To subject the outsider to liability for compensatory damages on account of this tort, the plaintiff must allege and prove these essential elements of the wrong: *First,* that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second,* that the outsider had knowledge of the plaintiff's contract with the third person. *Third,* that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Fourth,* that in so doing the outsider acted without justification. *Fifth,* that the outsider's act caused the plaintiff actual damages." (All citations are omitted.)

The contract which defendants' interference caused to be terminated in *Childress* was terminable at the will of the parties. The contract here was for one year only, but it is a fair inference that both plaintiff and Gateway expected it to be renewed from year to year as long as plaintiff was able to perform his duties. The distinction between *Childress* and the case *sub judice* is that defendants here are not *outsiders.* They are all stockholders and directors of Gateway. As stockholders they had a financial interest in the corporation; as directors

they owed it fidelity and the duty to use due care in the management of its business. G.S. § 55-35. As either directors or stockholders, they were privileged purposely to cause the corporation not to renew plaintiff's contract as president if, in securing this action, they did not employ any improper means and if they acted in good faith to protect the interests of the corporation. In other words, because of their financial interest and fiduciary relationship they had a qualified privilege to interfere with contractual relations between the corporation and a third party. Restatement, *Torts*, § 769 (1939); 30 Am. Jur., *Interference* §§ 34, 37; Annot., 26 A.L.R. 2d 1227, 1270. To hold otherwise, "would tend to hinder directors of a corporation from acting on their judgment for the interest of their corporation . . ." 3 Fletcher, *Private Corporations* § 1001; *May v. Sante Fe Trail Transportation Co.*, 189 Kan. 419, 370 P. 2d 390; *Schuster v. Largman*, 318 Pa. 26, 178 A. 45.

In an article entitled Liability For Inducing a Corporation to Breach its Contract, 43 Cornell Law Quarterly, 55, 65, by Avins, we find this statement:

> "Officers, directors, agents or employees who have an interest in the activities of a corporation or the duty to advise or direct such activities should be immune from liability for inducing the corporation to breach its contract, assuming their actions are in pursuit of such interests or duties. Public policy demands that so long as these parties act in good faith and for the best interests of their corporation, they should not be deterred by the danger of personal liability. . . ."

The comment of the Georgia Court of Appeals in *Rhine v. Sanders*, 100 Ga. App. 68, 110 S.E. 2d 128 is also applicable here.

> ". . . They (defendants) had the right while acting as corporate officers and agents to counsel and advise with the defendant corporation as to the management of its affairs in all matters with which the corporation was concerned without the risk of rendering themselves personally liable to third parties for their acts in that regard if they should err. 'Any other rule would make it impossible for corporate business to be carried on at all except at the peril that every agent who advised concerning corporate action would be suable under some such allegations as are made in this complaint'."

The acts of a corporate officer in inducing his company to sever contractual relations with a third party are presumed to have been done in the interest of the corporation. "Individual liability may, however,

be imposed where his acts involve individual and separate torts distinguishable from acts solely on his employer's behalf or where his acts are performed in his own interest and adverse to that of his firm." *Rampell, Inc. v. Hyster Co.*, 148 N.Y.S. 2d 102, 153 N.Y.S. 2d 176, 165 N.Y.S. 2d 475; *Pennington Trap Rock Co. v. Pennington Quarry Co.*, 22 N.J. Misc. 318, 38 A. 2d 869; *Iverson & Co. v. Durham Mfg. Co.*, 18 Ill. App. 2d 404, 152 N.E. 2d 615.

Plaintiff's own testimony reveals that he voluntarily committed himself to the State Hospital as an inebriate in January 1960. The testimony of other witnesses for the plaintiff tended to show that it was plaintiff's use of alcohol which prompted defendants to take the action which resulted in Gateway's failure to renew his contract. Directors of an insurance company may not be subjected to liability for acting on the assumption that it might prejudice the corporation to retain as president a man with a drinking problem who had been committed to a State institution as an inebriate. Plaintiff offered no evidence tending to show that the defendants abused their privilege as directors.

The question whether plaintiff's use of alcohol had *actually* rendered him unfit to perform his duties or prejudiced the business of Gateway is not determinative of the second cause of action. An error in judgment about this would not impose liability upon the directors. The judgment of nonsuit as to the second cause of action must be sustained. *Langley v. Russell*, 218 N.C. 216, 10 S.E. 2d 721; *Herndon v. Melton*, 249 N.C. 217, 105 S.E. 2d 531; *Yancey v. Gillespie*, 242 N.C. 227, 87 S.E. 2d 210.

The plaintiff excepted to the order of the court below striking certain allegations from his complaint relative to special damages. The assignment of error based on these exceptions has been considered and it is overruled. The briefs debate the admissibility of certain evidence which the court excluded over plaintiff's objection. Without this evidence plaintiff was still entitled to go to the jury on his first cause of action, and it could not have changed the status of the second cause of action. Since these questions of evidence may not arise on the retrial, this opinion will not be lengthened with further discussion.

As to the first cause of action —

Reversed.

As to the second cause of action —

Affirmed.

PIEDMONT AVIATION, INC. v. S & W MOTOR LINES, INC.

(Filed 12 June 1964.)

1. Corporations § 24—

Evidence tending to show a contract was made for defendant corporation by its president for the maintenance and repair of airplanes, that plaintiff performed the work under the contract during the term thereof, and that part of the charges was for work done on an airplane which defendant corporation owned and still owns, *is held* to repel nonsuit on the ground that the contract was primarily for the benefit of another corporation of which the same person was president, and was therefore *ultra vires* defendant corporation. G.S. 52-18 curtails to a considerable degree the doctrine of *ultra vires*.

2. Frauds, Statute of § 5—

Evidence tending to show that plaintiff, before undertaking to perform work in the maintenance and repair of airplanes, called the president of defendant corporation and obtained the promise of the president that defendant corporation would pay the amounts which should become due under the contract, and further that at least some of the work and labor performed under the contract was for the benefit of defendant corporation, *is held* to repel nonsuit on the defense that the action is barred under the provisions of G.S. 22-1, since the evidence tends to show the promise was an original promise not coming within the statute.

3. Trial § 40—

In an action for work and labor performed pursuant to an agreement for the maintenance and repair of certain airplanes, the demand being for the total of a number of items on an account, the submission of the case to the jury under the single issue of indebtedness and the refusal to submit issues tendered, *is held* erroneous, since the jury, if it found for plaintiff, was required to find the indebtedness in the sum demanded, and there was neither allegation nor proof by either party that the work done and materials furnished were to be performed for an agreed sum or what constituted the reasonable value of the labor and materials furnished.

APPEAL by defendant from *Johnston, J.*, 21 October 1963 Civil Session of FORSYTH.

Civil action to recover for alleged labor and materials furnished, sold and delivered to defendant upon an express contract to pay and upon an account duly stated and rendered in the amount of $10,166.20, with interest on $3,862.54 from 31 January 1959 until paid, with interest on $2,330.14 from 19 March 1959 until paid, with interest on $1,852.11 from 26 April 1959 until paid, with interest on $984.90 from 31 August 1960 until paid, and with interest on $136.51 from 30 April 1960 until paid. A statement of the account is attached to the complaint and market Exhibit A. The various amounts alleged in the complaint upon which interest is prayed from various dates total $9,166.20. An examination of the statement of account attached to the

complaint seems to show that the figures $1,852.11 should be $2,852.11.

Defendant in its answer denies that it is indebted to plaintiff in any amount. By way of further answer and defense and in bar of any recovery, defendant alleges in substance:

One. If any of the items listed on the statement of account attached to the complaint and marked Exhibit A are for work done or materials furnished by plaintiff at the request of defendant, which is denied, then defendant has paid for them in full and has paid any and all sums due by it to plaintiff.

Two. It alleges, on information and belief, that all items on the statement of account attached to the complaint and marked Exhibit A are for work done and materials furnished by plaintiff to Miami Airlines, Inc., a Florida corporation, in connection with the maintenance and operation of certain aircraft by Miami Airlines, Inc., when its offices were located in Greensboro, North Carolina. That none of this work done and materials furnished by plaintiff for Miami Airlines, Inc., was requested by defendant, and defendant did not enter into any agreement or give any undertaking to plaintiff to pay for the same, and that any sums alleged to be due by defendant to plaintiff in its complaint are the debt and obligation of Miami Airlines, Inc., and not this defendant.

Three. Defendant specifically pleads the provisions of G.S. 22-1 (promise to answer for debt of another), in bar of any recovery herein by plaintiff.

Each party introduced evidence in support of the allegations in its pleading.

After the evidence was ended, plaintiff tendered to the court the following issues, which the trial court declined to submit to the jury:

> "1. Did the defendant contract and agree with plaintiff that defendant would pay plaintiff for labor and materials furnished, as alleged in the Complaint?"
>
> "2. What amount, if any, is the plaintiff entitled to recover of the defendant?"

At the same time defendant tendered to the court the following issues, which the trial court declined to submit to the jury:

> "1. Did the defendant through its duly authorized officer promise to pay the plaintiff for materials and labor, as alleged in the Complaint?"

"2. Were the labor and materials furnished of benefit to the defendant?"

"3. Was the contract, if any, between plaintiff and defendant in writing?"

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

The trial court framed and submitted to the jury the following issue:

"Is the defendant indebted to the plaintiff as alleged in the plaintiff's Complaint?"

The jury answered the issue: "Yes, $10,166.20, plus 6% interest as indicated in the Complaint." Defendant excepted to the one issue submitted by the trial judge to the jury.

From a judgment entered in conformity with the verdict, defendant appeals.

Block, Meyland & Lloyd by A. L. Meyland and Henry H. Isaacson for defendant appellant.

Blackwell, Blackwell, Canady & Eller by Jack F. Canady for plaintiff appellee.

PARKER, J. Milton F. Fare, a witness for plaintiff, testified in substance, except when quoted: He has been an officer of plaintiff for 23 years, to wit, its secretary and assistant treasurer. His duties consisted of the supervising of its books and accounts, the billing for services rendered, the extension of credit, and the collection of accounts. The account of defendant with plaintiff has been under his personal supervision since its inception in 1957 when defendant purchased a DC-3, No. N-21798, airplane. The books and accounts of plaintiff show an account due it by defendant in the amount of $10,166.20 covering the period from 1 December 1958 through 31 March 1960. This account covers maintenance, inspection, and repair primarily on DC-3 airplanes, and in some cases for parts purchased. This account was sent to defendant and is due and unpaid.

In June 1957 plaintiff performed a major overhaul and conversion job for defendant on a DC-3 airplane, No. N-21798, owned by defendant, and the bill was approximately $41,000. In June 1958 plaintiff began a series of work on airplanes, and it ran through 31 March 1960. George H. Sharp, president of defendant, authorized the work on these airplanes. The account for $10,166.20 sued on covers work on a DC-3,

No. N-21798, and he has been able to trace $6,405.07 to this airplane, which airplane was owned by defendant during the period 1958 through 1960. This account also covers work done by plaintiff on another DC-3 airplane and a DC-4 airplane, which were sent to plaintiff by defendant. "He called Mr. Sharp in June, 1958, after these aircraft had come into plaintiff's shop, and told him he would like to work out an arrangement for payment. The aircraft that was owned by S & W Motor Lines, Inc. and registered in its name had 'Miami Airlines' painted on its side and, since he had no information on Miami Airlines, he couldn't do any work and charge it to that company because he didn't know anything about it. He stated Mr. Sharp told him to bill it to S & W Motor Lines, and they would pay it." He also testified: "Mr. Sharp stated S & W Motor Lines was promising to send the payments, that S & W Motor Lines, Inc. was the company to whom billings were rendered and to whom credit was extended. He stated that on several occasions, Mr. Sharp gave the reasons for the account getting so large and delinquent that his trucking company business was not good, or the S & W Motor Lines' business was not good, he had had to buy licenses for his over-the-road vehicles, his trucks, and he just didn't have the money, but he would promise to pay when he could. He stated that S & W Motor Lines, Inc. promised to pay when it could." In his conversations with Mr. Sharp in trying to collect this account, Mr. Sharp never denied that defendant owed this account. The first time that Mr. Sharp ever denied that defendant owed this account was in a letter from his attorney dated 19 July 1960.

Defendant's office was located at 3300 High Point Road, Greensboro, North Carolina, and the office of Miami Airlines was located at the same place. Mr. Sharp was president and owner of Miami Airlines and was president of defendant. He never extended any credit to Miami Airlines. The account sued on was carried in the name of defendant.

Mr. Fare testified in substance on cross-examination and recross-examination, except when quoted: He knew defendant was a North Carolina corporation when it purchased a DC-3 aircraft, No. N-21798, and arranged for plaintiff to perform a major overhaul on it at a cost of $41,693.06. He is generally familiar with certificates of ownership for aircraft issued by FAA, formerly CAA, and according to FAA regulations the registration certificates were required to be in the aircraft at all times. The registration certificate shows the registered owner of the aircraft. The name "Miami Airlines" appearing on the shop work orders after the name "S & W Motor Lines" was for identi-

fication purposes. After June 1958 all his conversations with Mr. Sharp were over the telephone. Credit reports received by him showed that Miami Airlines was a Florida corporation, and that Mr. Sharp was its principal owner. The credit reports did not indicate that defendant owned any stock in Miami Airlines. "Mr. Sharp, in a conversation, told him to bill S & W and that S & W would pay for the maintenance services on the various aircraft. This conversation occurred in early June 1958, before Mr. Fare received the letter from Mr. Boyd Royal, general manager of S & W, dated July 29, 1958 (defendant's exhibit 14), stating the account was paid in full." He did not ask Mr. Sharp to confirm any of the conversations by letter. Mr. Sharp had done business with plaintiff for several years, and "we accepted his statements at face value. We trusted him. We extended credit to the S & W Motor Lines and we relied on what he told us." He does not know if any payments were received from S & W Motor Lines after the conversation in June 1958. He received letters from Miami Airlines and wrote to them, but it was a mistake. His testimony on direct examination that the airplanes were sent to plaintiff's work shop by S & W Motor Lines was hearsay. He received some letters from Miami Airlines, Inc., signed by G. H. Sharp as president. The only communication received from S & W Motor Lines signed by Mr. Sharp as president was the letter dated 10 February 1961 denying S & W Motor Lines owed the account.

He testified on redirect examination: "The invoices were addressed as follows:

S & W Motor Lines, Inc.
Miami Airlines
3300 High Point Road
Greensboro, North Carolina"

Archie Ferguson, a witness for plaintiff, testified in substance: He has been employed by plaintiff for ten years in the position of maintenance supervisor. Mr. Sharp, whose voice he knew from prior conversations, called him on the telephone and identified himself with S & W Motor Lines, and ordered work done on aircraft during 1958, 1959, and early 1960, during the period covered by the account sued on. He testified in substance on cross-examination: Mr. Sharp had possibly 15 conversations with him in 1957 during the period of three months when defendant's DC-3 airplane, No. N-21798, was in the shop. The airplanes came into plaintiff's work shop for maintenance at all times of the day or night. There was usually a call before ar-

rival from S & W Motor Lines. Miami Airlines operated two C-46 type aircraft, and also a DC-4, No. N-90443.

G. H. Sharp, a witness for defendant, testified in substance, except when quoted: He has been president of S & W Motor Lines since its incorporation in 1949 as a long-haul freight transportation company by motor vehicles and all kinds of vehicles of whatever nature. He was president of Miami Airlines, Inc., a Florida corporation, a non-scheduled airline regulated by FAA and CAA, during the period 1957-1960, and severed his connection with it in the spring of 1960. He never owned any stock in Miami Airlines, Inc. After he became president of Miami Airlines in October 1957, its offices were moved from Miami, Florida, to 3300 High Point Road, Greensboro, North Carolina, where its offices were located on the second floor of a three-story building. S & W Motor Lines' offices were on the first floor of the same building. Separate telephone facilities were maintained by each corporation. Miami Airlines was never operated as a part of or in conjunction with S & W Motor Lines. The bookkeeping was separate, the bank accounts were separate, and checks were signed by different persons. The S & W Motor Lines was, and still is, the owner of a DC-3, No. N-21798, having acquired it in 1957. About five years prior to that, S & W Motor Lines had acquired a twin Beech aircraft. The airplane DC-3, No. N-21798, was leased to Miami Airlines in 1957, 1958, 1959, and a portion of 1960. Miami Airlines operated another DC-3 airplane owned by Ayer Lease Plan of New Jersey, under lease, and two C-46 aircraft. He identified defendant's Exhibits 27 and 28 as certified copies of certificates of registration from the FAA showing ownership of the plane as described above. He identified written leases dated 1 October 1957 and 1 January 1958 between S & W Motor Lines and Miami Airlines covering lease of the aircraft DC-3, No. N-21798, to the effect that the maintenance of this plane was the responsibility of Miami Airlines. As an officer of S & W Motor Lines, he never authorized any work on the Miami Airlines' planes. He recalls talking with Mr. Fare in 1958 about the airplanes and Mr. Fare did not address him as president of either corporation but called him by his name. He recalled conversations with Mr. Archie Ferguson over the telephone about work on Miami Airlines' planes, but did not tell Mr. Ferguson in those conversations that the work was authorized by S & W Motor Lines, or that S & W Motor Lines would pay for the work. In his conversations with Mr. Fare about the aircraft, most of which were about money, he would tell him "we," meaning Miami Airlines, would send him money. Miami Airlines sent some money, but S & W Motor Lines never sent any money in this period.

He testified in substance on cross-examination: In 1958, 1959, and 1960 he was president of S & W Motor Lines and owned 416 of its shares, his wife was vice-president and owned 1 share, his daughter owned 107 shares, a bank held as trustee for his son 321 shares, and Boyd Royal, secretary and general manager, owned 1 share. He had been examined under oath in March 1963 in connection with this case. At the prior hearing he had testified that he was the sole owner of Miami Airlines, owning 100 per cent of the stock, and that he sold his interest in Miami Airlines in the early part of 1960; that the stock was issued in the name of Bob Higgins, but that Bob Higgins did not have an interest in the company but was just an employee, and that he preferred not to put it in his own name; when he stated he owned 100 per cent of the stock of Miami Airlines, it was a mistake; the stock was held in escrow by Mr. R. W. Duff of Miami. He recalls receiving numerous letters addressed to him as president of S & W Motor Lines from Mr. Fare concerning payments on account, and he never contacted Mr. Fare to tell him S & W Motor Lines did not owe the money and that the billing was wrong until February 1961. At the time of the leases between Miami Airlines and S & W Motor Lines, both companies were in the same building, and he never notified plaintiff of the leases. He supposed he got two letters from Mr. Fare requesting financial information as to Miami Airlines, but he never furnished any financial information as requested. He was shown a financial statement of S & W Motor Lines and a financial statement of Miami Airlines and was asked if it was not true that S & W Motor Lines had loaned Miami Airlines over $100,000 during the period of the account sued on. He replied as follows: "It could have been, I don't deny it, no, Mr. Royal can answer that question better than I can." It might be that S & W Motor Lines during the period of this account charged off a substantial amount of money it loaned to Miami Airlines.

He testified on redirect examination in substance: Most of the Miami Airlines documents were removed to Texas in 1960, and later in Texas it went into bankruptcy.

Boyd Royal, a witness for defendant, testified in substance, except when quoted: He has been secretary and general manager of S & W Motor Lines since 1949. He paid all the bills and signed all the checks for S & W Motor Lines in 1957 through 1960. On 29 July 1958 he sent a check to plaintiff, paying S & W Motor Lines' account in full, with a letter stating as follows: "Attached hereto is our check, amount $1234.66, to cover account in full for S & W Motor Lines, Inc. The invoice number 6-1858, dated June 29, listed on your statement to

S & W Motor Lines, should be charged to Miami Airlines, Inc." Prior to that time he never received any bill for charges of Miami Airlines against S & W Motor Lines. The payments made on the plaintiff's account from December 1958 to February 1960 were never made by S & W Motor Lines. He examined the invoices in plaintiff's account, and none of them were ever entered on the books of S & W Motor Lines. No payments thereon were ever made by S & W Motor Lines.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence.

The evidence of plaintiff, considered in the light most favorable to it, and of defendant favorable to it, *Sugg v. Baker,* 261 N.C. 579, 135 S.E. 2d 565, would permit a jury to find that a contract was made in the name of the corporate defendant, by its president G. H. Sharp, with plaintiff for the maintenance and repair of airplanes, that the contract provided that the corporate defendant would pay for this work, and that this contract was in effect during the period of time covered by the account sued on. That pursuant to such contract, and while it was in effect, plaintiff did work and furnished materials on airplanes, which G. H. Sharp authorized to be done, and that there remains due and unpaid on this work the sum of $10,166.20 with interest on various amounts of this sum from various dates, as shown by the account sued on which is attached to the complaint as Exhibit A. That of this amount of $10,166.20, $6,405.07 is for work done on a DC-3 airplane, No. N-21798, which defendant's evidence shows was purchased by the corporate defendant in 1957, and which it still owns.

Defendant contends in brief that, in the absence of a charter or by-law provision to the contrary, the president of a corporation is the general manager of its corporate affairs, and that his contracts made in the name of the company in its general course of business and within the apparent scope of his authority are ordinarily enforceable, but the president G. H. Sharp had no implied authority to bind the corporate defendant to pay for materials and services furnished on airplanes owned by or leased to Miami Airlines, Inc., which G. H. Sharp owned. It cites in support of its contention *Tuttle v. Building Corp.,* 228 N.C. 507, 46 S.E. 2d 313, a case decided in 1948. It contends in brief that the acts of its president in making the contract in its name alleges in plaintiff's complaint are *ultra vires.* That plaintiff's evidence shows that the account sued on covers work done on airplanes leased to or owned by Miami Airlines, Inc., which G. H. Sharp owned at the time.

Defendant in making this contention overlooks the fact that plaintiff's evidence shows that of the amount of $10,166.20 sued for, $6,405.07 is for work done on a DC-3 airplane, No. N-21798, which defendant's evidence shows it purchased in 1957 and still owns.

In 1955, subsequent to the decision in 1948 in the *Tuttle* case, the General Assembly enacted a "Business Corporation Act," which became effective 1 July 1957. A part of this Act set forth in G.S. 55-18 has curtailed to a considerable degree the doctrine of *ultra vires*. The *ultra vires* provision of our "Business Corporation Act" was in question in *Everette v. D. O. Briggs Lumber Co., Inc.*, 250 N.C. 688, 110 S.E. 2d 288. Defendant was a South Carolina corporation, whose president, the owner of 90% of its outstanding stock, contracted with plaintiff in the name of the defendant corporation for the transportation of lumber for an independent lumber company in North Carolina. The plaintiff performed services, and when the defendant corporation refused to pay plaintiff, suit was brought. Defendant raised the defense of *ultra vires* on the grounds that it had not authorized such a contract with plaintiff and had no interest in the transaction, that it did not benefit from it, and that in reality it was for the benefit of its president as an individual since he was a stockholder of the North Carolina firm. The Court held that under the provisions of G.S. 55-18 of our "Business Corporation Act" *ultra vires* was not available as a defense to defendant in a suit brought against him by an outside contracting party to recover on a contract made with defendant, and affirmed a judgment against defendant. Following our decision in the *Everette* case, the doctrine of *ultra vires* is not available as a defense to defendant in the instant suit.

Defendant further contends that plaintiff's evidence shows that the contract sued on was oral, was to pay the debt of another, and that its action is barred by the provisions of G.S. 22-1. This contention finds no support in plaintiff's evidence considered in the light most favorable to it. The cause of action alleged in the complaint, which plaintiff's evidence supports, is based upon an original contract of defendant corporation, made for it in its name by its president, to pay for labor and materials furnished on airplanes, and consequently does not come within the provisions of G.S. 22-1. *Pegram-West v. Insurance Co.*, 231 N.C. 277, 56 S.E. 2d 607. Defendant in its answer denies that it made any contract with plaintiff to pay for any work on airplanes.

The court properly denied defendant's motion for judgment of compulsory nonsuit made at the close of all the evidence.

As set forth above, in apt time plaintiff tendered to the trial court two issues, and defendant four issues. The trial court refused to submit the issues tendered by the parties, and submitted one issue reading as follows: "Is the defendant indebted to the plaintiff as alleged in the plaintiff's complaint?" Defendant excepted to the one issue submitted and assigns this as error. The jury answered the issue: "Yes, $10,-166.20, plus 6% interest as indicated in complaint."

The question raised by this assignment of error is controlled by *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731. Following this case, we hold that defendant was entitled to have submitted an issue relating to whether defendant entered into the alleged contract with plaintiff, and that the failure to submit such an issue is prejudicial error.

The prejudicial effect to defendant of submitting this one issue as phrased is shown by the closing words of the charge:

> "The Court instructs you, members of the jury, that if the plaintiff has satisfied you by the greater weight of the evidence, the burden being upon the plaintiff to so satisfy you that the plaintiff furnished and delivered the goods and services as alleged in the plaintiff's complaint to the defendant, and that such was furnished and delivered at the request of the defendant acting through its president or agents or employees, then the Court instructs you it will be your duty to answer this issue YES. If the plaintiff has failed to so satisfy you, then it will be your duty to answer the issue NO."

Under this charge if the jury answered the issue Yes, then it had no alternative, and was required to find that defendant was indebted to plaintiff in the sum of $10,166.20 plus interest, even if the jury was not satisfied by the greater weight of the evidence that all the items in the account sued on were correct in amount and justly owed by defendant. There is neither allegation nor proof by either party that the work done and materials furnished were to be performed for an agreed sum, and neither allegation nor proof by either party as to the reasonable value of such labor done or materials furnished.

Defendant is entitled to a

New trial.

HOWARD E. KIRBY v. JAMES ALEXANDER FULBRIGHT, DEHART MOTOR LINES, INC. AND COASTAL TRUCKWAYS, INC.

(Filed 12 June 1964.)

1. Courts § 20—

An action growing out of a collision occurring in another state is governed in regard to substantive rights, including whether the evidence is sufficient to require its submission to the jury, by the laws of such other

state, while the adjective law, including the rule that in passing on motion to nonsuit the evidence must be considered in the light most favorable to plaintiff and discrepancies resolved in his favor, is governed by the laws of this State.

2. Evidence § 2—

Our courts are required to take judicial notice of the pertinent statutory laws of a sister state. G.S. 8-4.

3. Automobiles § 41e—

The failure to set out flares or other devices to warn motorists of an unlighted tractor-trailer obstructing a lane of travel on a highway at nighttime is sufficient to support a finding of negligence under both statutory and common law, and whether there is a causal connection between such negligence and a collision is largely a question of fact for the jury.

4. Automobiles § 43— Negligence of driver hitting unlighted truck held not to insulate negligence of other driver in failing to maintain flares.

Plaintiff was injured in a collision between the truck in which he was riding and defendant's tractor-trailer which was standing without lights at nighttime, partly on the hardsurface, so as to block one of the lanes for southbound travel. *Held:* Even conceding negligence on the part of the driver of the truck in which plaintiff was riding in failing to avoid collision with the standing truck, such negligence cannot be held to insulate defendant's negligence, since injurious consequences could and should have been foreseen from the failure to maintain signals warning of the unlighted truck, and therefore such negligence was at least one of the proximate causes of the collision.

5. Negligence § 21—

The burden of proof on the issue of contributory negligence is upon defendant.

6. Negligence § 26—

Nonsuit for contributory negligence is proper only when the evidence, considered in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable conclusion may be drawn therefrom.

7. Automobiles § 42d— Motorist traveling at lawful speed held not contributorily negligent as matter of law in hitting unlighted vehicle.

The evidence tended to show that defendant's vehicle was standing at nighttime, without lights, blocking one of the southbound lanes for travel, and that the driver of the vehicle in which plaintiff was riding, traveling within the maximum legal speed, saw the standing vehicle when some 50 or 60 feet away but was unable to turn into the left lane for southbound traffic before the right front of his vehicle struck the left rear of the standing vehicle. *Held:* Under the laws of the state of Virginia, in which the accident occurred, the failure of the driver of the truck in which plaintiff was riding to so operate the truck that he could have stopped or turned left in time to have avoided the collision is not contributory negligence as a matter of law.

APPEAL by defendants from *Crissman, J.*, October 21, 1963, Civil Session of GUILFORD, Greensboro Division.

Plaintiff's action is to recover damages for personal injuries he sustained as a result of a collision that occurred about 1:45 a.m. on Saturday, February 14, 1959, on U. S. Highway No. 1, near Doswell, Virginia, between a tractor-trailer (Central T/T) owned by Central Motor Lines, Inc., and a tractor-trailer (DeHart T/T) owned by DeHart Motor Lines, Inc., and leased to and operated under the franchise of Coastal Truckways, Inc.

The Central T/T was operated by Walter L. Thompson. He and Howard E. Kirby, the plaintiff, were co-drivers and agents of Central. When the collision occurred, plaintiff was in the sleeping compartment of Central's tractor, asleep.

The DeHart T/T was operated by defendant James Alexander Fulbright as agent of the corporate defendants.

The highway, where the collision occurred, runs generally north and south. Two "solid white parallel lines" mark the center. Two lanes east of said center lines are for northbound traffic. Two lanes west of said center lines are for southbound traffic. The two lanes for southbound traffic (also the two lanes for northbound traffic) are divided by a broken white line.

The DeHart T/T, headed south, was parked partly on the right (west) lane for southbound traffic and partly on the shoulder. The Central T/T, proceeding south in said right (west) lane for southbound traffic, struck the rear of the parked DeHart T/T, the right front of the Central tractor striking the left rear of the DeHart trailer.

As a result of said collision: Plaintiff was seriously injured. The DeHart T/T, which was loaded and weighed some 56,000 pounds, was knocked 20-25 feet. The left rear of the DeHart trailer was extensively damaged. The Central T/T, which was loaded and weighed some 48,000-50,000 pounds, stopped some 15-18 feet from the point of impact. The Central tractor "was just practically junk."

Plaintiff alleged the negligence of Fulbright, imputed to the corporate defendants, proximately caused the collision and his injuries.

Defendants, by joint answer, denied plaintiff's allegations as to their actionable negligence. They alleged the negligence of Thompson was the sole proximate cause of the collision. They alleged further: If not the sole proximate cause, the negligence of Thompson was one of the proximate causes of the collision and a bar to recovery of the amount to which Central and its compensation insurance carrier would otherwise be entitled (by subrogation) on account of payments made and to be made to and for the benefit of plaintiff under the North Carolina Workmen's Compensation Act.

Evidence was offered by plaintiff and by defendants.

The issues submitted, and the jury's answers, are as follows: "1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes. 2. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $35,000.00. 3. Was the Central Motor Lines, Inc., through the driver of its tractor-trailer, negligent and did its negligence contribute to the injuries to the plaintiff, as alleged in the answer? Answer: No."

Judgment, "that the plaintiff have and recover of the defendants, and each of them, jointly and severally, the sum of THIRTY-FIVE THOUSAND and no/100 ($35,000.00) DOLLARS, together with the costs of this action to be taxed by the Clerk," was entered.

Defendants excepted and appealed.

Jordan, Wright, Henson & Nichols; William B. Rector, Jr.; Smith, Moore, Smith, Schell & Hunter; and Stephen Millikin for plaintiff appellee.

Lovelace & Hardin for defendant appellants.

BOBBITT, J. In this Court, on oral argument, defendants, through their counsel, abandoned all their assignments of error except those which present two questions, *viz.:* 1. Are defendants entitled to judgment of nonsuit? 2. If not, does the evidence disclose as a matter of law that Thompson was contributorily negligent as alleged in the answer?

The substantive rights and liabilities of the parties are to be determined in accordance with the law of Virginia, the *lex loci.* Procedural matters are to be determined in accordance with the law of North Carolina, the *lex fori. Nix v. English,* 254 N.C. 414, 419, 119 S.E. 2d 220, and cases cited; *Knight v. Associated Transport,* 255 N.C. 462, 464, 122 S.E. 2d 64; *Frisbee v. West,* 260 N.C. 269, 271, 132 S.E. 2d 609. G.S. 8-4 requires that we take judicial notice of the pertinent Virginia law.

Whether, under the substantive law of Virginia, the evidence was sufficient to require its submission to the jury is determinable in accordance with the procedural law of this jurisdiction. *Nix v. English, supra,* and cases cited; *Knight v. Associated Transport, supra,* and cases cited. Hence, under our established rule, the evidence must be considered in the light most favorable to plaintiff. Too, discrepancies and contradictions in the evidence, even though such occur in the evidence offered in behalf of plaintiff, are to be resolved by the jury, not by the court. *Stathopoulos v. Shook,* 251 N.C. 33, 36, 110 S.E. 2d 452. *Cf. Allen v. Brooks (Va.),* 124 S.E. 2d 18.

There was evidence tending to show the following facts: Fulbright, while traveling south, "ran out of gas." When the DeHart T/T stopped, the right wheels were on the "two-foot shoulder." With this exception, the DeHart T/T was on the right (west) lane for southbound traffic, referred to in the evidence as the "driving lane" as distinguished from the "passing lane." Six to six and one-half feet of the DeHart T/T was in the said (paved) traffic lane. Fulbright put out two "ten minute fusees." A Virginia patrolman, traveling south, observed the bright red glare of these fusees for at least a mile. There were no lights on the DeHart T/T. The patrolman told Fulbright to "turn his lights on," but Fulbright "had not turned them on" when the patrolman (continuing south) left. Thereafter, when two southbound tractor-trailers passed, there were no lights on the DeHart T/T and no (burning) fusees or flares anywhere in the area. "The truck (DeHart T/T) was stopped completely in the dark." One driver first saw the DeHart T/T when he was forty to fifty feet from it. He made "a turn to the left and missed it." The other driver first saw the DeHart T/T when he was fifty feet from it. He turned to his left and "missed it approximately five feet." Shortly thereafter, as Thompson approached, there were no lights on the DeHart T/T and no (burning) fusees or flares anywhere in the area.

While evidence favorable to defendants was in sharp conflict, the foregoing was sufficient to support findings that defendants failed to provide lights, torches or flares, as required by Section 46.1-255 and Section 46.1-276 of the Code of Virginia (1950). See also, Section 46.1-248. "The violation of a statute constitutes negligence *per se*, and if it proximately causes or contributes to an injury, it will support a recovery of damages for such injury." *Crist v. Fitzgerald (Va.)*, 52 S.E. 2d 145, 148. Independent of statute, there was evidence sufficient to support findings that defendants failed to exercise due care to give notice to southbound traffic that the DeHart T/T was substantially blocking the "driving lane" for southbound traffic. "The question of proximate cause, or whether there is causal connection between negligence and accident, is a question of fact." *Scott v. Simms (Va.)*, 51 S.E. 2d 250, 253.

Defendants contend the evidence, if sufficient to support a finding that they were negligent as alleged, is insufficient to support a finding that such negligence on their part was a proximate cause of the collision. Defendants do not allege or contend plaintiff was negligent. They contend Thompson was negligent and that Thompson's negligence was the *sole* proximate cause of the collision.

Pertinent to defendants' said contention, there was evidence tending to show the following facts: The DeHart T/T was on a "gradual

hill" (about 4% grade) approximately 250 feet south of a "little dip." Thompson came down a hill and passed through the "little dip." Earlier it had been raining. It was "very cloudy." The road (blacktop) was wet. A "little patch of fog" was rising from the creek in the "little dip." However, there was no fog from the "little dip" up to the DeHart T/T. Going up the "gradual hill," in the "driving lane" for southbound traffic, Thompson was driving at a speed of approximately forty miles per hour. His headlights were on low beam. They were in good condition and enabled him to see an object in front of him for at least one hundred feet. The DeHart trailer was "dirty." When fifty or sixty feet away, Thompson saw "a dark object in the road" in front of him. Thompson hit his brakes, swerved to his left and "(t)he right front of (his) tractor came in contact with the left rear of the (DeHart) trailer."

On cross-examination, Thompson testified he could not say positively whether he could have stopped the Central T/T in a hundred feet or less. His testimony, pertinent to his ability to swerve to the left in time to avoid collision, was as follows: "Yes, I can turn my truck into another lane in less than fifty or sixty feet, but you got to consider the time of reaction and all in this fifty feet."

Defendants contend the evidence establishes *as a matter of law* that Thompson was negligent and that Thompson's negligence "intervened and insulated any negligence of the driver of the defendants' truck" and was the sole proximate cause of the collision. In considering this contention, which underlies defendants' motion for nonsuit, we assume but do not decide that negligence on the part of Thompson was a proximate cause of the collision.

In *Crist v. Fitzgerald, supra,* the plaintiff was *a passenger* in an automobile which collided at night with the rear of a trailer parked in the right lane of the highway without warning lights. On appeal from a judgment for the plaintiff, the court rejected the defendant's contention that the evidence disclosed as a matter of law that negligence on the part of the driver of the car in which the plaintiff was riding was the sole proximate cause of the collision. The legal principles stated and applied in *Crist v. Fitzgerald, supra,* and cases cited therein, are set forth in opinion by Spratley, J., as follows:

"In *Jefferson Hospital v. Van Leer,* 186 Va. 74, 41 S.E. 2d 441, 444, we said: '* * * an intervening cause does not operate to exempt a defendant from liability if that cause is put into operation by the defendant's wrongful act or omission * * *.

" 'An intervening cause will not be deemed to have broken the causal connection if the intervening cause was foreseen or reasonably might have been foreseen by the wrongdoer.'

"In *Richmond v. Gay's Adm'x,* 103 Va. 320, 324, 49 S.E. 482, 483, it was said: '* * * And in order to excuse the defendant's negligence, this intervening cause must be either a superseding or responsible cause. To be a superseding cause, whether intelligent or not, it must so entirely supersede the operation of the defendant's negligence that it alone, without the defendant's contributing negligence thereto in the slightest degree, produces the injury. * * *'

"To the same effect see also *Appalachia Power Co. v. Wilson,* 142 Va. 468, 129 S.E. 277; and *Scott v. Simms, Adm'r, supra.*"

The elements of proximate cause are defined in *Scott v. Simms, supra.* With reference to the element of foreseeability, the court said: "In order for the defendant's negligence to be a proximate cause of the injury, it is not necessary that the defendant should have foreseen the precise injury that happened. It is sufficient if an ordinary, careful and prudent person ought, under the circumstances, to have foreseen that an injury might probably result from the negligent act."

Applying the cited Virginia decisions: If, as the evidence favorable to plaintiff tends to show, the DeHart T/T was stopped in and substantially blocked the "driving lane" for southbound traffic on U. S. Highway No. 1 at night without lights, flares or other warning of its presence and position, there was ample basis for factual findings that defendants, in the exercise of due care, could and should have foreseen that injurious consequences might probably result from their negligence and that defendants' negligence was not entirely superseded as a proximate cause of the collision. Stated differently, there was ample basis for a factual finding that the negligence of defendants was at least one of the proximate causes of the collision. Hence, defendants were not entitled to judgment of nonsuit.

If not entitled to judgment of nonsuit, defendants contend the evidence establishes as a matter of law that Thompson (Central's agent) was contributorily negligent as alleged in the answer. If so, defendants contend, based on legal principles stated in *Essick v. Lexington,* 233 N.C. 600, 606, 65 S.E. 2d 220, and cases cited, the judgment should be reduced by striking therefrom the amount to which Central and its compensation insurance carrier would otherwise be entitled (by subrogation) on account of payments to and for the benefit of plaintiff under the North Carolina Workmen's Compensation Act.

The third issue arose on defendants' allegations in which they plead the contributory negligence of Thompson (Central) as a bar *pro tanto* to plaintiff's action. On this issue, the burden of proof was on defendants to establish said plea. *Essick v. Lexington, supra,* and cases cited; *Lovette v. Lloyd,* 236 N.C. 663, 669, 73 S.E. 2d 886. This issue was for

jury determination unless the evidence, when considered in the light most favorable to plaintiff, establishes Thompson's (Central's) contributory negligence as alleged in the answer so clearly that no other reasonable inference or conclusion may be drawn therefrom.

The allegations on which defendants base said plea, as stated summarily in their brief, are that Thompson "was negligent in that he was speeding, was not keeping a proper lookout, outran his headlights, failed to have his tractor-trailer unit under proper control and failed to turn his tractor-trailer unit to his left and avoid striking the tractor-trailer unit of the defendants, as a person of ordinary prudence would have done."

The evidence most favorable to plaintiff tends to show Thompson was traveling in his proper lane on a four-lane highway apparently free of traffic at 40 miles an hour in a 45-mile speed zone for trucks.

The evidence is equivocal as to whether Thompson could have stopped within the range of his headlights. However, "it has never been held as a principle of law in Virginia, that the operator of an automobile must so operate his vehicle that he can stop within the range of his lights, or within the range of his vision." *Twyman v. Adkins (Va.),* 191 S.E. 615; *Body, Fender & Brake Corporation v. Matter (Va.),* 200 S.E. 589.

Bearing upon Thompson's alleged failure to keep a proper lookout and exercise proper control and cut to his left in time to avoid collision: Thompson had the right to assume the "driving lane" was clear until he saw or by the exercise of reasonable care should have seen it was obstructed. As stated (in accordance with cited prior decisions) in *Crist v. Fitzgerald, supra:* "The driver of plaintiff's car was travelling in her proper lane, and she had the right to assume that no vehicle or obstruction would be parked on the highway in front of her." True, Thompson testified on cross-examination his (low beam) headlights would show up an object at least a hundred feet away (see Code of Virginia (1950), Section 46.1-270); that he did not see this object (DeHart T/T) until he was fifty or sixty feet from it; and that (without allowing for reaction time) he could turn the Central T/T into another lane in less than fifty or sixty feet. It is contended that this testimony shows conclusively that Thompson saw or by the exercise of due care should have seen the DeHart T/T for a distance of one hundred feet or more and that, had he done so, he could by the exercise of due care have turned to his left and avoided the collision. While this evidence, together with evidence that the two drivers who preceded Thompson were able (by a narrow margin) to avoid collision with the DeHart T/T, was for consideration by the jury, we cannot

say that Thompson was required as a matter of law to act with the precision and infallibility upon which defendants' said contention is based.

While there was ample evidence to support a verdict in defendants' favor on the third issue, we are of opinion, and so decide, that the evidence, when considered in the light most favorable to plaintiff, does not establish as a matter of law that Thompson was contributorily negligent as alleged in the answer. As stated in *Armstrong v. Rose (Va.),* 196 S.E. 613: "We cannot say, under the circumstances here, that all reasonable men could reach but one conclusion."

Decisions cited by defendants include *Barnes v. Ashworth (Va.),* 153 S.E. 711; *Kinsey v. Brugh (Va.),* 161 S.E. 41; *Davis v. Scarborough (Va.),* 97 S.E. 2d 731.

In *Barnes v. Ashworth, supra,* the plaintiff's intestate was standing in the highway beside a parked car at the scene of a minor automobile collision when struck by the defendant's car and killed. On appeal, judgment for the plaintiff in accordance with the verdict was reversed on the ground the evidence disclosed the plaintiff's intestate was contributorily negligent as a matter of law.

In *Kinsey v. Brugh, supra,* the plaintiff, traveling by buggy, was injured when the rear of his buggy, partly on the hard surface and partly on the shoulder, was struck by defendant's truck. There was a judgment for the plaintiff in accordance with the verdict. Upon appeal, the court rejected the defendant's contention that the plaintiff was guilty of contributory negligence as a matter of law. The court said: *"The jury found, as they had a right to do from this testimony,* that the defendant was guilty of negligence, and that such negligence was the sole proximate cause of the injury, and that the failure of the plaintiff to carry a light was the remote cause which may have antecedently contributed to it." (Our italics).

In *Davis v. Scarborough, supra,* the plaintiff's intestate, whose car was parked partly on the highway, was changing the left rear tire when struck and killed by a car operated by the defendant. On appeal, it was held that the issues of negligence and contributory negligence were for jury determination.

The decisions cited below involve factual situations where the plaintiff (or the plaintiff's intestate), while driving his car at night in his proper highway lane, strikes the rear of a vehicle parked without lights or other warning signals.

In *Harris v. Howerton (Va.),* 194 S.E. 692, and in *Perdue v. Patrick (Va.),* 29 S.E. 2d 371, cited by defendants, the plaintiff was held contributorily negligent as a matter of law.

In *Harris v. Howerton, supra,* the evidence disclosed the plaintiff was driving on a street (used as a public highway) and was familiar with the custom of residents to park unlighted vehicles in front of their homes. There was undisputed evidence as to the presence and effect of nearby street lights. This excerpt indicates the basis of decision: "The evidence is uncontradicted, save by the negative testimony of the plaintiff, that he did not see the truck; *that the highway was sufficiently lighted to show its presence;* and that with proper lights on the plaintiff's car the driver could have discerned its presence if he had been keeping a proper lookout regardless of whether a rear light was displayed." (Our italics).

In *Perdue v. Patrick, supra,* the defendant's truck had stopped and was stalled at a railroad grade crossing. The driver, "in an effort to get more current to start his engine," cut off his bright lights and cut on his dim or parking lights. According to undisputed evidence, one of the flares the driver of the truck had put out "was present and illuminated" as the plaintiff approached. Based on these and other evidential facts adverse to the plaintiff, the court concluded the uncontroverted evidence established contributory negligence as a matter of law.

Whether the plaintiff (or the plaintiff's intestate) was contributorily negligent was held for jury determination in the following cases: *Twyman v. Adkins, supra; Body, Fender & Brake Corporation v. Matter, supra; Armstrong v. Rose, supra; Allen v. Brooks, supra.*

For the reasons stated herein, the assignments of error brought forward for decision on this appeal are overruled. Hence, the verdict and judgment will not be disturbed.

No error.

KATHERINE TODD WATSON v. GEORGE ROBERT CLUTTS.

(Filed 12 June 1964.)

1. Physicians and Surgeons § 16—

Where plaintiff's own expert witness testifies from a microscopic examination of plaintiff's thyroid gland after removal that while it was not malignant it was diseased and of a type indicating surgery, plaintiff fails to make out a case upon her contention that defendant surgeon was negligent in employing surgery in her case rather than medication.

2. Pleadings § 29—

Allegations contained in a pleading are ordinarily conclusive as against the pleader.

3. Physicians and Surgeons § 16—

Plaintiff's contentions, based upon her testimony, that defendant surgeon was negligent in failing to advise her of the nature of the operation and its consequences prior to the operation, cannot prevail in the face of an allegation in plaintiff's complaint that defendant advised plaintiff that the contemplated surgery was serious and was not done without risk.

4. Physicians and Surgeons § 11—

Except in emergencies, consent of the patient or someone duly authorized to consent for him is required before a surgeon undertakes an operation. Such consent must be based upon a disclosure of the risks involved of which the surgeon has knowledge and the patient has not, so that the patient may make an informed decision, but the extent of such disclosure must be balanced against the surgeon's primary duty to act in the best interest of the patient.

5. Physicians and Surgeons § 16—

Where plaintiff's own expert witness testifies to the effect that the paralysis depriving her of the use of her vocal cords was not due to the cutting of a nerve during the thyroidectomy performed by defendant surgeon, but was due to the natural growth of scar tissue which choked off the blood supply to the nerves, plaintiff's evidence fails to make out a cause of action upon the theory that defendant surgeon negligently severed a nerve during the thyroidectomy.

6. Physicians and Surgeons § 15—

Where plaintiff's own expert witness testifies that surgery was indicated in plaintiff's case, and plaintiff's own allegations are to the effect that she was advised that the operation was serious and involved some risk, testimony by plaintiff that she would not have consented to the operation had she been advised that it involved a danger of paralysis of her vocal cords, is properly excluded, since plaintiff will not be permitted to change her decision as to consent in light of conditions after the operation rather than before.

7. Same—

The court properly excludes that part of hospital records relating to a second operation indicating that a nerve had been cut in a prior operation when such records were made by a physician other than the surgeon performing the operation and plaintiff's own expert witness who actually performed the second operation testifies that he found no evidence that a nerve had been cut.

8. Physicians and Surgeons § 16—

Res ipsa loquitur does not apply in malpractice cases and liability must be based on proof of actionable negligence.

APPEAL by plaintiff from *Shaw, J.*, September 23, 1963 Session, GUILFORD Superior Court, Greensboro Division.

The plaintiff instituted this civil action to recover damages for the personal injuries she alleged she suffered as a result of the defendant's

negligence in performing a subtotal thyroidectomy. At the conclusion of the plaintiff's evidence, the court sustained a demurrer to the evidence and entered judgment dismissing the action. The plaintiff appealed.

Harry J. O'Connor, Jr., Sapp & Sapp by Armistead W. Sapp for plaintiff appellant.

Jordan, Wright, Henson & Nichols, G. Marlin Evans, Hubert E. Seymour, Jr., by G. Marlin Evans for defendant appellee.

HIGGINS, J. The plaintiff alleged that on September 13, 1960, she became the patient of the defendant, a physician specializing in surgery, having been referred to him by her regular physician, Dr. Merritt. The defendant had the plaintiff admitted to the L. Richardson Memorial Hospital in Greensboro "for examination and probable surgery. Defendant advised the plaintiff that additional studies would be made at the hospital to determine whether surgery was necessary."

The complaint, among other allegations, contained the following:

> "VII. While in defendant's office on September 13, 1960, the defendant advised plaintiff that she would have to remain in the hospital approximately a week prior to surgery as this was a serious operation; that the operation was not done without risk, that it was a bigger operation than one would say of an appendectomy or some lesser procedure. No further explanation or description of the operation nor of its possible results was made to plaintiff.
>
> "When plaintiff entered L. Richardson Memorial Hospital and before any tests or examinations were made she was presented and signed a form which contained a written consent for defendant to perform an operation on her.
>
> "On September 26, 1960 at L. Richardson Memorial Hospital the defendant operated on the plaintiff's throat for the purpose of performing a subtotal thyroidectomy. * * *
>
> "During the operation defendant carelessly and negligently severed both recurrent laryngeal nerves which resulted in paralysis of plaintiff's vocal cords on both sides of her throat."

Additional allegations charged that the defendant negligently failed (1) to ascertain that the thyroid gland was not malignant and should have been treated by medication rather than by surgery; (2) to advise the plaintiff of the dangers involved in surgery; (3) to obtain an enlightened consent for the operation; (4) to follow proper surgical procedures in performing the operation, thereby severing the recurrent laryngeal

nerves, causing permanent paralysis of the vocal cords; (5) to evaluate and remedy in so far as possible the injuries resulting from the operation.

The trial consumed almost one week. The record and the briefs are full and complete. The evidence consisted in the main of technical medical testimony and hospital records. In addition, the plaintiff, age 32, testified that in March or April, 1960, she consulted Dr. Fred Merritt, her family physician, because of her nervousness and loss of weight. Dr. Merritt prescribed "thyroid, vitamins, and iodine." This treatment continued, except for a short interval, until September when Dr. Merritt advised, "That I was able to take the operation . . . and he sent me to Dr. Clutts. . . . After examination, Dr. Clutts said, 'There's thyroid there . . . that it should be removed . . . He told me that I would have to remain in the hospital a week before the operation in order to run some tests." Dr. Merritt checked the charts on Thursday. "Dr. Clutts . . . asked me was I ready for the operation. I told him, 'Yes.' He said, . . .'We will do it on Monday and after this operation you will feel like you are 16 again.' At no time while I was in the hospital did Dr. Clutts make any further statement to me as to the nature of the operation and its probable consequences."

"I talked to Dr. Clutts about my condition the next morning (after the operation) and he said that he had run up on a little difficulty and said that my thyroid was wrapped around my vocal cord and that was the condition he found. . . . He said it was nothing to worry about, that it would be all right."

The plaintiff further testified as to the hoarseness, difficulty in breath ing and in talking, beginning immediately after the operation and continuing, although she returned to work for a few months. After consulting with Dr. Clutts a number of times, she returned to Dr. Merritt for treatment. Thereafter, she consulted with Dr. Shahane Taylor who sent her to the Memorial Hospital in Chapel Hill where she submitted to a tracheotomy.

Dr. Groat, pathologist at the Richardson Memorial Hospital in Greensboro, made a microscopic examination of the thyroid tissues (removed by the operation). Diagnosis, "Diffuse hyperplasia of the thyroid," and "Parathyroid gland . . . there was no malignancy in this tissue. . . . The gland I examined which came from the patient was diseased. . . . This is the type of thyroid gland that is removed surgically. This is generally done when a patient does come under the care of a physician who finds the condition of thyrotoxicosis, so this is a type of gland which is frequently removed in such case . . . a disease of the thyroid gland in which a gland oversecretes thyroxine or . . . If a patient has that type condition and nothing is done about it, no treatment is given, it may well be fatal sooner or later." * * *

"The vocal cords in relation to the thyroid gland and the larynx or voice box, are in the interior, the interior of the larynx, interior of the upper part of the larynx. Inside the upper part of the larynx. The vocal cords run horizontal from front to back. They consist in part of muscle, which is the interior of the vocal cords. They are covered over by some other types of tissue on the outside. Immediately covering the vocal cords, there is a type of tissue called the connective tissue. Immediately over that, there is a type of tissue lying on the surface of the vocal cords called epithelium. The vocal cords which run from front to back of the throat inside the upper part of the voice box or larynx, open and close. When you breathe in, when you inhale, the cords are open. When you speak, the vocal cords open and close, or go through the motions of what we doctors call abduction and adduction, very rapidly — vibrate. They vibrate at very high speed, and as you speak, that vibration is going on in your vocal cords all the time, but of course, you are not conscious of it . . . While I was making this examination of this tissue, the results of which are covered in my report, Plaintiff's Exhibit 5, during either the gross or microscopic examination, I did not discover the presence of any nerve tissue."

Plaintiff's witness, Dr. Lusk, testified: "There are three basic treatments for an overactive thyroid gland. There is drug treatment. There is radioactive iodine treatment, and there is surgery. . . .

"Now, all three are used and must be used in different conditions. For instance, we generally prefer drug treatment for children and preparation for surgery. Radioactive iodine treatment is x-ray, and we generally reserve that for an older age person or the poor risk patient, or those with a diffuse goiter, who may have exophthalmos, prominence of the eyes.

"Surgery is generally reserved for the younger patient, who is too young to be exposed to the radiation of radioactive iodine or who has a large gland, and, of course, surgery is also reserved for those in which there is any question of cancer. If there is any question of cancer, surgery, of course, becomes the immediate form of treatment, so we have basically three forms of treatment for thyroid, and we have to use our judgment in regards to the patient, each individual, as to which is going to be the best treatment for this patient."

The records from Memorial Hospital at Chapel Hill contain these entries: " 'Section of recurrent laryngeal nerve secondary to thyroidectomy bilateral,' and the words in item 3 on that page, 'due to lesion of nerve.'

" 'Bilateral paralysis of the vocal cords,' these words in quote and enclosed in brackets, 'following surgical trauma to the recurrent laryngeal nerve on each side,' . . . 'due to lesion of nerve'."

Dr. Shahane Taylor of Greensboro, a specialist in otolaryngology, and a plaintiff's witness, testified:

"My examination revealed a complete abductor paralysis of the vocal cords. The abductors of the larynx are muscles which pull the vocal cords apart. When you take a deep breath, your abductor muscles pull your vocal cords apart so you can breathe. I found a complete paralysis of the abductor muscles on both sides. * * *

"I believe that had this girl had an abductor paralysis, she would have had to have had the tracheotomy before she did have it. I don't believe she could have gone that long, and that is my opinion, and the only thing that I know of — talking about fibrous tissue, the only thing that I know of that came on here to cause this delayed paralysis of this larynx is fibrosis from healing, which we all know is one of nature's processes of healing. Fibrosis, formation of scar tissue in healing, it's all the same. All of us heal in scar tissue."

In reviewing a week-long trial in which most of the evidence came from medical experts and from hospital records, the Court necessarily must confine the factual recitals to those matters which bear directly on the questions of law presented by the appeal. To begin with, the plaintiff concedes the defendant possessed the necessary qualifications to permit him, as a surgeon, to accept the plaintiff as his patient and to undertake the diagnosis and treatment of her thyroid involvement. She also concedes he is a specialist in surgery. Her family physician, Dr. Merritt, after diagnosis and treatment for several months, advised surgery, and he referred her to the defendant for the operation. The defendant arranged for her admission to the Richardson Memorial Hospital in Greensboro for further tests and preparation for surgery if required. She signed a proper authorization for the operation.

Notwithstanding this background, the plaintiff alleged the defendant was negligent in that he should have discovered her thyroid condition was nonmalignant and should have treated her by medication rather than by surgery. Not only did the plaintiff fail to offer medical evidence in support of this contention, but her own expert witness, Dr. Foust, testified he made a microscopic examination of the gland after removal, and while it was nonmalignant, nevertheless it was diseased. "This is the type of tryroid that is removed surgically." The plaintiff's witness, Dr. Lusk, testified she is in the category indicating surgery. The decision to operate, therefore, is supported by the plaintiff's own evidence. Negligence in the decision to operate is not disclosed.

The plaintiff next contends her consent to the operation was obtained because of the defendant's negligent failure to advise her of the "nature

of the operation and its probable consequences." She so testified. However, in paragraph VII of the complaint she alleged the defendant advised the plaintiff that she would have to remain in the hospital approximately a week prior to surgery as this was a serious operation; that the operation was not done without risk. The plaintiff is bound by that allegation. "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." *Davis v. Rigsby*, 261 N.C. 684. The plaintiff's testimony that she was not advised of danger must give way to the judicial admission contained in her complaint. In addition, she knew her family physician had advised, and for months had been preparing her for, a thyroidectomy. He checked her chart before the operation.

Courts have expressed widely divergent views as to how far the surgeon should go in advising of dangers involved in a proposed operation. Plaintiff insists this Court should take the extreme view expressed in *Salgo v. Leland Stanford Jr. University Board of Trustees*, 154 Cal. App. 2d 560, 317 P. 2d 170: "A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent." See, also, 40 Minn. Law Review 876.

Of course, the type of risk involved should have bearing on the completeness of the disclosure required. Obviously, brain or heart surgery involves high risks. Removal of an ingrown toe-nail ordinarily does not. However, a surgeon, except in emergency, should make a reasonable disclosure of the risk involved in a proposed surgical operation if the operation involves known risk. And yet, to send a patient to the operating room nervous from fright is not often desirable. The middle ground rule is admirably stated in 75 Harvard Law Review 1445: "The duty narrows then, in the average case, to disclosure of dangers peculiar to the treatment proposed and of which it is likely that the patient is unaware. The doctor should have little difficulty in choosing from these the risks that are sufficiently serious and likely to occur as to be essential to an intelligent decision by his patient."

Difficulty arises in attempting to state any hard and fast rule as to the extent of the disclosure required. The doctor's primary duty is to do what is best for the patient. Any conflict between this duty and that of a frightening disclosure ordinarily should be resolved in favor of the primary duty. And yet, the consent of the patient or of someone duly authorized to consent for him, except in emergencies, is required before the operation is undertaken. The surgeon should disclose danger of which he has knowledge and the patient does not — but should have — in order to determine whether to consent to the risk.

In this instance the defendant, according to the plaintiff's judicial admission, was advised the operation was serious and involved risk. For months Dr. Merritt had been preparing her for surgery. If, in order to withdraw her written consent, she desired to be further advised, a simple request would have disclosed the surgeon's view as to adverse possibilities. The claim of defendant's failure to advise the patient that the proposed operation was serious and involved risk is not sustained.

Does the evidence disclose negligence in performing the operation? The plaintiff's pathologist made a microscopic examination of the gland after removal. "I did not discover the presence of any nerve tissue." Plaintiff's witness, Dr. Taylor, gave as his opinion that if the nerve had been severed by the operation, paralysis would have been immediate, and a tracheotomy would have been required. The delayed paralysis, in his opinion, resulted from the formation of scar tissue developed in the healing process. This view appears to be strengthened by the plaintiff's evidence that on the day following the operation the defendant told her he ran into some difficulty during the operation and that the gland had wrapped itself around the vocal cord. Hospital records at Chapel Hill disclose heavy scar tissue was encountered in the tracheotomy. The evidence is insufficient to disclose negligence in the surgical procedure followed by the defendant in this case. Either of two operative procedures has its advocates among surgeons. See *DiFilippo v. Preston,* 173 A. 2d 333 (Supreme Court of Delaware, decided June 29, 1961).

The evidence offered at the trial indicates that the slow process involved in scar tissue formation following the operation finally choked off the flow of blood to the nerves which supply the motor power for the vocal cords, causing paralysis. Plaintiff's evidence fails to show the paralysis resulted from a severance of the nerves during the operation. This view is supported by the plaintiff's own evidence. After the operation at Richardson Hospital in Greensboro in September, 1960, and before the tracheotomy in Memorial Hospital at Chapel Hill in November, 1961, the plaintiff was treated by her regular physician, Dr. Merritt. She did not call him as a witness.

The plaintiff attempted to testify that if the defendant had advised her the operation might involve paralysis of the vocal cords she would have withdrawn her consent. The court excluded this testimony which presented a case of looking backward. Perhaps the defendant with the benefit of a backward look would not have performed the operation; but at the time decision was made to operate the surgeon was dealing with a patient who had a diseased gland which failed to secrete the proper amount of hormone. The medical experts, plaintiff's witnesses, say surgery in such event is indicated. All cutting operations involve some risks. Possible

dangers of an operation had to be balanced against the certain danger of a diseased thyroid. Decision had to be made before the operation. To permit the plaintiff to change the decision afterwards is equivalent to looking at the answer without solving the problem.

The court, over objection, admitted in evidence certain entries made in the hospital records at Chapel Hill, including the following: "Diagnosis: paralysis of vocal cords (due to nerve lesions) . . . secondary to thyroidectomy bilateral . . . (due to nerve lesions)." These entries were made by Dr. Haywood, then serving his first year as assistant resident physician. Later in the record Dr. Haywood repeated in substance this diagnosis. At the time of these entries, Dr. John W. Foust was resident physician and in overall charge of the patient and the records. He actually initialed them as approved.

Dr. Foust and Dr. Mason performed the tracheotomy. Dr. Foust testified: ". . . (T)he first diagnosis that is listed here is one that I don't think can be made on the basis of studies that have been made on the patient while at Chapel Hill. . . . I would interpret this diagnosis to mean that the nerve had been sectioned, which means cut, . . . From the information we have in this chart, we have no evidence that a nerve has been cut." On the basis of the foregoing testimony of the plaintiff's witness, Dr. Foust, the court withdrew from the jury that part of Dr. Haywood's diagnosis enclosed in parenthesis. If the plaintiff's own evidence shows that Dr. Haywood did not have sufficient basis for the opinion he expressed in the hospital records, and in fact without a showing of his having made any tests, or his qualification to make them, the exclusion was not error.

The decisions of this Court generally hold that liability in malpractice cases must be based on proof of actionable negligence. The doctrine *res ipsa loquitur* cannot be relied on to supply deficiencies in the proof. *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762; *Hawkins v. McCain*, 239 N.C. 160, 79 S.E. 2d 493; *Grier v. Phillips*, 230 N.C. 672, 55 S.E. 2d 485; *Smith v. Wharton*, 199 N.C. 246, 154 S.E. 12.

After careful review of all assignments of error, we conclude the demurrer to the evidence was properly sustained.

Affirmed.

STATE OF NORTH CAROLINA v. WALTER THOMAS LAWRENCE.

(Filed 12 June 1964.)

1. Robbery § 1—

Robbery is the taking of money or goods with felonious intent from the person of another, or in his presence, against his will, by violence or putting him in fear, and the felonious intent with respect to the law of robbery is the intent to deprive the owner of his goods and to appropriate them to the defendant's own use.

2. Robbery § 5—

In defining robbery as the felonious taking of personal property from the person of another, or in his presence without his consent, against his will, by violence or putting him in fear, it is proper for the court to explain to the jury that the felonious intent is the intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker, and the failure of the court to do so must be held for prejudicial error when defendant introduces evidence that the taking amounted only to a forceful trespass. Further, an instruction that "taking unlawfully" would support conviction, is error.

APPEAL by defendant from *Morris, J.*, October 1963 Session of GATES.

This is a criminal action in which defendant is charged with robbery and felonious assault.

The State's version of the occurrence giving rise to the prosecution is as follows: On 6 April 1963 the prosecuting witness, Glenn M. Wimbley, a member of the U. S. Marine Corps, was en route from Camp Lejeune to Norfolk. He was dressed as a civilian. The car in which he was riding developed mechanical trouble in Washington, N. C. While he was walking along a street a car stopped and the occupants invited him to ride. He accepted. Defendant Walter Thomas Lawrance was driving; the other passenger was Noah Lawrence. At Windsor defendant and Wimbley purchased whisky — all three took a drink. They then proceeded toward Norfolk and Wimbley fell asleep. About "dusk dark" he was awakened by the jolting of the car which came to a stop on a dead-end road in Gates County. Noah commenced hitting Wimbley with his fists. The latter disengaged himself and attempted to run, but Noah overtook him and caught him by the sweater. Defendant came up and began striking Wimbley with his fists. Defendant said, "You owe me something." Wimbley replied, "What do I owe you . . . I would be glad to pay you." Defendant answered, "That's O. K., I'll get it myself." Defendant forcibly seized Wimbley's wallet and took some money from it. The assault continued and Wimbley was struck on the head by his assailants with bottles. He managed to make his escape to a nearby farm house. Defendant and Noah Lawrence drove away.

Defendant offered no evidence.

Verdict of the jury: Guilty of robbery. Judgment: Prison sentence.

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

Philip P. Godwin and Gerald F. White for defendant.

MOORE, J. Defendant assigns as error portions of the judge's charge defining robbery and applying the legal elements of the offense to the facts in evidence.

In the preliminary explanation of the law with respect to robbery the judge stated to the jury: "Robbery, gentlemen of the jury, is the felonious taking of the personal property from the person of another, or in his presence, without his consent or against his will, by violence, intimidation or putting him in fear."

Robbery, as distinguished from robbery with firearms or other dangerous weapons (G.S. 14-87), is strictly a common law offense and is not defined by statute. Common law robbery (the offense with which defendant is charged in the indictment) is defined and explained by Sir William Blackstone as follows: "Open and violent larceny from the *person,* or *robbery,* the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear. 1. There must be a taking, otherwise it is no robbery. . . . 2. It is immaterial of what value the thing taken is . . . 3. Lastly, the taking must be by force, or a previous putting in fear . . . This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies . . . it is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent." Chitty's Blackstone (19th London Ed., 1857), Book IV, Ch. XVII, pp. 242-244.

Common law robbery has been repeatedly and consistently defined by this Court in accordance with the Blackstone definition. *State v. Stewart,* 255 N.C. 571, 572, 122 S.E. 2d 355; *State v. McNeely,* 244 N.C. 737, 741, 94 S.E. 2d 853; *State v. Sipes,* 233 N.C. 633, 635, 65 S.E. 2d 127; *State v. Bell,* 228 N.C. 659, 662, 46 S.E. 2d 834; *State v. Holt,* 192 N.C. 490, 492, 135 S.E. 324; *State v. Brown,* 113 N.C. 645, 647, 18 S.E. 51; *State v. Burke,* 73 N.C. 83, 87. The phraseology most often employed is, "Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." However, there are some slight but immaterial variations in the language used in the cases.

There was formerly more severe punishment if it was alleged and proven that the offense was committed on or near a public highway. Blackstone comments: "This species of larceny is debarred of the benefit of clergy by statute 23 Hen. VIII, c. 1, and other subsequent statutes, not indeed in general, but only when committed in a dwelling-house, or in or near the king's highway. A robbery therefore in a distant field, or footpath, was not punished with death; but was open to the benefit of clergy, till the statute 3 & 4 W. & M. c. 9, which takes away clergy from both principals and accessories before the fact, in robbery, wheresoever committed." These statutes were repealed by 7 & 8 G. IV, c. 27. Until a relatively recent date robbery in or near a public highway (highway robbery) was a capital offense in North Carolina. *State v. Johnson,* 61 N.C. 140 (1866); *State v. Anthony,* 29 N.C. 234 (1847). But the distinction between robbery and highway robbery, as to punishment and otherwise, is no longer recognized in this jurisdiction — the punishment is imprisonment in the State's prison for a term not to exceed 10 years. G.S. 14-2; *In re Sellers,* 234 N.C. 648, 68 S.E. 2d 308. But see G.S. 14-87; G.S. 14-88; G.S. 14-89; G.S. 14.89.1.

The excerpt from the charge, quoted above, of the trial judge in the instant case is in accord with the definition of common law robbery approved by this Court. Defendant agrees that this is so, but contends that the phrase "felonious taking," without further explanation, is insufficient to inform the jury of the specific felonious intent requisite to constitute robbery in a forcible taking, and that it is error for the judge, in applying the law to the facts (G.S. 1-180), to fail to explain in certain and, to a layman, understandable terms the essential felonious intent implicit in the expression "felonious taking." We think that the question raised is of sufficient importance to warrant a re-examination of robbery cases involving jury instructions with respect to the elements of robbery and especially those dealing with felonious intent as an element.

State v. Sowls, 61 N.C. 151, is a leading case. By force and intimidation defendant took a sword from a house against the will of the occupants. He stated that he was acting under orders of the captain of the Home Guard, the sword was taken for the purpose of disarming prosecutor and not to appropriate it. The act was committed in 1865 during the War between the States; the case was tried in 1866 after the surrender. The trial judge refused defendant's request that he instruct the jury that it was only a case of forcible trespass, but charged the jury that they could not convict unless they were satisfied beyond a reasonable doubt that the taking and carrying away was with a "felon-

ious intent." He "explained that the taking and carrying away are felonious, where the goods are taken against the will of the owner . . ., or where possession is obtained either by force, or surprise, or by trick . . ., and where the taker intends in any such case fraudulently to deprive the owner of his entire interest in the property, against his will." On appeal a *new trial* was awarded. The Court, after giving the common law definition of robbery, said: "It must be done *animo furandi,* with a felonious intent to appropriate the goods taken to the offender's own use. Roscoe's Cr. Ev., 895. Although a person may wrongfully take the goods, yet unless he intended to assume the property in them, and to convert them to his own use, it will amount to trespass only, and not to a felony. 1 Hale's P. C., 590." Further: ". . . it is apparent that the distinction between robbery and forcible trespass is, that in the former there is, and in the latter there is not, a felonious intention to take the goods, and appropriate them to the offender's own use . . . Now this intent is a question of fact, and must be submitted to the jury with *such instructions* from the court as the circumstances of each case may require."

It was stated in *State v. Deal,* 64 N.C. 270, that "If one takes the property of another, it is a mere trespass . . .; if *manu forti,* the owner being present, it is a forcible trespass . . . If the taking be with a felonious intent, the act is larceny, either stealing, or robbery. So it turns upon the felonious intent . . ."

In *State v. Curtis,* 71 N.C. 56, defendant was charged with robbery, and there was a special verdict. The facts found were equivocal on the question of intent. A new trial was ordered that a jury might find whether the taking was with a felonious intent. The Court said: "In the case before us the special verdict states what was done, but the intent is not stated. And it is very evident that that was the difficulty they had in coming to a general verdict. They could not satisfy themselves as to the intent. Was it the purpose to steal, or was it a Christmas frolic. Now that is not a question of law, but it is a question of fact which the jury ought to have found."

State v. Burke, supra, turns on the questions of taking and asportation — intent is only indirectly involved. Defendant stopped the prosecuting witness on a road at night and accused the latter of having robbed him. When the prosecuting witness denied the accusation, defendant demanded money and by means of assault, threats and intimidation caused the prosecuting witness to give him a dollar. Defendant threw the money on the ground and said he would have to have seven dollars. After further effort to procure money defendant departed leaving the dollar on the ground. There was a prayer for special instruc-

tions which the trial judge refused to give. On appeal, this Court defined robbery according to the common law definition, and said: "Unlike larceny, the gist of the offense in robbery is not in the taking, but in the force and terror used . . . Hence, when his Honor charged . . . that if the prisoner kept the money in his hands, 'one minute,' it was a sufficient taking . . ., he was supported by all of the authorities." We do not understand from the holding in this case that the taking and the intent were considered unimportant; the case stands for the proposition that if the force or putting in fear was enough to cause the prosecuting witness to surrender possession of his property, other elements being present, the taking was sufficient and the crime complete.

In *State v. Nicholson,* 124 N.C. 820, 32 S.E. 813, the following instruction was approved: "If the jury find from the evidence beyond a reasonable doubt . . . the defendant assaulted the prosecuting witness, H. A. Lowery, and put him in fear, and that the prosecuting witness surrendered his pistol, watch and money through fear of bodily injury, to the defendant and that the defendant took through such fear from the possession of the prosecuting witness said pistol, watch and money, and carried them away, and that the defendant did this *feloniously, that is with the intent to deprive the owner of the goods and appropriate them to the defendant's own use,* the jury will find the defendant guilty of robbery as charged in the bill of indictment. If the defendant won the property in question playing cards, and did not take the property in a felonious manner, he could not be guilty under this bill." (Emphasis added).

State v. Lunsford, 229 N.C. 229, 49 S.E. 2d 410, is a more recent case dealing directly with the matter of intent. The prosecuting witness Maney on a Saturday afternoon had in possession and displayed a pistol in a cafe. He went to the rest room where defendants forcibly took the pistol from him and carried it away. Defendant Lunsford surrendered the pistol to the arresting officers the following day, Sunday. Defendants' version of the occurrence was that Maney was intoxicated, displayed the pistol in the cafe, came into the rest room where defendants were, got into an argument with Lunsford, drew the pistol and pointed it at Lunsford; defendants took the pistol from Maney to prevent him from shooting Lunsford, and told Maney they would leave the pistol at the cafe on Monday and he could get it there. Defendants were convicted of robbery. On appeal they insisted that the "trial judge erred in failing to instruct the jury as to the felonious intent essential to the crime of robbery." This Court granted a new trial and said:

"Writers upon criminal law often suggest that robbery is merely an aggravated form of larceny. 54 C.J., Robbery, section 11. It has been defined with accuracy and clarity as 'the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation.' Miller on Criminal Law, section 123. This definition clearly comports with that sanctioned by our cases. *S. v. Bell,* 228 N.C. 659, 46 S.E. (2d), 834; *S. v. Burke,* 73 N.C. 83.

"In his charge in the case at bar, the trial judge told the jury with commendable correctness that a person cannot be guilty of robbery in forcibly taking property from the person or presence of another unless the taking is with felonious intent. But he inadvertently failed to explain to the jurors, who were unfamiliar with legal standards, what constitutes the requisite felonious intent in the law of robbery. In the absence of any instruction from the court on this aspect of the case, the jury was necessarily forced to resort to its own notions for the significance of this element of the offense when it passed upon the all-important issue as to whether the defendant acted with felonious intent in taking the pistol from the prosecuting witness.

"Inasmuch as an intent to steal is an essential element of the crime of robbery, the judge ought to have told the jury that in robbery, as in larceny, the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use. S. v. Sowls, 61 N.C. 151; *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560; 54 C.J., Robbery, section 49. It is plain that the judge failed to perform his statutory duty to declare and explain the law as to this substantial feature of the case. G.S. 1-180; *Lewis v. Watson, ante,* (229 N.C.) 20, 47 S.E. (2d), 484."

The charge in *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364, was held to be erroneous for the reason that the judge instructed the jury that they might return a verdict of guilty of common law robbery even if they found that the taking was without felonious intent.

State v. Rogers, 246 N.C. 611, 99 S.E. 2d 803, involves the judge's charge, which included the common law definition of robbery without any further explanation of the phrase "felonious taking." The bill of indictment charged robbery with a dangerous weapon. No question was raised with respect to the sufficiency of the charge on the matter of felonious intent. This Court declared: "The vice of this instruction

is that it directed the jury to return a verdict of guilty of armed robbery as charged in the bill of indictment upon a mere finding that he (defendant) was guilty of common law robbery." This opinion should not be considered as authority for legal propositions which it did not discuss and with which it does not deal.

An essential element of the offense of common law robbery is a "felonious taking," *i.e.,* a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker. A failure to so explain to the jury is error. This is especially true when the evidence will permit a finding that the taking was without felonious intent as, for example, where there may have been only a forcible trespass (*State v. Sowls, supra*) or defensive action (*State v. Lunsford, supra.*)

In the instant case defendant and the prosecuting witness had been drinking. Defendant told prosecuting witness that he owed him something and he (defendant) would get it himself. In the light of all of the circumstances disclosed by the State's evidence, a contention by defendant that his actions amounted only to a forcible trespass may seem unreasonable indeed, but the weight and reasonableness of the evidence is for the jury, and defendant has the right to have the jury consider the case in accordance with his theory of the legal effect of his acts if his theory is supported by any permissible inference to be drawn from the evidence. *State v. Guss,* 254 N.C. 349, 118 S.E. 2d 906. The learned judge inadvertently failed to give a legal explanation of the term "felonious taking," and to apply it to the facts. This was error which entitles defendant to a new trial.

The judge was guilty of another inadvertence when he came to apply the law to the facts. He charged: "I instruct you that if the State of North Carolina has satisfied you from the evidence in this case and beyond a reasonable doubt that on the 6th day of April, 1963, the defendant, Walter Thomas Lawrence did take *unlawfully* from the person of Glenn M. Wimbley personal property without his consent or against his will, by violence, intimidation or putting him in fear by use of force, whether the same be actual or constructive, it would be your duty to return a verdict of guilty of robbery." "Taking unlawfully" is not synonymous with "felonious taking." A forcible trespass is an *unlawful* taking.

Defendant was acquitted on the second count in the bill charging an assault, which allegedly took place after the robbery. The retrial will be only upon the first or robbery count.

New trial.

IDA GEORGIA TURPIN SNOW v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 12 June 1964.)

1. *Eminent Domain* § 2—

To entitle a land owner to damages for the closing of a portion of a highway he must show injury different in kind, and not merely in degree, from that suffered by the general public, which requires a showing of a taking of property or a property right or physical damage to property or an interference with a property right.

2. Highways § 5—

The right of the owner of land to access to a highway is an easement appurtenant constituting a property right beyond his right as a member of the general public, but such right of access obtains only to lands which abut the highway.

3. Highways § 6—

The Highway Commission has authority in the exercise of delegated police power to eliminate grade crossings and intersections. G.S. 136-89.48, G.S. 136-89.53.

4. Highways § 11—

The fact that a section of an old highway is kept open and thus constitutes a neighborhood public road, G.S. 136-67, does not preclude the Highway Commission from barricading it at its intersection with a new highway upon constituting the new highway a nonaccess highway.

5. Eminent Domain § 2—

Impairment of the value of property resulting from the exercise of the police power does not entitle the property owner to compensation when no property or property right is taken.

6. Same—

Plaintiff's property abutted an old highway kept open after the construction of a new highway, but plaintiff's property did not abut the new highway. Upon the improvement of the new highway into a nonaccess highway the old highway was barricaded at the intersection, leaving plaintiff's property in a cul-de-sac, so that plaintiff's route to the new highway and to a municipality was made more circuitous and inconvenient. *Held:* Plaintiff's inconvenience was different in degree but not in kind to that suffered by the public generally and there was no "taking" of any property right so as to entitle plaintiff to compensation.

APPEAL by plaintiff from *Gwyn, J.*, September 3, 1963, Civil Session of SURRY.

This is an action to recover damages for the alleged taking of property for highway purposes.

Plaintiff's land, on which her home is located, abuts old Highway 52 for a distance of 105 feet. Old Highway 52 runs generally north and

south. Plaintiff's land is situate on the west side of said highway approximately three-fourths of a mile north of the corporate limits of the town of Pilot Mountain. Highway 52 was relocated about 1953, and the highway at the new location was designated as U. S. Highway 52 and is about 100 yards or more east of plaintiff's property at the nearest point. Old Highway 52 was not discontinued; it intersected U. S. Highway 52 at a point approximately 1200 feet southeast of plaintiff's property; the intersection was "on-grade" and there were stop signs at the intersection controlling traffic on old Highway 52. Both old Highway 52 and U. S. Highway 52 had two lanes, one for northbound, and one for southbound, traffic. In 1960 defendant Highway Commission approved and began construction of a project (No. 8.17542-Surry County) for the widening and relocation of U. S. Highway 52, making it a limited-access dual lane highway, and separating the lanes for northbound and southbound traffic by a "grassed-in" median area. Access was limited to interchange ramps at grade separations. In connection with this project 750 feet of old Highway 52 was discontinued. At a point 450 feet south of plaintiff's southern property line old Highway 52 was "dead-ended" and barricaded. A circular turn-around was constructed and the barricade was erected immediately south of the "turn-around." The "on-grade" intersection of old Highway 52 and U. S. Highway 52 was eliminated. Plaintiff's property was thus left on a cul-de-sac. The barricading of old Highway 22 south of plaintiff's property does not interfere in any way with travel northwardly from her property on that highway, but it increases by about one mile the distance one must travel to reach Pilot Mountain and other points south thereof on the old and new highways. In order to reach Pilot Mountain by vehicular travel from plaintiff's property, it is necessary to travel northwardly 2100 feet on old Highway 52 to the Cook's School Road, go eastwardly on Cook's School Road a short distance, enter U. S. Highway 52 by way of the interchange ramp to the southbound traffic lane, and then proceed southwardly. In constructing the project defendant did not take or in any way interfere with "the ground or the physical property of the plaintiff." The land on which the project is located does not touch plaintiff's property at any point, but is several hundred feet therefrom. Plaintiff still has unlimited access to old Highway 52 at all points along her 105-foot frontage.

Plaintiff contends that the barricading of old Highway 52 at a point 450 feet south of her property, leaving it on a dead-end road, and the circuitous route required for travel to Pilot Mountain and other points on the highways south of her property, constitute a taking of and in-

terference with her property rights and right of access. Defendant contends that no property rights have been taken in the legal sense.

The judge, acting pursuant to G.S. 136-108, tried the issues (other than the issue of damages) without the intervention of a jury, found the facts (in substance as above set out), and concluded that the construction of the project and the barricading of old Highway 52 do "*not* constitute a taking or interference with any property or property rights, or special rights of the plaintiff" and "there is no issue of damages to submit to a jury." Judgment was entered dismissing the action. Plaintiff appeals.

Attorney General Bruton, Assistant Attorney General Lewis, Trial Attorney McDaniel, and Thomas M. Faw for defendant Highway Commission.

Blalock & Swanson and C. Orville Light for plaintiff.

MOORE, J. Plaintiff does not except to the judge's findings of fact. The sole question for decision is whether, under the facts found, there was a taking of or interference with any property or property rights of plaintiff for which she is entitled to recover compensation.

Plaintiff contends that, by constructing the project so as to leave her property on a cul-de-sac, defendant has taken from her a property right in the nature of an easement appurtenant. She relies principally upon the holding of this Court in *Hiatt v. Greensboro*, 201 N.C. 515, 160 S.E. 748 (1931). The city of Greensboro, to eliminate a dangerous crossing, closed a street at its intersection with a railroad. Plaintiffs' lot, on which their home was located, fronted on this street. There was no intersecting street between their lot and the barricade at the railroad right of way, and the closing of the street deprived plaintiffs of the street as a means of access to their lot from one direction and stopped travel from the other direction. It was held that this constituted a taking of property, the opinion stating: ". . . the owner of the abutting lot has the right to have the street kept open as a means of egress from and of ingress to his property. He has an easement in the street, which is appurtenant to his lot. This easement is his private property of which he cannot be deprived even for the use of the public, without just compensation. . . . 'An abutting owner has two distinct kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. These rights are property of which he

may not be deprived without his consent, except upon full compensation and by due process of law. They include the easement of access . . . and the right to have the highway left open as a thoroughfare to the whole community for the purpose of travel. . . .' 29 C.J., p. 547. See *Colvin v. Power Co.*, 199 N.C. 353, 154 S.E. 678."

It is said that "The weight of authority supports the proposition that if, by the vacation or closing of a street, access to property from the general system of streets in that direction (is cut off), and the property is left fronting on a cul-de-sac, the owner may recover damages." 49 A.L.R. 351 (1927); 93 A.L.R. 642 (1934). Thus, *Hiatt* was in accord with the majority opinion. However, "The rule appears to be well settled that ordinarily damages cannot be recovered by a property owner for the vacation or closing of a street in another block from that in which his property is located, or, in other words, beyond the next cross street, since his right, if any, to have the street remain open, extends only to the next cross street, and under these circumstances he may be regarded as having access to his property, and as sustaining no special or peculiar damages," 49 A.L.R. 361; 93 A.L.R. 644. In *Sanders v. Smithfield*, 221 N.C. 166, 19 S.E. 2d 630 (1942), the obstruction was beyond the next cross street, and the holding was in accord with the latter rule — also the majority view. The opinion comments: "It seems clear that the owner is not entitled to freeze the map, or demand compensation for municipal changes in the street, however remotely they occur."

The rule that an abutting owner has a right of access to the general system of streets and to the remainder of his street with all of its connections to a point where they cease to be of more than remote advantage to him, and that when one end of the street is closed he is entitled to compensation, is sometimes referred to as the "cul-de-sac principle." *Tift County v. Smith*, 131 S.E. 2d 527 (Ga. 1963). It seems that this principle has been generally limited in application to streets of a city or town. See cases listed and discussed in 49 A.L.R. 351-365, 93 A.L.R. 642-645, and Supplemental Decisions. Text writers in discussing the principle usually refer to "streets" rather than "highways." 18 Am. Jur., Eminent Domain, § 225, pp. 858-9; Nichols on Eminent Domain (3d Ed.), Vol. 2, § 6.32(2), pp. 421-425.

The cul-de-sac principle may, under some circumstances, find support or analogy in the rule, recognized in this and most jurisdictions, that "where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots . . . the purchaser of a lot or lots acquires the right to have all and each of the streets kept open . . ." *Steadman v. Pine-*

tops, 251 N.C. 509, 515, 112 S.E. 2d 102; *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898. But the rights of abutting owners with respect to highways were at common law based upon a different theory, which is explained by Nichols (§ 6.32, pp. 419, 420) as follows: "In the case of a highway, the abutting owner generally owns the fee of the land within the limits of the way subject to an easement in favor of the public. His is the servient estate; and it is well settled at common law that the owner of the dominant estate may abandon an easement if he sees fit without any act of consent or concurrence on the part of the servient tenant. Although, as a matter of fact, the abandonment may injure the land upon or near which the easement was exercised, it could not constitute an actionable injury at common law, and certainly does not amount to a taking within the meaning of the constitution."

To entitle a landowner to damages in the closing of a portion of a highway, he must show that he has suffered an injury different in kind from that suffered by the general public. *Sanders v. Smithfield, supra; In re Hull,* 204 N.W. 534 (Minn. 1925). That is, he must show that land has been taken or physically damaged, or that some easement or right appurtenant to the land has been taken or interfered with.

In North Carolina it is 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 highway for access purposes. This right of access is an easement appurtenant which cannot be damaged or taken from him without compensation. *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129. This easement consists of the right of access to the particular highway upon which the land abuts. In the instant case no land was taken or physically damaged, and plaintiff's access to old Highway 52, the highway upon which her land abuts, has not been limited, impaired or interfered with in any way.

"An individual proprietor has no right to insist that the entire volume of traffic that would naturally flow over a highway of which he owns the fee pass undiverted and unobstructed. In fact, while under some circumstances and conditions he has a right of access to and from his own premises, he has no constitutional right to have anyone pass by his premises at all. Nichols on Eminent Domain, Third Edition, Volume 2, § 6.445." *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732. Highways are built and maintained for public necessity, convenience and safety in travel and not for the enhancement of the property of occasional landowners along the route. *Nelson v. State Highway Board,* 1 A. 2d 689, 118 A.L.R. 915 (Vt. 1938). An abutting

property owner is not entitled to compensation because of circuity of travel, so long as he has access to the highway which abuts his property. *Moses v. Highway Commission,* 261 N.C. 316, 134 S.E. 2d 664; *Barnes v. Highway Commission, supra; Mosteller v. R. R.,* 220 N.C. 275, 17 S.E. 2d 133. "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 . . . 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.*" *Sanders v. Smithfield, supra.*

The flow of traffic by plaintiff's property has diminished. If she could collect for such diminution in travel by her property, "so could every merchant in a town when the Highway Commission constructed a by-pass to expedite the flow of traffic." *Moses v. Highway Commission, supra.* Plaintiff's travel to and from the town of Pilot Mountain and points farther south is more circuitous and inconvenient (though according to the judge's findings of fact it is safer). But, as we have seen, damages arising from mere circuity of travel are not compensable. Nevertheless, plaintiff contends she has a right to travel and reach a public outlet *in both directions* from her property.

The General Assembly has found, determined and declared that controlled-access highways are necessary for the preservation of the public peace, health and safety, the promotion of the general welfare, the improvement and development of transportation facilities in the State, the elimination of hazards at grade intersections, and other related purposes. G.S. 136-89.48. The Highway Commission is authorized to regulate, abandon and close grade crossings and intersections. G.S. 136-18(11); G.S. 136-89.53. It also has authority to change, alter, add to or discontinue roads of the State Highway system. G.S. 136-47; G.S. 136-54. Persons owning lands on abandoned segments of roads may not be left without access to new improved roads when necessary deviations are made, and, as against an owner of land over which the old road passed, injunctive relief will be granted to an owner whose land abutted the old road to prevent its obstruction, though the obstruction closes the road in only one direction. *Davis v. Alexander,* 202 N.C. 130, 162 S.E. 372. "All those portions of the public road system of the State which . . . have been abandoned by the State Highway Commission,

but which *remain open and in general use as* a necessary means of ingress to and egress from the dwelling house of one or more families . . . are . . . neighborhood public roads . . ." G.S. 136-67. Every segment of a public road which has been abandoned as a part of the State road system coming within the terms of the statute (G.S. 136-67) is . . ., by legislative enactment, established as a neighborhood public road." *Woody v. Barnett*, 235 N.C. 73, 76, 68 S.E. 2d 810. However, the elimination by the Highway Commission of a section of a road so as to exclude a dangerous grade intersection, underpass or overpass, is not a segment of an abandoned road "which remain(s) open and in general use by the public" so as to qualify it as a neighborhood road which must be kept open. *Mosteller v. Railroad, supra.*

No property, property right or special right of plaintiff has been taken, damaged or interfered with by the Highway Commission, in the legal or constitutional sense, and she is not entitled to compensation. When the Highway Commission acts in the interest of public safety, convenience and general welfare, in designating highways as controlled-access highways, its action is the exercise of the police power of the State. And the impairment of the value of property by the exercise of police power, where property itself is not taken, does not entitle the owner to compensation. *Barnes v. Highway Commission, supra; Nick v. State Highway Commission*, 109 N.W. 2d 71 (Wis. 1961).

A recent case decided by the Supreme Court of Georgia (*Tift County v. Smith, supra*) is in point. There the plaintiffs sought damages because of a dead-end obstruction of the public road upon which their farm abutted. A controlled-access highway was constructed a short distance east of their farm; the old road was closed at the right of way of the controlled-access highway leaving plaintiffs' farm on a cul-de-sac; the travel distance from the farm to plaintiff's market town was increased more than two miles. None of their land was taken or physically damaged; they had the same access to the old road they had before. Though the Georgia Court had recognized the cul-de-sac principle, it was held that there was no compensable taking or damage. The Court said:

> "It must be remembered that in this situation the rights of the plaintiffs fall into two categories: general rights, which they have in common with the public, and special rights, which they hold by virtue of their ownership of this property. In order to constitute a taking or damaging of their property, it is the special rights that must have been violated.
>
> "The only interference plaintiffs allege is inconvenience of travel on the old road. But this inconvenience they share general-

ly with other members of the public who use this road. . . . their damage is different from that of the general public in degree only, and not in kind. . . .

". . . their inconvenience does not constitute a taking or damaging of their property under the Constitution.

". . . In *Warren v. Iowa State Highway Commission,* 250 Iowa 473, 480, 93 N.W. 2d 60, the Supreme Court of Iowa said: 'It is evident that the closing of the road will put (the property owner) to a considerable amount of inconvenience, additional effort, and expense. On the other hand, it is apparent that if intersecting secondary roads . . . cannot be closed without payment to those who may suffer such inconvenience, who may be forced to travel by circuitous routes instead of the direct ways they formerly had, the expense to the general public will be tremendous. We are in the process of cooperating with the federal government in building several wide highways across the state, both north and south and east and west. They are a part of the National Interstate and Defense Highway system. They will inevitably cross many secondary roads and city and town streets, and numerous users of these latter ways will find themselves shut off, in part at least, from their accustomed convenient and direct means of going from place to place. Farmers, such as the plaintiff, will find they cannot reach their neighbors or shopping centers or, perhaps other tracts of their own lands, without much additional travel. . . . Of course, the heavy expense of compensating those who suffer some special damage is not a sufficient reason for not paying such damage. Their property may not be taken without fair compensation, if compensable damage they have . . .

"'. . . upon careful analysis of the cases the true rule appears with reasonable certainty. It is that one whose right of access from his property to an abutting highway is cut off or substantially interfered with by the vacation or closing of the road has a special property which entitles him to damages. But if his access is not so terminated or obstructed, if he has the same access to the highway as he did before the closing, his damage is not special, but is of the same kind, although it may be greater in degree, as that of the general public, and he has lost no property right for which he is entitled to compensation'."

To the same effect are: *Department of Highways v. Jackson,* 302 S.W. 2d 373 (Ky. 1957); *Holbrook v. State,* 355 S.W. 2d 235 (Tex. 1962); *Nick v. State Highway Commission, supra.*

Hiatt v. Greensboro, supra, is not controlling or applicable under the circumstances of the instant case. The Georgia and Kentucky courts, in the *Smith* and *Jackson* cases, declare that they no longer recognize a distinction between city streets and rural highways, and they repudiate the cul-de-sac principle *in toto. Quaere:* If the questions presented by *Hiatt* arise again in this jurisdiction, should this Court re-examine its holding in that case in the light of modern conditions and the trend of recent opinion in other States?

Affirmed.

ELIZA DUNN MALLET AND SELMA DUNN JAMES v. B. R. HUSKE, III, MARY LOU HUSKE; J. S. HUSKE, INDIVIDUALLY; J. S. HUSKE, TRUSTEE FOR J. S. HUSKE, JUNIOR, MARY COOKE HUSKE AND B. R. HUSKE, III; J. S. HUSKE, JUNIOR, MARY COOK HUSKE AND TO ALL OTHER PERSONS UNKNOWN, CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE REAL PROPERTY DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFFS' OWNERSHIP, OR ANY CLOUD UPON PLAINTIFFS' TITLE THERETO.

(Filed 12 June 1964.)

1. Appeal and Error § 51—

Where defendant introduces evidence, only his motion for nonsuit made at the close of all of the evidence need be considered on appeal.

2. Adverse Possession § 23—

Plaintiffs' evidence that they claimed the tract in question under definite, known and visible boundaries, that the cleared land was suitable for farming and the wooded portion for timber and firewood, that they and their father, under whom they claim, continuously farmed the cleared land or rented it out for farming and cut timber and firewood from the wooded land for more than twenty years, *is held* sufficient to be submitted to the jury on the issue of acquisition of title by adverse possession, and defendants' contention that plaintiffs' evidence is insufficient because it failed to relate any act of possession to particular portions of the tract, is untenable.

3. Adverse Possession § 3—

Testimony of one plaintiff that his father had a deed to the land and that plaintiffs claimed the land and thought it was theirs until they "found out his deed was not recorded" *is held* not to negate the hostile character of the possession, there being no question of lappage and plaintiffs' claim of ownership being unequivocal as to all the land embraced within the known and visible boundaries.

4. Trial § 40—

Where the issues submitted by the court are determinative and are sufficient to present all of the controverted facts, the refusal to submit issues in the form tendered will not be held for error.

5. Appeal and Error § 45—

Where the jury finds that plaintiffs are the owners of land upon evidence tending to show that they and their father before them had been in continuous adverse possession for more than 55 years, such possession is sufficient to ripen title, even though plaintiffs' father had taken possession as a tenant in common, and therefore the exclusion of evidence offered for the purpose of showing that plaintiffs' grandfather owned the land, and an instruction to the effect that there is no evidence that plaintiffs' grandfather acquired title by adverse possession, cannot be prejudicial to defendants in view of the verdict.

6. Adverse Possession § 22—

While a witness may not testify that a certain person "owned" the land, when the witness explains that he meant that such person was in possession of the land, the testimony is not prejudicial, since a witness may testify in regard to possession.

7. Same—

Testimony of declarations of plaintiffs' predecessor that he owned the land is competent for the purpose of showing the character of his possession.

8. Appeal and Error § 41—

The admission of evidence over objection cannot be held prejudicial when evidence of the same import is thereafter admitted without objection.

APPEAL by defendants from *Clark, J.*, September 1963 Civil Session of CUMBERLAND.

This action was instituted 25 January 1962. Plaintiffs allege: They are the sole owners of a tract of land in Fayetteville bounded on the west by Ramsey Street, on the north by the Godwin and Blue subdivision, on the east by A. G. Benton's Tokay tract, on the south by the E. M. Currin's subdivision, containing 25 acres; their father, Alexander (Sandy) Dunn, "assumed full and complete possession" of the land about 1904; his exclusive possession continued until his death in 1936; plaintiffs, only children of Alexander Dunn, with their mother until her death, have continued in exclusive possession of the property; 10 deeds have been recorded in the office of the Register of Deeds of Cumberland County purporting to convey an undivided two-thirds interest in said tract and to vest title thereto in defendants; the deeds dated in 1957, 1960, and 1961, are clouds on plaintiffs' title.

They pray that they be adjudged the absolute and sole owners of the land described, that defendants have no interest therein, and that a notation be made on the deeds recorded in the office of the Register of Deeds that they are mere clouds on the title of plaintiffs.

Defendants denied plaintiffs' claim of sole ownership. Defendants admit plaintiffs are the owners of an undivided one-third interest in

the land in controversy. They allege they own the remaining two-thirds. To support their allegations of co-tenancy, they allege: Robert Dunn died in 1905. He owned the land at his death, having occupied it adversely and continuously from 1877 until his death. Robert died intestate. He left three children, one of whom was Alexander, father of plaintiffs. His share passed by inheritance to plaintiffs. The remaining two-thirds passed by descent to those under whom defendants claim. Defendants specifically deny that Alexander Dunn, or plaintiffs, have ever claimed title adversely to them.

The court submitted, as determinative of the controversy, these issues: (1) Are the plaintiffs the owners of the land described in the complaint? (2) Are the defendants the owners of a two-thirds undivided interest in the land described in the complaint? The jury answered the first issue "yes." Having so answered, it did not answer the second issue. Judgment was entered on the verdict. Defendants excepted and appealed.

McCoy, Weaver, Wiggins & Cleveland for defendant appellants.

N. H. McGeachy, Jr., Robert W. Pope and Paul L. Whitfield for plaintiff appellees.

RODMAN, J. Defendants' assignments of error, Nos. 20, 57 and 67, are directed to the refusal of the court to allow their motions for nonsuit. Defendants elected to offer evidence. They thereby waived the right to insist on motions made prior to the conclusion of the evidence. G.S. 1-183. Only the motion, assignment No. 67, made at the conclusion of the evidence, need be considered.

In their argument for a nonsuit, defendants say: "The evidence was insufficient to support a verdict of adverse possession in that it did not describe, identify or locate as definite areas of land within the bounds of the tract in question those parts of the property on which the alleged acts of ownership took place."

Defendants do not contend the description of the area claimed by plaintiffs is insufficient. In fact, the description used by plaintiffs is the identical description used by defendants. Their contention is that plaintiffs' evidence is not sufficient to show possession of the entire area, or to fix the boundaries of the part actually occupied. This contention is based on the erroneous assumption that there is no evidence to show that plaintiffs and their father exercised exclusive possession of the entire 25 acres.

B. H. Bill, a witness for plaintiffs, testified:

> "This land from 1905 until 1936 was suitable for 2 purposes: one for farming and the other wood and timber. About half and

half, half for farming, half for timber. The portion that was suitable for farming was cleared land. From 1905 until 1936, referring only to the cleared part of the land, there was corn planted and peas and potatoes and different things like that for his use. Sandy planted some of it in time. All I can say is that he planted up until his mule died, And then, it was rented out."

Plaintiff Mallet testified that her recollection of the property began in 1915. After describing the property, she said:

"My father, Alexander Dunn, claimed title to this particular tract of land from 1915 until 1936. * * * About half of this 25 acres were cleared and about half was uncleared and in woods. The half that was cleared was suitable for farming. From 1915 to 1936 my father made use of this cleared land that was suitable for farming. He made use of it every year from 1915 to 1936. * * * I know that my father, "Sandy" Dunn or Alexander Dunn rented out a portion of this cleared land for farming. He was paid rent for this land that was rented out. * * * The other portion of that land that was not cleared was suitable for firewood and for selling timber and selling cord wood. My father, "Sandy" Dunn, sold timber and timber rights on this uncleared portion to Mr. James Purvey. * * * I know that my father made use of the wooded portion of the tract from 1915 to 1936. He cut cord wood and brought it to town and sold it and he cut wood for the home use to burn in the fire at home. He would cut wood for firewood there for the house all winter and from as far back as I can remember until 1935. From 1915 to 1936 my father "Sandy" cut trees out there for firewood for about 23 years. He cut them every year. He cut timber to haul it in for cordwood every winter from 1915 to 1936. He would take the cordwood to town. * * * [H]e had a mule, a cow and a bull and a calf which he grazed on this land. He did that every year between 1915 and 1936. From 1915 to 1936 this piece of land was open and visible publicly. * * * No one ever tried to put my father off this land."

After her father's death, she, her mother and sister, rented and farmed the cleared portion of the land. They sold timber from the woods portion.

"No one else received any of the money but me and my mother and sister. Nobody else claimed a portion of the money. Besides that timber that was sold off, there was wood cut and pre-

pared for my mother, fuel to burn. That was done every year from 1936 to 1956. * * * I testified that the other half of that property was suitable for timber and firewood. It has been cut out so much until I imagine it is not quite large enough now; it might have a few trees large enough for timber but not enough to go through the process of selling. At the present time the property is surrounded by subdivisions and has been for many years. It is good property for residential development. I could not say that this is the best use that could be made for it, of it; it could be made good farm land and could be maybe timber again. Right now it is surrounded by houses and has been surrounded by houses for a number of years."

Several witnesses testified that the possession exercised by "Sandy" Dunn, his widow and children, was so extensive and continued for such length of time that the entire tract was generally referred to in the community as the "Sandy Dunn land."

Walker, J., writing in *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347, gave this definition of adverse possession: "It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner." He supports his definition by an analysis of many of the earlier cases defining adverse possession. The definition there given has been quoted with approval on numerous subsequent occasions. *Holmes v. Carr*, 172 N.C. 213, 90 S.E. 152; *Clendenin v. Clendenin*, 181 N.C. 465, 107 S.E. 458; *Everett v. Sanderson*, 238 N.C. 564, 78 S.E. 2d 408.

Avery, J., writing in *Shaffer v. Gaynor*, 117 N.C. 15, 23 S.E. 154, said: "A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, or it must be an actual and continuous occupation of a house or the cultivation of a field, however small, according to the usages of husbandry. (Citations). The test is involved in the question whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass *quare clausam fregit* for damages."

However tested, the evidence of plaintiffs in this case is, in our opinion, sufficient to justify a jury in finding that for more than twenty years plaintiffs, and those under whom they claim, had continuous, open, notorious, and actual possession of the entire tract of land. During all of that period they were subject to actions in ejectment. The court correctly overruled the motion for nonsuit.

Plaintiff Mallet testified:

> "My father, Alexander Dunn, claimed title to this particular tract of land from 1915 until 1936. Yes, sir, Sandy Dunn or Alexander Dunn did have a deed to *this property.*" (Emphasis supplied.)

On cross examination she said:

> "Yes, sir, I testified that my father had a deed. Yes, sir, I seen the deed. I don't know if it was ever recorded. Yes, sir, I thought this land was my father's. He said it was his land and I believed him. Yes, sir, I thought this was my father's. Yes, sir, I thought it was up until the time I went to see Mr. John H. Cook (attorney) in 1955. At that time I found out that his deed wasn't recorded."

Defendants argue the quoted testimony defeats plaintiffs' claim of title by adverse possession. They rely on *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630, and *Price v. Whisnant*, 236 N.C. 381, 72 S.E. 2d 851, to support their contention. Defendants misinterpret the import of the cases they cite. Those cases merely enunciate the principle that possession beyond the boundaries described in the deed is not adverse to the true owner if there is no intent to assert title beyond the occupants' boundaries. That rule has no application to this case. Here, if the witness is to be believed, the area occupied conformed to the boundaries in the deed which their father had. Father and children, each asserted title to the highway and to the lines of their neighbors. Here, there is no question of lappage.

The deed could not be found, and neither the date of the deed, nor the names of the grantors were known. Was it such a conveyance as would constitute color ripening into good title by seven years? G.S. 1-38. The record does not disclose. The deed to which the witness referred neither hinders nor helps plaintiffs.

Defendants tendered as the first issue: "Have the plaintiffs and their predecessors in title been in the adverse possession of the lands described in the complaint under known and visible lines and boundaries for twenty years?" Instead, the court submitted the issue set out in the statement of facts. Defendants assigned as error the court's refusal

to submit the issue in the form tendered by them. The assignment is lacking in merit. *Conference v. Miles,* 259 N.C. 1, 129 S.E. 2d 600; *Wood v. Insurance Company,* 245 N.C. 383, 96 S.E. 2d 28; *Crowell v. Air Lines,* 240 N.C. 20, 81 S.E. 2d 178. The charge as given required the jury to find each of the facts enumerated in the issue tendered by defendants.

The court also charged:

> "Now, there is no record title involved in this case, Members of the Jury; neither the plaintiffs nor defendants contend they have any record title, or that they have legal, lawful record title. Both rely on title by adverse possession for the statutory period of twenty years. Now Robert Dunn, the original Robert Dunn, died in 1905; there is some evidence tending to show that he, Robert Dunn, lived on the home place across the highway from the tract in question for some years prior to his death, but (I charge you as a matter of law, Members of the jury, that it has not been established in evidence that Robert Dunn was the owner of this land at the time of his death; there is not sufficient evidence to establish that Robert Dunn acquired title by adverse possession for a period of twenty years prior to his death.)"

Defendants assigned as error that portion of the charge included in parentheses. They do not except to that portion of the charge stating there is no evidence of record title in Robert Dunn. They merely challenge that portion stating there is no evidence that Robert Dunn had possession for twenty years. We have carefully examined the record. No witness testified to that fact. We do not understand that defendants contend there is any direct evidence to that effect. They base their contention that there is evidence from which a jury could find that Robert Dunn had acquired title by adverse possession by the testimony of plaintiffs and other witnesses that the property was known as the Robert Dunn property.

Defendants' assertion of error is answered by Ervin, J., who said in *Everett v. Sanderson, supra,* "The testimony of some of the witnesses that it was generally reputed in the community during the possessory period that the *locus in quo* belonged to L. W. Everett was not competent to establish title. *Sullivan v. Blount,* 165 N.C. 7, 80 S.E. 892; *Locklear v. Paul,* 163 N.C. 338, 79 S.E. 617; Stansbury's North Carolina Evidence, section 148."

Another complete answer to this contention lies in the fact that the jury has found that plaintiffs were the sole owners. They could not have found that fact without finding that Alexander and his children

had exercised exclusive adverse possession of the land in controversy for more than twenty years, since 1905. Such possession would suffice to bar everyone, including co-tenants. *Brewer v. Brewer,* 238 N.C. 607, 78 S.E. 2d 719; *Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440; *Winstead v. Woolard,* 223 N.C. 814, 28 S.E. 2d 507. It is immaterial, therefore, whether Robert Dunn was in fact the owner of the property in 1905.

Defendants offered, and the court excluded, a deed dated January 1877, from C. B. Mallet and others, to Abram Dunn for a tract containing 12 acres. The description of this tract begins at William Dunn's northwest corner in the western edge of the Raleigh Plank Road (now Ramsey Street.) They then offered a mortgage, dated April 3, 1894, from William Dunn to H. W. Lilly. The description there given begins at Robert Dunn's northwest corner on the Raleigh Plank Road. The courses and distances there given are substantially the same as those appearing in the deed from Mallet to Abram Dunn. They next offered a deed, dated in March 1905, from Lilly to Abram Dunn for what seemingly is the land mortgaged from William Dunn to Lilly.

Defendants, as we understand their contention, maintain these deeds, by the call for *William Dunn's* northwest corner in the Mallet deed and for *Robert Dunn's* northwest corner in the mortgage to Lilly, and his deed to Abram Dunn, establish the fact that William Dunn and his son, Robert Dunn, were in possession of a tract of land adjoining that described in the instruments offered from 1877 to 1905, and this evidence they say was sufficient to support a finding that the land in controversy was owned by Robert at his death in 1905. We do not agree with defendants' premise or conclusion, but accepting the contention as correct, the asserted error in excluding the deed cannot be prejudicial. This is so because of the answer to the first issue.

B. H. Bill, witness for plaintiffs, testified he had known the land in controversy for 65 years. He was asked if he knew who claimed title to the land from 1905 to 1936. He answered, "Yes, Sandy Dunn." The court then said, "I am going to strike the word title." Thereupon, counsel inquired, "Mr. Bill, during the period 1905 until 1936, do you know who owned this land?" Defendants objected and the objection was overruled. The witness answered, "Sandy Dunn." The question was not framed in accordance with the court's ruling and, if there were no explanation of what the witness meant to say, the testimony that Sandy Dunn owned the land would not be competent. A witness may not answer the very question to be submitted to a jury. The court seemingly recognized this fact. It inquired, "What do you mean, he owned it? How do you know he owned the land?" The witness answer-

ed, "Well I have knowed the land all my life, practically, see, and I know Sandy Dunn was in possession of the land." Court: "And that is what you mean when you say he owned the land?" Answer: "Yes." It was competent for the witness to testify who had possession of the property for the described period. The assignment directed at this evidence cannot be sustained.

Finally, defendants claim they were prejudiced by the admission of declarations made by Alexander Dunn with respect to his claim of ownership. Defendants offered evidence of declarations by Alexander Dunn that his possession was not adverse to the claims of his cotenants. Plaintiffs, on rebuttal, asked their witness, Bill: "What statement, if any, did Sandy Dunn make to you in regards to who was the owner of this 25 acres in contest in this lawsuit?" Defendants' objection was overruled. The witness answered, "Sandy Dunn."

The witness thereafter testified without objection: "Sandy Dunn said he owned all interest in all of it. He made that statement when we were on the 25 acre tract investigating about selling some timber."

Defendants' claim of prejudicial error cannot be sustained. This is true for two reasons. (1) Defendants waived their exceptions to the competence of the evidence by failing to object to the subsequent testimony of the witness to the same effect. (2) The evidence is competent to show the character of the possession asserted by the occupant. *Everett v. Sanderson, supra; Smith v. Moore,* 149 N.C. 185, 62 S.E. 892; *Bunch v. Bridgers,* 101 N.C. 58, 7 S.E. 584; *Phipps v. Pierce,* 94 N.C. 514; *Smith v. Reid,* 51 N.C. 494; *Richmond Cedar Works v. Foreman Blades Lumber Company,* 267 Fed. 363; *Thacker v. Hicks,* 224 S.W. 2d 1; *Lamons v. Mathes,* 232 S.W. 2d 558; Stansbury's North Carolina Evidence, section 160; 3 Am. Jur. 2d 349; 2 C.J.S. 834; 31A C.J.S. 663.

No error.

GEORGE L. FORGY v. MRS. EVELYN K. SCHWARTZ AND HENRY BANE, ADMINISTRATOR OF THE ESTATE OF JOHN EDWARD MITCHELL, DECEASED.

AND

VIRGINIA DAVIS FORGY v. MRS. EVELYN K. SCHWARTZ AND HENRY BANE, ADMINISTRATOR OF THE ESTATE OF JOHN EDWARD MITCHELL, DECEASED.

AND

JOY LEE FORGY, BY HER NEXT FRIEND VIRGINIA DAVIS FORGY v. MRS. EVELYN K. SCHWARTZ AND HENRY BANE, ADMINISTRATOR OF THE ESTATE OF JOHN EDWARD MITCHELL, DECEASED.

AND

ROSE KLUGERMAN v. MRS. EVELYN K. SCHWARTZ AND HENRY BANE, ADMINISTRATOR OF THE ESTATE OF JOHN EDWARD MITCHELL, DECEASED.

AND

WILLIAM R. WINDERS, ANCILLARY ADMINISTRATOR OF THE ESTATE OF NATHAN SCHWARTZ, DECEASED v. MRS. EVELYN K. SCHWARTZ AND HENRY BANE, ADMINISTRATOR OF THE ESTATE OF JOHN EDWARD MITCHELL, DECEASED.

(Filed 12 June 1964.)

1. Automobiles §§ 7, 15—

When a motorist sees, or in the exercise of ordinary care should see, another motorist approaching from the opposite direction on the wrong side of the highway, the first motorist is under duty to exercise due diligence under the conditions then existing to prevent an accident, and, when possible, to slow down, turn from a direct line, drive off the highway, stop, or take such other evasive action as a person of ordinary prudence would take under similar circumstances.

2. Automobiles § 43—

Even though a head-on collision results from the negligence of one motorist in pulling to his left and traveling at excessive speed in passing preceding vehicles, a passenger may hold both drivers liable as joint tortfeasors if the second motorist fails to exercise ordinary care to avoid the accident by taking evasive action and such failure is a proximate cause of the accident.

3. Automobiles § 19—

Where a motorist is confronted with a sudden emergency when a car approaching from the opposite direction pulls to its left side of the highway to pass other vehicles, such motorist will not be held to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence similarly situated would have made, and the failure to take certain evasive action cannot be held for negligence when it is merely speculative whether such action would have avoided the accident.

4. Automobiles § 43—

Evidence tending to show that defendant motorist was traveling at a lawful speed in her proper lane and that a driver approaching from the opposite direction turned to his left to pass a line of cars when such a short distance away and at such excessive speed that defendant had only four or five seconds prior to impact in which to take evasive action, and that in this short interval defendant applied her brakes and veered to her right, *held* insufficient to be submitted to the jury upon the theory that defendant driver failed in the exercise of ordinary care, to take evasive action to avoid the collision.

APPEAL by defendant, Mrs. Evelyn K. Schwartz, from *Sink, E.J.*, September 1963 Civil Session of DURHAM.

These five actions, one for wrongful death and four for personal injuries, grow out of a collision between the Buick automobile operated

by John Edward Mitchell, the intestate of defendant Henry Bane, and a Mercury station wagon operated by the defendant Mrs. Evelyn K. Schwartz and owned by her husband, the intestate of plaintiff William R. Winders. The cases were consolidated for trial in the Superior Court and for this appeal. Each plaintiff recovered a substantial judgment against both defendants. The defendant Schwartz appealed and assigns as error, *inter alia*, the denials of her motion for nonsuit made at the close of plaintiff's evidence and renewed at the close of all the evidence. The evidence, viewed in the light most favorable to the plaintiffs, tends to establish the following facts:

On November 1, 1959 about 6:00 p.m., Mrs. Schwartz was operating her husband's station wagon in a northerly direction on U. S. Highway #401 between Fuquay Springs and Lillington. The weather was clear and "there was still a good bit of day light left." Some cars had lights on; some did not. Mr. Schwartz was asleep in the front seat beside his wife. The plaintiff George L. Forgy was seated in the second seat immediately behind the driver. On his right was his wife, the plaintiff Virginia Davis Forgy. Sitting next to her was Mrs. Schwartz' mother, Mrs. Rose Klugerman, also asleep. Behind the second seat, asleep on the floor was the plaintiff Joy Lee Forgy, the ten-year-old daughter of the Forgys.

Seven miles north of Lillington the station wagon was involved in a collision with the automobile of defendant Bane's intestate, Mitchell. At the point of collision U. S. 401 was a level, two-lane highway with a center line separating the north and south travel lanes. The paved portion of the road was twenty-four feet wide, eighteen feet of cement with a three-foot wide strip of asphalt on each side. The shoulders were dirt with a grass overlay. The east shoulder was at least eight feet wide. Beyond it was a ditch one to two feet deep and about two and a half feet wide. Beyond the ditch was a small embankment. To the south the road was straight for about one third of a mile; one hundred feet to the north there was a slight curve. A drainage culvert went under the road in the vicinity of the accident.

The station wagon was six feet, six inches wide. It was meeting several automobiles which were traveling south. Mr. and Mrs. Forgy testified that they first observed the Mitchell Buick seven hundred and fifty feet away when it pulled out from behind these cars on the curve into the center of the highway. At that time the station wagon was traveling about fifty miles per hour in the center of the lane for northbound traffic. Mitchell was traveling in excess of sixty miles per hour — possibly seventy-five miles per hour. "He was traveling." His Buick had a cutout on the motor.

According to plaintiff George Forgy, Mrs. Schwartz immediately applied her brakes and he felt "some sensation of the car slowing down" but none of skidding. Mrs. Schwartz said, "He is going to hit us; he has got no place to go. . . . When Mrs. Schwartz made the statement, I turned around to check my daughter who was behind me in the back of the station wagon and then turned back and told my wife he was going to hit us, 'try to relax,' and I turned around and watched the car hit us. It was five to six seconds from the time I first saw the oncoming car until the time of the impact between the two cars. . . . At the time of the impact, it is my opinion that the speed of the station wagon was between 40 and 45. . . . Mrs. Schwartz applied her brakes only and continued right straight on the highway . . . No wheel of the station wagon went onto the dirt shoulder of the highway. From the point where I first observed the oncoming car to the point of impact was 270 feet . . . At the moment of the impact the two automobiles went up in the air and our automobile went backwards along the line of travel . . . The station wagon came to rest with the front wheel on the shoulder and the two rear wheels still on the pavement of the highway."

Mitchell and his companion were killed instantly. All the occupants of the station wagon were seriously injured. The appealing defendant's husband, Nathan Schwartz, died eleven days later as a result of the injuries he sustained. He was survived by his wife, his mother, a brother and a sister. He had no children.

Each car was damaged on its left front. The patrolman who arrived at the scene at 6:15 p.m. measured twenty-two feet of black tire marks in the northbound lane beginning two feet from the center line and ending five feet from it. From that point scuff marks entended forty-five feet in a southeasterly direction to the wrecked station wagon which was then headed southeast. The Buick was sitting sixty-two feet from the beginning of the scuff marks. It was headed south in the southbound lane directly in the line of traffic. The odor of alcohol was in the Buick and in the air about its occupants.

On September 5, 1963, Mr. and Mrs. Forgy went to the scene of the accident with an engineer and pointed out to him the spot where the collision occurred, where the Mitchell car was when they first observed it crossing the center line, and where the station wagon was at that time. According to the engineer's measurements, the Mitchell car traveled four hundred and sixty-six feet while the Schwartz vehicle went two hundred and seventy feet to the point of collision, a total distance of seven hundred and thirty-six feet. On an adverse examination held in March 1961, Forgy said with reference to the distance at which he

first saw the Mitchell car, "(W)ell now, distances are pretty hard to judge at night that way, but I would say it was at least 600 feet."

Upon this evidence the judge submitted the cases to the jury.

Bryant, Lipton, Bryant & Battle for plaintiff appellees.

Maupin, Taylor & Ellis for Evelyn K. Schwartz, defendant appellant.

SHARP, J. That the reckless driving of defendant Bane's intestate, John Edward Mitchell, proximately caused the head-on collision between the Buick and the Schwartz station wagon is not contested. The question is whether there is any evidence tending to show that defendant Schwartz, by the exercise of reasonable care, could have avoided the consequences of Mitchell's negligence after he drove his automobile into her lane of travel. A motorist, although in his proper lane, has the duty to avoid colliding with another vehicle which comes into his path from the opposite direction if he can do so in the exercise of due care. From the time the motorist sees, or in the exercise of ordinary care should see, that the approaching driver cannot or will not return to his side of the road, it is encumbent upon him to exercise due diligence under the conditions then existing to prevent an accident. *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383. When possible, it is his duty to slow down, turn from a direct line, drive off the highway, stop, or take such other evasive action as a person of ordinary prudence would take under similar circumstances to avoid a collision. If he neglects to do so, and such failure is a contributing cause of the resulting collision, he is liable as a joint tort feasor to those who are injured as a consequence of his negligence. *Jones v. Atkins Co.,* 259 N.C. 655, 131 S.E. 2d 371; *Redden v. Bynum,* 256 N.C. 351, 123 S.E. 2d 734; *Johnson v. Lewis,* 251 N.C. 797, 112 S.E. 2d 512; *Taylor v. Rierson,* 210 N.C. 185, 185 S.E. 627. *Kapla v. Lehti,* 225 Minn. 325, 30 N.W. 2d 685; 8 Am. Jur. 2d, *Automobiles and Highway Traffic* § 762.

The appealing defendant, Mrs. Schwartz, proceeding in her proper lane of travel at a lawful rate of speed, was suddenly confronted by an emergency caused solely by the gross negligence of Mitchell. Her conduct, therefore, must be evaluated in the light of the rule that one who is required to act suddenly in an emergency, without opportunity to reason or to reflect, is not held by the law to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence similarly situated would have made. *Cockman v. Powers,* 248 N.C. 403, 103 S.E. 2d 710; *Patterson v. Ritchie,* 202 N.C. 725, 164 S.E. 117; 60 C.J.S., *Motor Vehicles* § 257. The law recognizes that the sud-

den appearance of an automobile, speeding toward a driver in his lane of travel, will create such excitement and apprehension of impending doom in the ordinary prudent man that it may paralyze his reactions or cause him to make an error of judgment. 7 Am. Jur. 2d, *Automobiles and Highway Traffic* § 359. "Some allowance must be made for the excitement of the moment and strain on the nerves." *Crowe v. Crowe,* 259 N.C. 55, 129 S.E. 2d 585. When "the unexpected occurs, time must be allowed a driver put in peril without his fault to appreciate the danger and form a judgment of how to meet it." *Torbert v. Smith's Estate,* 250 Mich. 62, 229 N.W. 406.

The cases reveal that motorists who have been confronted by an automobile approaching in the wrong lane have, on occasions, (1) continued straight ahead, (2) turned to the right, (3) turned to the left, and (4) stopped. 8 Am. Jur. 2d, *Automobiles and Highway Traffic* §§ 763-766. A lengthy annotation, *Collision — Approaching Car — Wrong Lane,* 47 A.L.R. 2d 6, collects the cases. In applying the doctrine of sudden emergency, the courts have not been inclined to weigh in "golden scales" the conduct of the motorist who has acted under the excited impulse of sudden panic induced by the negligence of the other motorist.

In *Hoehne v. Mittelstadt,* 252 Wis. 170, 31 N.W. 2d 150, the defendent, driving on his proper side of the road on a foggy morning, was suddenly confronted in his lane of travel by the automobile of one Orlich approaching from the opposite direction and attempting to pass a truck. Orlich drove farther to his left; defendant continued straight ahead and struck the right front of the Orlich vehicle. Plaintiffs, passengers in the Orlich car, argued that defendant had two and a half seconds in which to slow down and if he had done so Orlich would have made it into the ditch and averted the accident. On these facts the court said: "We think that the emergency rule when properly applied must likewise excuse inaction on the part of the innocent driver in his proper lane of traffic when suddenly confronted with an automobile on the wrong side of the road." This statement was quoted with approval in *Griffy v. Havey,* 201 F. 2d 501 (7th Cir.) and in *Feinsinger v. Bard,* 195 F. 2d 45 (7th Cir.). In the latter case, plaintiff, a passenger in the car of W, was injured in a head-on collision which occurred when the automobile of B came into W's lane of travel on a snow-covered highway. Plaintiff sued the estates of both drivers. He testified that the car of B was first seen approaching in the wrong lane when it was about seven hundred feet away and traveling "a good deal faster" than the car of W. Thereafter, neither B nor W ever veered from a straight course, and W never applied his brakes. Seven seconds elapsed before the collision. In reversing a judgment against W, the court

said: "In the first place, there is a presumption that the deceased Wedell exercised due care and caution for his own safety. . . . If there was any negligence on his part, it must have been as to control and management and not as to lookout. . . . It is argued that during that time he could have applied his brakes or he could have turned either to the left or to the right. As to whether the collision could have been avoided by following any of such suggestions is purely a matter of guess and speculation." However, in appraising W's situation the court took into consideration one factor which is not present in the instant case. W had the right to assume that the B car would return to its proper side of the road. Here, Mitchell was passing a line of cars and there is evidence that he did not have any "place to go."

According to the estimates of the Forgys, Mrs. Schwartz had a maximum of only five or six seconds in which to form a judgment and take evasive action. She probably had less than five seconds.

It is rarely safe to predicate negligence solely on a strict mathematical computation of time, distance, and rate of speed for the problems of human conduct cannot be solved by reference to a slide rule. This is especially true when, as here, the measurements upon which they are based were made almost four years after the accident. The initial observations and estimates of the persons involved were necessarily made under great stress and apprehension — despite Mr. Forgy's measured description of his activities during the seconds which intervened between his discovery of the peril and the moment of collision. However, for the purpose of passing on the motion for nonsuit here, they must be considered as accurate.

Whether Mitchell appeared in the northbound lane six hundred feet or seven hundred and fifty feet from the Schwartz automobile he was driving at a speed in excess of sixty miles per hour — possibly at seventy-five miles per hour. He made no effort to slow down but Mrs. Schwartz, traveling at fifty miles per hour, applied her brakes and perhaps slowed to forty or forty-five miles per hour. Mathematically, between four and five seconds only could have elapsed. At seventy miles per hour a vehicle goes one hundred and three feet per second; at forty-five miles per hour, sixty-six feet a second. Hence, taking the median speeds, the distance separating the two vehicles was being closed at approximately one hundred and sixty-nine feet per second. Under either of Mr. Forgy's estimates of distance, Mrs. Schwartz had a maximum of five seconds in which to form a judgment and take evasive action. She probably had as little as four.

One textwriter has said, "The instinctive reaction of a motorist meeting another motorist approaching on the wrong side of the road is to apply his brakes." 8 Am. Jur. 2d, *Automobiles and Highway Traffic* §

766. Barnhill, J. (later C.J.), said in *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337: "It is a human instinct when a collision is impending between two vehicles to turn or cut away from the other vehicle." The evidence is that Mrs. Schwartz did both. The witnesses testified that she applied brakes. The skid marks on the highway, those "physical facts which speak louder than some of the witnesses," *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88, show that she also turned to the right. Plaintiffs complain that she did not turn quickly enough but, considering the acute emergency which faced her, who can say that she failed to exercise ordinary care in the operation of her vehicle during the four to five seconds which determine the destiny of this case?

It may have been that Mrs. Schwartz could have driven farther to the right faster than she did; that at the same time she should have applied brakes with more force; or that she straightway should have "taken to the ditch." However, the faster a car is going the greater the risk that a sharp turn will upset it. We do not judge her conduct by hindsight, nor can we say that less disastrous consequences would have resulted had she driven off the pavement at fifty miles per hour. In any event, she was headed off the road when time and distance ran out on her.

If we were to concede both a delayed reaction and an error of judgment on the part of Mrs. Schwartz when she was suddenly brought face to face with unexpected danger, it is our opinion that her conduct in the acute emergency did not constitute actionable negligence. The evidence fails to show that an ordinary prudent person would have reacted more quickly or used better judgment under the same circumstances. *Jones v. Atkins Co., supra; Patterson v. Ritchie*, 202 N.C. 725, 164 S.E. 117. The defendant Schwartz' motions for judgment as of nonsuit should have been allowed.

The judgments of nonsuit eliminate the questions which would have arisen in the action of Winders, Administrator of Nathan Schwartz, had he made out a case of actionable negligence against Mrs. Schwartz for the pain and suffering and the wrongful death of his intestate. As his widow, the defendant Schwartz is the chief beneficiary of his estate. G.S. 29-14(3). These questions were not raised by either party, but had she shared the responsibility for his injuries and wrongful death the law would not permit her enrichment by her own negligence. *Dixon v. Briley*, 253 N.C. 807, 117 S.E. 2d 747; *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203; *Pearson v. Stores Corporation*, 219 N.C. 717, 14 S.E. 2d 811; *Davis v. R. R.*, 136 N.C. 115, 48 S.E. 591.

The judgments are

Reversed.

STATE OF NORTH CAROLINA v. BRENDA ANN FOX, T.D. 15855; EVERLEAN SONYA FOXX, T.D. 15857; MAVIS LOUISE GARNER, T.D. 15879; ANNIE MARY GILCHRIST, T.D. 15897; THOMAS GILCHRIST, JR., T.D. 15900.

(Filed 12 June 1964.)

1. Municipal Corporations § 24.1—

A municipal ordinance, like a statute or other written instrument, should not be interpreted as detached, unrelated sentences, but must be construed as a whole.

2. Same; Evidence § 1—

The rule that the courts will not take judicial notice of municipal ordinances does not preclude the courts, when called upon to construe an excerpt from an ordinance set out in a bill of indictment, from interpreting the excerpt correctly by construing it with the rest of the ordinance, certainly when the entire ordinance is before the court by stipulation of the parties.

3. Municipal Corporations § 28—

Where a municipal ordinance deals with the obstruction of streets incident to excavation and construction, individuals may not be prosecuted under an excerpt from the ordinance for obstructing a street with their persons by standing and sitting down in the portion of the street ordinarily reserved for vehicular traffic, since the ordinance was not intended to apply to such situation.

PARKER, J., concurring in result.

APPEALS by defendants from *Crissman, J.*, August 1963 Criminal Session of GUILFORD (Greensboro Division).

Defendants were alleged, in warrants issuing from the Greensboro Municipal-County Court, to have violated the provisions of section 18-58 of the Code of the City of Greensboro. They demanded a jury trial. The cases were thereupon, as required by Rule 6, § 4, C. 971, S.L. 1955, transferred to the Superior Court. The Grand Jury returned true bills charging the same offense. The cases were, with the consent of defendants, consolidated for trial. The jury returned verdicts of guilty. The court imposed a fine of $25.00 on each defendant. Each excepted and appealed.

Attorney General Bruton and Deputy Attorney General Moody for the State.

C. C. Malone, Jr., for defendants.

RODMAN, J. Defendants rely on their motions to nonsuit. Did the court err when it refused to allow the motions? To answer correctly,

it is necessary to ascertain exactly what crime is charged and what evidence, if any, tends to establish the commission of that crime.

The Solicitor, at the beginning of the trial, said it was stipulated by counsel for defendants that sec. 18-58 of the City Code of Greensboro, entitled "Obstructing Streets or sidewalks," reads: "It shall be unlawful to obstruct or block any street or sidewalk without a written permit therefor from the city manager." The Solicitor then said: "Attorney for the defendants may introduce any other portion of Article III, section 18, hereafter as being the ordinances of the City of Greensboro." The court, interjecting, said: "What you are doing, you are just stipulating and agreeing that this book that you have is the Code of ordinances and that any of these sections in this particular article are ordinances of the city and may be introduced without bringing someone here to prove that they are ordinances isn't that about all that you are stipulating to?" Counsel answered in the affirmative. It was further stipulated that the city manager had not issued defendants any permit as required by the quoted section.

To establish commission of the crime charged, the State offered evidence tending to establish these facts: Defendants, in company with some 250 other persons, marched "around the uptown area of the city and to the corner of Market and Elm Streets [principal thoroughfares of Greensboro] where they moved into the middle of the intersection of Elm and Market Streets." They were requested by members of the Police Department to move. They refused. Instead of moving, some sat and others squatted in the street. The part occupied by defendants "is ordinarily reserved for motor vehicle traffic, and there was vehicular traffic on this occasion which could not proceed because of the presence of people in the streets." In addition to the defendants and their 250 associates occupying the vehicular portion of the streets, there were some 400 other persons present. They were "singing and clapping their hands so loud that you couldn't hear yourself speak."

The State's evidence was sufficient to support a finding that defendants and their associates were intentionally obstructing the flow of traffic on Elm and Market Streets. This conduct constituted an indictable nuisance — *State v. Godwin,* 145 N.C. 461, 59 S.E. 132; *State v. Edens,* 85 N.C. 522 — a misdemeanor, punishable by fine, or imprisonment not exceeding two years, or both, G.S. 136-90.

Defendants were not, however, tried for violating the State statute. They were tried for violating the city ordinance, a misdemeanor, punishable by a fine not exceeding $50.00, or imprisonment not exceeding 30 days, G.S. 14-4.

Is the evidence sufficient to show a violation of the ordinance? The answer requires interpretation. Defendants, as we understand them,

concede that if read out of context subsection 58 may suffice to make unlawful the things done; but, they say, when read as a part of a single ordinance, it becomes apparent the quoted portion has no application to the facts of this case.

Proper interpretation of a document, be it statute, contract or will, requires an examination of the whole instrument. It should not be interpreted as detached, unrelated sentences. *Canteen Service v. Johnson, Com'r of Revenue,* 256 N.C. 155, 123 S.E. 2d 582; *In Re Hickerson,* 235 N.C. 716, 71 S.E. 2d 129; *State v. Barksdale,* 181 N.C. 621, 107 S.E. 505; *Weyerhaeuser Co. v. Light Co.,* 257 N.C. 717, 127 S.E. 2d 539; *Robbins v. Trading Post,* 253 N.C. 474, 117 S.E. 2d 438; *Worsley v. Worsley,* 260 N.C. 259, 132 S.E. 2d 579; *Maxwell v. Grantham,* 254 N.C. 208, 118 S.E. 2d 426.

Defendants, to permit proper interpretation and in support of their motion for nonsuit, incorporated as part of their brief a copy of section 18 of the City Code.

No part of the ordinance, except subsection 58, is incorporated in the record. We do not take judicial notice of municipal ordinances, *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543; *State v. Clyburn,* 247 N.C. 455, 101 S.E. 2d 295. That does not mean that when called upon to interpret that we should deny ourselves the opportunity to answer correctly. Certainly that is true in this case, when it affirmatively appears that the Code containing the entire ordinance was on the table before the court. It was only necessary to open and read the book to put the quoted section in proper context.

Because we felt the ordinance would be of assistance in interpreting the quoted portion, counsel for the State and defendant have, at our request, stipulated and made a part of the record Articles I, II, and III, section 18 of the Greensboro Code.

Section 18 contains the ordinances relating to the streets and sidewalks. Article I, thereof, captioned "IN GENERAL" contains 23 subsections. Subsection 12, entitled "Permits required for conducting public meetings prohibited areas designated," reads:

"It shall be unlawful to conduct any public meeting or deliver any address on any street or sidewalk of the city without first obtaining a permit from the council. Application for a permit to conduct any public meeting or to deliver any address on any street or sidewalk of the city shall be in writing and filed with the city clerk at least seven (7) days before the meeting of the council at which the application will be passed upon. Any permit authorized by the council shall be subject to the following conditions: * * * (b) That the speaker not interfere with the orderly movement of vehicular and pedestrian traffic. * * * (e)

That in the interest of public safety and to insure the free passage and constant flow of pedestrian and vehicular traffic in certain congested areas of the city, it shall be unlawful for the speaker to locate himself on any of the sidewalks or other public places along, adjacent to, and in the immediate vicinity of the following streets. Davie Street, Elm Street, Eugene Street, Gaston Street, Greene Street, Market Street, Sycamore Street and Washington Street."

Defendants claimed that they and the others were gathered for the purpose of protesting and to bring their asserted grievances to the attention of the City Council.

Article III carries the title "Protection and Care." It consists of two divisions. DIVISION I is designated "In General." DIVISION 2 relates to the use of the streets by utility companies.

Subsection 58 is the first subsection of Article III; subsection 59 bears the title "Protection of Obstructions." It requires: "Every person causing or allowing any obstruction or opening on any street or sidewalk shall protect the same in the daytime by means of a red flag and at night with a sufficient number of red lights." Subsection 60, entitled "Openings to be filled," provides: "All openings made in any public alley, street or sidewalk under the provisions of this article, shall immediately upon the accomplishment of the purpose for which the same was made, be completely filled up, and the surface thereof shall be made flush with the adjacent surface of the street." Subsection 61, entitled "Permit required for placing material in streets," provides: "It shall be unlawful to place any brick, stone, lumber, sand or other building material upon any of the streets or sidewalks of the city without having first obtained from city manager permission in writing therefor and then only under such reasonable restrictions as may be prescribed by him for the public safety."

When the ordinance is read as an entirety, and when the subsection of the ordinance which the defendants are charged with violating is read as a part of a single document, it is, we think, apparent that it does not, and was not, intended to apply to situations of the kind described in this case. It follows that the motion for nonsuit should have been allowed.

Reversed.

PARKER, J., concurring in the result:

Defendants in their brief state two questions are involved:

> "1. Is the ordinance, as applied in the instant case, an unconstitutional interference with the defendants' rights to freedom of

speech and peaceable assembly protected against State infringement under the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 17, of the North Carolina State Constitution?

"2. Is the ordinance, as applied in the instant case, unconstitutionally vague in that it does not apprise these defendants nor the public generally of the offense prohibited by it?"

The entire argument in their brief of 39 pages is addressed to these two constitutional questions. Defendants incorporated in their brief a copy of Article III, section 18, of the ordinances of the city of Greensboro, North Carolina, which had not been introduced in evidence.

Chief Justice Hughes speaking for a unanimous Court said in *Cox v. New Hampshire,* 312 U.S. 569, 85 L. Ed. 1049, 133 A.L.R. 1396:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

The Court said in *Poulos v. New Hampshire,* 345 U.S. 395, 97 L. Ed. 1105, 30 A.L.R. 2d 987:

"The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express

> may gather around him at any public place and at any time a group for discussion or instruction. It is a *non sequitur* to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion."

Mr. Justice Holmes said for the Court in *Schenck v. United States,* 249 U.S. 47, 63 L. Ed. 470, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic."

If lucid words mean what they unambiguously say, and if the Supreme Court of the United States adheres to what it said in the *Cox* and *Poulos* cases, the State and municipalities have authority to impose regulations in order to assure the safety and convenience of all the people in the use of their public streets and of their public highways, and defendants, and other persons like-minded, have no state or federal constitutional right of freedom of speech or of peaceable assembly for redress of grievances to wilfully sit down or squat down or lie prone on the public streets and public highways of this State, singing and shouting and clapping their hands, blocking and obstructing the convenience and safety of the people in the use of the public streets and public highways, and thereby create chaos, with the result that "liberty itself would be lost in the excesses of unrestrained abuses." If it were otherwise, then defendants, and others like-minded, could wilfully sit down, squat down, or lie prone on the public highways and airstrips and railroad tracks of this nation, and paralyze the entire transportation system of the people of the United States.

The mistake of whoever is responsible for drafting the indictments here charging defendants in this case with a violation of a city ordinance which has no application is difficult to understand. Such mistake has cost the taxpayers money.

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or indictment. *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

The majority opinion holds that the indictments here charge no criminal offense. Jeopardy attaches only when, *inter alia,* a defendant is tried upon a valid warrant or indictment. Consequently, it is settled

law that a prosecution under an indictment that charges no criminal offense cannot bar a prosecution upon a subsequent valid indictment. *S. v. Strickland,* 246 N.C. 120, 97 S.E. 2d 450, *cert. den.* 355 U.S. 831, 2 L. Ed. 2d 43; *S. v. Jernigan,* 255 N.C. 732, 122 S.E. 2d 711; *S. v. Scott,* 237 N.C. 432, 75 S.E. 2d 154; *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537; *S. v. Beasley,* 208 N.C. 318, 180 S.E. 598; 22 C.J.S., Criminal Law, § 246; Wharton's Criminal Law and Procedure, Anderson, 1957, Vol. I, § 139; 15 Am. Jur., Criminal Law, § 374.

J. A. PEACOCK FOR HIMSELF AND ON BEHALE OF ANY OTHER TAXPAYERS OF SCOTLAND COUNTY v. COUNTY OF SCOTLAND AND SIDNEY D. SMITH, R. F. McCOY, TURNER K. McKENZIE, JESSE SNEED AND JAMES A. GIBSON, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SCOTLAND.

(Filed 12 June 1964.)

1. Statutes § 2—

A statute enabling the consolidation of county and city school administrative units under the general laws and the levy of certain taxes for the construction and operation of the schools of the consolidated unit, does not violate Article II, Section 29 of the State Constitution, since it does not in itself undertake to establish or change the lines of a school district but merely provides machinery for action by local units under the general law, and further provisions of the statute requiring that the merger and the levy of the taxes be approved by a vote does not alter this result.

2. Constitutional Law § 7—

A statute requiring the levy of taxes in a school administrative unit sufficient to provide funds for current expenditures per pupil equal to that of the average for the State as certified by the State Board of Education is not unconstitutional as a delegation of legislative power, since the ascertainment of the amount of the tax is merely a matter of mathematical computation and does not involve the exercise of discretion.

3. Counties § 5—

Objection that the bonds to be issued by a county upon the approval of its voters would raise the county's outstanding indebtedness to an amount in excess of five per cent of the county's assessed valuation and that, therefore, the proposed bond issue was invalid, G.S. 153-87, *held* untenable when a portion of the county's debt was incurred under a statute exempting bonds issued thereunder from the limitation of G.S. 153-87, the total amount of the county's debt, excluding the special issue, not being in excess of the limitation of the statute.

APPEAL by plaintiff from *McKinnon, J.*, April Civil Session 1964 of SCOTLAND.

This is an action to enjoin the Board of Commissioners of Scotland County from issuing bonds, the proceeds from which are to be used for school construction, and from proceeding with the merger of the Laurinburg City School Administrative Unit and the Scotland County School Administrative Unit under the provisions of Chapter 707, 1963 Session Laws of North Carolina and Chapter 115 of the General Statutes of North Carolina.

The Act in question provides for a merger of the above named administrative units if approved by a majority of the voters of Scotland County.

The essential parts of the plan as adopted and approved by a majority of the duly qualified voters of Scotland County, are as follows:

(1) The issuance of school building bonds in an aggregate principal amount not exceeding $1,750,000 for the purpose of building a new consolidated high school, remodeling, enlarging and reconstructing existing school buildings and other school plant facilities, and to acquire the necessary land and equipment therefor, in order to provide the additional school facilities in the County of Scotland to maintain the six months' school term in said county as required by Section 3 of Article IX of the Constitution of North Carolina, and the levy and collection of a sufficient tax for the payment of the principal of and interest on said bonds.

(2) The merger of the Laurinburg City School Administrative Unit and the Scotland County School Administrative Unit and their respective Boards of Education. These Boards, if and when consolidated, shall constitute the Laurinburg-Scotland County Board of Education.

(3) To require the Laurinburg-Scotland County Board of Education to request and the Scotland County Board of Commissioners "to appropriate annually from any local sources, including both general and supplemental tax revenues, such funds as will provide, at a minimum, current expense expenditures per student from local funds which shall be no less than the average current expense expenditures per student from local funds throughout the State, as determined by the latest certification of the State Superintendent of Public Instruction."

(4) To authorize the County Commissioners to levy a countywide supplemental school tax not to exceed fifty cents (50¢) per one hundred dollar valuation.

The Act also provides for the details of the school merger, such as terms of office of Board members, election procedure, administrative personnel, *et cetera,* which the General Statutes do not provide for in detail.

Pursuant to the provisions of Chapter 707, 1963 Session Laws, the Scotland County electorate, on 3 March 1964, approved the merger of the City and County Administrative School Units, the issuance of the bonds to finance said construction, and authorized the levy and collection of a tax sufficient to pay the principal of and the interest on said bonds. The voters likewise approved the levy of the minimum tax as set forth in paragraph three above, as well as the supplemental tax of fifty cents.

Thereafter, on 19 March 1964, the Laurinburg Board of Education petitioned the Scotland County Board of Education and the State Board of Education requesting the merger of the City and County Administrative School Units; and on 20 March 1964 the said petition was approved by the Scotland County Board of Education and by the State Board of Education.

This action was instituted on 20 March 1964 and, by consent of all parties, the matter was heard on 6 April 1964 before the Honorable Henry A. McKinnon, Jr., Resident Judge of the Sixteenth Judicial District, without a jury, upon the facts stipulated by the parties and the allegations of the complaint admitted by the answer.

The trial judge denied the injunction prayed for and dismissed the action, holding that Chapter 707, 1963 Session Laws, does not violate the Constitution of North Carolina and that Scotland County had the authority to issue the bonds in question.

The plaintiff appeals, assigning error.

Bailey, Dixon & Wooten for plaintiff appellant.

Smith, Leach, Anderson & Dorsett, and Henry A. Mitchell, Jr., for defendant appellees.

DENNY, C.J. The appellant's first assignment of error is to the failure of the court below to hold that Chapter 707, 1963 Session Laws, establishes or changes the lines of school districts in violation of Article II, Section 29 of the Constitution of North Carolina.

An examination of the Act in question reveals that it is an enabling statute, in addition to and not intended to be in lieu of existing general statutes.

We do not construe the Act in question as one establishing or changing the lines of school districts in violation of Article II, Section 29 of the Constitution of North Carolina. In fact, the Act provides that the merger, if approved by the voters of Scotland County, shall be effected under the provisions of Section 115-74 of the General Statutes of North Carolina. This statute, among other things, provides: "Nothing

in this section shall prevent city administrative units from consolidating with county administrative units in which such city administrative unit is located, upon petition of the board of education of the city administrative unit and the approval of the county board of education and of the State Board of Education * * *."

Moreover, the Act further provides that the election authorized to be held in order to ascertain the wishes of the voters of Scotland County with respect to the adoption of the four proposals hereinabove set out, "shall be conducted in accordance with the applicable provisions of the General Statutes of North Carolina."

In the case of *Fletcher v. Comrs. of Buncombe,* 218 N.C. 1, 9 S.E. 2d 606, this Court held that a public-local Act which provides the machinery under which Buncombe County might establish school districts or special bond tax units in the county, was not in contravention of Article II, Section 29 of the State Constitution. The Court said: "It will be observed that the Act in question prescribes a method whereby school districts or special bond tax units may be uniformly established throughout the county. The Act itself deals only with the mechanics of establishing or changing the lines of school districts or special bond tax units, and does not, *ex proprio vigore,* undertake to establish or to change any such lines. These are matters which, in terms, are committed to the sound discretion of the county board of education. The constitutional prohibition as respects the matter now in hand is against direct action on the part of the General Assembly and not against the establishment of machinery for the accomplishment of these ends."

In *Hinson v. Comrs. of Yadkin,* 218 N.C. 13, 9 S.E. 2d 614, this Court upheld as constitutional the provisions of a public-local Act which provided in substance that, upon the receipt of a petition signed by not less than ten per cent of the qualified voters of the territory described in the petition, the County Board of Education may create a school district and define the boundaries thereof; and that upon a further petition by the County Board of Education the Board of County Commissioners shall order a special election to be held in such district upon the question of issuing bonds and notes and levying a tax for the payment thereof; and may, upon a favorable vote, proceed to issue such bonds and notes.

It will be noted that the Act challenged by the appellant does not purport to authorize any plan or proposal that could not have been instituted and carried out under provisions of the General Statutes of North Carolina. It does require, however, that each of the four proposals be approved by the voters of Scotland County. The General Statutes do not require that a merger of school districts or units

be approved by a vote of the qualified voters of the area; such consolidation requires only the approval of the County Board of Education and the State Board of Education.

The fact that the Act requires that the proposed merger be approved by the voters of Scotland County before such merger would become effective, does not make the Act unconstitutional. This assignment of error is overruled.

The appellant further assigns as error that, upon the merger of the two administrative units involved, the Board of Commissioners of Scotland County shall "appropriate annually from any local sources, including both general and supplemental tax revenues, such funds as will provide, at a minimum, current expense expenditures per student from local funds which shall be no less than the average current expense expenditures per student from local funds throughout the State, as determined by the latest certification of the State Superintendent of Public Instruction."

It was stipulated below: "Under G.S. 115-93 the treasurer of each county and city board of education must report to the State Superintendent of Public Instruction on the first Monday of August of each year the entire amount of money received and disbursed by him during the preceding fiscal year. These reports are made on blanks furnished by the office of the State Superintendent. These reports require information as to the amount of money expended for current expense expenditures in the particular school unit.

"Upon receipt of the required reports by the office of the State Superintendent, tabulations are made by school systems and by State totals. From tabulating these figures, the State Superintendent can then certify the average current expense expenditures per student from local funds throughout the State."

The appellant contends that the foregoing method of ascertaining the average student expense constitutes an unlawful delegation of discretionary power to the State Superintendent of Public Instruction and vitiates the discretionary authority vested in the board of county commissioners by G.S. 115-80.

We do not construe G.S. 115-93 as giving to the State Superintendent of Public Instruction any discretionary power in connection with ascertaining the average current expense expenditures per student from local funds throughout the State. It is a matter of tabulating and certifying to the local units the facts as found from the reports submitted to him by the local units.

In the case of *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 22 S.E. 2d 896, Barnhill, J., later C. J., speaking for the Court, said: "While the

Legislature cannot delegate its power to make a law it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside the halls of legislation. *Field v. Clark,* 143 U.S. 649, 36 L. Ed. 294; *Provision Co. v. Daves,* 190 N.C. 7, 128 S.E. 593; *Meador v. Thomas,* 205 N.C. 142, 170 S.E. 110; *Cox v. Kinston, supra* (217 N.C. 391, 8 S.E. 2d 252).

" 'The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be and the fact that these acts may affect private rights do not constitute an exercise of judicial powers. Accordingly, a statute may give to nonjudicial officers the power to declare the existence of facts which call into operation its provisions and, similarly, may grant to commissioners and other subordinate officers power to ascertain and determine appropriate facts as a basis for procedure in the enforcement of particular laws.' 11 Am. Jur. 950; *Cox v. Kinston, supra.*" See *In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795; *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688; *Williamson v. Snow,* 239 N.C. 493, 80 S.E. 2d 262. *Cf. Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310.

The minimum levy required under the Act involved is for the purpose of providing the necessary funds to cover the current expense budget and funds for vocational subjects, except those funds approved for such units in the State budget. There is no contention, evidence tending to show, or finding that the average current expenditure per student in the State is excessive or that it has exceeded in past years the amount levied for this purpose by the Commissioners of Scotland County pursuant to the mandatory levy required for such purposes by G.S. 115-80. Moreover, this minimum levy has been approved by the voters of Scotland County and, therefore, it is constitutionally unassailable. This assignment of error is also overruled.

The appellant assigns as error the failure of the court below to hold that the Board of County Commissioners of Scotland County was without authority to adopt a bond order or ordinance authorizing the issuance of bonds in the total principal amount which exceeded the limitation fixed by G.S. 153-87.

According to the financial statement of Scotland County, filed in connection with the passage of the bond ordinance involved herein as

required by G.S. 153-84, the assessed valuation of taxable property in Scotland County as last fixed for county taxation, was $43,128,260. The outstanding school debt on 8 April 1964 was $1,285,000. The total outstanding school debt, including the proposed bond issue, amounted to $3,035,000. Five per cent of the total assessed value is $2,156,413. The outstanding bonds and the proposed issue amount to $878,587 over and above the five per cent limitation fixed in G.S. 153-87. However, Chapter 1220 of the North Carolina Session Laws of 1959 authorizes the Board of County Commissioners of Scotland County to issue school bonds pursuant to the County Finance Act up to $975,000, notwithstanding the limitation contained in G.S. 153-87. Section 2 of this Act reads as follows: "That the powers granted by this Act are in addition to and not in substitution for any other powers heretofore or hereafter granted to said county."

Furthermore, it was stipulated by the parties in the hearing below, "That Chapter 1220, Session Laws of 1959, was obtained for the purpose of exceeding the debt limitations in G.S. 153-87 by adding to the amount available under the general law, up to $975,000 in addition to any other school debt the county could incur under the general law; and that the County Commissioners had sought such legislation in 1959 because the merger of the City and County school systems was being considered."

In our opinion, the Board of Commissioners of Scotland County was authorized to pass the bond ordinance providing for the issuance of school bonds in the sum of $1,750,000, subject to the approval of the voters of Scotland County. We hold that Chapter 1220 of the Session Laws of 1959 authorized the Board of Commissioners of Scotland County to issue school bonds up to but not in excess of $875,000 over and above the limitation prescribed in G.S. 153-87. The authorized school bond issue of $1,750,000 is within the limitation provided in G.S. 153-87 and Chapter 1220, Session Laws of 1959. This assignment of error is likewise overruled.

No attack is made on the validity of the election in which all four of the proposals submitted were approved.

The appellant took no exception to any finding of fact, nor did he request the finding of any specific fact or facts. The only exception entered in the hearing below, according to the record, was to the judgment from which appeal was taken. However, since the validity of bonds is involved, as well as the levy and collection of taxes, we have considered the pertinent questions sought to be raised by the assignments of error. No prejudicial error has been shown.

The judgment entered below is

Affirmed.

IN THE MATTER OF CUSTODY OF DEBRA CAROL SIMPSON AND JOHNNY SIMPSON, MINORS.

(Filed 12 June 1964.)

1. Adoption § 1; Courts § 16—

The clerk of the Superior Court has exclusive original jurisdiction in adoption proceedings, and the Superior Court has no jurisdiction except on appeal from the clerk. G.S. 48-12, G.S. 48-27.

2. Courts § 16—

The juvenile court has exclusive original jurisdiction to determine the right to custody of children under 16 years of age in all cases except those in which the Superior Court is given jurisdiction by G.S. 17-39 or G.S. 50-13, and thus has exclusive jurisdiction to award the custody of an abandoned child, G.S. 110-21.

3. Same—

Where children have been adjudged abandoned by the juvenile court and their custody placed in the county superintendent of public welfare, who has placed the children in a licensed foster home, *held* the legal custody of the children remains in the county superintendent, though the actual custody is in the operators of the foster home.

4. Same; Habeas Corpus § 3—

Where order of the juvenile court has adjudged certain children abandoned and placed their legal custody in the county superintendent of public welfare who has placed them in a licensed foster home, and thereafter the children are taken away pursuant to preliminary adoption proceedings, the Superior Court does not have original jurisdiction to entertain a petition by the operators of the home to award their custody to the operators, but the matter is determinable by the juvenile court with right of appeal to the Superior Court. G.S. 110-40.

APPEAL by petitioners from a judgment signed (after hearings in Chambers) on December 26, 1963, by his Honor, *Allen H. Gwyn, Resident Judge* of the Seventeenth Judicial District.

Notice that Willie Bethel Lovelace and wife, Willie Faulkner Lovelace, would apply "to his Honor, Allen H. Gwyn, Resident Judge of the 17th Judicial District, for an order awarding to the petitioners the care, custody, and control of Debra Carol Simpson and Johnny Simpson, minor children," was given (service accepted) to "Jule McMichael, Attorney for Elizabeth Barksdale, Superintendent of the Department of Public Welfare for Rockingham County," on October 19, 1963.

In a petition addressed to Judge Gwyn as Resident Judge, the petitioners (Lovelaces) alleged in substance, except when quoted, the following:

Debra Carol Simpson (Debra), age seven, and Johnny Simpson (Johnny), age six, "are currently in the legal custody of Elizabeth

Barksdale, Superintendent of the Department of Public Welfare for Rockingham County, North Carolina." Petitioners, citizens and residents of Rockingham County, were licensed by the Superintendent of the Department of Public Welfare of Rockingham County to operate a foster home. Under said license, the Superintendent placed Johnny, then aged fourteen months, with petitioners on May 25, 1958, and placed Debra, then aged three years, with petitioners on March 3, 1959. "(I)t was the understanding of the petitioners at this time that they would not be allowed to adopt the children." The children, when brought into the home of petitioners, were in bad health and emotionally disturbed. Petitioners treated them as their own children. As a result of five years of love and attention, the children, in August, 1963, were healthy and emotionally secure. In August, 1963, Debra and Johnny were removed from the home of petitioners by the Superintendent of Public Welfare of Rockingham County. Petitioners "at that time asked to have the privilege of adopting the children" but were informed by the Department of Public Welfare of Rockingham County "that they could not adopt the children."

Petitioners love the children and the children love petitioners. Petitioners feel that separation, after living in the home of petitioners for approximately five years, would be injurious to the health, both mental and physical, of the children. They seek the custody of the children and "the right to adopt these children and to continue to give them the love and affection and security that they have given them for approximately five years." They are fit and proper persons to have the custody of the children and "are in the process of filing a Special Proceeding for the adoption of the . . . children with the Clerk of the Superior Court for Rockingham County."

Petitioners pray "that an Order be made directing the Superintendent of Public Welfare for Rockingham County to return Debra Carol Simpson and Johnny Simpson, minor children, to the custody of your petitioners and that your petitioners be allowed to proceed with their Adoption Proceedings."

In behalf of Elizabeth A. Barksdale, *Director* (see Session Laws of 1961, Chapter 186) of the Department of Public Welfare of Rockingham County, Jule McMichael, Esquire, the County Attorney, filed (1) a motion to dismiss said petition and (2) an answer thereto. Petitioners filed (1) an answer to said motion to dismiss and (2) a reply to said answer.

The matter was heard in Chambers by Judge Gwyn on two occasions. On October 30, 1963, it was heard on respondent's motion to dismiss. No order was then entered. On November 7, 1963, it was heard

on the evidence offered by petitioners, which included the testimony of Miss Barksdale, the respondent, and the testimony of Miss Willis, a case worker. (Note: Petitioners were tendered for cross-examination but did not testify. Apparently, their verified petition was accepted and treated as evidence.)

The pleadings and uncontradicted evidence established the following facts:

On March 12, 1958, the Clerk of the Superior Court of Rockingham County, in his capacity as Juvenile Judge, upon findings that eight named Simpson children had been grossly neglected by their parents, ordered "that the said children be committed to the Superintendent of Public Welfare to be placed in suitable homes until such time as the mother may be located and heard." Pursuant to this order, the Superintendent placed two of the children with petitioners, Johnny on May 25, 1958, and Debra on March 3, 1959.

On January 12, 1960, in a special proceeding, the said Juvenile Judge, on findings that the eight Simpson children had been abandoned by their parents, ordered "that the custody of said abandoned children . . . be and is hereby placed in the petitioner, Dorothy J. Martin, Rockingham County Superintendent of Public Welfare, or her successors in office." Pursuant to this order, the Superintendent continued the arrangement previously made with petitioners with reference to Johnny and Debra.

Under the arrangement with petitioners, the Department of Public Welfare paid $50.00 per month per child "for food and shelter" and was "responsible for medical needs, doctor, drug, dentist, clothing, whatever it might be." While the Lovelaces had the children, the Department of Public Welfare paid "(f)or room and board — $5,724.76; for medical care — $108.46; for clothing — $355.61; for doctors — $107.00." The amount of all payments was $6,295.83.

After January 12, 1960, to wit, in June or July of 1963, a Mr. Brown, cousin of Bethel Lovelace (male petitioner), requested permission to adopt Johnny and Debra. The children were taken to Virginia where Brown lived. They were gone from Rockingham County about eight weeks. During this period the Lovelaces "were hearing from them all along." The evidence is unclear as to further details concerning this incident.

There is no evidence as to specific further efforts, if any, of the Department of Public Welfare with reference to adoption until August, 1963. In accordance with the State policy, the Department of Public Welfare of Rockingham County prepared a descriptive summary of

children under its supervision "in need of adoption placement." The State Department sent such summaries to the county offices. In 1963, in response to such a summary concerning Johnny and Debra, the Director of an unidentified county (not in the Seventeenth Judicial District) advised that a childless couple in such county wished to adopt two older children. Thereafter, the interested husband and wife came to Rockingham County to see Johnny and Debra. The children, with the cooperation of the Lovelaces, were taken to the office of the Rockingham Department of Public Welfare and visited with the prospective adoptive parents an hour or so in "a small play area." An "inter-county agreement," with approval of the State Department, was signed. Miss Barksdale testified: "Whenever a child is moved from one county to another there is an agreement signed by both counties whereby the county accepting the child accepts the responsibility and assumes supervision."

The Lovelaces have three children of their own, all a few years older than Johnny and Debra.

The Lovelaces have fully discharged their responsibilities as foster parents. They accepted Johnny and Debra as members of their family and treated them with loving care. The children were healthy, happy and well adjusted. Prior to their removal for adoption in August of 1963, the Lovelaces were the only parents the children had ever known.

Johnny and Debra were not present before Judge Gwyn and were not in the Seventeenth Judicial District at the time of said hearings. There is no evidence: (1) as to the identity of the county in which the children now reside; (2) as to the names of the prospective adoptive parents; or (3) as to the present status of the adoption proceedings.

On December 26, 1963, Judge Gwyn signed a judgment which, after recitals, provides:

"The Court being of the opinion finds as a fact:

"1. That the Court has jurisdiction in this matter even though it is not shown that the minor children are residing in the 17th Judicial District of North Carolina at the present time.

"2. That the Court cannot find from the evidence introduced by the petitioners that the interest of said minor children would best be served by placing said children in the home of the petitioners for adoption instead of the undisclosed home of the adoptive parents presently in the process of adopting said children.

"3. That the State and County Public Welfare Department's policy of not disclosing the whereabouts and names of adoptive

parents and children being adopted is a sound policy which should not be disturbed by the courts.

"4. That the petitioners are not the natural parents or guardians of said children and, therefore, have no legal right to the custody of said children.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the petitioners' request for custody of said minor children be and the same is hereby denied, and it is further ordered that this action be dismissed and that the petitioners be taxed with the cost."

Petitioners excepted and appealed.

D. Leon Moore for petitioner appellants.
McMichael, Griffin & Rankin for respondent appellee.

BOBBITT, J. Our first question is whether Judge Gwyn had original jurisdiction to hear and pass upon the questions presented by the petition.

The only procedure for the adoption of minors is that prescribed by G.S. Chapter 48. "Adoption shall be by a special proceeding before the clerk of the superior court." G.S. 48-12. A superior court judge has no jurisdiction in adoption proceedings except upon appeal from the clerk. See G.S. 48-21 and G.S. 48-27. There is nothing in the evidence concerning an adoption proceeding, if any, filed by petitioners except *the allegation* that "your petitioners are in the process of filing a Special Proceeding for the adoption of the . . . children with the Clerk of the Superior Court for Rockingham County." Clearly, Judge Gwyn had no jurisdiction to make an order relating to any adoption proceeding.

Did Judge Gwyn have original jurisdiction to determine whether custody of Debra and Johnny should be awarded to petitioners?

The petition was not filed in any pending civil action or special proceeding. It was presented directly to Judge Gwyn as Resident Judge some two months after the children had been removed to another county and placed in the custody of prospective adoptive parents in accordance with an interlocutory order in an adoption proceeding.

It does not appear that Debra and Johnny were subject to adoption until the order of January 12, 1960, in which they were adjudged *abandoned* children. G.S. 48-2(3a); G.S. 110-28 *et seq.* Prior thereto, the order of March 12, 1958, made provision for immediate (temporary) custody. G.S. 110-27.

Under G.S. 110-21, the clerk of the superior court, in his capacity as Juvenile Judge, has exclusive jurisdiction of an *abandoned* child

under sixteen years of age; and, "(w)hen jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purposes of this article during the minority of the child."

It is noteworthy that the Juvenile Court, under G.S. 110-21, has exclusive original jurisdiction of a child under sixteen years of age "whose custody is subject to controversy" in all cases except those in which the superior court is given jurisdiction by G.S. 17-39 or G.S. 50-13. *In re Melton,* 237 N.C. 386, 74 S.E. 2d 926; *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906; *In re Prevatt,* 223 N.C. 833, 28 S.E. 2d 564.

By his order of January 12, 1960, the Juvenile Judge placed the custody of Debra and Johnny in the then Superintendent (now Director, see Session Laws of 1961, Chapter 186) of Public Welfare of Rockingham County and her successors in office. The record does not indicate there were any further proceedings or orders in the Juvenile Court.

Petitioners allege that the children are in the legal custody of the Director of the Department of Public Welfare of Rockingham County. It is noted that respondent denies this allegation. It is respondent's contention that the custody of Debra and Johnny was properly transferred (incident to the adoption proceedings) to the Department of Public Welfare of an unidentified county, which county, under the inter-county agreement, has assumed responsibility for supervision of the children. It is noted that one of the statutory powers and duties of a County Director of Public Welfare is "(t)o investigate cases for adoption and supervise placements for adoption." G.S. 108-14(10).

To support their contention, petitioners cite *In re Blalock,* 233 N.C. 493, 64 S.E. 2d 848, 25 A.L.R. 2d 818. In that case, the Domestic Relations Court, in which was vested Juvenile Court jurisdiction, made an order relating to a dependent child. Thereafter, *the mother* of such child made a motion *before the said Domestic Relations Court* for a modification of said order. The motion was contested by those who had actual custody. The matter was heard in the superior court *on appeal* from the order of the Domestic Relations Court.

The basis for petitioners' allegation and contention is the order entered January 12, 1960, by the Juvenile Judge. Whether, under this order, the Director of Public Welfare of Rockingham County was authorized to transfer the custody of the children to the Director of Public Welfare of another county, and if not, whether the Juvenile Court should authorize such transfer, are questions determinable in the first instance in the Juvenile Court. The superior court has jurisdiction to hear appeals from orders and judgments of the Juvenile Court. G.S. 110-40.

In our view, Judge Gwyn did not have original jurisdiction to determine whether custody of Debra and Johnny should be awarded to petitioners.

With reference to petitioners' *legal* status: Petitioners are not the natural parents of Debra and Johnny. During the period petitioners had actual custody of the children, the legal right to custody was in the Director of Public Welfare of Rockingham County; and petitioners' actual custody was under authority granted by said Director pursuant to the arrangement for their care. Understandably, petitioners, on account of their long and happy association with the children, are deeply concerned for their welfare. Without passing upon petitioners' legal standing, if any, to proceed by motion in the Juvenile Court, it would be appropriate for the Juvenile Court to hear any matters brought to its attention bearing upon what occurred subsequent to its order of January 12, 1960, with reference to the custody and welfare of the children.

Although compensated to the extent indicated, it seems appropriate to say that the care and affection provided by petitioners to Debra and Johnny deserve the highest commendation.

We express no opinion as to whether the Director of Public Welfare of Rockingham County acted legally or wisely in removing the children from petititoners' custody and placing them under the supervision of the Department of Public Welfare of an unidentified county. Decision on this appeal is based solely on the ground Judge Gwyn did not have original jurisdiction to hear and pass upon the questions presented by the petition.

For lack of jurisdiction, the judgment from which petitioners appeal is vacated.

Judgment vacated.

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

NANCY PRUDEN, MARY P. WILLIS AND VIRGIE P. PHELPS, PETITIONERS v. J. B. KEEMER AND WIFE, ELLA KEEMER AND JOHN HENRY BULLOCKS AND WIFE, OPHELIA BULLOCKS, RESPONDENTS.

(Filed 12 June 1964.)

1. Clerks of Courts § 1—

The clerk of the Superior Court has no common law or equitable jurisdiction but only that jurisdiction conferred by statute.

2. Boundaries § 1—

A processioning proceeding does not put in issue title to real estate but only the location of a disputed boundary between the land of petitioners and adjacent lands. G.S. 38-1.

3. Boundaries § 8—

In a processioning proceeding, what constitutes the boundary line is a matter of law, where it is located is a matter of fact.

4. Judgments § 13—

Failure to answer admits the facts alleged in the complaint or petition and entitles plaintiffs or petitioners to such judgment only as is proper upon the facts thus admitted, so that if the facts alleged are insufficient to constitute a cause of action, default judgment rendered thereon is a nullity.

5. Same; Boundaries § 7—

Where the petition in processioning proceedings does not allege what boundary is in dispute between petitioners and respondents, and, while containing a legal description of the lands claimed by petitioners, fails to locate any lines as claimed by petitioners on the earth's surface, the petition is fatally defective and insufficient to confer jurisdiction on the court. G.S. 38-1.

6. Judgments § 19—

A void judgment is a nullity.

APPEAL by respondents from *Parker, J.*, August-September 1963 Session of BERTIE.

This special (processioning) proceeding was instituted July 20, 1961, under G.S. 38-1 *et seq.;* and on July 20, 1961, the summons and petition were served on each defendant.

In their petition, addressed to the clerk of the superior court, petitioners alleged:

"1. That petitioners are the owners of Lot No. 5 of the Jacob Pruden land division, containing 195 acres, more or less, and more particularly described in Book RR, page 42, Bertie County Public Registry, and being more particularly described as follows, to-wit:

"BEGINNING in the Hog Pond Branch and running thence North 4 degrees East 1650 feet along the Cowan land; thence South 55 degrees West 1056 feet; thence North 32 degrees West 503.25 feet; thence North 27 degrees West 561 feet, North 20 degrees 30 minutes West 462 feet; thence along Union Bag-Camp Paper Corporation's line North 39 degrees East 1534.5 feet; thence South 34 degrees 30 minutes East 330 feet; thence South 58 degrees East 825 feet; thence South 82 degrees 30 minutes East 643.5 feet; thence South 85 degrees 30 minutes

East 660 feet to Guy's Hall Branch; thence along Guy's Hall Branch and Hog Pond Branch to the point of BEGINNING.

"2. That the true and correct location of the line of petitioners' lands and as claimed by them is as follows: BEGINNING at a point in Guy's Hall Branch at the call above, reading 'South 85 degrees 30 minutes East 660 feet,' and running thence from Guy's Hall Branch, North 85 degrees 30 minutes West 660 feet, North 82 degrees 30 minutes West 643.5 feet, North 58 degrees West 825 feet and North 34 degrees 30 minutes West 330 feet.

"3. That the respondent, J. B. Keemer, is adjoining landowner and his lands are affected by this proceeding; that J. B. Keemer, and wife, sold to John Henry Bullock and wife, Ophelia Bullock, a lot by deed dated October 31, 1956, registered in Book 461, page 249, Bertie County Public Registry, and said lot will be affected by the location of the said line.

"WHEREFORE, petitioners pray: That the location of the boundary line of petitioners' land be fixed as set out in the petition and pursuant to the provisions of Chapter 38 of the General Statutes of North Carolina; for all other and further relief."

No answer having been filed, the clerk, on August 1, 1961, entered an order which, after recitals, states: "the court further finds that the allegations of the petition are true and that the true and correct location of the line of petitioners' lands where it adjoins respondents is as set out in section 2 of the petition, and that the petitioners are entitled to the relief demanded in the petition." The clerk's order concludes as follows:

"THEREUPON, it is ORDERED, CONSIDERED AND ADJUDGED that the true and correct location of the line of the petitioners' lands where it adjoins the lands of the respondents is as follows:

"BEGINNING at a point in Guy's Hall Branch at the call reading 'South 85 degrees 30 minutes East 660 feet,' and running thence from Guy's Hall Branch North 85 degrees 30 minutes West 660 feet, North 82 degrees 30 minutes West 643.5 feet, North 58 degrees West 825 feet and North 34 degrees 30 minutes West 330 feet, and all of which is more particularly shown on Lot No. 5 of the Jacob Pruden land Division in Book RR, Page 42, Bertie County Public Registry.

"It is FURTHER ORDERED that a plat of Lot No. 5 of the Jacob Pruden Land Division be filed and recorded with this Judgment, showing the true location of said boundary line.

"It is FURTHER ORDERED that the petitioners recover the cost of this action of the respondents, the same to be taxed by the Clerk of this Court. Let the same be registered with plat in the office of the Register of Deeds of Bertie County, N. C."

On May 29, 1963, respondents, represented by counsel, filed with the clerk a paper entitled "MOTION TO VACATE ORDER AND DISMISS PETITION." On July 22, 1963, petitioners answered the allegations of respondents' said motion and moved that it be dismissed.

Respondents' (verified) motion of May 29, 1963, asserted, *inter alia*, that J. B. Keemer, within ten days after service of summons and petition on respondents, appeared in the clerk's office and made inquiry and was given certain information "about the nature and meaning of the proceeding." These allegations were denied by petitioners in their answer to respondents' said motion. The clerk, by order of July 22, 1963, on the ground "it may become necessary in the hearing for the clerk or his deputies to testify," was of opinion he was disqualified to hear respondents' said motion and ordered that "the motion be, and it is hereby, transferred to the Judge of the Superior Court of Bertie County to be heard at such time as the Court may determine."

On August 27, 1963, respondents made a supplemental motion, "BEFORE THE JUDGE," that an order issue directing the county surveyor to make certain surveys.

There appears in the record a "MOTION FOR CONTINUANCE," bearing date of September 3, 1963. It is noted that affidavits filed in connection with a motion by petitioners to dismiss this appeal disclose a controversy as to whether this motion was filed prior to September 6, 1963, the date on which Judge Parker entered judgment.

Judge Parker's judgment provides:

"This cause having been transferred by the Clerk of the Superior Court to the undersigned Judge of the Superior Court for hearing by order dated July 22, 1963, and the same having been set for hearing September 3, 1963, and counsel for respondents having failed to appear, but notwithstanding their failure to appear, the court has considered the motion of respondents, together with the petition filed in this cause and upon considering the same the court finds that a duly verified petition was filed in this cause July 20th, 1961; that summons was issued on said date and personally served upon the respondents by B. B. Joyner, Deputy Sheriff of Bertie County, July 20, 1961; that no answer was filed and on August 1, 1961, the Clerk of the Superior Court entered a judgment appearing of record, which judgment was duly

entered upon the records in the Superior Court of Bertie County; that the motion to vacate the same was filed the 29th day of May 1963, more than one year after the entry of the aforesaid judgment; the court further finds that defendants have failed to show reasonable or proper excuse for vacating said judgment and they have failed to show a meritorious defense to said action; the court further finds that the motion should be denied;

"THEREUPON, it is ORDERED, CONSIDERED, AND ADJUDGED that the motion to vacate the order heretofore entered in this cause by G. C. Spoolman, Clerk of the Superior Court, August 1, 1961, and dismiss the petition be, and the same is hereby, denied."

Respondents filed "SPECIFIC EXCEPTIONS" to said judgment and appealed.

Pritchett & Cooke for petitioner appellees.

James R. Walker, Jr., Samuel S. Mitchell, Robert L. Harrell, Sr., and T. T. Clayton for respondent appellants.

BOBBITT, J. The basic question is whether the clerk had jurisdiction to enter the purported default judgment of August 1, 1961. If not, said purported judgment is absolutely void and must be treated as a nullity. *Deans v. Deans,* 241 N.C. 1, 9-10, 84 S.E. 2d 321, and cases cited.

The clerk of the superior court has no common law or equitable jurisdiction. *McCauley v. McCauley,* 122 N.C. 288, 30 S.E. 344. The clerk is a court "of very limited jurisdiction — having only such jurisdiction as is given by statute." *Moore v. Moore,* 224 N.C. 552, 555, 31 S.E. 2d 690, and cases cited; *In re Dunn,* 239 N.C. 378, 383, 79 S.E. 2d 921; *Deans v. Deans, supra.* As stated by Seawell, J., in *Johnston County v. Ellis,* 226 N.C. 268, 279, 38 S.E. 2d 31: "The jurisdiction of the clerk of the Superior Court is statutory and limited, and can be exercised only with strict observance of the statute."

A special proceeding under G.S. 38-1 through G.S. 38-3 may be instituted by an owner of land *whose boundary lines are in dispute.* G.S. 38-1. "Title or ownership is not directly put in issue in a processioning proceeding." *Bumgarner v. Corpening,* 246 N.C. 40, 43, 97 S.E. 2d 427, and cases cited. The sole purpose of a processioning proceeding is to establish *the true location* of disputed boundary lines.

In determining the true location of a disputed boundary line, this legal principle is well settled: "What constitutes the line, is a matter

of law; where it is, is a matter of fact." *McCanless v. Ballard,* 222 N.C. 701, 703, 24 S.E. 2d 525; *Jenkins v. Trantham,* 244 N.C. 422, 426, 94 S.E. 2d 311.

"The default admits only the averments in the complaint, and if these are insufficient to warrant the plaintiff's recovery, no judgment can be given; as where it appears that the court has no jurisdiction or the facts do not constitute a cause of action." McIntosh, North Carolina Practice and Procedure § 634, p. 713; *Howze v. McCall,* 249 N.C. 250, 255, 106 S.E. 2d 236. Respondents' failure to answer (default) constituted an admission of the facts alleged in the petition. The question is whether these facts were sufficient to vest in the clerk jurisdiction to enter the purported default judgment of August 1, 1961.

Facts alleged in the petition and deemed admitted are: Petitioners own the described tract of land. Respondent Keemer is "adjoining landowner" and his lands "are affected by this proceeding"; and a lot purchased by respondents Bullock from Keemer "will be affected by the location of the said line."

Petitioners prayed that "the location of the boundary line" of their land "be fixed as set out in the petition." The petition contains no allegation as to what boundary line is in dispute. Indeed, there is no allegation that *any* boundary line is in dispute. Only disputed boundary lines are the subject of processioning proceedings. G.S. 38-1.

The burden of proof rests upon a petitioner to establish the true location of a disputed boundary line. *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501; *McCanless v. Ballard, supra.* It is equally true, under general rules applicable to pleadings and specifically under G.S. 38-3, that a petitioner must allege the true location of a disputed boundary line.

G.S. 38-3, in pertinent part, provides: "The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. *If the defendants fail to answer, judgment shall be given establishing the line according to petition.*" (Our italics). As under prior statutes relating to processioning proceedings (Chapter 48, The Code of 1883; *Forney v. Williamson,* 98 N.C. 329, 4 S.E. 483; *Euliss v. McAdams,* 101 N.C. 391, 7 S.E. 725), a strict observance of statutory provisions in all material respects is required.

The clerk's jurisdiction to enter a judgment by default in a processioning proceeding is based solely on the italicized sentence in the quoted portion of G.S. 38-3. In our view, and we so hold, a petition in

compliance with statutory requirements is a prerequisite to the clerk's jurisdiction to enter such default judgment.

There are eleven calls in petitioners' description of their land. Petitioners reversed four of these calls (tenth, ninth, eighth and seventh) and alleged these (reversed) calls constitute "the true and correct location of the line of petitioners' lands . . . as claimed by them."

G.S. 38-3 provides that petitioner allege "facts sufficient to constitute the location of such line as claimed by him." This provision requires that petitioner allege facts as to the location of the (disputed) line as claimed by him with sufficient definiteness that its location on the earth's surface may be determined from petitioner's description thereof.

What are petitioners' lines is determinable as a matter of law from the calls in the description of their lands. Where these lines are located on the earth's surface is determinable as a matter of fact. The petition is deficient in that it does not allege facts sufficient to identify *the location* of any (disputed) line "as claimed" by petitioners. While our statutory provisions control decision, the result appears to be in substantial accord with decisions in other jurisdictions. 12 Am. Jur. 2d, Boundaries § 97; 11 C.J.S., Boundaries § 103.

What lines, if any, are disputed? Where are the disputed lines, if any, located on the earth's surface? Petitioners' allegations provide no answer. (While not considered material, it is noted that petitioners did not attach to the petition a plat purporting to show Lot No. 5 of the Jacob Pruden land division.) The petition is fatally defective and insufficient to confer jurisdiction on the clerk. Hence, the purported default judgment of August 1, 1961, is absolutely void and must be treated as a nullity.

Having reached the conclusion the purported default judgment of August 1, 1961, is absolutely void and must be treated as a nullity, consideration of other questions raised by the appeal and discussed in the briefs is unnecessary.

Reversed.

J. BRUCE YOKLEY, HOWARD LOFLEN AND HOWARD SCOTT, AND OTHER TAXPAYERS v. MAYOR E. T. CLARK, COMMISSIONERS MAYNARD BEAMER, FLETCHER HARRIS, L. M. LAMM, CHARLES LOWRY, MARTIN A. THOMAS AND CLERK J. C. HILL OF THE TOWN OF MOUNT AIRY, N. C., AND COMMISSIONERS HOWARD HARDY, CHAIRMAN,

YOKLEY *v.* CLARK.

HOWARD FOY AND MARION WHITNER AND CLERK PAUL D. MELTON OF SURRY COUNTY, NORTH CAROLINA, AND JOHN BANNER, JR., CHAIRMAN, HENRY R. ROWE, TREASURER, RAYMOND SMITH, JR., VICE PRESIDENT, HOWARD O. WOLTZ, JR., SECRETARY, AND DR. LOUIS SPILLMAN, OF THE MOUNT AIRY-SURRY COUNTY AIRPORT COMMISSION.

(Filed 12 June 1964.)

1. Taxation § 6—

A contract between a county and one of its municipalities to contribute funds for the construction and operation of an airport, without submitting the question to a vote, is invalid, even if the contribution of funds for the construction of the airport is made from nontax revenue, since the contract is indivisible and the pledging of future operating funds is unlimited, and, even if limited to nontax revenue, would be unconstitutional. Constitution of North Carolina, Art. VII, § 6. Whether the proceeds of sale by a county of lands purchased with tax funds become surplus funds derived from a source other than taxation, *quaere?*

2. Municipal Corporations § 37—

Water and sewer receipts of a municipality may not be treated by it as surplus funds until all expenses of operating, managing, maintaining, and extending its water and sewer facilities, as well as the interest and principal required to be paid during the next succeeding year on bonds issued for such interprises, have been paid. G.S. 160-397.

3. Taxation § 6—

Intangible tax receipts of a county may not be treated by it as nontax revenue which it may spend for an unnecessary purpose without a vote, since the State levies and collects such taxes for and on behalf of its political subdivisions. G.S. 105-198.

APPEAL by plaintiffs from *Gwyn, J.*, October, 1963 Civil Session, SURRY Superior Court.

The plaintiffs, who are residents, property owners, and taxpayers of the Town of Mount Airy and County of Surry, instituted this civil action to restrain the Town and County from appropriating and expending public funds of the Town and County in constructing and maintaining an airport outside the Town of Mount Airy, Surry County. The Mount Airy-Surry County Airport Authority was made a party defendant. Judge Johnston, upon application of the plaintiffs, issued a temporary restraining order pending hearing. At the hearing, Judge Gwyn modified the order but permitted the expenditures with some limitations. Plaintiffs appealed.

J. N. Freeman, Womble, Carlyle, Sandridge & Rice, by I. E. Carlyle and Grady Barnhill, Jr., for plaintiff appellants.

John C. W. Gardner, of Barber & Gardner for defendant Town of Mount Airy, appellee.

Fred Folger, Jr., of Folger & Folger, for defendant County of Surry, appellee.

Thomas M. Faw, of Woltz & Faw, for defendant Mount Airy-Surry County Airport Authority, appellee.

HIGGINS, J. According to the Census of 1960, Surry County had a population of 48,205. The Town of Mount Airy had a population of 7,055. For the year 1963 a total of ten airplanes were listed for taxes in Surry County. An air strip with a topsoil runway 1,800 feet long (not useable in bad weather) is privately owned and privately maintained near Mount Airy. The nearest modern airfield is at Winston-Salem, 38 miles distant.

On March 7, 1963, the proper governing authorities of Surry County and of the Town of Mount Airy entered into a written contract pursuant to Chapter 63, General Statutes, establishing the Town of Mount Airy-Surry County Airport Commission. The contract empowered the Commission "to acquire by purchase or eminent domain such real estate or personal property which shall be required for the operation of the Airport Authority . . . Title . . . shall vest in said authority for the purpose of operating, constructing, maintaining, equipping, and regulating the Airport Authority and all Airport facilities acquired by the Authority."

> "That the Town of Mount Airy agrees to appropriate from its funds the sum of $37,500.00 and Surry County agrees to appropriate the sum of $25,000.00 from its general funds to be used for the initial acquisition and construction of a landing strip and other required facilities, such contributions to be supplemented by donations from interested private individuals and matched by the Federal Government. That after the establishment of the landing strip and other required facilities, revenues of the Authority shall be devoted to the expenses of operation and maintenance of the Airport Authority and the further expenses of operation and maintenance shall be on the basis of sixty (60%) per cent contributions by the Town of Mount Airy and forty (40%) per cent contributions by the County of Surry. . . .
>
> "After the construction of the Airport facilities by the Mount Airy-Surry County Airport Authority, the Airport Commission shall submit to Surry County and the Town of Mount Airy for approval and consideration annual budget estimates of anticipated expenditures required for the operation of the Commission. If and in the event the expenditures of the Commission exceed budgeted expenditures, the Airport Commission shall apply to the parties to this Agreement for approval of all additional expenditures."

The Town of Mount Airy, in its first further defense, recites as its authority to finance the original contract, the following:

> "That thereafter, the Town Board of Commissioners of the Town of Mount Airy, acting upon the advice of its Attorneys and upon the advice of the Attorney General of North Carolina, budgeted for payment during the 1963-1964 fiscal year the sum of $37,500.00 to the Mount Airy-Surry County Airport Authority. That $25,000.00 of this amount is payable from the sale of the old watershed property; $9,338.50 payable from water and sewer surplus and $3,111.50 from water revenues. That all of the said sums are nontax revenues within the meaning of Chapter VII, Section 7, of the Constitution of the State of North Carolina."

The Board of Commissioners of Surry County, in its 1963-1964 budget, included the sum of $25,000.00 for the Airport Authority, (one member of the Board opposed this grant). The budget carried this notation:

> "(T)hat it is specifically directed that the $25,000.00 appropriated for use by the Mt. Airy-Surry County Airport Authority be paid out of any non Ad Valorem tax revenues available such beer tax and wine tax revenues or intangibles tax revenue due the General Fund according to the following schedules:"

Judge Gwyn approved the Town's appropriation of $25,000.00 from the proceeds of a sale of a part of the Town's watershed lands. The parties stipulated these lands were paid for by tax money. Judge Gwyn also approved the Town's appropriation of $9,338.50 from its water and sewer receipts, and $3,111.50 from water revenues which the court found to be surplus funds. The court likewise approved the appropriation of $25,000.00 by Surry County from its general fund since the wine, beer and intangibles taxes had been paid into that fund by the State. The court held the foregoing appropriations were from surplus funds, hence valid. These findings and conclusions were challenged by exceptions and assignments of error.

The contract here involved obligates Mount Airy and Surry County to make contributions in the respective sums of $37,500.00 and $25,000.00 to the construction of the airport. It likewise provides "that revenues of the Authority shall be devoted to the expenses of operation and maintenance of the airport authority, and the further expenses of operation and maintenance shall be on the basis of sixty per cent contribution by the Town of Mount Airy and forty per cent contribution by the County of Surry . . . If and in the event the expenditures

of the Commission exceed budgeted expenditures the Airport Commission shall apply to the parties to this agreement for approval of all additional expenditures."

The contributions to the construction of the airport are limited. The obligation to underwrite costs of operation are unlimited either as to time, amount, or source of funds. Costs of operating an airport include maintenance of runways, hangars, repair facilities, observation and directional tower, communications, lights, wind and weather measuring and testing devices, in addition to the personnel necessary to man them. Operating receipts from the ten planes now in Surry County, and any likely additions, in all probability will fall far short of meeting operating expenses. The contract requires the Town and County to finance all additional costs of operation. To that extent the contract pledges the faith and credit of the town and County. The undertaking and pledge are in violation of Article VII, Section 6, of the State Constitution in the absence of approval "by a majority of those who shall vote therein in any election held for such purpose." *Sing v. Charlotte*, 213 N.C. 60, 195 S.E. 271. "The referendum is definitely recognized as an instrument of democratic government, widely used, and of great value. Where it is adopted in the Constitution it is entitled to respect and should not be abridged by withdrawal from its processes of the subjects with which it was intended to deal." *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E. 2d 702.

The contract to build, and to operate the airport is indivisible. The judge is without power to eliminate the objections by confining the operating expenses to nontax receipts. In the first place, the parties do not so limit their commitment. In the second place, the Constitution forbids contracting the debt or pledging the credit of the Town and County without a vote. The making of the pledge for future fulfillment is unauthorized. The method by which payment was intended, whether by taxation or otherwise, is immaterial, if for an unnecessary purpose.

In addition to the constitutional prohibition there are other serious questions involved. The plaintiffs' appeal challenges the court's conclusion that money received from the sale of the watershed lands (paid for by taxes) becomes surplus funds derived from a source other than taxation. Research fails to disclose a case in which the question has been directly presented. In the majority of the cases the question is removed from controversy by stipulation or admission. For example, *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803. However, notwithstanding this stipulation, Barnhill, J., later C. J., in his opinion concurring in part and dissenting in part, had this to say on the sub-

ject: "Ordinarily cities obtain funds with which to buy property through taxation. Where tax money is used to purchase property and the property is sold, the money received therefrom is in a legal sense derived from taxation. The conversion and reconversion do not change its essential nature as tax money." Justice Barnhill held the view that the stipulation was not a stipulation of fact, but a conclusion of law.

The plaintiffs challenge the finding that Mount Airy has on hand surplus funds from water and sewer receipts which the Town may properly appropriate for construction of the airport. The record shows the Town has in its treasury receipts from water and sewer revenues in an amount sufficient to pay this appropriation. However, the record likewise shows that the Town is issuing new bonds in the sum of $52,000.00 for the extension and upkeep of its water and sewer lines. The record further shows the Town is issuing refunding bonds in the amount of $56,000.00 to redeem water and sewer bonds maturing on or prior to June 1, 1964. The statute, G.S. 160-397, earmarks the income from municipally owned revenue producing enterprises, first to the payment of all expenses of operating, managing, maintaining, repairing, enlarging, and extending such enterprises; then to the payment of interest payable in the next succeeding year on bonds issued for such enterprises; and, finally, to the payment of amount necessary to be raised by tax in such succeeding year for the payment of the principal of said bonds. Hence, there is no surplus from water and sewer bonds until the foregoing payments are provided for.

Judge John J. Parker, in the case of *George v. Asheville,* 103 A.L.R. 568, had this to say in interpreting the above statute: "In other words, the governing body of the city may make such use of the gross revenues of the system as . . . they may think wise for maintaining, repairing, enlarging or extending the system . . . but they may not divert its revenues to other purposes so as to dissipate the net revenues which the law requires to be applied on principal and interest of waterworks bonds." Consequently, the court's finding that the Town had on hand surplus water and sewer revenues is not supported by the evidence.

The County may not treat intangibles tax receipts as surplus funds, notwithstanding the fact the State collects the tax and makes distribution to the counties and towns. G.S. 105-198 provides: "(T)axes so levied for the benefit of the political subdivisions of the State are levied for and on behalf of said political subdivisions . . . to the same extent and manner as if . . . made by the governing authorities of said subdivisions . . ." Hence, intangibles taxes may not be used by

Surry County other than as tax funds. The prohibition extends not only to ad valorem tax revenues, but to all tax revenues. *Dennis v. Raleigh,* 253 N.C. 400, 116 S.E. 2d 923.

Opportunities to spend matching funds from the Federal Government and from other sources without voter approval are attractive to many county and city governing authorities. But, if the proposed appropriation is for an unnecessary public purpose, (as in this case) the town and county officials are without authority either to use tax money or to incur a debt in furtherance of the project. We conclude, therefore, the evidence is insufficient to support the findings and conclusions necessary to sustain the validity of the contract here involved. The judgment of the Superior Court is reversed. The cause is remanded for the entry of an order enjoining the enforcement of the contract. The defendants will pay the costs of the appeal.

Reversed and remanded.

GRADY ENNIS, ADMINISTRATOR OF THE ESTATE OF CECIL MAC ENNIS, DECEASED V. TALLIE DUPREE AND WIFE, SARAH DUPREE.

(Filed 12 June 1964.)

1. Automobiles § 41m—Evidence held insufficient to show that motorist could have seen cyclist in time to have avoided collision.

Evidence tending to show that plaintiff was traveling at a lawful speed in a northerly direction along a paved highway and that plaintiff's intestate, an eight year old boy, rode his bicycle down a path or a dirt road from the east out into the highway and was struck by defendant's car, with evidence that there was a scooped-out place on the highway some 18 inches to the west of its center line, indicating the place of impact, with further evidence that the path or dirt road entered the highway down a steep grade, with an enbankment obstructing the view of the child until he was within some 20 feet of the hardsurface, *is held* insufficient to be submitted to the jury on the issue of the driver's negligence.

2. Automobiles § 32—

A driver is not an insurer of the safety of children along the highway, and, when nothing puts or should put him on notice of their presence, he may not be held liable for hitting a child who runs or rides a bicycle into his lane of travel from behind an obstruction under circumstances in which the motorist, in the exercise of due care and a proper lookout, could not have seen the child in time to have avoided collision.

3. Appeal and Error § 60—

Decision on former appeal overruling nonsuit is not conclusive upon a subsequent trial when the evidence upon the subsequent trial is materially

different from that of the first so as to attract the application of a different principle of law.

APPEAL by plaintiff from *Parker (Joseph W.), J.*, September 1963 Civil Session of HARNETT.

Civil action to recover damages for the death of an eight-year-old boy in a bicycle-automobile collision, allegedly caused by the *feme* defendant's negligent operation of a 1958 Plymouth station wagon owned by and registered in the name of her husband, the male defendant.

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

Taylor & Morgan and Everette L. Doffermyre by Everette L. Doffermyre for plaintiff appellant.

Franklin T. Dupree and Franklin T. Dupree, Jr., for defendant appellees.

PARKER, J. This is the second appeal in this case. In the first trial of this case in the superior court of Harnett County at the 4 June 1962 Civil Term, judgment of compulsory nonsuit was entered at the close of plaintiff's evidence. Plaintiff's appeal was heard at our Fall Term 1962, and a majority of the Court were of the opinion that plaintiff's evidence made out a *prima facie* case of actionable negligence on the part of the defendants, and that a judgment of compulsory nonsuit on the ground that plaintiff's intestate, an eight-year-old boy, was guilty of legal contributory negligence was not permissible, because of the rebuttable presumption that the eight-year-old boy was incapable of contributory negligence. We reversed the judgment of nonsuit. *Ennis v. Dupree*, 258 N.C. 141, 128 S.E. 2d 231.

This is said in *Johnson v. R. R.*, 257 N.C. 712, 127 S.E. 2d 521:

> "When it has been determined on appeal that the evidence warrants the submission of the case to the jury, such determination of the Supreme Court is the law of the case and, in a subsequent hearing upon substantially the same evidence, the refusal of the trial court to submit the case to the jury is error. [Citing authority.] But where the evidence on the subsequent trial is materially different from that on the former trial, the decision of the Supreme Court on the former appeal as to the sufficiency of the evidence is not conclusive. [Citing authority.]"

The question for decision on the instant appeal is whether upon the retrial of this case plaintiff's evidence, considered in the light most

favorable to him, is materially different from that in the former trial so as to warrant the judgment of compulsory nonsuit.

The majority opinion on the former appeal contains a brief summary of the pleadings of the parties and a summary of plaintiff's evidence at the first trial. For an understanding of the general facts and circumstances of the case, reference should be had to our former majority opinion. The pleadings in the retrial are not materially different from those in the first trial. We summarize here only such of the evidence introduced at the two trials as is necessary to a decision of the instant appeal.

Plaintiff's evidence in both trials shows the following facts:

About 3:40 p.m. on 16 February 1959 Mrs. Sarah Dupree, a school teacher, was driving a 1958 Plymouth station wagon on her right side of the road in a northerly direction on State Highway #55. This station wagon was registered in the name of her husband, the male defendant. Mrs. Hilda Rose Lee, Frances Hockaday and Sheila Dupree, a daughter of defendants, were riding in the station wagon as passengers.

State Highway #55, which has pavement 24 feet wide and dirt shoulders several feet wide on each side of the pavement, is straight for several hundred feet south of the place where the collision on the highway occurred. At or near the scene of the collision two dirt roads, one from the east and one from the west, intersect the highway. The road intersecting the highway from the east is slightly south of the road that intersects the highway from the west. The dirt road that intersects the highway from the east is about 12 feet wide and goes down into the highway at a fairly steep angle. There are no signs on the highway indicating this road. At the southeast side of this little road entering the highway from the east is an embankment over six feet high according to plaintiff's witness William Ragsdale, and over ten feet high according to the male defendant, who was examined as an adverse witness by plaintiff. According to measurements made by State Highway Patrolman Stuart Moore, the distance from the pavement to this embankment on the east side of the highway at or near the scene of the collision is 20 feet; it is 32 feet from the center of the highway to this embankment.

At or near the scene of the collision *feme* defendant was traveling on the highway at a speed of 40 to 45 miles an hour. It was open country, and the speed limit was 55 miles an hour. No other motor cars were near. *Feme* defendant was looking straight ahead. Suddenly a child on a bicycle appeared in front of her on the highway and in a

second she hit the child. Her station wagon swerved to the left on the highway, went down on its west side about 120 feet, and turned over in a ditch on the left side of the highway. When her automobile came to rest, the bicycle was on the west side of the highway, and the dead body of plaintiff's intestate, a boy who was eight years, eleven months old, lacking three days, was lying in the ditch beside the station wagon. Plaintiff's intestate was riding a 26″ bicycle. On the west side of the highway in the direction plaintiff was traveling, about 18 inches from the center line, there was a scooped-out place across from the right-hand ditch of the dirt road coming into the highway from the east.

On the first trial plaintiff's evidence did not disclose the direction in which the plaintiff's intestate was riding his bicycle, or where he was a short time before he was struck by the station wagon and killed.

At the retrial of this case plaintiff called as a witness one Joanne Tripp, who was not a witness at the first trial. She testified in substance, except when quoted: For one going north on Highway #55 she lives on the little dirt road entering the highway from the east. Her home is 400 or 500 feet up this little dirt road from where it goes into the highway. The little dirt road goes up "a right good hill" from the highway to her home. "Where my house is the little path is almost level, but on the west side of my house it starts down a slope toward 55, and when it gets within 50 to 60 feet from 55 it drops off sharply down a steep hill as it goes into the highway." Plaintiff's intestate, Cecil Mac Ennis, lived with his parents on the opposite side of the highway from her home. On the afternoon little Cecil Mac Ennis was killed, she, a junior in high school and now 22 years old, got off a school bus and began walking up this little dirt road to her home. When she was about 55 feet from her home, Cecil Ennis riding a bicycle came up the little dirt road to where she was. "I saw the bicycle, that is the same bicycle that little Mac Ennis was riding. It is about 26 inches. It is a small bicycle." He wanted to know if his mother could borrow a wheelbarrow. She told him yes, and he said, "I will take my bicycle back home." He then turned around and started back down the hill. She testified on direct examination: "After he started back down the hill I heard a noise, but I didn't pay any attention to it then. I heard his mother scream and I threw my books down and ran down to the bottom of the hill." She testified on cross-examination: "I watched the child as he started toward his home on the bicycle. I watched him peddle down the hill until he went out of sight. He started peddling down the hill and when he got enough speed he took his feet off the pedals and stuck his feet out on each side of the bicycle. He was riding that way when he went out of sight. He was about 60 feet from the highway when he went out of sight and in a matter of no more

than a few seconds I heard the crash and then his mother scream. I ran down to the scene."

The majority opinion in the former appeal states, "This is a border line case." There was in the former appeal a total absence of evidence as to the direction in which Cecil Ennis was riding his bicycle, or where he was a short time before he was struck. The evidence in the former trial, and also in the retrial, is that there was a scooped-out place in the highway about 18 inches west of its center line in the direction the *feme* defendant was traveling. The majority opinion in the former appeal states that this "permits the reasonable inference that the child on his bicycle was struck at that point." A majority of the Court on the former appeal were of opinion that the testimony of *feme* defendant in the first trial, who was examined by plaintiff as an adverse witness, and the total absence of evidence in the first trial as to the direction in which Cecil Ennis was riding his bicycle, or where he was a short time before he was struck, would permit a jury to find that Cecil Ennis was riding his bicycle on the highway at a time when she was an appreciable distance away from him, and that her failure to see him until just an instant before the collision was attributable to her failure to keep a proper lookout, and, therefore, the judgment of nonsuit was reversed.

Joanne Tripp was not a witness in the first trial. She was called as a witness by plaintiff in the retrial, and her testimony in the retrial makes the plaintiff's evidence in the retrial materially different from that in the first trial. Her evidence in the retrial is to the effect that she lives 400 or 500 feet from Highway #55 on the little dirt road or path that enters the highway from the east. Where her home is the little path is almost level, and when it gets within 50 to 60 feet from the highway it drops off sharply down a steep hill as it goes into the highway. That from a distance of about 55 feet from her home Cecil Ennis, whose parents lived across the highway from her, started riding his bicycle down this little dirt road or path to the highway. He started peddling down the hill, and when he got up enough speed he stuck his feet out on each side of the bicycle. He was riding that way when he got out of her sight about 60 feet from the highway, at which point the little dirt road or path drops off sharply down a steep hill as it goes into the highway. A few seconds after Cecil Ennis went out of her sight, she heard a crash and his mother scream.

Cecil Ennis entered the highway from the east. To his left was an embankment over six feet high according to the witness William Ragsdale, and over ten feet high according to the male defendant, who was examined by plaintiff as an adverse witness. There is no evidence as to

the speed of the bicycle, though there is evidence that Cecil Ennis got up speed and coasted down a steep hill into the highway. From the embankment to the center of the highway is 32 feet. The scooped-out place in the highway was about 18 inches west of the center line of the highway. When Cecil Ennis on his bicycle came from behind the embankment headed into the highway, he was about 33-½ feet from this scooped-out place in the highway, where it seems the collision occurred. If Cecil Ennis was traveling 20 miles an hour when he entered the highway, he was going 29 feet a second; if he was traveling 15 miles an hour, he was going 22 feet a second.

The *feme* defendant was traveling in the afternoon on a straight road at a speed of 40 to 45 miles an hour, in a 55-mile speed zone. She was looking straight ahead. There is nothing in the evidence to indicate that the *feme* defendant in the exercise of ordinary care should have reasonably foreseen that a child on a bicycle would come riding down the little dirt road to her right from behind the embankment so suddenly in front of her that in a matter of seconds a collision would occur. Plaintiff's evidence in the retrial, which is materially different from that in the first trial, shows, when considered in the light most favorable to him, that Cecil Ennis rode his bicycle into the highway so suddenly and so close in front of *feme* defendant's station wagon that she had no opportunity to stop it and avoid striking him. According to a "Driver's Refresher Handbook of Traffic Laws and Highway Safety," published by the N. C. Department of Motor Vehicles, 1962, a car with good brakes traveling at a speed of 40 miles an hour can be brought to a stop 105 feet from the point at which the brakes actually take hold.

This Court said in *Dixon v. Lilly,* 257 N.C. 228, 125 S.E. 2d 426, quoting from Blashfield, Cyclopedia of Automobile Law and Practice, Per. Ed., Vol. 2A, § 1498:

> " 'Drivers or owners of motor vehicles are not insurers against all accidents wherein children are injured. Accordingly, a driver proceeding along a street or highway in a lawful manner using ordinary and reasonable caution for the safety of others, including children, will not be held liable for striking a child whose presence in the street could not reasonably be foreseen. He is not required to anticipate the appearance of children in his pathway, under ordinary circumstances, from behind parked automobiles or other obstructions.
>
> " 'Thus, when a motor vehicle is proceeding upon a street at a lawful speed, and is obeying all the requirements of the law of the

road and all the regulations for the operation of such machine, the driver is not generally liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid injuring him'."

The death of little Cecil Mac Ennis was a tragic accident. However, considering the materially different evidence in the retrial, represented by the testimony of Joanne Tripp, in the light most favorable to plaintiff, it fails to establish actionable negligence on the part of defendants. By reason of the fact that the evidence in the retrial is materially different from that in the first trial, our decision on the former appeal as to the sufficiency of the evidence in the first appeal is not conclusive.

Our decision in the instant case finds support in our following cases: *Dixon v. Lilly, supra; Johns v. Day,* 257 N.C. 751, 127 S.E. 2d 543; *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610; *Brinson v. Mabry,* 251 N.C. 435, 111 S.E. 2d 540; *Knott v. Transit Co.,* 231 N.C. 715, 58 S.E. 2d 696; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Fox v. Barlow,* 206 N.C. 66, 173 S.E. 43; *Kennedy v. Lookadoo,* 203 N.C. 650, 166 S.E. 752.

The judgment of compulsory nonsuit is

Affirmed.

J. B. RAMEY v. SOUTHERN RAILWAY COMPANY.

(Filed 12 June 1964.)

1. Railroads § 5—

In this action to recover for a collision at a railroad crossing, evidence that the view of an approaching train was obstructed by a bank and vegetation, that it was the custom of the railroad to have a flagman present and have the whistle blow and a bell ring, and stop the train until the flagman waived it to proceed, and that on the occasion in question there was no flagman or sound of whistle or bell, *is held* sufficient to be submitted to the jury on the issue of the railroad company's negligence.

2. Negligence § 26—

Nonsuit for contributory negligence is proper when plaintiff's own evidence, considered in the light most favorable to him, induces this conclusion as the sole reasonable one that can be drawn from the evidence.

3. Railroads § 5—

A railroad grade crossing is in itself a warning of danger.

4. Same—

A motorist cognizant of the custom of the railroad to have a flagman at a grade crossing has the right to place some reliance upon the custom,

but is not entitled to rely entirely thereon and omit the exercise of all care for his own safety.

5. Same— Evidence held to show contributory negligence as matter of law on part of motorist injured in railroad crossing accident.

Evidence tending to show that the view of an approaching train was obscured until a motorist got to within 22 or 25 feet of the nearest rail of the grade crossing, that a flagman was ordinarily present at the crossing, that plaintiff motorist was cognizant of this custom and was familiar with the crossing, that the motorist failed to stop before entering the crossing and was struck by defendant's train, which stopped after the impact while still on the crossing, leaving plaintiff's automobile entirely on the hardsurface, *is held* to show contributory negligence on the part of plaintiff as a matter of law in relying entirely on the precautionary measures customarily taken by the railroad and failing to exercise any care for his own safety.

6. Negligence § 26—

No inflexible rule can be laid down as to whether the evidence discloses contributory negligence as a matter of law, but each case must be determined upon its own particular facts.

APPEAL by plaintiff from *Latham, S. J.,* 3 September 1963 Session of SURRY.

Civil action to recover damages for personal injuries and automobile damage resulting from a collision between plaintiff's automobile and defendant's engine at a grade crossing in Mt. Airy.

Defendant in its answer denies any negligence on its part, and as a further answer and defense conditionally pleads plaintiff's contributory negligence as a bar to recovery.

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

Elledge and Mast; Blalock and Swanson; Randolph and Clayton by Clyde C. Randolph, Jr., for plaintiff appellant.

W. T. Joyner; A. B. Carter; Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., for defendant appellee.

PARKER, J. The judgment of compulsory nonsuit must be sustained if plaintiff's evidence considered in the light most favorable to him fails to show any actionable negligence on defendant's part, or if his evidence considered in the same light affirmatively shows contributory negligence on his part so clearly that no other conclusion can be reasonably drawn therefrom. *Jenkins v. R. R.,* 258 N.C. 58, 127 S.E. 2d 778; *Carter v. R. R.,* 256 N.C. 545, 124 S.E. 2d 561; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

The only eye witness to the actual collision was plaintiff. His evidence, considered in the light most favorable to him, *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281, shows:

North-South Street in Mt. Airy runs approximately in a north and south direction. The tracks of the Southern Railway run east and west, and cross this street at a grade crossing from northeast to southwest on a slight curve, according to plaintiff, and on a sharp curve, according to his witness B. J. Ledford. Plaintiff, at 7:30 p.m. on 11 September 1959, was driving his automobile north on this street and approaching this crossing at a speed of about 20 miles an hour. His right window was up; his left window was down. It was dark. This street is downhill in the direction he was approaching the crossing, until it is within about 100 feet from the crossing, where it levels off. Defendant's train was approaching the crossing going west.

Plaintiff had been familiar with this crossing for the last fifteen years. He had traveled over it seven or eight times a day for two or three years immediately prior to the collision in the instant case. During this time he had seen defendant's trains use this crossing 25 or 30 times.

A railway crossarm sign was erected at the crossing on the side of the railway tracks plaintiff was approaching, which plaintiff said he did not see. On the same side of the railway tracks, about 100 feet from the tracks, was a triangular, diamond-shaped sign bearing the words "Railroad Crossing Ahead," which is difficult to see because of trees. To the right of North-South Street, as plaintiff approached the crossing, was a bank covered with old field pines and undergrowth, which extends to within ten feet of the first rail of the railway tracks. The bushes on this bank were three to five feet high or higher. This bank was two feet high twelve or fifteen feet from the railway rail, as plaintiff approached it, and rose to a height of twelve or fifteen feet twenty feet from this rail.

B. J. Ledford, a witness for plaintiff, has lived in Mt. Airy 40 years. He was a member of the police force there for 10 years up to September 1959. He is thoroughly familiar with this crossing. He testified: "As to my knowledge as to the custom and usage for defendant Southern Railway, the train would stop as it came to the intersection. Based on my familiarity with the custom and usage by the defendant, the Southern Railway, the flagman, if there was no oncoming traffic, would motion the engine to come on through. * * * When the train was approaching the intersection, their habits were always to blow the whistle and ring a bell."

Plaintiff testified: "As I came around the curve I was traveling about 20 miles an hour. I changed the speed of my automobile as I approached the grade crossing. I removed my foot from the accelerator. As to how far from the crossing, traveling on this road, you can first see the crossing itself, the point where the tracks cross the road, I'll say around 30 feet. * * * I was traveling north on North-South Street coming down at a speed of 20 or 25 miles an hour which I reduced speed as I come down the slope there, as I started around the curve. I didn't observe no whistle blowing, no flagman or bell ringing, or nothing. All of a sudden I heard brakes on the train and that's where the collision happened. That's when I collided, when the train hit me. I was approximately 30 feet when I heard the brake on the train. My headlights were burning. * * * When I came to myself after the collision, they was *(sic)* putting me in the ambulance. * * * At other times I have used this crossing, there would be a flagman out there, a whistle blowing and a bell ringing. I have never seen this crossing in use by the railroad when there was not a flagman stationed there. * * * I never saw the train at all until after the wreck. I didn't stop before I went onto the crossing." Plaintiff testified on cross-examination: "The first time I became conscious of the train at all was when I heard the brakes of the train going on. That's right. That was about 30 feet from the crossing. * * * I remember applying my brakes before I hit the train. I skidded my wheels. I don't know how far I skidded." He testified on redirect examination: "I listened, looked, to see if there was a flagman out there at the crossing. I listened for a bell to ring, and a whistle to blow, and did not hear any; no flagman there. There was no flagman there. * * * I was half-way out on the railroad track when the train struck me." He testified on recross-examination: "I was on the track when the train hit me. I never saw the train. I said I did skid. The reason I skidded was that I heard the train shrieking, the brakes shrieking. * * * And the only thing I did until I heard the brakes of the train slow down was to take my foot off the accelerator. I reduced speed coming all the way down the hill taking my foot off. I didn't put on my brakes at all until I heard the brakes of the train go on."

Three or four hundred feet behind plaintiff's automobile at the time of the collision, and traveling in the same direction, was an automobile driven by B. J. Ledford. Between these two automobiles and traveling in the same direction was an automobile driven by a Mr. Venable, who was not a witness. Ledford testified in substance, except when quoted: He drove up to the crossing, radioed for an ambulance, and got out of his automobile. Plaintiff was in the street at the left front door of

his automobile on his hands and knees. He lifted him up, and took him and set him down on the edge of the road. Plaintiff's automobile was on the left-hand side of the shoulder of North-South Street just a few feet behind the cow catcher of the railway engine, and its left front door was open. "The debris was approximately right at the edge of the hard surface, right on the shoulder, his right front wheels. The debris was right on the track. I noticed skid marks from Mr. Ramey's vehicle back just a few feet. I don't remember exactly how many, where his wheels had skidded, and when he hit the train, it twisted his car around and brought him, the right side of it laying up against the train and the train entered onto the intersection and stopped at just about the edge of the hard surface on the other side. * * * The automobile was on the road. No part of the automobile was off the road." Ledford testified in part on cross-examination: "When I came to a stop and got out of the car just seconds after the wreck, the light was burning on the train. I didn't see the light on the train as I approached the accident. The front end of the engine was on the left side of the shoulder of the road setting right on the shoulder. The bell was ringing when I stopped the car and got out." In his opinion, it would be pretty hard 28 feet from the crossing to see a train east of the crossing for more than a short distance. The right front fender and wheel of plaintiff's automobile and the left front of the engine collided.

Considering plaintiff's evidence in the light most favorable to him, we are of opinion that his evidence makes out a *prima facie* case of actionable negligence on defendant's part. *Jenkins v. R. R., supra; Carter v. R. R., supra; Johnson v. R. R.*, 255 N.C. 386, 121 S.E. 2d 580.

The crucial question for decision is whether plaintiff's own evidence shows contributory negligence as a matter of law. The rule is firmly embedded in our adjective law to enter a judgment of nonsuit on the theory of contributory negligence when plaintiff's own evidence, considered in the light most favorable to him, shows negligence on his part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom. *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137; *Bundy v. Powell, supra.* The plaintiff thus proves himself out of court. *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601. The very term "contributory negligence" implies that it need not be the sole cause of the injury. *Fulcher v. Lumber Co.*, 191 N.C. 408, 132 S.E. 9.

A railroad grade crossing is in itself a warning of danger. *Bennett v. R. R.*, 233 N.C. 212, 63 S.E. 2d 181; *Coleman v. R. R.*, 153 N.C. 322, 69 S.E. 251; 75 C.J.S., Railroads, § 768 a. Plaintiff had the right to place some reliance on the custom or usage of the defendant when

one of its trains was approaching this grade crossing, where a bank to his right partially obscured his view of its tracks, to have a flagman there and its whistle blowing and bell ringing, and to stop the train at the grade crossing until the flagman waved it to proceed, with which custom and usage he was familiar. *Johnson v. R. R., supra; Oldham v. R. R.*, 210 N.C. 642, 188 S.E. 106; *Southern Ry. Co. v. Whetzel*, 159 Va. 796, 167 S.E. 427; 75 C.J.S., Railroads, § 939; 44 Am. Jur., Railroads, §§ 561 and 562. However, this rule does not mean that plaintiff could rely entirely on a proper performance on the part of defendant of its custom and usage there, and omit the exercise of all ordinary care on his part for his own safety, because it was his legal duty to take such precautions for his own safety as an ordinarily prudent man would take under the same or similar circumstances. *Johnson v. R. R., supra; Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370; *McCrimmon v. Powell*, 221 N.C. 216, 19 S.E. 2d 880; *Miller v. R. R.*, 220 N.C. 562, 18 S.E. 2d 232; *Godwin v. R. R., supra;* 75 C.J.S., Railroads, §§ 939 and 763; 44 Am. Jur., Railroads, § 480, p. 719.

In *Johnson v. R. R., supra,* the Court said: "A traveler on a highway has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed. [Citing authority.] But the fact that an automatic warning signal is not working does not relieve the traveler of the duty to look and listen for approaching trains when from a safe position such looking and listening will suffice to warn him of danger."

On plaintiff's right as he approached the crossing was a bank that ended ten feet from the nearest rail of the railway tracks. For a distance of twelve to fifteen feet from where it ended, the bank was two feet high with undergrowth on it three to five feet high or higher. Twenty-two to twenty-five feet from the nearest rail, as plaintiff approached it, a train's engine could be plainly seen, because it would be higher than a two-foot bank with undergrowth on it three to five feet high or higher. It would seem that farther back than twenty-two or twenty-five feet from the nearest rail of the tracks the railway engine could not be seen, as plaintiff approached the crossing. Plaintiff was thoroughly familiar with this crossing and its danger, because he had crossed it seven or eight times a day for the two or three years immediately prior to this occasion. With such knowledge he approached this crossing looking straight ahead, but neither to the left nor the right, to see if there was a flagman at the crossing and listening if he could hear the bell of a train ringing or its whistle blowing, and seeing no flagman and hearing no signals from a train, he continued to approach this crossing at such a speed that when he, about thirty feet

from the crossing, heard the brakes of the train, he could not stop his automobile but skidded onto the crossing and into the train's engine. He testified: "I never saw the train at all." The engine stopped on the crossing. If he had approached this crossing, which he well knew was a zone of danger, at such a speed that he could have stopped his automobile within twenty-two feet of the nearest rail of the tracks, from which distance *by merely looking to his right* he could have seen the approaching train's engine, he could easily have avoided the collision and his resulting injuries. What *Higgins, J.,* said for a unanimous Court in affirming a judgment of compulsory nonsuit in *Jenkins v. R. R., supra,* is apposite here: "The evidence does not even suggest the plaintiff stopped to look or listen, but apparently trusted to blind luck and ran into the train." Plaintiff's evidence, considered in the light most favorable to him, permits only one unescapable conclusion, and that is that he failed to exercise *any ordinary care* for his own safety, but *relied entirely* on the habit and custom of the defendant of having a flagman at the crossing and of ringing the bell and blowing the whistle of its engine when a train was proceeding to cross the crossing. He has proved himself out of court by his own evidence of legal contributory negligence on his part. On the facts here, this decision is controlled by the line of cases represented by *Jenkins v. R. R., supra; Carter v. R. R., supra; Bennett v. R. R., supra; Boyd v. R. R.,* 232 N.C. 171, 59 S.E. 2d 785; *Parker v. R. R., supra; Godwin v. R. R., supra; McCrimmon v. Powell, supra; Miller v. R. R., supra; Pitt v. R. R.,* 203 N.C. 279, 166 S.E. 67; *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598; *Coleman v. R. R., supra; Trull v. R. R.,* 151 N.C. 545, 66 S.E. 586.

Northern Pacific R. Co. v. Freeman, 174 U.S. 379, 43 L. Ed. 1014, is a case with facts somewhat similar to the instant case. In that case it is said in the syllabus: "Where a person approached a railway crossing well known to him, when a coming train was in full view, and he could have seen it while 40 feet distant from the track if he had used his senses, but did not look, or took the chance of crossing the track before the train reached him, and was killed, he was guilty of contributory negligence."

Johnson v. R. R., supra, is factually distinguishable. In that case Johnson stopped his pickup truck about 30 feet before reaching the railroad track and *looked in both directions* and listened.

No inflexible rule can be laid down as to what constitutes contributory negligence as a matter of law, as each case must be decided on its own facts. Plaintiff's own evidence clearly shows that he failed to take proper care and precaution for his own safety, and hence it must be declared that, under established rules of law, he is guilty of contribu-

tory negligence as a matter of law. The judgment of compulsory nonsuit below is

Affirmed.

JO NITA G. HARDEE v. CHARLES WORTH YORK.

(Filed 12 June 1964.)

1. Appeal and Error § 42—

An instruction omitting the element of foreseeability in charging upon proximate cause cannot be prejudicial to plaintiff.

2. Trial § 34—

The charge of the court that the burden is upon plaintiff to satisfy the jury by the greater weight of the evidence of the affirmative of the issues will not be held for error in failing to define "greater weight of the evidence" in the absence of a special request.

3. Trial § 34—

While pretrial instruction to the jury is contrary to the usual practice in this jurisdiction, pretrial instructions will not be held prejudicial when they are correct and do not charge upon an abstract principle of law not presented by the evidence.

4. Automobiles § 13—

While the mere skidding of a vehicle does not imply negligence, liability may attach if the skidding is the result of fault on the part of the driver, as where a motorist fails to exercise the care of a reasonably prudent person in the presence of ice and snow and the skidding results from the failure to exercise such care.

5. Negligence § 1—

Whether an act or ommission constitutes negligence is to be judged by the circumstances existing at the time.

6. Trial § 33—

Where the court, in applying the law to the facts with reference to the presence of ice and snow, instructs the jury to the effect that plaintiff had the burden of making out her case "regardless of" the existence of the ice and snow, such instruction must be held for prejudicial error notwithstanding a later correct instruction that the existence of the ice and snow was a circumstance to be considered in determining what care a reasonably prudent person would have exercised under similar circumstances, since it cannot be ascertained which of the conflicting instructions on the material point was followed by the jury.

APPEAL by plaintiff from *Brock, S. J.*, December 1963 Session of RANDOLPH.

This is an action to recover damages for personal injuries sustained by plaintiff when the car she was operating was struck in the rear by a car owned and operated by defendant.

The collision occurred about 12:15 P.M. on Sunday, 29 January 1961, on Sunset Avenue in the city of Asheboro. Sunset Avenue is a main business street of the city, is 46 feet wide, runs in an east-west direction, has space for parking on both sides and one lane for eastbound, and one for westbound, traffic. Plaintiff was driving east on Sunset Avenue approaching the Fayetteville Street intersection which is controlled by a traffic light. There were vehicles ahead of her which had stopped in obedience to the traffic light. She stopped to allow a parked vehicle to enter the lane. A few seconds later defendant ran into the rear of her car and knocked it forward about a car's length.

Plaintiff alleges that the collision was proximately caused by the negligence of defendant in that, among other things, he operated his car at a speed greater than was reasonable and prudent under existing circumstances, failed to keep a reasonable lookout, and neglected to maintain proper control of his car. Defendant denies that he was negligent and asserts that the accident was unavoidable.

It had snowed in Asheboro about two days before the accident. The lane of Sunset Avenue for westbound traffic, which was not shaded by buildings, was relatively free of snow and ice. The evidence is conflicting as to the condition of the eastbound lane at the time of the accident. Plaintiff alleges that "There was some ice on the street in scattered patches on this occasion." Defendant alleges that "There was extensive ice on the street in the area of the collision." The evidence of neither of the parties is consistent on this point.

Plaintiff's evidence (several witnesses): The roads were icy in spots. The biggest portion of the ice and snow had gotten off at that time. The south side of Sunset Avenue was shaded by buildings; it did have certain icy spots. It had some snow and soft slush but wasn't frozen hard. The street was slippery, but plaintiff didn't "hit any slippery spots." It was not completely covered with ice. There was ice on the curb; there wasn't any in the middle of the street.

Defendant's evidence (several witnesses): A good portion of the eastbound lane of traffic had ice, more dense toward the curb. There was ice in spots toward the center of the highway. In the vicinity of the accident there was solid ice in the lane all of the way down, a sheet of ice frozen over all the way. Defendant testified that he saw the plaintiff's car and applied his brakes about five car lengths away, his car kept going, despite his efforts the car continued forward, and there were ruts in the ice and he couldn't get out of the ruts.

There was evidence on behalf of plaintiff that when defendant's car was approaching it was observed for a distance of 210 feet and the speed was 25 to 30 miles per hour, and when it was last seen by the witness it was 138 feet from plaintiff's car and was proceeding at the same speed. Defendant testified that his speed was 10 or 12 miles per hour.

The court submitted two issues — negligence and damages. The jury found that plaintiff was not injured by the negligence of defendant. Accordingly, judgment was entered decreeing that plaintiff recover nothing.

Miller and Beck for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter and Richmond G. Bernhardt, Jr., for defendant appellee.

MOORE, J. There are eleven assignments of error. We discuss some of these under two general headings.

— I —

After the jury was selected but before any evidence was introduced, the judge gave the jury certain preliminary instructions, apparently on the theory that the jurors were unfamiliar with court proceedings and that general instructions as to what to expect would be helpful to them in performing their duties. He explained to them that they were the sole triers of the ultimate facts, the order in which the trial would proceed, the presentation of evidence, cross-examination, arguments of counsel and the judge's charge. He cautioned them that his rulings on objections to evidence should not be considered as expressions of opinion. He defined burden of proof, greater weight of the evidence, negligence and proximate cause. Plaintiff contends that a pretrial charge is, as a matter of procedure, erroneous for that it amounts to a declaration of legal principles in the abstract. Plaintiff further contends that there was prejudicial error in two specific aspects of the preliminary instructions. First, there is a variance between the definition of proximate cause given in the preliminary instruction and that given in the charge proper, in that in the former there is no mention of foreseeability as an element of proximate cause, but there is in the latter. Second, the judge defined "burden of proof" and "greater weight of the evidence" in the pretrial charge, but not in the charge proper, and in the latter charge the judge said: "Now, if there is any member of the jury who would like for me to explain again what is meant by the burden of proof and greater weight of the evidence, if you will in-

dicate it by raising your hand I will be glad to do it. Since no one has indicated, I understand that you all understand what is meant by those terms."

If the court erred in the specific instances mentioned, the errors were not prejudicial to plaintiff. (1) If, from the preliminary instruction, the definition of proximate cause was construed by the jury as permitting them to predicate a verdict upon a finding that defendant's negligence proximately caused the accident, even though the accident and injury were not reasonably foreseeable, the error was in plaintiff's favor, placed upon her a lighter burden and was therefore not prejudicial. (2) In the charge proper the court said: "Now the burden of proof is upon the plaintiff on both of those questions (issues), that is, the burden of satisfying you by the greater weight of the evidence that those questions should be answered in her favor." This was sufficient. The burden of proof is a substantial right, and the failure of the charge to properly place the burden of proof is reversible error. *Tippite v. R. R.*, 234 N.C. 641, 68 S.E. 2d 285; *Crain v. Hutchins*, 226 N.C. 642, 39 S.E. 2d 831; *Haywood v. Insurance Co.*, 218 N.C. 736, 12 S.E. 2d 221. But when the court correctly places the burden of proof and states the proper intensity of the proof required, the court is not required to define the term "greater weight of the evidence" in the absence of a prayer for special instructions. *Bank v. Slaughter*, 250 N.C. 355, 108 S.E. 2d 594; *Arnold v. Trust Co.*, 218 N.C. 433, 11 S.E. 2d 307; *Wilson v. Casualty Co.*, 210 N.C. 585, 188 S.E. 102. Here the charge proper placed the burden of proof on the plaintiff, stated the intensity of the proof required, and there was no request for further definition of the term "greater weight of the evidence."

After careful search we have been unable to find any statute or judicial decision, and none has been called to our attention, which either authorizes or prohibits a pretrial charge. It is clearly contrary to the usual practice in this jurisdiction. However, we take note of the fact that some years ago booklets were prepared and in some of the trial courts distributed to jurors called for service, explaining in a general way the functions and duties of jurors. Whether this practice has continued we have no information. We neither condemn nor approve pretrial charges. If prejudicial error results, the offended party may take advantage thereof on appeal. The duty of a trial judge with respect to instructions to jurors is that "he shall declare and explain the law *arising on the evidence.*" G.S. 1-180. Declaration of legal principles in anticipation that they will arise on the evidence may conceivably lead to serious error. It is error to charge on an abstract principle of law not supported by the evidence. *Dunlap v. Lee*, 257 N.C. 447, 450, 126

S.E. 2d 62; *McGinnis v. Robinson,* 252 N.C. 574, 114 S.E. 2d 365. We are of the opinion, however, that trial judges should have the utmost freedom of action in conducting trials so long as litigants are not prejudiced, positive rules of procedure are not violated, and no injustice is done.

— II —

Plaintiff excepts to the following portion of the charge proper:

"Now, there has been a conflict in the evidence as to whether or not there was ice on the street at the time of the accident in question; so with respect to this aspect of the case, the Court instructs you that if you find from all the evidence that the area of the street upon which the defendant was traveling had ice upon its surface sufficient to cause uncontrolled skidding, it would be your duty to determine in your minds whether or not the plaintiff has satisfied you by the greater weight of the evidence that the defendant was negligent in one or more of the respects (speed, lookout, control) I have already listed for you for your consideration. If you find that the plaintiff has carried this burden and that you find that the defendant was negligent in one of those respects, and further that such negligence was a proximate cause of the accident and without which the accident would not have occurred, *regardless of the existence of the ice,* then it would be your duty to answer this first issue Yes. However, if the plaintiff has failed in her burden of establishing either negligence or proximate cause, or both, then it would be your duty to answer the first issue No. Or, if you are satisfied from all the evidence that the icy condition of the street was the sole cause of the accident, then it would be your duty to answer the first issue No." (Parentheses and italics added).

Here the court is applying the law to the facts with special reference to the presence of ice and snow on the street. The use of the expression, "regardless of the existence of ice," renders the instruction erroneous. According to Webster's Third International Dictionary, "regardless of" means "without taking into account; in spite of." Thus the effect of the instruction is: If there was ice "sufficient to cause uncontrolled skidding," before plaintiff will be entitled to an affirmative answer to the negligence issue, she must satisfy the jury by the greater weight of the evidence that defendant was negligent as to speed, lookout or control, and that such negligence was a proximate cause of the accident, *"without taking into account" the existence of the ice.* This re-

quires plaintiff to prove her cause as if there was no ice, even if there was ice. An act or omission of a motorist which would not be negligent in the absence of the ice on the highway, might well be so if ice were present. And negligence which would be harmless on a clear, dry highway might well be the proximate cause of injury on an icy highway. An actor's act or omission is to be judged by the circumstances under which it occurs.

The mere skidding of a motor vehicle is not evidence of, and does not imply, negligence. *Howdershelt v. Handy,* 261 N.C. 164, 134 S.E. 2d 175; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406. The skidding of a motor vehicle while in operation may or may not be due to the fault of the driver. *Fox v. Hollar,* 257 N.C. 65, 125 S.E. 2d 334; *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11. 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 and the resulting damage is caused from some fault of the operator amounting to negligence on his part. *Redden v. Bynum,* 256 N.C. 351, 123 S.E. 2d 734; *Durham v. Trucking Company,* 247 N.C. 204, 100 S.E. 2d 348. When the condition of the road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger, to keep the vehicle under control so as not to cause injury to another automobile, or an occupant thereof, on the highway by skidding into it. And the skidding of an automobile may be evidence of negligence, if it appears that it was caused by a failure to exercise reasonable precaution to avoid it, when the condition at the time made such result probable in the absence of such precaution. *Wise v. Lodge,* 247 N.C. 250, 100 S.E. 2d 677. An unavoidable accident, as understood in the law of torts, can occur only in the absence of causal negligence. *Baxley v. Cavenaugh,* 243 N.C. 677, 92 S.E. 2d 68.

The judge undertook to declare these principles immediately following the challenged instruction by saying: "Now, members of the jury, the fact of a collision, without more, is not in itself evidence of negligence. Also, the skidding of an automobile is not in itself, and without more, evidence of negligence. However, the driver of an automobile on a public street must at all times exercise care commensurate with all of the surrounding circumstances, and if there is ice or snow on the street, that is a surrounding circumstance to be considered in determining what care a reasonably prudent man would exercise under the same or similar circumstances." This is, of course, a correct statement of law. But it does not render harmless the error pointed out above for the reason that the challenged instruction is in direct conflict with this instruction and opposite in effect. "Conflicting instructions upon a ma-

terial aspect of the case must be held for prejudicial error, since it cannot be known which instruction was followed by the jury." 4 Strong: N. C. Index, Trial, § 33, p. 334.

New trial.

OSCAR KRECHEL AND WIFE, RUBY STEVENSON KRECHEL v. HARRY T. MERCER AND WIFE, VIRGINIA D. MERCER.

(Filed 12 June 1964.)

1. Alteration of Instruments— Alteration with consent of parties prior to registration is effective.

Uncontradicted evidence that the contract between the parties was to convey all of a subdivision except lots which had already been sold, that the deed described the entire tract but excepted fourteen lots by number, that the number "3" in the list of lots excepted was marked through prior to registration with the consent of the president of the granting corporation as indicated by his signature in the margin beside the alteration, and that lot "3" had not been sold at the time of the execution of the deed, *is held* to establish a conveyance of lot "3" to the grantees as a matter of law, regardless of whether the alteration was made before or after delivery, since the alteration was with the consent of the granting corporation, and the redelivery to grantees being, in legal effect, a re-execution of the instrument.

2. Corporations § 7—

An alteration in the deed of a corporation initialed or signed by the president of the corporation and redelivered to the grantee is binding on the corporation. G.S. 55-36(e).

APPEAL by plaintiffs from *Pless, J.*, January Session 1964 of PAMLICO.

This is an action instituted pursuant to the provisions of G.S. 41-10 to quiet title.

On 13 February 1960, the New Bern Tractor & Equipment Company, a corporation, conveyed to the plaintiffs by metes and bounds a subdivision on the Neuse River in Pamlico County consisting of 41 lots. A map or plat of the subdivision had been recorded prior to the execution of the foregoing deed in Map Book 2, at page 17, in the office of the Register of Deeds of Pamlico County. Certain designated lots were excepted from the metes and bounds description, which excepted lots, according to the deed, "have heretofore been conveyed by the party of the first part." As originally drawn, this deed excepted

lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16 and 17; as recorded, the deed excepted all the foregoing lots except lot No. 3, the figure "3" having been marked through. G. E. Lee, the president of the corporate grantor, signed his name beside the alteration. The only real conflict in the evidence is with respect to the time of the alteration. Plaintiff testified that the alteration was made before the deed was delivered to him. The defendant offered G. E. Lee as a witness who testified on direct examination as follows: "At the time that Mr. Krechel gave me that check and I delivered that deed to him, I do not THINK that Lot Number three was stricken out and initialled by me." On cross examination this witness testified: "I do not recall how much later it was with reference to February 17 (the date the deed was actually executed). He said that there was one lot that had been missed and that it should be marked out, and that if I would mark it out and initial it on the side it would be all right." This witness testified that he did sign his name on plaintiffs' Exhibit No. 1 (the original deed). He further testified that Lot No. 3 had not been conveyed by the corporation prior to the execution of plaintiffs' deed.

Plaintiffs' deed, as altered, was duly recorded in Book 128, page 283, in the office of the Register of Deeds in Pamlico County on 19 February 1960.

On 9 August 1963, the above corporation purported to convey Lot No. 3 to the defendants.

It was stipulated that Lot No. 3 had not been conveyed on the date of plaintiffs' deed.

The court submitted the following issue to the jury, which was answered in the negative: "Are the plaintiffs the owner of the lands as described in the complaint to the exclusion of the defendants?"

From the judgment entered on the verdict, the plaintiffs appeal, assigning error.

Robert G. Bowers for plaintiff appellants.
No counsel contra.

DENNY, C.J. The plaintiffs assign as error the refusal of the trial court to grant their motion for peremptory instructions in their favor.

All the evidence tends to show that G. E. Lee, the president of New Bern Tractor & Equipment Company, the grantor in the deed involved, consented to the alteration, striking out Lot No. 3 from the exceptive clause in the deed, and that his consent was indicated by his signature on the margin of said deed beside the alteration.

The plaintiffs' evidence tends to show that the alteration was made before delivery of the deed and payment of the consideration therefor.

On the other hand, the defendants' evidence tends to show that the alteration was made after the execution of the deed, its delivery, and payment of the purchase price. All the evidence, however, is to the effect that the alteration was made with the consent of Mr. Lee before the deed was offered for probate and registration.

The evidence further discloses the fact that it was the intent of the grantor in said deed to convey to plaintiffs all the lots in the subdivision involved, except those lots sold and conveyed by the grantor prior thereto. Furthermore, it was stipulated that Lot No. 3 had not been conveyed prior to the execution and delivery of plaintiffs' deed.

In light of the facts disclosed on this record, we consider it immaterial whether the deed was altered before or after its execution and delivery to the plaintiffs, since all the defendants' evidence supports the view that the alteration was made with the consent of the president of the granting corporation and there was a redelivery to the plaintiffs after the alteration was made and witnessed by Mr. Lee's signature before the probate and registration of the deed. Upon these facts, we hold that the title to Lot No. 3 passed to the plaintiffs under the provisions of the deed executed and delivered by the grantor therein.

In 3 C.J.S., Alteration of Instruments, section 58(b), page 974, in pertinent part it is said: "Even though there has already been a delivery, however, a deed or sealed instrument may be changed with the consent of the parties and redelivered, the new delivery constituting a re-execution. Accordingly, where a land grant, issued and delivered, was subsequently altered as to the quantity granted by the direction of the grantor, on the application of the grantee, and was then redelivered to the grantee, such redelivery was in legal effect a re-execution of the grant," citing *Malarin v. United States,* 1 Wallace 282, 17 L. Ed. 594.

In the *Malarin* case, the Supreme Court of the United States was considering a grant that was altered from one to two leagues after the original execution of the grant. The Court, speaking through Justice Field, said: "The Governor who issued the grant testifies substantially that the alteration was made by his direction and that the grant was subsequently delivered or re-delivered to the grantee. If this were the case, it is immaterial whether the alteration was made before the grant had received his signature or after it had been once delivered. The redelivery after the alteration, if such were the fact, was, in legal effect, a re-execution of the grant."

In 4 Am. Jur., 2d, Alteration of Instruments, section 24, page 23, it is said: "Although there are indications of a contrary doctrine in a few cases, the rule followed generally is that, in the absence of a

statute making acknowledgment or attestation of an instrument, such as a deed or mortgage, a prerequisite to the validity thereof, an alteration made in such an instrument, by consent of the parties, after execution and acknowledgment or attestation, and either before or after delivery, or even after recording, does not, as between the parties thereto, render invalid the instrument as originally executed. Also, the alteration itself is generally held to be valid and effective as between the parties to the instrument, especially where there is a redelivery after the alteration, without a new attestation or acknowledgment, although there is some authority to the contrary."

In the case of *Campbell v. McArthur*, 9 N.C. 33, it is clearly implied that not only is a deed not voided by an alteration made with the consent of the parties, but that the alteration is also binding. Taylor, C.J., speaking for the Court, said: "Whether the deed was altered after its execution was properly submitted to the jury as a question of fact; and if it was so altered they were instructed that the deed was thereby avoided, *unless the alteration was made with the consent and knowledge of the grantor*. In this instruction I think the judge is clearly sustained by undoubted authority. Where A. and B. sealed and delivered a bond to C., and afterwards the name and addition of D. was interlined, and he also sealed and delivered the obligation, with the consent of all parties, it was held to be a good obligation of all three. 2 Lev., 35. This case is cited by Comyns in his Digest, and has been repeatedly recognized as law." *Howell v. Cloman*, 117 N.C. 77, 23 S.E. 95. (Emphasis ours.)

In *Martin v. Buffaloe*, 121 N.C. 34, 27 S.E. 995, in considering an alteration in a deed, Faircloth, C.J., said: "When a deed has been signed and delivered, and a stranger, without consent of the grantor and grantee, makes additions, interlineations or erasures and the like, quite a number of questions are presented, and some of them were argued before us. These questions do not arise, because the inserted words were filled in with the consent of the grantor and grantee and by direction of the grantor. So the blank in the deed was filled by consent of the parties and does not affect or invalidate the deed in other respects. The burden of showing the grantor's consent is upon the grantee. *Havens v. Osborne*, 36 N.J. Eq., 426. 'If the alteration is made by consent of parties, such as filling up the blanks or the like, it is valid.' 1 Greenleaf Ev. (14 Ed.), § 568a; 19 Johns, 396; *Collins v. Collins*, 24 Am. Rep. 639, 2 A. and E. Enc. (2 Ed.), 205.

"The principle is subject to the distinction between matters inserted which are material and those which are not essential to the operation of the instrument, for if it be deficient in some material part when

executed, so as to be incapable of operation at all, it could not afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, and unauthorized by an instrument under seal. *McKee v. Hicks*, 13 N.C. 379. But when an alteration or addition is made by consent, it gives full effect to the intention of the parties, without the violation of any rule of law."

It is also said in 4 Am. Jur. 2d, Alteration of Instruments, § 89, p. 84: "* * * (I)f the fact is that an instrument appears on its face to have been altered, the question whether the alteration was made after execution so as to require an explanation is one of law, relating to the admission of evidence. So too, although the question whether a particular alteration is or is not manifest or visible is usually one of fact, it becomes a question of law if there can be no reasonable difference of opinion in this respect."

In making the alteration in plaintiffs' deed, the president of the corporate grantor was only carrying out the grantor's contract to convey to plaintiffs all the 11.58 acre tract described by metes and bounds in the deed, included in the subdivision, except those lots which had already been sold and conveyed which were enumerated. Lot No. 3 was included by mistake because it had not been sold.

Furthermore, it is provided in subsection (e) of G.S. 55-36, governing the execution of corporate instruments, as follows: "Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to the express, implied or apparent authority, ratification, estoppel or otherwise."

In our opinion, the evidence adduced in the trial below clearly establishes the fact that the alteration in plaintiffs' deed was made with the knowledge and consent of the grantor and that plaintiffs are entitled to judgment in their favor as a matter of law. To hold otherwise would unjustly enrich the corporate grantor and enable it and the defendants, who had notice of the alteration, to perpetrate a fraud upon these innocent plaintiffs.

The judgment entered on the verdict rendered in the trial below is set aside and the cause is remanded for judgment in accord with this opinion.

Remanded.

W. D. ALDRIDGE, EMPLOYEE PLAINTIFF v. FOIL MOTOR COMPANY, EMPLOYER; ST. PAUL FIRE & MARINE INSURANCE COMPANY, CARRIER, DEFENDANTS.

(Filed 12 June 1964.)

1. Master and Servant § 53—

The law of estoppel applies in compensation proceedings as in other cases.

2. Same; Master and Servant § 59— Insurer accepting premium for coverage of employee held estopped to deny coverage.

Evidence that the officers of a close corporation owned certain realty, including the building in which the corporate business was carried on, that they employed claimant to keep their several properties in repair, told the local agent of insurer they wanted the employee covered by the corporation's compensation insurance policy and, in response to the agent's assurance that this would accomplish this purpose, put the employee on the corporation's payroll, so that his remuneration was included in computing the insurance premium, *is held* to estop insurer from denying that an injury to such employee while repairing property unconnected with the corporate business was within the coverage of the policy.

APPEAL by plaintiff from *Armstrong, J.*, September 1963 Session of ROWAN.

Plaintiff instituted this proceeding as a claim under the Workmen's Compensation Act. The facts are undisputed. The defendant Foil Motor Company is a close corporation owned by Linwood Foil and his brother, James H. Foil. The former is president; the latter, the manager and secretary-treasurer. The Motor Company has the sales agency for Chrysler and Plymouth automobiles and is subject to the provisions of the Workmen's Compensation Act. The Foil brothers individually own a number of properties which include the building occupied by the Motor Company and a warehouse leased to American Bakery.

For thirty years prior to April 30, 1962, plaintiff Aldridge had worked for Cone Mills as a card tender on the 3:00 to 11:00 p.m. shift. For five years prior to that date he had also worked regularly in good weather for the Foil brothers as a painter and carpenter to keep their buildings in repair. Approximately two years before April 30, 1962, the Foils decided that plaintiff should be covered by workmen's compensation insurance while working for them. James H. Foil called in Mr. R. C. Mills, the local agent of the St. Paul Fire & Marine Insurance Company which carried the workmen's compensation insurance on Foil Motor Company, and told him "exactly what Mr. Aldridge did, and the whole story," *i.e.*, that he kept not only the garage property in re-

pair but worked on all the other Foil properties. Foil asked Mills if he could obtain workmen's compensation for plaintiff and Mills replied, "If you will put him on your payroll and pay him he would be covered." Foil then said, "You be sure of that thing, I want to know that he is covered."

Thereafter, plaintiff was placed on the payroll of the defendant Foil Motor Company which paid him at the rate of one dollar and a quarter an hour for his work on the properties jointly owned by the Foil brothers. If he worked for one brother only he was paid by that one and not by the Motor Company. Plaintiff worked on those properties four or five hours during the morning and eight and ten hours on Saturday, averaging twenty hours a week. During 1961 the Motor Company paid him approximately six hundred dollars. It deducted social security and withheld income tax from his wages. The premiums which Foil Motor Company paid to the defendant carrier were based upon its payroll which included plaintiff's wages.

On April 30, 1962, plaintiff reported at the Motor Company and was instructed by James H. Foil to go to the American Bakery Warehouse and repair an overhead door. While standing on a ladder and removing screws from that door, plaintiff fell and fractured his left hip. He was totally disabled for six months.

On these facts both the hearing commissioner and the full Commission concluded that plaintiff had sustained an injury by accident arising out of and in the course of his employment by Foil Motor Company and that the defendant Insurance Company, by accepting and retaining premiums based in part on plaintiff's wages, was estopped to deny its liability to plaintiff. Compensation of fifteen dollars a week was awarded under G.S. 97-29. Defendants appealed to the Superior Court. It sustained the carrier's contentions that the evidence did not support the Commission's findings and that the findings did not justify its conclusion that plaintiff had sustained a compensable injury. From a judgment reversing the Commission's award, plaintiff appealed.

Robert M. Davis and George R. Uzzell for plaintiff.
Shuford & Yarbrough by Reginald S. Hamel for defendant.

SHARP, J. In *Burnett v. Paint Co.*, 216 N.C. 204, 4 S.E. 2d 507, 172 A.L.R. 378, it was held that if an employee of a business coming within the purview of the Workmen's Compensation Act is injured while performing work for the private and personal benefit of his employer, which work is unrelated in character or location to the business of the employer, he is not entitled to compensation under the Act. In that

case, Mrs. Lipe, the employer, was the sole proprietor of a paint and decoration shop at 82 Patton Avenue in Asheville where Burnett worked as janitor and delivery boy. His salary, paid entirely through the shop, also covered janitorial work at Mrs. Lipe's residence, and he was injured there while mowing her lawn. The Industrial Commission allowed compensation and this Court reversed. Mrs. Lipe's policy of employer's liability insurance specified that the only location of employer's work was 82 Patton Avenue; that her operation was a retail store risk; and that she conducted no other business operations at this or any other location. The insurance carrier had no knowledge that plaintiff's wages included work elsewhere. The rationale of the opinion was that the policy excluded liability for an injury received while plaintiff was working at Mrs. Lipe's residence. The Court pointed out: Plaintiff worked for Mrs. Lipe in a dual capacity. At the shop he was insured; at her home he was not. The Workmen's Compensation Act was designed to protect an employee against the hazards of his employer's business and not those of domestic service at his home. Moreover, Mrs. Lipe's insurance rates had been determined by the risk of injury to her employees at 82 Patton Avenue only.

The defendant carrier contends that when injured the plaintiff was not working for the defendant Motor Company but for its two officers and stockholders individually, and therefore the Burnett decision controls the instant case. With this contention we do not agree. We hold that this case is controlled by *Pearson v. Pearson, Inc.*, 222 N.C. 69, 21 S.E. 2d 879. In that case, P was the president and general manager of Newton Pearson, Inc., the insured employer, a business which sold both new and used cars. P not only supervised the business as president, but he frequently drove cars from distant points, collected accounts, and sold cars. His name appeared on the list of employees furnished the defendant carrier and his salary was included in the payroll which determined the amount of the compensation insurance premiums. When P was killed in an automobile accident while making collections for the corporation, the carrier contended that, as president and general manager, owning all the stock of the corporation except two shares, he could not be an employee. In sustaining the award of the Industrial Commission, this Court said:

> "However, we deem it unnecessary to decide the precise point chiefly debated, whether or not, under the facts of this case, the president and general manager of a small corporation, who also works as a salesman and collector of accounts, can be classified as an employee, since it appears that the defendants, by their

treatment of the decedent's relationship to the corporation as that of employee rather than executive, and the acceptance of the benefits of that status, have recognized his dual capacity and classification as employee to such an extent that they should not now be permitted to assert the contrary after loss has been sustained. The record shows that the defendant Insurance Company's agent gave instruction that decedent be so classified, and that his salary be included in the totals of the wages of the corporation's employees, and that this was done after consultation between the agent of the Insurance Company and the secretary-treasurer of the corporation. The premiums thereon were collected accordingly and received by the Insurance Company over a period of several years. . . . Thus the Insurance Company had knowledge that it was being paid for carrying the risk of accidental injury to decedent arising out of and in the course of his indicated employment in work other than that of an executive.

". . . While ordinarily the parties may not by agreement or conduct extend the provisions of the Workmen's Compensation Act, in this case the defendants' continued and definite recognition of the relationship of the president to the corporation as that of an employee, based upon knowledge of the class of work he performed, and the acceptance of the benefits of that classification, may well be regarded as having the effect of preventing them from changing their position after loss has been sustained."

"The law of estoppel applies in compensation proceedings as in all other cases." *Biddix v. Rex Mills,* 237 N.C. 660, 665, 75 S.E. 2d 777, 781; *Ammons v. Sneeden's Sons, Inc.,* 257 N.C. 785, 127 S.E. 2d 575. "That liability for workmen's compensation may be based on estoppel is well established." *Smith Coal Co. v. Feltner, Ky.,* 260 S.W. 2d 398.

In *Brown v. Bouschor,* 207 Mich. 594, 175 N.W. 129, B was a subcontractor of C Lumber Company. B was also engaged in the lumber business for himself. When his Insurance Company withdrew its coverage, B requested C Company to carry his workmen's liability insurance with its own. As a result, C Company secured an endorsement on its policy with the Lumbermens Mutual Casualty Company which extended its coverage, terms, and conditions to B as an employer. Thereafter Brown, an employee of B, was killed while working for B on one of his independent projects. The insurance carrier denied its liability on this ground. Upon the hearing before the Industrial Accident Board, it appeared that neither C Company nor the insurance carrier knew that B had employees other than those who worked on subcontracts for C

Company. However, a substantial portion of B's employees were thus engaged, and B thought his insurance covered them all. Each month he had returned his entire payroll and paid the insurance premium on all his men. At the hearing the insurance carrier tendered back the premiums but the tender was, of course, refused. In holding the Insurance Company liable, the court said: B had "made no misrepresentations. He was not asked to disclose anything that he did not disclose. He desired liability insurance that would protect him under the Employers' Liability Law, as to all his employes. He supposed he was getting that kind of insurance, and he paid premiums upon that basis. We think it too late now for the insurance company to avail itself of the defense it is urging."

In this case the Industrial Commission found that plaintiff was an employee of Foil Motor Company and concluded that the injury was compensable. The evidence sustains the finding, *Pitman v. Carpenter,* 247 N.C. 63, 100 S.E. 2d 231, and the conclusion is legally correct. In accordance with an agreement between the corporation and its two stockholders who were also its officers, the corporation employed plaintiff to keep in repair all the properties which were jointly owned by the two officers and stockholders. Plaintiff was carried on its payroll and it deducted social security and income taxes from his wages. This was convincing evidence that plaintiff was actually an employee of the corporation. Certainly, at the time of his injury he was engaged in performing the work which the corporation had paid him to do for two years. Indeed, plaintiff had been put on its payroll for the very purpose of protecting him by workmen's compensation insurance and upon the advice of the defendant carrier's agent after a full disclosure to him of the specific nature and location of the plaintiff's work. Therefore, the carrier knew that it was insuring an employee of the Motor Company who would work as a painter and carpenter on all properties jointly owned by its officers individually. Plaintiff's wages were used in computing the amount of the premiums which the Motor Company paid defendant for its coverage, and defendant had accepted these premiums for over two years.

Under these circumstances the Insurance Company is in no position to contend that the Motor Company's contract or arrangement with plaintiff was *ultra vires.* It will not now be permitted to say either that the plaintiff was not the employee of Foil Motor Company or that the work which he was doing at the time of his injury was outside the risk it had assumed when insuring the employees of a garage and automobile sales agency. Had defendant not extended this coverage to plaintiff, the evidence indicates that other insurance would have been

procured to protect his income from the hazards of accident while repairing the Foil properties.

The judgment of the Superior Court is reversed and this case is remanded to it with directions that the award of the Industrial Commission be reinstated.

Reversed and remanded.

CLAUDIUS C. JOHNSTON, SR. v. UNITED INSURANCE COMPANY OF AMERICA.

(Filed 12 June 1964.)

1. Appeal and Error § 49—

A finding of fact will not be disturbed on exception when such finding is in no way prejudicial to appellant.

2. Evidence § 14—

The privileged relationship between physician and patient extends to hospital records.

3. Same; Bill of Discovery § 1—

The discretionary authority of "the presiding judge of a Superior Court" to compel the disclosure of the privileged portion of hospital records is limited to the judge presiding at the trial and does not extend to compelling disclosure by deposition prior to trial.

4. Same—

Where insured in his application for an accident policy authorizes any physician to disclose information obtained in treating insured and, after injury, insured signs an authorization that any hospital, physician, or other persons might furnish all information with respect to the treatment of insured, such authorization constitutes waiver of the statutory privilege with respect to the hospital records, G.S. 8-53, but since such records are not in the possession of insured within the meaning of G.S. 8-89, the question of whether the hospital should be required to produce the records in response to subpoena is not presented.

APPEAL by plaintiff from *Carr, J.*, November 1963 Civil Session of ALAMANCE.

Plaintiff instituted this action September 14, 1961, to recover benefits under a policy issued to him by defendant on April 30, 1958. He seeks to recover for loss of time and total disability allegedly "resulting directly and independently of all other causes from accidental bodily injury" sustained February 9, 1960. Defendant admits the policy

was issued as alleged and since then has been continuously and is now in force. It denies further liability on the claim asserted by plaintiff, alleging it has paid and tendered to plaintiff specified amounts in full discharge of its liability.

The hearing below was on defendant's motion "for an order *allowing* the defendant or its agents or attorneys to inspect and copy the hospital records of Duke University Medical Center of Duke Hospital, Durham, North Carolina, pertaining to the examination of the plaintiff, the medical history secured from him, the diagnosis and treatment of the plaintiff, and his present condition, insofar as such information relates to the injury alleged to have been suffered by the plaintiff and referred to in the complaint," (our italics) or, "if the defendant is not found to be entitled to inspect and copy the medical records, by contract," for a finding by the court "that in its opinion the disclosure of such records and the right to inspect and copy the same is necessary to a proper administration of justice in this case."

The court, after considering "the complaint and policy attached thereto, the written motion of the defendant, the 'response to motion,' filed by the plaintiff, and the argument of counsel," made findings of fact, stated conclusions of law and entered an order as follows:

"(1) That this case is duly calendared at this Term of Court on both the trial docket and the 'motion docket and non-jury cases.'

"(2) That notice of this motion was duly served on counsel for the plaintiff and on Duke University Medical Center of Duke Hospital; that no appearance was made on behalf of Duke University Medical Center of Duke Hospital, when this motion was heard.

"(3) That the defendant has requested of the plaintiff the right to inspect and copy the hospital records of Duke University Medical Center of Duke Hospital, and that plaintiff has refused such request and asserts the physician-patient privilege set forth in Chapter 8, Section 53 of the General Statutes of North Carolina.

"(4) That this is an action brought by the plaintiff against the defendant for recovery from the defendant under the terms of a health and accident policy issued to the plaintiff by the defendant, for bodily injury resulting directly and independently of all other causes from accidental bodily injury sustained; that said policy was issued on April 30, 1958.

"(5) That under date of March 20, 1958, the plaintiff signed an application for the issuance of such policy, which application became and is a part of the policy; that said application contained the following question and the answer thereto as given by the plaintiff:

'14. Do you hereby authorize any physician or other person who has attended or may attend you to disclose any information thus acquired unless prohibited by law? *Yes.*'

"(6) That after the date of his alleged injury in February, 1960, the plaintiff on the following dates, May 16, 1960, August 12, 1960, September 30, 1960, and April 13, 1961, signed authorizations as follows:

'I hereby authorize any hospital, physician or other person who has attended me, to furnish to the United Insurance Company of America, or its representatives, any and all information with respect to any sickness or injury, medical history, consultations, prescriptions or treatments and copies of all hospital or medical records. I agree that a photostatic copy of this authorization shall be considered as effective and valid as the original.'

"(7) That in the opinion of the undersigned Judge Presiding the disclosure, to the defendant, of the hospital and medical records, of Duke University Medical Center of Duke Hospital and the right to inspect and copy them, by the defendant, is necessary in order that the truth be known and justice done.

"UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

"(1) That the plaintiff has waived the physician-patient privilege set forth in Chapter 8, Section 53 of the General Statutes of North Carolina, and is not now entitled to assert such privilege and prevent the defendant, or its agents, or attorneys from inspecting and copying the Medical Records of Duke University Medical Center of Duke Hospital as they relate to the injury alleged in the complaint to have been sustained by the plaintiff.

"(2) That irrespective of whether or not there has been a waiver of the physician-patient privilege referred to in Conclusion of Law No. 1 the disclosure of such records as relate to the injury alleged in the complaint is necessary to a proper administration of justice in this case and the right to inspect and copy such records at such time as they are made available by the custodian of the same in response to a subpoena duly issued and served pursuant to the statute with respect to the taking of depositions is necessary in order that the truth be known and justice done.

"Upon the foregoing Findings of Fact and Conclusions of Law, IT IS THEREFORE ORDERED that the defendant, its agents, or at-

torneys, be, and they are hereby allowed to inspect and copy such hospital records of the Duke University Medical Center of Duke Hospital as relate to the injury alleged in the complaint to have been sustained by the plaintiff at such time as said records are made available by the custodian of the same in response to a subpoena duly issued and served upon Duke University Medical Center of Duke Hospital pursuant to the statute relating to the taking of depositions."

Plaintiff noted exceptions and appealed.

W. R. Dalton, Jr., and C. C. Cates, Jr., for plaintiff appellant.
Sanders & Holt for defendant appellee.

BOBBITT, J. Plaintiff's assignments of error are based on his exceptions to Findings of Fact Nos. 2 and 7, to Conclusions of Law Nos. 1 and 2 and to the order. Plaintiff did not tender findings of fact or except to the court's failure to find additional facts.

Plaintiff excepted to the court's finding (Finding of Fact No. 2) that notice of defendant's motion was "duly" served on Duke University Medical Center of Duke Hospital on the ground "such person is not a party to this action." Plaintiff admits "such notice was actually received" by Duke University Medical Center. We perceive nothing prejudicial to plaintiff in the court's finding.

Plaintiff's exceptions to Finding of Fact No. 7 and to Conclusion of Law No. 2 may be considered together.

The statute now codified as G.S. 8-53 created a privileged relationship between physician and patient. *Capps v. Lynch,* 253 N.C. 18, 116 S.E. 2d 137, and cases cited. The extent this statutory privilege applies to hospital records is discussed by *Moore, J.,* in *Sims v. Insurance Co.,* 257 N.C. 32, 125 S.E. 2d 326.

In *Lockwood v. McCaskill,* 261 N.C. 754, 136 S.E. 2d 67, decided May 6, 1964, it was held that the words, "the presiding judge of a superior court" as used in the proviso of G.S. 8-53, refer to the superior court judge who presides at the trial. This case was calendared as stated in Finding of Fact No. 1. There was no trial. The hearing was on defendant's motion.

Under our decision in *Lockwood,* Judge Carr did not have discretionary authority under the proviso in G.S. 8-53 to compel disclosure of the privileged portion, if any, of the hospital records. Hence, there is merit in plaintiff's exceptions to Finding of Fact No. 7 and to Conclusion of Law No. 2.

The crucial question is whether the unchallenged findings of fact support Conclusion of Law No. 1 and the order. Upon the facts found,

nothing else appearing, we are of opinion, and so decide, that defendant, by reason of the authorizations set forth in Findings of Fact Nos. 5 and 6, is entitled as of right (as between plaintiff and defendant) to inspect and to copy hospital records relevant to plaintiff's claim; and that, to the extent the hospital records contain entries privileged under G.S. 8-53, such authorizations constitute a waiver of the privilege. As to waiver of privilege, see *Capps v. Lynch, supra,* and cases cited; 16 N.C.L.R. 53 *et seq.* Whether such hospital records are incompetent, in whole or in part, on grounds other than the privilege created by G.S. 8-53 is not presented.

Plaintiff contends the authorization (waiver) set out in Finding of Fact No. 5 refers only to physician(s) who attended him prior to the issuance of the policy. He cites *Bryant v. Modern Woodmen of America (Neb.),* 125 N.W. 621, 27 L.R.A. (N.S.) 326, and *Pride v. Interstate Business Men's Acc. Ass'n (Iowa),* 216 N.W. 62, 62 A.L.R. 31. In *Bryant,* the evidence related to consultations, diagnoses, etc., prior to the issuance of the policy. In *Pride,* the authorization (waiver) referred expressly to any physician or surgeon who *had been* consulted by the insured. Here, while the authorization (waiver) set out in Finding of Fact No. 5 is not as full and complete as the authorizations (waivers) considered in *Fuller v. Knights of Pythias,* 129 N.C. 318, 40 S.E. 65, and *Metropolitan Life Ins. Co. v. Brubaker (Kan.),* 96 P. 62, 18 L.A.R. (N.S.) 362, it does apply expressly to any physician who has attended *or may attend* the insured. Clearly, if and when authorized, such disclosure is not "prohibited by law" within the meaning of that phrase as used in the authorization (waiver) set out in Finding of Fact No. 5.

We need not determine whether the authorization (waiver) set out in Finding of Fact No. 5, standing alone, would be sufficient to support Conclusion of Law No. 1 and the order. Incompleteness therein, if any, is fully supplied by the full and complete authorizations (waivers) set out in Finding of Fact No. 6, all executed subsequent to the alleged injury (February 9, 1960) on which plaintiff bases this action.

The unchallenged findings of fact and Conclusion of Law No. 1 support Judge Carr's order "that the defendant, its agents, or attorneys, be, and they are hereby *allowed* to inspect and copy such hospital records of the Duke University Medical Center of Duke Hospital as relate to the injury alleged in the complaint." (Our italics). This, in effect, adjudges only that plaintiff has waived the statutory privilege (G.S. 8-53) with reference to such records. However, the records here involved are records of said Duke University Medical Center. They are not in the possession or under the control of plaintiff within the

meaning of G.S. 8-89 *et seq.* Whether Duke University Medical Center should be *required* to produce the records "in response to a subpoena duly issued and served upon Duke University Medical Center of Duke Hospital pursuant to the statute relating to the taking of depositions" was not presented. Hence, these words (quoted in the preceding *sentence*) are stricken from the order. As so modified, Judge Carr's order is affirmed.

Whether plaintiff's appeal should be dismissed as premature is not presented or considered. Compare *Buick Co. v. General Motors Corp.*, 251 N.C. 201, 110 S.E. 2d 870. Since Judge Carr's order was entered *prior to* our decision in *Lockwood*, it has seemed appropriate that the appeal be considered as properly before us.

Modified and affirmed.

JAMES EDDIE HOLLOWAY, BY HIS NEXT FRIEND, MRS. IZOLIA BLAKE HOLLOWAY v. ROSA HOLLOWAY.

AND

JAMES EDDIE HOLLOWAY, SR. v. ROSA HOLLOWAY AND HUSBAND CONNIE HOLLOWAY.

(Filed 12 June 1964.)

1. Automobiles § 42k—

Evidence tending to show that plaintiff stopped on the steps of an inn some 15 or more feet distant from the curb and looked both ways and then ran or walked into the street from between parked cars without again looking to the east, and was struck by a car approaching from the east, that a car could be seen approaching from this direction for some three blocks and that cars were parked on both sides of the street so as to leave only one lane for traffic, *is held* to show contributory negligence as a matter of law on the part of plaintiff.

2. Automobiles § 33—

While the failure of a pedestrian to yield the right of way to a motorist when crossing at a point other than a crosswalk is not contributory negligence *per se*, if all of the evidence establishes such failure as a proximate cause of his injury so clearly that no other reasonable conclusion is possible, nonsuit is proper.

APPEAL by plaintiffs from *Hall, J.*, October Civil Session 1963 of DURHAM.

These two civil cases were consolidated for trial and appeal purposes. The first is an action instituted on behalf of the minor plaintiff

by his next friend to recover for personal injuries; the second is an action instituted by his father for loss of earnings and medical expenses. Since the right of the father to recover depends upon the right of the minor plaintiff to recover in his action, it is only necessary to consider the minor plaintiff's appeal.

Shortly after 10:30 p.m. on 16 September 1961, the defendant was operating her 1957 Mercury automobile westwardly along East Pettigrew Street in the City of Durham. The plaintiff had just left Birdland Inn, on the south side of Pettigrew Street, and was crossing to the north side of the street, where he intended to get into a waiting automobile stopped in the westbound lane, when he was struck by the right front portion of defendant's automobile. The point of impact was some 50 or 60 feet east of the intersection of Pettigrew and Sowell Street. Pettigrew Street is 28 feet wide in the block where the accident occurred, and there is no pedestrian crosswalk; the northern ten feet is the westbound traffic lane; the southern 18 feet is the eastbound traffic lane with parking space along this lane. The speed limit was 35 miles per hour. Although there were "No Parking" signs along the westbound lane, two cars were parked in this lane at the time of the accident, and cars were parked on the south side of the street. There was room only for a single car to pass between these parked cars. The defendant driver was passing these cars at the time of the accident.

Plaintiff's evidence tends to show that defendant Mrs. Rosa Holloway did not apply her brakes until after she struck the plaintiff, and that she did not sound her horn.

Plaintiff's evidence, including that given by the *feme* defendant, who was called as a witness by the plaintiff, conflicted sharply in several respects. Witnesses for the plaintiff testified that the speed of Mrs. Holloway's car was 45 to 50 miles per hour; Mrs. Holloway testified that her speed was 25 to 30 miles per hour.

Worth Hill, a policeman for the City of Durham, arrived at the scene of the accident about three minutes after it occurred. This officer testified that the Birdland Inn is 20 to 30 feet from the curb line of Pettigrew Street; that three vehicles were parked in front of the Birdland Inn and two across the street on the north side thereof; that defendant Mrs. Rosa Holloway said she was driving west on Pettigrew Street and was passing the cars that were parked on the north side of the street; that she pointed out where the impact occurred, which was right in front of the Birdland Inn. Skid marks began about ten feet from the point of impact and continued for 70 feet to the point where the car stopped. This witness testified that the defendant stated to him that the boy ran right out from the parked cars in front of her. "She

told me that there was no time or opportunity for her to stop to avoid it."

Barbara Jean Council Clemmons, one of plaintiff's witnesses, testified that she was sitting on the fender of a car parked in front of the Birdland Inn and saw the accident. "I saw the car driven by the defendant Rosa Holloway when he was running across the street. * * * At the time that she * * * hit him, he had almost made it to this other boy's car * * *, Her right front fender hit him."

On cross examination this witness testified: "James came out running at the time and he ran right on in front of where I was sitting. Right out onto the street * * *. There were two cars parked there, and he ran between them. He ran between the car nearest Sowell and the next one up. * * * He never stopped running until he got hit * * *. Until he got hit he kept right on running. He almost made it, though. It wasn't far from the car across the street, because * * * couldn't but one car get past. * * * That car got right up on James when he ran out into the street. * * * (W)hen I saw the car, he was coming between the cars * * *."

Plaintiff's evidence further discloses that he and some boyfriends were driving around in a Chevrolet automobile driven by Fred Edgerton; that Edgerton let the boys out of his car in front of the Birdland Inn a few minutes before the accident. Edgerton admitted on cross examination that he signed a statement shortly after the accident which read in part as follows: "I stopped on the north side of Pettigrew Street, facing west, and they got out of the car and ran across the street to Birdland Inn and went in * * *, they were inside only a few minutes when they came running back out. Both of them ran out into — in the street toward my car. Holloway was in front. Just before he reached my car he was hit by another westbound car which was in the act of passing my car."

James Eddie Holloway testified: "I am 19 years old. On September 16, 1961, I went into the Birdland Inn in Durham * * *. I was in there about 10:35 and was there about eight or nine minutes. I rode to the Birdland with Fred Edgerton in his father's 1959 Chevrolet. * * * After I went in, I got a hot dog. * * * When I started out of the Birdland Inn, I stopped on the steps in front of the Birdland Inn * * * I looked west, as I was coming out the door; * * * I looked east; and then I came to the curbing and I looked west, and I started across the street. I do not remember anything after that."

On cross examination, plaintiff testified: "I walked on out on the steps. That isn't about 30 feet back from the curb; it's 15 feet. I looked to the east and the west from the steps and did not see any cars

coming from either way. I walked out to the curb; as I remember it, I walked. I did not see Barbara Jean Council then. * * * There were a number of cars parked on the south side. I went to the curb between two cars. I looked up to the west towards Durham and did not see anything coming from the west. I did not look back to the east then. * * * When I went down to the curb, I did not look back to the east. I never saw the car of Rosa Holloway. You could see back at least three blocks to the east from the curb there in front of the Birdland. * * * I knew before that time that that was the main thoroughfare back and forth from East Durham over toward town; and I knew that cars traveled that street all the time. * * *"

At the close of plaintiff's evidence, the defendants moved for judgment as of nonsuit. The motion was allowed and the plaintiff in each case appeals, assigning error.

Everett, Everett & Everett for plaintiff appellants.
Bryant, Lipton, Bryant & Battle for defendant appellees.

DENNY, C.J. The only assignment of error is based on an exception to the ruling of the court below sustaining defendants' motion for judgment as of nonsuit.

In our opinion, if it be conceded that defendant Rosa Holloway was guilty of actionable negligence, it is equally clear that the minor plaintiff contributed to his own injury by negligently and carelessly entering the street without taking any precaution whatever for his own safety.

It clearly appears from the evidence introduced in the trial below that the minor plaintiff never looked in the direction from which the Holloway car was approaching after he left the front steps of the Birdland Inn, whether such Inn is 15, 20 or 30 feet south of Pettigrew Street. Moreover, according to the evidence of the witness Barbara Jean Council Clemmons, who was sitting on the front fender of a car parked on the south side of the street in front of the Birdland Inn, she saw the Holloway car approaching when the minor plaintiff ran in front of her, between two parked cars, and into the street. Furthermore, the plaintiff testified that one could see at least three blocks to the east from the curb in front of the Birdland Inn. The facts compel the view that the Holloway car was visible to him at the time he entered the street, if he had looked. "There are none so blind as those who have eyes and will not see * * *." *Furst v. Merritt,* 190 N.C. 397, 130 S.E. 40.

In *Blake v. Mallard, Ante,* 62, *Sharp, J.,* speaking for the Court, said: "The failure of a pedestrian crossing a roadway at a point other

than a crosswalk to yield the right of way to a motor vehicle is not contributory negligence *per se;* it is only evidence of negligence. *Landini v. Steelman,* 243 N.C. 146, 90 S.E. 2d 377. However, the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. *Gamble v. Sears,* 252 N.C. 706, 114 S.E. 2d 677; *Barbee v. Perry,* 246 N.C. 538, 98 S.E. 2d 794; *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246.

"The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury. It was plaintiff's duty to look for approaching traffic before she attempted to cross the highway. Having started, it was her duty to keep a lookout for it as she crossed. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499. Having chosen to walk diagonally across a six-lane highway, vigilance commensurate with the danger to which plaintiff had exposed herself was required of her."

It is manifest from the minor plaintiff's evidence, which is all the evidence adduced in the trial below, that his negligence was at least one of the proximate causes of his injury. No other conclusion can reasonably be drawn. Consequently, the judgment as of nonsuit will be upheld.

Affirmed.

STATE v. ANNA COBB, CARSON NORWOOD SUTTON AND FREEMAN NICK OATES.

(Filed 12 June 1964.)

1. Trespass § 12—

The proprietor of a private business has the right to select the clientele he will serve and, if he so desires, may arbitrarily exclude from his premises any individual or group of individuals for any reason satisfactory to himself, and his right to be protected against wrongful invasion of his property and his right to maintain undisputed possession is protected by G.S. 14-134, rendering it a criminal trespass for a person to refuse to leave the premises after having been requested to do so by the person in lawful possession.

2. Same—

The amusement business is not one affected with a public interest, and therefore the proprietor of a theatre, unlike an innkeeper or public carrier, may admit or exclude any person for any reason satisfactory to himself.

3. Criminal Law § 1—

A man's conduct must be judged by the law as it exists at the time his conduct is called into question and not by the law as he and others think it should be rewritten in the interest of social justice.

4. Constitutional Law § 10—

It is the function of the courts to declare the law and not to make it, and therefore if a law should be changed, only the Legislature and not the judiciary may properly change it.

5. Trespass § 12—

Where the parties are cognizant of the policy of a theatre to segregate its white and colored patrons, colored persons, having procured tickets previously purchased by a white person, may not assert that as the holder of such tickets they are entitled to be seated in the section reserved for white patrons, and such claim cannot be under a *bona fide* belief that they have a legal right to be seated in the section. G.S. 14-134.

APPEAL by defendants from *Williams, J.*, January 6, 1964 Session of CUMBERLAND.

On June 26, 1963 each of the three defendants was convicted in the Fayetteville City Recorder's Court upon a warrant which charged that on June 11, 1963 he "unlawfully and willfully and intentionally did go and enter upon the lands of the North Carolina Theatre, Inc., Colony Theatre without a license therefor, and did willfully and unlawfully remain on said premises after being asked to leave the Colony Theatre by the said E. W. Wray, Manager, this being in violation of G.S. 14-134." Each defendant was convicted and fined twenty-five dollars. Each appealed to the Superior Court where the three cases were consolidated for trial. At the conclusion of the State's evidence, the defendants moved for judgment as of nonsuit. The motion was overruled. They elected to offer no evidence and again renewed their motion. The motion was again denied. The jury returned a verdict of "guilty as charged as to each defendant." The judgment was that each be imprisoned in the county jail for sixty days and pay a fine of ten dollars together with the court costs. The prison sentence was suspended upon payment of the fine and costs. Each defendant appealed.

Attorney General Bruton and Deputy Attorney General Ralph Moody for the State.

Arthur L. Lane and Sylvia X. Allen for defendants.

SHARP, J. The defendants' assignments of error present only the question of nonsuit. Other purported assignments do not comply with our Rules 19(3) and 21 as they have repeatedly been interpreted by

this Court. *Gibbs v. Gaimel,* 257 N.C. 650, 127 S.E. 2d 271; *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597; see also the annotations to the Rules.

The evidence offered by the State tends to establish these undisputed facts: On June 11, 1963, it was the policy and practice of the Colony Theater to seat Negroes in the balcony and white patrons in the orchestra section. In other words, the Colony was a segregated theater. It had a dual ticket office. From its right side, tickets were sold to whites; from its left, to the colored customers. This arrangement, custom, and rule of the business was well known. The first three tickets sold after 4:00 p.m. on June 11th were sold by the manager, E. S. Wray, to a white man whose identity was unknown to him. These tickets were numbered M-380959, M-380960, M-380961 and were to the downstairs section of the theater. That night while a movie was being shown, the three defendants, all Negroes, appeared in the outer lobby between the ticket office and the first set of doors which gave entrance to the orchestra section and tendered tickets numbered M-380959, M-380960, and M-380961. Wray instructed the ticket taker not to accept their tickets and twice requested the defendants not to enter the downstairs section but to go to the balcony reserved for colored patrons. The three defendants ignored the manager's request and remained in the doorway completely blocking the entrance to the auditorium for seven or eight minutes. He then closed these doors and admitted the line of white patrons into the theater through the exit doors. The defendants moved to this line. A police officer of the City of Fayetteville, who was on the scene, identified himself to the defendants and requested them to surrender their tickets to him, and they did so. The manager again told the defendants not to enter the auditorium but they went past him and sat down. He followed and asked them once more to go to the balcony section. They continued to sit without replying. In the presence of the police he again asked the defendants to go to the balcony; the police made the same request. Again the defendants failed to respond in any manner. The manager then requested the police to arrest and remove the defendants. The officers placed defendants under arrest and left the theater with them. The defendants asked for no refund on the tickets and none was tendered.

The decision of this case is controlled by *State v. Clyburn,* 247 N.C. 455, 101 S.E. 2d 295, and *State v. Davis,* 261 N.C. 463, 135 S.E. 2d 14. It is the law in North Carolina today that the proprietor of a private business has the right to select the clientele he will serve and, if he so desires, he may arbitrarily exclude from his premises any individual or group of individuals. Therefore, he may select his customers or patrons upon the basis of sex, color, creed, or caprice.

This power of selection and exclusion is a right which is protected by law and one which has always been regarded as basic to the institution of private property. A violator of this right is punished as provided in G.S. 14-134. Such a right, without remedy of enforcement by law, would be no right at all — merely an invitation to an invasion by superior force with resulting violence and anarchy. The removal of a trespasser, whether he be white or Negro, from an owner's premises by the police does not constitute state action to enforce segregation and is not prohibited by the Fourteenth Amendment to the Federal Constitution. This contention of the defendants was decided adversely to them in *State v. Davis, supra,* and *State v. Williams,* 253 N.C. 804, 117 S.E. 2d 824, *petition for cert. filed,* 29 U.S.L. Week 3319 (U.S. April 20, 1961) (No. 915). The law does not look to the motive of the proprietor but to the wrongful invasion of his property and to the disturbance of his right to undisputed possession. 37 N.C.L. Rev. 73, 76.

In a similar case in Maryland in which defendants contended that their arrest and conviction for trespass was unconstitutional enforcement by the State of Maryland of racial segregation, the Court of Appeals said:

> "As we see it, the arrest and conviction of these appellants for a criminal trespass as a result of the enforcement by the operator of the park of its lawful policy of segregation, did not constitute such action as may fairly be said to be that of the State. The action in this case, as in *Drews, (Drews v. State,* 224 Md. 186, 167 A. 2d 341), was also 'one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants'." *Griffin v. State,* 225 Md. 422, 171 A. 2d 717, *cert granted,* 370 U.S. 935.

The *Clyburn, Davis,* and *Williams* cases, cited above, involved a lunch counter, restaurant, and soda fountain respectively. However, it is equally well settled that in the control of his own business, the proprietor of a privately owned place of amusement may admit or exclude any person for any reason satisfactory to himself or for no reason whatever. In the absence of civil rights legislation, and North Carolina has none, the law imposes no obligation upon the owner or proprietor of a theater or other public amusement with respect to whom he shall admit or exclude. Unlike a public utility, his business is not affected with a public interest, and he is under no legal obligation to admit every person who applies and is ready to pay the price of admission. 52 Am. Jur., *Theaters, Shows, etc.* § 6; 10 Am. Jur. *Civil Rights* § 22; *Terrell Wells Swimming Pool v. Rodriguez,* Tex., 182 S.W.

2d 824. His license to operate is not a franchise for "with the possible exception of ancient Rome — amusement of the populace has never been regarded as a function or purpose of government." *Madden v. Queens County Jockey Club,* 296 N.Y. 249, 72 N.E. 2d 697, 1 A.L.R. 2d 1160, *cert. denied,* 332 U.S. 761.

> "Historically, apart from 'innkeepers,' 'public carriers,' and the like, the proprietor of a business can deal with his patrons as he likes — denying service to some and not to others. This right to deny service was recognized by the English common law and some fifty years ago by the United States Supreme Court. Such is the law except in the twenty-six states that recently enacted laws prohibiting such discrimination." Pollitt, Dime Store Demonstrations, 1960 Duke L. J. 315, 352.

The rule, as it exists in North Carolina, is stated in 52 Am. Jur., *Theaters, Shows, etc.* § 4: "It is the majority rule in this country that a ticket of admission to a theater or place of public amusement confers on a purchaser thereof a mere license to witness the performance, which the owner or proprietor may revoke at will, either before or after admission of the ticketholder, and that in the absence of aggravating circumstances, a revocation is actionable only as a breach of contract. . . ." The measure of damages in such an action is usually held to be limited to the amount paid for the ticket and the necessary expenses incurred in attending the performance. 52 Am. Jur., *Theaters, Shows, etc.* § 12.; *Griffin v. Southland Racing Corp.,* Ark., 370 S.W. 2d 429; *De La Ysla v. Publix Theatres Corporation,* 82 Utah 598, 26 P. 2d 818.

A man's conduct must be judged by the law as it exists at the time his conduct is called into question and not by the law as he and others think it should be rewritten in the interest of social justice. In no other way can orderly government be preserved and a "reign of tooth and claw" be prevented. If the law is to be changed, it is the firm conviction of this Court that our system requires it to be changed by the legislative branch of the government and not by the judiciary. When a court, in effect, constitutes itself a superlegislative body, and attempts to rewrite the law according to its predilections and notions of enlightened legislation, it destroys the separation of powers and thereby upsets the delicate system of checks and balances which has heretofore formed the keystone of our constitutional government.

To constitute the offense forbidden by G.S. 14-134 and with which defendants are charged, "there must be an entry on land after being forbidden; and such entry must be wilful, and not from ignorance, ac-

cident, or under a *bona fide* claim of right or license." *State v. Bryson,* 81 N.C. 595. However, a mere belief on the part of a trespasser that he had such a claim will not protect him; he must satisfy the jury that he had reasonable grounds for such belief. *State v. Crawley,* 103 N.C. 353, 9 S.E. 409; *State v. Fisher,* 109 N.C. 817, 13 S.E. 878; *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846, *appeal dismissed sub nom., Wolfe v. North Carolina,* 364 U.S. 177.

Here, there is no evidence that defendants entered the orchestra section of the Colony Theater under a *bona fide* belief that they had a *legal* right to do so. The fact that they held tickets to the downstairs section at the time is no defense. The theater did not sell these tickets to the defendants. As they well knew, they could not have purchased them. The tickets were obtained by subterfuge for the very purpose of creating a situation which would result in their arrest. Therefore, they may not claim the right to enter and remain in the theater after being forbidden so to do upon any status as ticketholders.

In *Griffin v. State, supra,* a group of Negroes entered Glen Echo, a segregated amusement park, and went to the carrousel. They had tickets which a white person had previously purchased for them and which the park attendant refused to honor. When they declined to leave the park after being asked to go, they were arrested upon a warrant charging them with trespass. On appeal, the Maryland defendants made the identical arguments which the defendants make in the case *sub judice.* In sustaining a conviction the Court of Appeals said:

> "Since it was admitted that the carrousel tickets were obtained surreptitiously in an attempt to 'integrate' the amusement park, we think the claim that these appellants had taken seats on the carrousel under a bona fide claim of right is without merit. While the statute specifically excludes the 'entry upon or crossing over' privately owned property by a person having a license or permission to do so, these appellants do not come within the statutory exception. In a case such as this where the operator of the amusement park — who had a right to contract only with those persons it chose to deal with — had not knowingly sold carrousel tickets to these appellants, it is apparent that they had no bona fide claim of right to a ride thereon, and, absent a valid right, the refusal to accept the tickets was not a violation of any legal right of these appellants."

In the trial below we find
No error.

W. A. ALLEN AND WIFE, BESSIE ALLEN v. FRED D. CATES AND WIFE, MILDRED M. CATES.

(Filed 12 June 1964.)

1. Boundaries § 2—

A call to a natural object which is permanently located controls course and distance, and a well recognized corner of an adjacent tract is a call to a natural object within the meaning of this rule.

2. Same—

A call to a stone without additional description is insufficient to constitute a call to a permanently located natural object, and such call cannot control course and distance.

3. Same—

Where petitioners in a processioning proceeding introduce evidence fixing the corner of a contiguous tract, and the next call in their description is by course and distance to a stone (a corner in dispute), and the evidence is to the effect that the stone was small and had been moved, the disputed corner must, as a matter of law, be fixed at the distance called for from the established corner, with the result that petitioners' evidence is sufficient to support a finding of the corner as contended by them.

APPEAL by petitioners from *Clark, J.*, October 7, 1963 Session of FORSYTH.

This is a processioning proceeding to fix, as authorized by C. 38 of the General Statutes, the location of the line separating the lands of petitioners from the lands of the defendants. The disputed area contains 4.23 acres.

The parties stipulated: "This is a processioning proceeding, or disputed line case, and that the title to the lands is not in question." James Burrow, in 1963, made a map showing the lands of petitioners and defendants and the locations of the dividing line as contended by petitioners and defendants; petitioners' contention fixes the true location as shown on the map by the letters B-C. Defendants contend the proper location is as shown on the map by figures 3-2. The course of this line is north 87 degrees 30′ west. The course of the line B-C is north 76 degrees 35′ west.

When petitioners concluded their evidence, defendants moved for nonsuit. The court overruled the motion, being of the opinion that the correct location of the boundary line should be established.

Judge Clark held the burden was on petitioners to establish the true location of the line. Since they had not offered any evidence sufficient to establish a location different from that claimed by defendants, he gave peremptory instructions directing the jury to find the line 3-2 was the boundary line. The jury answered as directed.

Buford T. Henderson for plaintiff appellants.
B. R. Browder, Jr., for respondent appellees.

RODMAN, J. Petitioners alleged the parties traced their titles to W. C. Stewart who in 1919 purchased a tract containing 52 acres from J. W. Knott; the southern 40 acres of this tract was acquired by petitioners in 1942. Defendants acquired the balance of the 52 acres conveyed by Knott to Stewart.

We interpret the stipulations, the recitals in the judgment, and the briefs filed here as an acceptance of petitioners' contention that the parties trace title to a common source and that petitioners have the older and hence better title.

The description in petitioners' deed reads:

> "Lying and being in Old Richmond Township and bounded as follows: BEGINNING at a stone in Liza Hauser's line, running thence North 44 deg. East 144 feet to a stone; thence North 18 deg. 30′ East 388 feet to a stone; thence North 71 deg. 44′ East 377 feet to a black gum; thence South 88 deg. 30′ East still along Eliza Hauser's line 534 feet to *L. A. Strupe corner; thence North with Strupe's line 1558 feet to a stone, W. C. Stewart's corner; thence with the line of W. C. Stewart North 88 deg. West 1061 feet to a stake, Stone Brothers' corner; thence South with Stone Brothers' line 2205 feet to the BEGINNING*, containing 40 acres, more or less, and being Lot No. 1 of the W. C. Stewart land."

The pertinent parts of the description are shown in italics. The controversy is solved by locating the line which runs north 88 degrees west 1061 feet from Strupe's line to a stake, Stone Brothers' corner. To locate that line, it is necessary to establish its beginning or, if that be impossible, to establish its western terminus and reverse that line. The deed gives this information about the beginning point of the disputed boundary. It is a stone in L. A. Strupe's line; it is 1558 feet north of Strupe's corner in Eliza Hauser's line; it is W. C. Stewart's corner.

A description by course and distance is an appropriate method of fixing the boundaries of a tract of land. If the beginning or some other corner is known, the boundaries can be located by running the given courses and distances. If, in addition to the course and distance, the deed contains other descriptive terms more definite and certain than the course and distance, the more certain description will control. This principle finds expression in the rule that a call for a natural object, permanently located will control course and distance. *Witherspoon v. Blanks,* 1 N.C. 157; *Swain v. Bell,* 3 N.C. 179; *Cherry v. Slade,* 7 N.C.

82; *Carney v. Edwards,* 256 N.C. 20, 122 S.E. 2d 786. As Hall, J., said in *Reed v. Shenck,* 14 N.C. 65, "To be of any avail they must in fact, or by way of reference, be fixed to the earth. They must be fixed to immovable objects. They may call for water courses, rocks, trees, or any thing immovable, that may be identified. Marked trees, the most common, are partly natural and partly artificial boundaries. * * * Movable things may become the boundaries of land, when they become immovable, as a wall or a pillar of stones, or any other fixed, stable substance."

A well known and recognized corner of another tract of land is more specific and certain than course and distance, and for that reason will control. *Carney v. Edwards, supra.*

The deed tells us that the beginning point of the land in controversy is W. C. Stewart's corner. It was so designated in a deed made by Stewart to W. M. Ball in June, 1927, but no evidence whatever was offered to show where Stewart's corner was and, since the lands of the petitioners and the defendants were all part of a single tract purchased by Stewart, it would seem that Stewart had no corner in the Strupe line prior to his deed to Ball in 1927. The deed says that the corner is a stone.

We are of the opinion that a call for a stone without additional description is insufficient to justify disregarding the call for course and distance. A stone may be small enough to be cast as a missile (John 8:7), or gigantic enough to be described as a mountain on which replicas of historic figures may be carved. Absent information as to size and how affixed to the soil, a rock falls into the category of a stake, having, as Hall, J. said in *Reed v. Shenck, supra,* "more fixity than feathers floating on water," but not that immobility required to control course and distance. Hoke, J. (later C. J.), in *Nelson v. Lineker,* 172 N.C. 279, 90 S.E. 251, compared the descriptive word "stone" to a stake. Petitioners' deed calls for stones at four of its corners. None are described.

Plaintiffs' witness, Myers, testified he occupied petitioners' land for a period of 7 years beginning in 1927. He described the stone called for at the end of the line running north 1558 feet as "a little dark looking round stone bedded down in the ground on a bank." It had been moved when he looked for it shortly prior to the trial. We conclude that the call for a stone at the end of the line 1558 feet from Strupe's corner is not sufficient to control and override the distance there given.

The parties seemingly are in agreement as to the location of L. A. Strupe's western line. If petitioners have offered any evidence with respect to the location of L. A. Strupe's corner in Eliza Hauser's line, the

court erred when it charged peremptorily to find adversely to petitioners, since the beginning corner of the line separating the land of petitioners from defendants is 1558 feet from Strupe's corner in the Hauser line.

When the evidence is viewed in the light most favorable to petitioners, we conclude there is some evidence from which a jury might find 3 on the court map (this, say defendants, is the beginning point of the boundary line) is only 1484.5 feet from Strupe's corner. If so, that point is not the beginning point, since petitioners' deed, as a matter of law, fixes the distance at 1558 feet.

The surveyor, Burrow, testified that he made surveys in the neighborhood in 1960. He was familiar with the properties; corners had been pointed out to him. There was a general reputation in the neighborhood as to the location of the Strupe and other corners.

After reading the description in the deed to petitioners, Burrow testified: "This call says 'to L. A. Strupe corner.' I have to a stone, Dallas Gibson's northeast corner." Thereupon the court intervened and said, "Let me stop you right there, 'Strupe corner.' Now, is that the stone that you have referred to as being the agreed southeast corner?" Answer: "Yes sir." Question: "That is where the stone is located?" Answer: "That's right."

Tending to corroborate the testimony of Burrows is the testimony of the witness Myers who testified that the dividing line "ran into a branch, ran up kind of in the branch a little ways." The map shows a branch between figure 3 and letter B. If Myers' testimony is accepted as correct, the beginning point in the disputed line would be somewhere between 3 and B.

When the beginning point of the disputed boundary has been properly located, the line will be run by course as set out in the deed to petitioners. The only way that course can be changed would be to establish Stone Brothers' corner and to show that it was well known and recognized in the community. When the western terminus of the disputed line has been established, its distance from the beginning corner of petitioners' land is immaterial. If that point is less than 2205 feet, it would stop at the beginning; if more than 2205 feet, it would extend to the beginning. *Harris v. Raleigh,* 251 N.C. 313, 111 S.E. 2d 329.

New trial.

CHARLES G. PERRY, EMPLOYEE, CLAIMANT v. AMERICAN BAKERIES COMPANY, EMPLOYER; ZURICH AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS.

(Filed 12 June 1964.)

1. Master and Servant § 54—

In order for an injury to arise out of the employment the injury must be a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some duty of the employment. G.S. 97-2(6).

2. Same—

An injury arises in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the employer's business.

3. Master and Servant § 93—

While the findings of the Industrial Commission are conclusive on appeal when supported by competent evidence, a finding that an accident arose out of and in the course of the employment involves a mixed question of law and fact, and the courts are authorized to review the legal aspects of the question upon the facts found.

4. Master and Servant § 54—

Findings to the effect that the claimant was required to attend a sales meeting at a recreational inn, that, with other employees, he attended a social hour given by the employer at the inn late Sunday afternoon, that afterwards claimant and another employee had dinner and returned to the inn, that claimant decided to go swimming and entered the pool maintained by the inn at 10:00 p.m., and that thereafter while diving claimant sustained a fractured cervical vertebra, *is held* not to show a causal relation between the employment and the injury, and therefore the injury did not arise out of the employment within the provisions of the Compensation Act.

5. Constitutional Law § 10—

Whether the coverage of the Compensation Act should be broadened is for the determination of the Legislature and not the courts.

APPEAL by defendants from *Olive, E. J.*, October 21, 1963, "A" Civil Session of WAKE.

This is a proceeding pursuant to the Workmen's Compensation Act.

The facts found by the hearing commissioner are in substance as follows:

Plaintiff, age 27, was employed by defendant American Bakeries Company as supervisor of route salesmen at Raleigh. He worked under the immediate supervision of H. A. Gay, assistant sales manager

for the Rocky Mount-Raleigh area. On 27 July 1960 Mr. Gay sent out a mimeographed letter to plaintiff and other employees directing them to attend a sales meeting at Greensboro and stating that employer desired everyone to be present by 4:30 P.M. Sunday, 31 July 1960. Plaintiff rode to Greensboro in Mr. Gay's automobile. He arrived at Sedgefield Inn, the place of the meeting, around noon on Sunday, 31 July 1960. The employer had made reservations for plaintiff and the other employees at the Sedgefield Inn. Employees from a wide area were in attendance. The employer paid all of the expenses of plaintiff and the other employees while attending the meeting, as well as all expenses of the meeting. The sales meeting did not begin until 8:30 A.M. Monday, 1 August 1960, but at 5:30 P.M. Sunday the employer had a social hour to which all attending employees were invited. Plaintiff attended the social hour. Afterwards plaintiff and a fellow employee had dinner and then returned to Sedgefield Inn. Plaintiff decided to swim in the pool maintained by Sedgefield Inn for its guests. He borrowed swim trunks and he and another employee entered the pool about 10:00 P.M. Other guests of the Inn were in and out of the pool and other employees of defendant Bakeries Company came down to the pool while plaintiff was swimming. After being at the pool for about an hour, the plaintiff while diving sustained a fractured cervical vertebra. He was carried to the hospital where he remained 65 days. He was out of work for a period of 5 months but was paid his salary during that entire time.

The hearing commissioner concluded that plaintiff "was injured by accident arising out of and in the course of his employment," and awarded compensation for permanent partial disability of the back and medical expenses. Upon review, the full commission adopted as its own the findings of fact, conclusions and award of the hearing commissioner. On appeal, the superior court affirmed the award of the full commission.

Young, Moore & Henderson for plaintiff claimant.
Smith, Leach, Anderson & Dorsett for defendants.

MOORE, J. Plaintiff was injured by accident. The question for decision is whether the injury "arose out of and in the course of" his employment. G.S. 97-2(6).

"The term 'arising out of employment', it has been said, is broad and comprehensive and perhaps not capable of precise definition. It must be interpreted in the light of the facts and circumstances of each case, and there must be some causal connection between the injury and

the employment." *Berry v. Furniture Co.*, 232 N.C. 303, 306, 60 S.E. 2d 97. To be compensable an injury must spring from the employment or have its origin therein. An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865; *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596; *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173; *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751. An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294.

In general terms the Industrial Commission found as a fact and concluded that plaintiff's injury arose out of and in the course of his employment. The findings of fact of the Industrial Commission are conclusive on appeal when they are supported by competent evidence. *McGinnis v. Finishing Plant*, 253 N.C. 493, 117 S.E. 2d 490. But whether an accident arose out of the employment is a mixed question of law and fact. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E. 2d 218. To make such determination it is necessary to examine the findings of specific crucial facts. *Guest v. Iron & Metal Co., supra.*

Plaintiff was required by his employer to be away from his home and place of regular employment for the purpose of attending a sales meeting for the mutual benefit of plaintiff and his employer. Employer paid all of his expenses and provided him with accommodations at the Sedgefield Inn for the duration of the meeting. Employer expressly invited plaintiff to a social hour on Sunday afternoon to provide him entertainment and afford him the opportunity to meet and associate with his fellow employees on a social basis. Plaintiff's accommodations at Sedgefield Inn included the opportunity to make use of the swimming pool and other recreational facilities maintained by the Inn for its guests. While diving into the pool plaintiff was injured.

The fact that plaintiff was required to be temporarily in a distant city with expenses paid by his employer is not a controlling factor. *Sandy v. Stackhouse, Inc., supra.* The question is whether his use of the pool was an authorized activity calculated to further, directly or indirectly, his employer's business, or whether it was employment connected to the extent that it may be concluded that there was a causal relation between the employment and the accident and the accident resulted from a risk involved in the employment. In providing plain-

tiff accommodations at Sedgefield Inn the employer provided him the recreational facilities maintained by the Inn for its guests. These recreational facilities undoubtedly influenced the employer in selecting Sedgefield Inn as the site for the meeting. Plaintiff was not required or expressly invited by his employer to use the swimming pool, but during his free time he was at liberty to use it. By providing the facility for him the employer impliedly invited him to use it, and he could swim or not at his option. Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment. *Lewis v. Tobacco Company,* 260 N.C. 410, 132 S.E. 2d 877; *Berry v. Furniture Co., supra; Hildebrand v. Furniture Co., supra.* Plaintiff's activity in swimming was not a function or duty of his employment, was not calculated to further directly or indirectly his employer's business to an appreciable degree, and was authorized only for the optional pleasure and recreation of plaintiff while off duty during his stay at the Inn. The injury did not have its origin in or arise out of the employment.

In Larson's Workmen's Compensation Law, Vol. 1, § 22.00, pp. 328-9, it is stated that injuries suffered by employees in recreational or social activities are compensable when

> "(a) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> "(b) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> "(c) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee's health and morale that is common to all kinds of recreation and social life."

These general conclusions are gleaned from an analysis of cases from all parts of the United States. The injury in the case at bar does not qualify for compensation even under these rules or suggested guides. The activity in question was not a regular on-premises lunch or recreation period pursuit incident to employment. Swimming was not expressly or impliedly required as a part of plaintiff's services at the meeting. The employer derived no direct substantial benefit. *Larson* points to a trend of greater liberality in awarding compensation due to the increasing prevalence of employer sponsored recreation, but ob-

serves that "the majority of cases still require a showing of something more than mere sponsorship." *ibid,* § 22.23, p. 334.

This Court, in compliance with the requirement of the statute, G.S. 97-2(6), that injury to be compensable must result from accident arising out of and in the course of the employment, has adhered to the rule of "causal relation" between employment and injury. In *Duncan v. Charlotte,* 234 N.C. 86, 91, 66 S.E. 2d 22, it is said: "This rule of causal relation is the very sheet anchor of the Workmen's Compensation Act. It has kept the Act within the limits of its intended scope — that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." Whether the scope of benefits under the Act is to be enlarged is not a matter for the Industrial Commission or the courts to determine, it is a matter for the legislative department.

The superior court will remand this cause to the Industrial Commission for an award in compliance with this opinion.

Reversed.

LOUIS GAMBLE v. LUCIAN KELLY STUTTS.

(Filed 12 June 1964.)

1. Compromise and Settlement—

Where each motorist claims that the collision was caused solely by the negligence of the other, a payment by one in compromise and settlement precludes either from thereafter maintaining an action against the other, but if payment is made by a third person who acts without authority from claimant, such payment does not bar claimant unless subsequently ratified by him.

2. Same—

A payment by insurer in settlement of the claim of one motorist against insured motorist, solely for the purpose of terminating the liability of insurer and reserving the insured motorist's rights, does not preclude the insured motorist from thereafter maintaining an action against the other. G.S. 20-279.21(f) (3).

3. Pleadings § 10—

New matter alleged in the answer, provided it does not amount to a counterclaim, is deemed controverted without the necessity of a reply, G.S. 1-159, and therefore plaintiff may offer evidence avoiding a plea in bar to set up in the answer without the necessity of alleging the facts by way of reply.

4. Appeal and Error § 47; Pleadings § 34—

If a party is entitled to introduce evidence in support of matter alleged in his pleading, it is error for the court to strike such matter, but if the party is entitled under his general or statutory denial to introduce evidence in regard to the facts alleged without the necessity of alleging them, the striking of the allegations is not prejudicial.

CERTIORARI, on plaintiff's motion, to review an order of *Walker, S. J.*, entered at the October 1963 Session of JOHNSTON, striking plaintiff's reply to an affirmative defense asserted by defendant.

This action was begun May 11, 1961. Plaintiff is a non-resident. Defendant is a resident of Johnston County. Plaintiff seeks to recover for personal injuries and property damage sustained in a collision between an automobile owned and operated by him, and an automobile owned and operated by defendant. The collision occurred on U. S. 301 in Johnston County on May 30, 1958.

Plaintiff bases his right to recover on his allegation that the collision was caused by defendant's negligence in operating his vehicle on the wrong side of the road and at an unlawful rate of speed.

Defendant denied plaintiff's allegations of negligence. As additional defenses, he pleaded (a) contributory negligence, and (b) a payment of $1,500 made in October 1960 by or for plaintiff Gamble to Stutts in settlement and compromise of all claims growing out of the collision.

Plaintiff replied to the plea of settlement. He denied any payment was made or authorized by him. He admitted his liability insurance carrier had paid Stutts $1,500, for which Stutts released all claims he had against plaintiff and his liability insurance carrier. He alleged the payment so made was merely the price his insurance carrier paid to buy its peace, it being expressly agreed by all parties that the payment would not in any manner impair Gamble's right to require Stutts to answer for the damages resulting from Stutts' negligence.

Defendant moved to strike those sections of the reply stating plaintiff's version of the facts relating to the asserted settlement.

The motion was allowed. We granted *certiorari*.

Nance, Barrington, Collier & Singleton for plaintiff appellant.
Albert A. Corbett for defendant appellee.

RODMAN, J. As an affirmative defense to Gamble's action, defendant alleges these facts: Stutts, in July 1958, instituted an action in the Superior Court of Johnston County to recover from Gamble $10,500 for personal injuries and property damage sustained by him be-

cause of Gamble's negligence which caused the collision of May 30, 1958. That action was, on Gamble's motion, based on diversity of citizenship, moved to the U. S. District Court for trial. Gamble denied the collision was caused by his negligence. He asserted a counterclaim in the amount of $26,500 for personal injuries and property damage resulting from Stutts' negligence. After the pleadings were filed, the District Court ordered a pretrial conference. The parties were represented at that conference by the attorneys who had signed the pleadings. The case was set for trial in the District Court in Raleigh on October 24, 1960, "when and where plaintiff, Stutts, and defendant, Louis Gamble, were present in court with their counsel; that just before entering into trial of said cause, the defendant, Louis Gamble, through his counsel agreed to pay, and soon thereafter, paid or caused to be paid to Lucian Kelly Stutts, the sum of $1500.00 in settlement of plaintiff's claim for injuries and property damages, and further agreed that his counterclaim be dismissed; that defendant, Gamble, obtained from the plaintiff, Lucian Kelly Stutts, a general release releasing the defendant, Louis Gamble and Selected Risk Insurance Company, from further claims by said plaintiff Stutts, arising out of the collision referred to herein, as appears from a copy of said release attached hereto as defendant Stutts' EXHIBIT H.

"That the plaintiff, Louis Gamble, was present in the courtroom in Raleigh, N. C. at the time of said settlement, acquiesced in and had full knowledge of said settlement, as set forth above, and the dismissal by the court of his counterclaim for alleged injuries and property damages."

Attached to the answer, to support the plea of settlement, are copies of the release executed by Stutts, the pleadings and orders made in the action brought by Stutts against Gamble.

Gamble, in reply to the plea of settlement, alleged: The action instituted by Stutts was removed to the Federal court by the attorney for his insurance carrier. "[P]laintiff (then defendant) Louis Gamble was represented by Attorney Hillard Chapnick, Patterson, New Jersey, and Louis Gamble's liability insurance company, Selected Risks Insurance Company, was represented by Attorney Joseph C. Moore." Gamble and his attorney, Chapnick, "recognized the right of Selected Risks Insurance Company pursuant to the terms of the liability policy to settle any claims against Gamble, but specifically instructed Attorney Joseph C. Moore, in event of such settlement, that it be effectuated in such a manner that Louis Gamble's counterclaim or right to institute an independent action be not adversely affected." Stutts' attorney "was aware at all times of Louis Gamble's intent to pursue his claim against Stutts."

Recognizing the limitation on Mr. Moore's authority to act, the parties, when the settlement was made, stipulated: "It is hereby stipulated by all parties hereto, through their respective counsel, that an order may be entered by the Court, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, that the complaint of plaintiff and counterclaim of defendant be dismissed."

Stutts, in support of his motion to strike plaintiff's reply, asserts, "said allegations are irrelevant, redundant, immaterial and improper." The court assigned no reason for allowing the motion to strike plaintiff's reply.

This is a typical case where each operator of a motor vehicle places the entire blame for a collision and resulting damages on the other. In such a case, a payment by one to the other in compromise and settlement puts an end to the controversy. Neither can thereafter recover from the other. *Keith v. Glenn, post,* 284; *Snyder v. Oil Company,* 235 N.C. 119, 68 S.E. 2d 805. It follows, therefore, that defendant's plea of settlement, if established, effectively bars plaintiff's cause of action; but a payment made by a third person who acts without authority from claimant does not bar him unless subsequently ratified. *Bradford v. Kelly,* 260 N.C. 382, 132 S.E. 2d 886; *Lampley v. Bell,* 250 N.C. 713, 110 S.E. 2d 316; *Beauchamp v. Clark,* 250 N.C. 132, 108 S.E. 2d 535.

Here, plaintiff denies any settlement made or ratified by him. He admits his insurance carrier, acting through its counsel, made a payment to Stutts, but he says that payment was made for the sole purpose of terminating the liability of the insurance company, a right which it could exercise without consulting him. G.S. 20-279.21(f)(3); *Bradford v. Kelly, supra; Daniel v. Adorno,* 107 A. 2d 700; *Perry v. Faulkner,* 102 A. 2d 908; *Wm. H. Heinemann Cream. v. Milwaukee Auto Ins. Co.,* 71 N.W. 2d 395, *Aff'd* 72 N.W. 2d 102; *Eller v. Blackwelder,* 130 S.E. 2d 426. He alleges the action in the Federal court was dismissed pursuant to Federal Rule 41(a), expressly preserving his right to assert his claim against Stutts.

Plaintiff cannot be deprived of the right to show facts necessary to determine whether he is bound by the payment made to Stutts, and because he has the right to show what the facts are, he had the right to allege those facts.

The court erred in allowing defendant's motion to strike. Notwithstanding that conclusion, it does not follow that we should reverse Judge Walker's order. That would be true only if the error were prejudicial. *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597; *In Re Will of Harrington,* 252 N.C. 105, 113 S.E. 2d 21.

It is provided by statute, G.S. 1-159: New matter in an answer, if not a counterclaim, is "deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires." Under this statutory provision, plaintiff is permitted to offer evidence avoiding the plea in bar without the necessity of alleging the facts by way of reply. *Creech v. Creech,* 256 N.C. 356, 123 S.E. 2d 793; *Nebel v. Nebel,* 241 N.C. 491, 85 S.E. 2d 876; *Williams v. Thompson,* 227 N.C. 166, 41 S.E. 2d 359; *Trust Company v. Dunlop,* 214 N.C. 196, 198 S.E. 645; *Simon v. Masters,* 192 N.C. 731, 135 S.E. 861; *Oldham v. Rieger,* 145 N.C. 254, 58 S.E. 1091; *Askew v. Koonce,* 118 N.C. 526, 24 S.E. 218.

Because plaintiff is not prejudiced by the erroneous ruling, the judgment is

Affirmed.

COUNTY OF DURHAM v. ELMORE L. ADDISON.

(Filed 12 June 1964.)

1. Counties § 3.1; Municipal Corporations § 34—

A zoning ordinance passed pursuant to an enabling statute is presumed valid, with the burden upon the property owner who asserts its invalidity to prove it.

2. Same—

The mere fact that a zoning ordinance adversely affects the value of particular property is insufficient to establish the invalidity of the ordinance.

3. Same—

Where a property owner begins construction of a dwelling in violation of a county zoning ordinance, notwithstanding the denial of a building permit by the zoning administrator, upheld by the Board of Adjustment, the county is entitled as a matter of law to enjoin further construction, the property owner having failed to pursue his remedy by *certiorari* to present the defenses of discrimination and confiscation. G.S. 153-266.17.

APPEAL by defendant from *Hall, J.,* September 1963 Civil Session of DURHAM.

This action was instituted July 30, 1962, to enjoin defendant from constructing a house in violation of provisions of Durham County's comprehensive zoning ordinance.

An order signed August 6, 1962, restrained defendant until the final hearing. Defendant answered. An order, allowing in part plaintiff's

motion to strike portions of the answer, was entered. Plaintiff's motion for judgment on the pleadings was denied. At trial, evidence was offered by plaintiff and by defendant.

One issue was submitted, *viz.*: "Has the defendant violated the zoning ordinances of Durham County as alleged in the complaint?" The jury, under peremptory instruction, answered, "Yes." Thereupon, judgment was entered enjoining defendant permanently in accordance with the prayer of the complaint. Defendant excepted and appealed.

Robert D. Holleman for plaintiff appellee.
H. F. Seawell, Jr., for defendant appellant.

BOBBITT, J. Under Durham County's zoning ordinance, effective January 16, 1956, the county is divided into "eighteen (18) classes of districts," one being "Village Residence District." Defendant's property, described below, is in a "Village Residence District."

In 1954, defendant purchased "one big lot," "a narrow strip of land," fronting 409 feet on the *northwest* (referred to for convenience as *north*) side of East Geer Street (Old Oxford Highway) and extending north between approximately parallel lines to the right of way of a railroad. The depth on the west side was approximately 75 feet and on the east side approximately 30 feet. Defendant's said property is in Oak Grove Township, Durham County.

In 1955, defendant constructed on said property a combination filling station, store and dwelling. It was defendant's declared intention, "when he could build it," to construct a dwelling on the portion of his property described below.

The lot directly involved, referred to as the subject lot, fronts 60 feet on the north side of East Geer Street. It is the west portion of defendant's property. According to the map designated defendant's Exhibit 1, the subject lot extends north between approximately parallel lines 75.25 feet on the west side and 61.12 feet on the east side to the railroad right of way. It contains approximately 4,000 square feet. The west portion of defendant's store building is 15 feet east of what would be the east wall of the proposed dwelling.

In 1960, defendant applied to the Zoning Administrator for a permit to construct a brick-veneer dwelling on the subject lot. According to defendant's Exhibit 8, the dimensions of the proposed dwelling would be 38 feet (approximately parallel with East Geer Street) by 28 feet. Plaintiff's application was denied. The record indicates the Board of Adjustment (in June or July, 1960) upheld the Administrator's decision. Later, plaintiff renewed his application. Upon denial

thereof, defendant appealed to the Board of Adjustment. The Board of Adjustment, at a meeting on March 26, 1962, considered defendant's appeal and his application for a variance permit. It upheld the Administrator's decision and denied defendant's application for a variance permit. Defendant did not apply for *certiorari* to review said decision of the Board of Adjustment.

On July 24, 1962, defendant notified the Administrator that he "was going to build the house on the said lot despite the ruling" of the Board of Adjustment. On or about July 25, 1962, plaintiff commenced construction thereof. Upon defendant's refusal to desist, plaintiff, on July 30, 1962, instituted this action.

There was evidence tending to show that defendant, in connection with said 1955 improvements, dug a well and installed a septic tank; that the water and sewerage systems then installed (if and when connected) were sufficient to take care of another house; and that in the years 1958-1961 defendant *was permitted* to have a trailer on a part of what is now the subject lot and to connect utilities thereto. However, defendant testified: "The actual starting of the foundation to the present house was in July 1962."

Durham County's comprehensive zoning ordinance was adopted pursuant to statutory authority. Session Laws of 1949, Chapter 1043; Session Laws of 1959, Chapter 1006, now codified (1963 Cumulative Supplement) as G.S. Chapter 153, Article 20B, Section 153-266.10 *et seq.*

"The presumption is that the zoning ordinance as a whole is a proper exercise of the police power, . . ." *Kinney v. Sutton,* 230 N.C. 404, 411, 53 S.E. 2d 306, and cases cited. The burden to show otherwise rests upon a property owner who asserts its invalidity. *Raleigh v. Morand,* 247 N.C. 363, 368, 100 S.E. 2d 870.

"The mere fact that a zoning ordinance seriously depreciates the value of complainant's property is not enough, standing alone, to establish its invalidity." *Helms v. Charlotte,* 255 N.C. 647, 651, 122 S.E. 2d 817; *Kinney v. Sutton, supra.* Here, the subject lot is only a portion of defendant's property; and it does not appear that defendant's property, considered as a whole, has been adversely affected by the zoning ordinance.

The zoning ordinance, in respect of "REQUIRED LOT AREA" in a "Village Residence District," provides: "Each dwelling together with its accessory buildings, hereafter erected shall be located on a lot having an area of not less than 15,000 square feet and an average width of not less than 75 feet, except that a dwelling may be erected on a lot or plot having less than the foregoing minimum area and width, provided the same existed under one ownership by virtue of a recorded

plat or deed at the time of the passage of this ordinance." The area of the subject lot is less than 15,000 square feet and its average width is less than 75 feet. When the ordinance was adopted, the subject lot was not owned (and is not owned) as an individual lot but as the western portion of the property on which defendant constructed his filling station, store and dwelling.

The zoning ordinance, in respect of "COMPLETIONS AND RESTORATIONS OF EXISTING BUILDINGS," provides: "Nothing herein contained shall require any change in the plans, construction or designated use of a building under construction at the time of the passage of this ordinance and the construction of which shall have been diligently prosecuted within a year of the said effective date and the ground story framework of which, including the second tier of beams shall be completed within such year, and which entire building shall have been completed within two years from the date of the passage of this ordinance." Defendant started the foundation for the proposed dwelling on the subject lot some six and a half years after passage of the ordinance.

It is unnecessary to consider ordinance requirements in respect of front, side and rear yards.

The zoning ordinance, in respect of "PERMITS," in pertinent part, provides: "No . . . building or part thereof shall be built, . . . until application has been made and the proper permit has been obtained from the Zoning Administrator, in accordance with the provisions of this Ordinance, and upon plans approved by him."

The legislative authority having determined the ordinance provisions are "in the interest of the public health, safety, morals, or general welfare," *In re Appeal of Parker,* 214 N.C. 51, 55, 197 S.E. 706, the defenses available to defendant are that enforcement as to him would be confiscatory or that the ordinance arbitrarily discriminates against him. As to these matters, there is no evidence upon which to base a finding in defendant's favor.

Moreover, with reference to the adverse decision by the Board of Adjustment, the applicable statutes provide: "Every decision of such board shall be subject to review by the superior court by proceedings in the nature of *certiorari.*" G.S. 153-266.17; Session Laws of 1949, Chapter 1043, Section 8. The decision of the Board of Adjustment is not subject to collateral attack. As stated by Adams, J., in *S. v. Roberson,* 198 N.C. 70, 72, 150 S.E. 674: "When . . . the building inspector's decision was affirmed by the board of adjustment the defendant should have sought a remedy by proceedings in the nature of *certiorari* for the purpose of having the validity of the ordinances finally determined

in the Superior Court, and if necessary by appeal to the Supreme Court. This he failed to do and left effective the adjudication of the board of adjustment." The decisions of the Board of Adjustment are final, subject to the right of courts on *certiorari* "to review errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 738, 15 S.E. 2d 1; *Chambers v. Board of Adjustment*, 250 N.C. 194, 199, 108 S.E. 2d 211; *In re Appeal of Hasting*, 252 N.C. 327, 329, 113 S.E. 2d 433; *Jarrell v. Board of Adjustment*, 258 N.C. 476, 479, 128 S.E. 2d 879. The cited cases refer to an identical provision (G.S. 160-178) in the enabling act applicable to "cities and incorporated towns."

The relevant enabling acts provide for enforcement of the provisions of a zoning ordinance by injunction. Session Laws of 1949, Chapter 1043, Section 9; G.S. 153-266.18.

Since all the evidence tends to show the construction by defendant of the proposed dwelling on the subject lot would constitute a violation of Durham County's zoning ordinance, plaintiff was entitled to a peremptory instruction. McIntosh, North Carolina Practice and Procedure, § 574.

Defendant's assignments of error have been considered and are overruled.

No error.

JAMES FOSTER KEITH v. GARLAND D. GLENN, SR.

(Filed 12 June 1964.)

1. Compromise and Settlement—

A consumated agreement to compromise and settle disputed claims is conclusive and binding on the parties to the agreement and those who knowingly accept its benefits.

2. Same—

When an insurance carrier of one motorist, under rights conferred upon it by the policy, compromises and settles liabilities under the policy to the other motorist, such settlement does not bind the insured motorist in the absence of his assent or his subsequent ratification.

3. Same; Principal and Agent § 6—

Where, in an action involving an automobile accident, defendant motorist, who has accepted a settlement by plaintiff's insurance carrier, files a

counterclaim, plaintiff motorist is put to his election, and if he pleads the settlement as a bar to the counterclaim he ratifies the settlement and may not maintain his action.

APPEALS by plaintiff and defendant from *Hall, J.,* November 11, 1963 Civil Session of DURHAM.

Plaintiff instituted this action to recover $20,000 for personal injuries, and $500 property damage sustained when the automobile owned and operated by him collided with the automobile owned and operated by defendant. Plaintiff alleges the collision was caused by the negligent manner in which defendant operated his vehicle.

Defendant denied the collision was the result of his negligence. He asserted a counterclaim, alleging the collision was the result of plaintiff's negligence causing him damage in the amount of $5,000 for injuries to person and property. He alleged in section 6 of his counterclaim: "* * * the defendant is entitled to recover said sum [$5,000] of the plaintiff by way of counterclaim less the sum of $1250, which has already been paid to the defendant by or on behalf of the plaintiff in partial satisfaction of his damages."

Plaintiff moved to strike parts of defendant's answer. Included in the motion to strike was the quoted portion of section 6 of the counterclaim. The court ordered the quoted portion stricken. Defendant excepted.

Plaintiff replied to the counterclaim. He denied the collision was caused by his negligence. For further defense to the counterclaim, he alleged his insurance carrier, against his wishes, paid defendant $1,250 in full settlement of defendant's claim against plaintiff. Notwithstanding his allegations that settlement was made contrary to his wishes, he specifically alleges it bars defendant's right to claim damages from plaintiff.

After the reply was filed, defendant moved for judgment on the pleadings for that the release pleaded by plaintiff to defeat defendant's counterclaim was binding on both of the parties and neither could recover of the other.

Plaintiff moved to strike the entire counterclaim, asserting, "* * * that said counterclaim is a sham pleading and an irrelevant defense for that the defendant has heretofore entered into a settlement in compromise of the purported cause of action set forth in said counterclaim and has executed a full release with plaintiff's liability insurance carrier * * *." Thereafter, plaintiff sought permission to withdraw the reply which he had filed.

The several motions were heard by Judge Hall in October 1963. He denied defendant's motion for judgment on the pleadings. He denied

plaintiff's motion to strike the counterclaim. In his discretion, he declined to permit plaintiff to withdraw his reply.

Plaintiff excepted to that portion of the order refusing to strike defendant's counterclaim. Defendant excepted to that portion denying its motion for judgment on the pleadings.

When the cause was called for trial, defendant demurred for that it appeared from plaintiff's pleadings (complaint and reply) that plaintiff could not maintain his action. The court sustained the demurrer, dismissed plaintiff's action and defendant's counterclaim. Each party excepted to the judgment and appealed.

Everett, Everett & Everett; Haywood & Denny by George W. Miller, Jr., for plaintiff appellant.

Dupree, Weaver, Horton & Cockman by Jerry S. Alvis for defendant appellant.

RODMAN, J. The basic question presented by plaintiff's appeal is this: May plaintiff maintain his action against defendant and at the same time rely on the release given by defendant to defeat the counterclaim? Unless we are to depart from logic and overrule prior decisions of this Court, the answer must be "No."

A consummated agreement to compromise and settle disputed claims is conclusive and binding on the parties to the agreement and those who knowingly accept its benefits. *Bradford v. Kelly,* 260 N.C. 382, 132 S.E. 2d 886; *Cannon v. Parker,* 249 N.C. 279, 106 S.E. 2d 229; *Houghton v. Harris,* 243 N.C. 92, 89 S.E. 2d 860; *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805; 11 Am. Jur. 272-3; 15 C.J.S. 747.

Plaintiff argues this sound legal principle should not be applied in controversies between insured motorists. He has, he says, purchased and paid for insurance which will compensate those he may injure. A payment by his insurance carrier for injuries he inflicts should not impair his right to compensation for injuries he sustains. The contention would have merit if his insurance provided for payment irrespective of fault or liability. It does not. It is *liability,* not *accident* insurance. Plaintiff's insurance carrier was under no obligation to pay unless plaintiff was legally liable. The insurance carrier had the right to compromise and settle claims asserted against its insured. However, a settlement, made without insured's assent or subsequent ratification, while protecting the insurer from further claims, would not bind the insured. *Bradford v. Kelly, supra; Phillips v. Alston,* 257 N.C. 255, 125 S.E. 2d 580; *Lampley v. Bell,* 250 N.C. 713, 110 S.E. 2d 316; *Beauchamp v. Clark,* 250 N.C. 132, 108 S.E. 2d 535.

An insured motorist, who refuses to ratify a settlement made by his insurer, is, if adjudged liable to the party executing the release, entitled to credit on his liability for the payment made by his carrier. *Bradford v. Kelly, supra; Ramsey v. Camp,* 254 N.C. 443, 119 S.E. 2d 209; *Holland v. Utilities Co.,* 208 N.C. 289, 180 S.E. 592. Recognizing this sound principle, defendant, when he asserted his counterclaim, offered to credit the amount he claimed as fair compensation with the payment made by plaintiff's insurance carrier. He did not plead settlement. His claim for additional compensation gave plaintiff the option to ratify and approve the action of his insurer in procuring a release for him, or to reject the purported settlement.

Plaintiff, before replying, moved to strike the counterclaim because, he asserted, it was a mere sham without foundation in fact. We are unable to agree with this contention. If defendant's factual allegations made under the sanctity of his oath are true, the collision was caused by plaintiff's negligence. In the collision defendant sustained a broken left hand; his elbows and knees were injured; he had a blow on the head; he was unable to work for eight weeks and, because of that inability, he lost $400 income. He incurred medical expenses. His automobile was, "badly battered, twisted, torn up and caved in."

We cannot hold, as a matter of law, that $1,250 is in fact full compensation for the injuries defendant says he sustained. Therein is the difference between this case and *Scott v. Meek,* 88 S.E. 2d 768, relied on by plaintiff in support of his motion to strike.

When the court overruled the motion to strike, plaintiff was called upon to elect the route he would take. *Bradford v. Kelly, supra.* He could not follow paths leading in opposite directions. He deliberately elected to plead: "That the receipt of the sum of $1,250.00 and the execution of said release was in compromise and settlement of a disputed claim * * * and the execution of the aforesaid release constitutes a bar to the counterclaim now being asserted by defendant." He has deliberately elected to ratify his insurance carrier's settlement with defendant. He must, when he accepts the benefits of the settlement, bear its burdens. As Dean Mordecai said in his Law Lectures: "The principal cannot of his own authority ratify a part and repudiate the rest, he cannot take the rose without the thorns." *Lawson v. Bank,* 203 N.C. 368, 166 S.E. 177; *Phillips v. Alston, supra; Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488; *Jones v. Bank,* 214 N.C. 794, 1 S.E. 2d 135; *Wilkins v. Welch,* 179 N.C. 266, 102 S.E. 316; *Rudasill v. Falls,* 92 N.C. 222.

In view of the conclusion reached with respect to the crucial question in the case, plaintiff's further assignments of error require no dis-

cussion; nor need we consider defendant's appeal taken merely to protect his rights if the judgment on plaintiff's appeal should be reversed.

Affirmed.

ELOISE LOVETTE, MOTHER, JOHN LOVETTE, BROTHER, ELOISE J. LOVETTE AND SAMUEL LOVETTE, DECEASED, EMPLOYEE v. RELIABLE MANUFACTURING COMPANY, EMPLOYER, AND EMPLOYERS MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 12 June 1964.)

Master and Servant § 69—

A person surreptitiously employed by defendant's truck driver to aid in unloading the truck at terminals on interstate runs is, at most, a casual employee, and his average weekly wage must be computed on the basis of the wage actually paid him, G.S. 97-2(5), unaffected by the minimum wage under the Fair Labor Standards Act for persons engaged in interstate commerce, subject to the minimum of $10.00 per week, G.S. 97-38.

APPEAL by plaintiff Eloise Lovette, from *Brock, J.*, October 1964 Civil Session of GUILFORD (High Point Division).

Proceeding under the Workmen's Compensation Act to recover compensation for the death of Samuel Lovette. The facts are not in dispute and defendants admit liability. The only question is the amount of decedent's "average weekly wages" upon which to base the compensation.

Defendant employer, Reliable Manufacturing Company (Company), manufactures furniture in High Point, North Carolina, which it sells and transports in interstate commerce. On Monday evening, August 24, 1959, Earmon Harris, a truck driver regularly employed by the Company, left High Point with a load of furniture destined for several towns in West Virginia. The Company's drivers were instructed to employ local labor in the town of delivery to assist them in unloading. A rule of the Company prohibited truck drivers from taking either companions or helpers with them from High Point. On this occasion Harris was advanced sixty dollars as expense money, fifteen of which was earmarked to pay labor to help him unload in West Virginia.

Unknown to the Company, Harris had taken one Alexander Dumas with him from High Point on nine previous trips to assist him in the unloading. He paid Dumas six dollars a trip and furnished his food until all the furniture had been unloaded and the return trip began.

Harris instructed Dumas "to get another fellow who didn't mind working" and who would be willing to accept these same terms to go with them on the trip to West Virginia. Dumas, himself unemployed and drawing unemployment compensation, procured the decedent, Samuel Lovette, also unemployed. Lovette had never taken one of these trips before. Neither Dumas nor Lovette was ever listed on any of the employment records of the Company, and they were not known to it until after Lovette's death. On the trip the two men slept in the truck and were sustained by sandwiches, canned beans, bread, luncheon meat, soft drinks and coffee which Harris furnished at a cost of two dollars each per day.

Having unloaded furniture at three places in West Virginia and picked up some items to be returned to High Point at a fourth, Harris paid Dumas and Lovette six dollars each on Thursday morning, August 27, 1959 and they began the return trip to High Point. After breakfast on that day each man was responsible for his own food. About 4:00 p.m., in Peytona, West Virginia, the truck collided with a train at a grade crossing. Harris was killed and Lovette received injuries which thereafter caused his death.

Lovette's mother and brother filed a claim for compensation for his death. At the hearing it was stipulated that the employer-employee relationship existed between Lovette and the Company on August 27, 1959; that the decedent was injured by accident arising out of and in the course of his employment; that both employer and employee were bound by the provisions of the Workmen's Compensation Act; that the only question to be determined was Lovette's average weekly wage; and that his mother was entitled to whatever compensation was awarded. The Commission found the average weekly wage to be twenty-four dollars a week and awarded compensation accordingly. All parties appealed to the Superior Court.

The defendants contended that the evidence would support a finding that decedent's average weekly earnings were a maximum of only $10.67 ($6.00 plus subsistence of $2.00 a day or .67¢ a meal). The plaintiff contended that Lovette and the Company, being engaged in interstate commerce, were subject to the provisions of the Fair Labor Standards Act and therefore that Lovette's minimum wage was required to be at least one dollar an hour. Figuring that Lovette had worked approximately sixty-three hours on the trip, plaintiff insisted that his average weekly wage should have been set at sixty-three dollars. The Superior Court remanded the cause to the Industrial Commission with directions that it enter an award based on an average weekly wage of $10.67. Plaintiff appealed.

Schoch & Schoch by Arch K. Schoch for plaintiff.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant.

SHARP, J. Under the North Carolina Workmen's Compensation Act, compensation for the injury or death of an employee is based on his average weekly wages. These must ordinarily be determined by the employee's *actual* earnings in the employment in which he was injured during the fifty-two weeks, or such lesser period as he may have worked, immediately preceding his injury. G.S. 97-2(5); *Liles v. Electric Co.*, 244 N.C. 653, 94 S.E. 2d 790. The purpose of the statute is to base compensation upon the normal income which the employee derived from his employment. To provide for situations in which, because of the shortness of time during which the employee has worked for his employer or the casual nature or terms of his employment, it would be impractical or unjust to compute the average weekly wages as above defined, the statute requires that "regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community."

In the instant case, the only evidence in the record tending to show the average weekly amount being earned at any time before Lovette's injury by casual employees of his grade and character and employed in the locality to unload orders of furniture to be delivered by truck from the factory to the retailer, was that concerning the wages which Harris paid Dumas — six dollars and subsistence of two dollars a day. There is evidence of the hourly wage paid other such workers but not the weekly wage. Lovette was, at most, a casual employee of the Company and, except for the stipulation, he would have been outside the purview of the Act. Under the circumstances of this case, no reason appears why the wages he had actually received during that week, $10.67, should not be determinative of his average weekly wages unless, as plaintiff contends, compensation under the North Carolina Act is subject to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §§ 201-219, which then required that a minimum hourly wage of one dollar be paid employees engaged in interstate commerce. 29 U.S.C.A. § 206.

Thus, this appeal presents the single question: Is the Fair Labor Standards Act of 1938 applicable to awards made pursuant to the North Carolina Workmen's Compensation Act? We concur in the answer which the Supreme Court of Georgia made when the question

was presented to it: "As we view the matter the Federal wage and hour law has no bearing whatever upon compensation for injury, except that because of it the employee may have been receiving a different wage. . . . The question at last is as to the weekly wage, for it is this and this alone that will determine the compensation. . . ." *Bituminous Casualty Corp. v. Sapp,* 196 Ga. 431, 26 S.E. 2d 724; 99 C.J.S., *Workmen's Compensation* § 292(b).

In *Miami Copper Co. v. Schoonover,* 65 Ariz. 239, 178 P. 2d 554, a claimant under the Arizona Compensation Act was injured while working in interstate commerce under a collective bargaining agreement between the union and his employer which provided for incentive bonus payments in addition to a guaranteed base wage. In such situations the Arizona law provided that an injured employee should "receive compensation on the basis only of the guaranteed wage as set out in the contract of employment." The contract was made pursuant to the requirements of "the Wagner Act, the Wage Stabilization Act, the Fair Labor Standards Act, and the Wage and Hour Law." The plaintiff contended that the Federal law determined the amount of the monthly wage which was the basis of his compensation and not the Arizona Workmen's Compensation Act. In disposing of this contention the Court said:

> ". . . If rights under those Acts were here involved, unquestionably the extra wages or remuneration earned by the employee as a result of his personal efforts would constitute a part of his average monthly wage.
>
> ". . . No issue is here presented, *nor could it be,* that the Company has in any respect failed to comply with all of the Federal acts above enumerated. Certainly Federal enactments would control where any violations of those laws were involved. . . .
>
> "The Federal Government has moved into the field of minimum wages and maximum hours where employees are engaged in interstate commerce. It has not moved into the field of disability compensation. The Arizona Workmen's Compensation Law, Code 1939, § 56-901, *et seq.,* is clearly within the field of permissible state legislation under its police power. *Ocean Accident Guarantee Corp. v. Industrial Commission of Arizona,* 32 Ariz. 275, 257 P. 644. The decision that is most nearly in point on the question here involved is from the Georgia Supreme Court, *Bituminous Casualty Corp. v. Sapp,* 1943, 196 Ga. 431, 26 S.E. 2d 724, 725."

We hold that the Federal statutes do not affect the amount of compensation claimant is entitled to receive under the provisions of the

North Carolina Workmen's Compensation Act. Under G.S. 97-38 she is entitled to receive compensation at the minimum rate of ten dollars a week.

The judgment of the Superior Court is

Affirmed.

CLINTON THOMAS, ADMINISTRATOR OF THE ESTATE OF TERRY EUGENE THOMAS, DECEASED v. DORA REVELS MORGAN.

(Filed 12 June 1964.)

1. Automobiles § 41p—

Testimony to the effect that immediately before the accident a witness sitting on a bench in front of a store saw a large man wearing a tee shirt as the passenger on the front seat, together with evidence that plaintiff's intestate was a large man wearing a tee shirt and that only intestate and defendant's husband were on the front seat, *is held* sufficient to be submitted to the jury as to whether defendant's husband was the driver of the car at the time of the collision, notwithstanding the testimony on cross-examination of a back seat passenger that intestate was the driver.

2. Trial § 18—

It is the province of the court to determine whether the evidence, circumstantial, direct, or a combination of both, considered in the light most favorable to plaintiff, is sufficient to permit a legitimate inference of the facts essential to recovery, and it is the province of the jury to weigh the evidence and determine what it proves or fails to prove.

3. Trial § 22—

Since the evidence must be considered in the light most favorable to plaintiff on motion to nonsuit, discrepancies and contradictions in plaintiff's evidence are for the jury to resolve and do not justify nonsuit.

APPEAL by defendant from *McKinnon, J.*, November, 1963 Civil Session, ROBESON Superior Court.

The plaintiff, Administrator of Terry Eugene Thomas, instituted this civil action against the defendant for the recovery of wrongful death benefits allegedly caused by the actionable negligence of Carlee Morgan, the defendant's husband. The pleadings raise these issues which the judge submitted and the jury answered as herein indicated:

"(1) Was the death of plaintiff's intestate caused by the negligence of Carlee Morgan, as alleged in the complaint?

Answer: Yes.

"(2) Was Carlee Morgan at the time in question operating the automobile of the defendant, Dora Revels Morgan, as her agent within the scope of the family purpose doctrine?

Answer: Yes.

"(3) What amount, if any, is plaintiff entitled to recover?

Answer: $10,000.00."

From the judgment in accordance with the verdict, the defendant appealed.

Hackett & Weinstein by F. D. Hackett for plaintiff appellee.
Johnson, Biggs & Britt by I. M. Biggs for defendant appellant.

HIGGINS, J. The defendant, by answer, admitted she was the registered owner of the 1957 Chevrolet two-door sedan in which the plaintiff's intestate was riding at the time he was fatally injured. The evidence is plenary that the driver's negligence proximately caused the accident. The defendant, by answer, denied her husband, Carlee Morgan, was the driver or had her permission to drive the vehicle. She alleged the plaintiff's intestate was the driver and his own negligence was solely responsible for his death. However, she alleged conditionally, that if it be found her husband, or some other person for whose negligence she is responsible, should be found to have been the driver, which she denies, then the plaintiff's intestate was guilty of contributory negligence in that he voluntarily continued to ride in the vehicle which was being operated negligently and in violation of law; and that recovery should be denied for that reason.

While the defendant assigns as error the court's failure to sustain her objection to a leading question and to certain parts of the judge's charge, her main contention is that the court committed error in overruling her motion for nonsuit upon the ground the evidence was insufficient to show her husband, Carlee Morgan, was driving her vehicle at the time of the accident. The evidence as to driver identity admittedly is conflicting.

The evidence disclosed that the defendant and her husband lived one mile from the Thomas home where the intestate, age 22, lived with his parents. On Sunday morning, May 26, 1963, Carlee Morgan drove the Chevrolet to the Thomas home. He was alone. About eleven o'clock he and plaintiff's intestate left in the Chevrolet. Carlee Morgan was driving. What happened to them until just after seven o'clock is undisclosed.

A few minutes after seven o'clock, while sitting on a bench in front of his mother's store, Lincoln Cade saw the Chevrolet approaching

from the south at a speed of more than 60 miles per hour. The store was on the East side of the road. Four persons were in the vehicle — two in the back seat and two in front. As the vehicle passed, the witness had a good view of the man sitting on the outside of the front seat. He was a large man in a white tee shirt. We quote his picturesque description of what happened: "As the car went down the highway, I heard a noise that attracted my attention on down the road. I just heard some wheels squealing and a big boom collision." He immediately went to the scene of the accident. Two boys were walking up and down the road. One was lying half under the car, the one with the white shirt, "the biggest boy." "The only thing I can say about what I saw was a big man seated in the right front seat. As to how I know it was the same man under the car, he had on a white T-shirt. As to whether anybody else in the car was dressed like that, I didn't see anyone. . . . It was the same big fellow . . . He was dead."

J. C. Davis, Highway Patrolman, arrived at the scene of the accident at 7:30. The Chevrolet was 20 to 25 feet off the highway, out of sight, in the bushes. "I saw Carlee Morgan and John Edmond Carter near the highway; . . . I found the other brother, James Melvin Carter, down in some water, . . . the automobile was laying on its left side, the driver's side . . . The car had all the windows broken except the left front driver's door window . . . The total skid marks from where they started to where the car finished was some 560 feet . . . there were three pine trees nine inches in diameter broken completely in half . . . The door on the left or driver's side was jammed. The door on the right side was sprung open."

John Edmond Carter testified that he and James Melvin Carter were riding in the back seat. Terry Eugene Thomas was thrown out of the car. On cross-examination, he testified that Terry Thomas was driving the car. "He started driving the automobile at the Old Foundry. That was fifteen to twenty or thirty minutes before the accident."

The evidence is undisputed that four persons were in the Chevrolet at the time of the accident. The Carter boys were in the back seat. The evidence is undisputed that two men were in the front seat. One of them was the plaintiff's intestate who weighed 220 pounds and was wearing a white tee shirt. The defendant's husband, Carlee Morgan, was there at the scene. The evidence, if true, clearly indicates that the two men in the front seat were the defendant's husband and the plaintiff's intestate. Lincoln Cade's testimony fixes the large boy in the white tee shirt as the passenger he saw in the front seat. If so, the defendant's husband must have been the driver, or at least such is the permissible, if not compelling, inference. On the other hand, on cross-

examination, a plaintiff's witness testified that plaintiff's intestate was the driver. The evidence, therefore, raises an issue of fact.

The respective duties of the court and jury in cases of this character are clearly marked. The court must determine whether the evidence, in its light most favorable to the plaintiff, permits a reasonable inference that Carlee Morgan was driving the Chevrolet at the time of the accident. Evidence sufficient to make out a case may be circumstantial, or it may be direct, or it may be a combination of both. *Pridgen v. Uzzell*, 254 N.C. 292, 118 S.E. 2d 755. In passing on the sufficiency of the evidence, "Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court." *Bridges v. Graham*, 246 N.C. 371, 98 S.E. 2d 492; *Keaton v. Taxi Co.*, 241 N.C. 589, 86 S.E. 2d 93; *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793. The court must determine as a matter of law whether the evidence is sufficient to permit a legitimate inference of the facts necessary to be proved. But a jury must weigh the evidence and determine what it proves or fails to prove. Tested by these rules, we hold the evidence was sufficient to survive the motion for nonsuit. In the trial and judgment, we find

No error.

H. F. MITCHELL CONSTRUCTION COMPANY v. THE ORANGE COUNTY BOARD OF EDUCATION.

(Filed 12 June 1964.)

1. Appeal and Error § 51—

Refusal of nonsuit will not be disturbed, notwithstanding the admission of incompetent evidence, when there is competent evidence to sustain an affirmative finding upon the issue.

2. Appeal and Error § 41—

Defendant was under contract to pay plaintiff a stated amount per cubic yard for stone excavated. The subcontractor who excavated the stone testified as to the number of cubic yards excavated by him. Judgment in favor of the subcontractor against plaintiff which showed the excavation of a much smaller number of cubic yards was admitted in evidence. Recovery was allowed on the smaller number of cubic yards excavated as shown by the judgment. *Held:* Defendant was not prejudiced by the admission of the subcontractor's judgment in evidence.

3. Appeal and Error § 39—

Appellant has the burden not only to show error but also that a different result would likely have ensued except for the error.

4. Tender—

Tender of an amount which is insufficient to cover the debt with legal interest from the time the debt was due to the time of tender, may be rejected.

APPEAL by defendant from *Latham, S. J.*, July 1963 Civil Session of ALAMANCE.

Plaintiff contracted with defendant for the construction of a gymtorium and classroom building for Central School in Hillsboro. The basic contract price was $198,832.00. Work changes made by defendant increased the contract price to $200,244.00. In addition to the contract price, defendant agreed to pay $15.00 per cubic yard for stone excavated.

Plaintiff sublet the excavations to J. C. Winters, Jr. He filed a claim with plaintiff for $7,215.00, asserting that he had excavated 481 cubic yards of rock for which he was entitled to payment at the rate of $15.00 per cubic yard. Plaintiff notified defendant of Winters' claim. Defendant denied liability, contending that no rock had been excavated. Plaintiff thereupon refused to pay Winters until he had established the quantity of rock, if any, excavated. Winters then sued plaintiff in Durham County. He also asserted a lien on the school building to the extent of his claim for rock excavated. Plaintiff notified defendant of the Winters' suit and tendered it the defense of that action. Defendant declined the offer. The court, in the trial of the Winters' suit, found that he had excavated 911 cubic yards of material of which 227 qualified as rock as defined in the contract between Construction Company and Board of Education. Based on this finding, judgment was entered in favor of Winters and against Construction Company for the sum of $3,405.00 and costs. On May 22, 1961, Construction Company paid the judgment. Winters thereupon released all claims he had against Board of Education.

Pending satisfaction of Winters' claim, Board of Education retained $15,024.40 owing plaintiff for the work done pursuant to the contract. By agreement between the parties, this money was placed on deposit at interest, at the rate of 3½ per cent.

In June 1961, after Winters had released any claim he had against it, the Board of Education tendered plaintiff the sum of $15,024.40, and interest which had accrued on the deposit in settlement of its liability to plaintiff. The tender was refused.

This action was instituted in December 1961. Plaintiff alleges it is entitled to recover: (1) $4,011.10 for 227 cubic yards of rock excavated pursuant to its contract with defendant; (2) $2,132.55 costs expended in defending the suit instituted by J. C. Winters; (3) "the amount

of $15,024.40, the balance due on stated contract sum as amended, together with lawful interest thereon."

Defendant admitted its contractual obligation to pay $15.00 per cubic yard for rock necessarily excavated. It denied any had been excavated. It disclaimed liability for any sums paid by plaintiff to Winters, or for expenses incurred by plaintiff in defending the suit brought by Winters. It alleged it, on March 9, 1962, "tendered a check payable to the order of the plaintiff in the amount of $16,812.87, of which amount $15,025.20 represented payment in full on the Contract, and $1,787.67 represented interest which had accrued while said funds were withheld by the County in accordance with request in the plaintiff's letter * * * and that said check was tendered without a general release provision in full payment of the County's obligation to the plaintiff."

The parties waived a jury trial. The court found defendant was, on June 30, 1961, exclusive of its liability for rock excavation, indebted to plaintiff in the sum of $16,435.37, of which $15,024.40 was principal, and $1,410.97 was interest accrued to that date under the deposit agreement; and was indebted to plaintiff in the sum of $3,405.00 for rock excavated by Winters, subcontractor. "The said excavation of 227 cubic yards of rock by J. C. Winters, Jr., subcontractor of plaintiff, was necessary for the performance and carrying out of the original excavation specifications in the contract between the plaintiff and the defendant."

Based on its findings, the court entered judgment in favor of plaintiff for the sum of $16,435.37 with interest thereon from June 30, 1961, and for the further sum of $3,405.00 with interest from the date of the judgment.

Defendant excepted and appealed.

Graham & Levings for defendant appellant.
Long, Ridge, Harris & Walker for plaintiff appellee.

RODMAN, J. Defendant assigns as error the refusal to allow its motion to nonsuit. It does not except to the findings of fact. If plaintiff offered competent evidence on which the court could find that rock had been excavated, as required by the contract, the motion to nonsuit was properly overruled. This is true even though the record also contains incompetent evidence admitted over defendant's objections. *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E. 2d 835; *In re Simmons*, 256 N.C. 184, 123 S.E. 2d 614; *Insurance Company v. Shaffer*, 250 N.C. 45, 108 S.E. 2d 49; *Bradsher v. Morton*, 249 N.C. 236, 106 S.E. 2d 217; *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668.

Winters testified that he actually excavated 481 cubic yards of rock. This testimony was not only competent, it was admitted without objection. His testimony provides full support for the court's findings. The motion to nonsuit was properly overruled.

Accepting as correct defendant's contention that the judgment rendered in Winters' suit against Construction Company was neither an estoppel, nor evidence against Board of Education that rock had been excavated, it does not follow that the defendant has been prejudiced by the admission of the judgment rendered in that action. As noted, Winters' testimony in this action would suffice to support a finding that 481 cubic yards of rock were excavated. Defendant was not prejudiced by reducing the quantity excavated from 481 to 227 cubic yards and its liability from $7,215.00 to $3,405.00.

Although plaintiff asserted he was entitled to recover the costs and expenses incurred in defending the Winters' suit, the court held otherwise.

Appellant, to succeed, must carry the burden, not only to show error, "but to show that if the error had not occurred there is a reasonable probability that the result of the trial would have been favorable to him." *Mayberry v. Coach Lines*, 260 N.C. 126, 131 S.E. 2d 671.

Defendant's plea of payment of that part of plaintiff's claim not related to excavation was properly rejected. Admittedly, that debt was due on June 30, 1961. On that date, it amounted to $16,435.37, composed of $15,024.40 principal, and $1,410.47 interest accrued under the deposit agreement. Interest at 6 per cent, the legal rate, G.S. 24-1, accrued from June 30, 1961, when the debt was due, G.S. 24-5, *Hood v. Smith*, 226 N.C. 573, 39 S.E. 2d 604. Mathematical computation shows that the check for $16,817.87, tendered on March 9, 1962, was not sufficient to pay the amount admittedly owing on June 30, 1961, with the interest from that date to the date of tender. Plaintiff was, of course, not required to accept less than the sum owing on the date the tender was made. *Ingold v. Assurance Company*, 230 N.C. 142, 52 S.E. 2d 366.

No error.

STATE v. BARNEY V. DAWKINS.

(Filed 12 June 1964.)

1. Criminal Law § 127—

In the absence of statutory requirement, the failure of the judge to sign the minutes of the court or the judgment does not affect the validity of the judgment in prosecutions for less than capital offenses. G.S. 7-201.

2. Criminal Law § 136—

A capias directing defendant to answer a charge of "failure to comply —$80 in arrears in alimony" is sufficient to constitute a substantial compliance with G.S. 15-200.1 in proceedings to revoke a suspended sentence entered in a prosecution of defendant for wilful failure to support his minor children.

3. Same—

While the hearing in the Superior Court on appeal from an order of the inferior court revoking suspension of sentence is *de novo*, it is solely on the question whether defendant had violated the terms upon which the sentence was suspended, and the jurisdiction of the Superior Court is derivative and limited to that question and G.S. 15-200.2 is not applicable.

4. Same—

A finding that defendant has wilfully failed to make payments required as a condition for suspension of sentence for wilful failure to support his minor children is a sufficient finding as to the fact of the violation of the condition of suspension.

5. Parent and Child § 8—

Where judgment against defendant for his wilful failure to support his children is suspended on condition that he make payments stipulated for their support, defendant may not contend that his failure to make the payments as directed was not wilful because he was seeking an adjudication of his right to visit the children, there being no authority in criminal prosecutions for nonsupport to determine visitation rights, and further, in no event would refusal of visitation rights excuse defendant from wilful refusal to support his children.

ON *certiorari* to review judgment (and related proceedings) of *Carr, J.*, December 2, 1963, Criminal Session of ALAMANCE.

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

Sanders & Holt for defendant.

PER CURIAM. Defendant was tried and convicted in the Burlington Municipal Recorder's Court on 11 September 1963 upon a warrant charging him with the wilful failure to support his minor children. A prison sentence of 18 months was imposed and was suspended for 5 years upon the condition, among others, that he pay $20 per week for the support of his minor children, ages 3 and 1. On 6 November 1963 the said court, finding as a fact that defendant had wilfully failed to make the support payments and was $100 in arrears, ordered that the prison sentence be activated. Defendant appealed, and the superior court on 2 December 1963 heard the matter *de novo*, found as a fact that defendant had wilfully failed to make the payments, and order-

ed that commitment issue and defendant be required to serve the prison sentence. We allowed *certiorari.*

Defendant attacks the judgment and proceedings on three grounds.

(1). He contends that the original judgment in recorder's court, appearing on the back of the warrant, is invalid because it was not signed by either the judge or the clerk. The entries in the minute docket of that count are not in the record and not under attack. There is no contention that the entry on the back of the warrant is not in form and content a judgment, nor that the entry was not made by the clerk or under his supervision. The sole contention is that it was not signed. In criminal cases, except capital, the failure of the judge to sign the minutes of the court or the judgment does not affect the validity of the judgment. *State v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507. The Burlington Municipal Recorder's Court was established pursuant to G.S., Ch. 7, art. 24. There is no statutory requirement that the judge sign judgment. It is provided that the clerk shall "keep an accurate and true record of all costs, fines . . . and punishments by the court imposed, and the record shall show the name and residence of the offender, the nature of the offense, the date of the hearing and trial, and the punishment imposed." G.S. 7-201. The entry in question complies with this statute. The statute does not require that the entry be signed. The clerk of superior court has certified to this Court "That all court documents filed in this (his) office in said (this) cause are included in the foregoing case on appeal and are hereby certified to be a correct transcript of the originals." In the absence of positive proof to the contrary, the clerk's certificate is accepted as true. Absence of signatures does not render the record of the judgment invalid.

(2). Defendant asserts that in the proceedings to put into effect his suspended sentence the State failed in recorder's court and in superior court to comply with G.S. 15-200.1 and G.S. 15-200.2 and the judgments entered are therefore void. G.S. 15-200.1 provides, in pertinent part, that "In all cases of . . . suspension of sentence in the superior courts and in courts inferior to the superior courts, before a . . . suspension of sentence may be revoked, the . . . solicitor or other officer shall inform the probationer in writing of his intention to pray the court to revoke . . . suspension and to put the suspended sentence into effect, and shall set forth in writing the grounds upon which revocation is prayed." On 2 November 1963 a capias, issued by the clerk of recorder's court, was served on defendant by an officer. The capias was in writing and directed defendant to answer "on a charge against him of failure to comply — $80.00 in arrears in alimony as of 10-25-63." The hearing was had and the suspension revoked four days later. The

capias constitutes substantial compliance with G.S. 15-200.1. No particular form of writing is required. The language of the capias could have been technically more explicit, but there is no possibility that defendant could have misunderstood it. Its effect was to charge him with noncompliance with the conditions of suspension by failure to make payments. The appeal to superior court was at defendant's instance. He already had notice of what was at issue on appeal — no further notice was necessary. The law does not require the doing of a vain thing. The hearing in superior court was *de novo,* but solely upon the question whether there had been a violation of the terms of suspension. *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376. The jurisdiction of the superior court, in such circumstances, is derivative, and the hearing in that court is limited to the violation of conditions of suspension charged in the hearing in recorder's court. G.S. 15-200.2 has no application here. It applies only to revocation of suspensions in cases which originate in superior court. Defendant's contention as to want of statutory notice is not sustained.

(3). Defendant contends that the superior court judgment, revoking the suspension of sentence, is erroneous because it does not contain "specific findings of fact as to the violation of the conditions of suspension of sentence." *State v. Davis,* 243 N.C. 754, 92 S.E. 2d 177. The court found as a fact "that he had wilfully failed to make the payments required by the judgment of that (recorder's) Court." This is a sufficient finding upon the only issue of fact before the court. The exception is not sustained.

Defendant submitted to this Court his affidavit, which is not properly a part of the record. The substance of the affidavit is that the recorder's court had directed that he be allowed to visit his children, his wife refused him that right, he did not make the payments hoping that his visitation rights would be settled when he was called into court for default of payments, neither the recorder's court nor the superior court would permit him to present the question of visitation rights, and the superior court would not permit him to pay the arrearage, though he had made arrangements to do so. Defendant contends that these facts constitute a valid excuse for deferring the payments and the failure to make the payments was not wilful. We do not agree. There is no provision in the original recorder's court judgment for visitation. Moreover, that court had no jurisdiction or authority in the criminal action for nonsupport to determine or make an order respecting visitation rights. Defendant's desire to visit his children is natural and commendable, but we are at a loss to understand by what reasoning he concluded that satisfaction of his sentimental needs took precedence

over the physical needs of his children. Assuming that the facts set out in the affidavit are true, they do not excuse his obstinate refusal to support his children, but tend to confirm his guilt.

The judgment below is

Affirmed.

TOMMY FARR CLAYTON v. JAMES WADE RIMMER.

(Filed 12 June 1964.)

1. Automobiles §§ 38, 39—

Evidence that defendant's car, traveling in a 55 mile per hour zone, left skid marks for 126 feet to the point of impact and 33 feet of scuff marks beyond the point of collision, *held* not to support an inference that defendant was traveling at excessive speed.

2. Automobiles § 42g—

Evidence that plaintiff, traveling west along a servient highway, stopped before its intersection with a dominant highway, that lights of a car approaching from the south could be seen for a distance of some 265 to 300 feet, and that plaintiff drove into the intersection in attempting to make a left turn and had traveled a distance of 12 feet when he was struck by defendant's car, which approached from the south, *is held* to show contributory negligence as a matter of law on the part of plaintiff.

APPEAL by defendant from *Latham, S. J.*, November 11, 1963 Session of ORANGE.

This action for personal injuries grows out of a collision at the intersection of the Old County Home and Cedar Grove-Efland Roads in Orange County on October 10, 1958 at about 10:30 p.m. between automobiles driven by the plaintiff and defendant. Plaintiff alleges: Defendant, traveling north on the Cedar Grove-Efland Road at an excessive rate of speed and without keeping a proper lookout, collided with plaintiff's automobile which was first in the intersection and making a left turn. As a result, plaintiff sustained serious and permanent personal injuries. Defendant alleges: He approached the intersection at a lawful rate of speed. Plaintiff, traveling west, drove suddenly into his path from a stopped position on the County Home Road, a servient highway. Defendant denied any negligence on his part and alleged plaintiff's sole negligence. He conditionally pled plaintiff's contributory negligence and counterclaimed for his personal injuries and property damage.

Plaintiff's evidence tended to show these facts: The County Home Road is unpaved and runs east and west. Stop signs make it servient to the Cedar Grove Road which runs north and south and is paved with asphalt and gravel to a width of eighteen feet with dirt shoulders approximately six feet wide. Plaintiff was very familiar with the intersection and knew he had to be careful about looking. Driving west in a 1951 Oldsmobile, he approached it from the east on County Home Road, traveling slightly downhill. Plaintiff testified: "My car stopped dead still one and a half feet from the paved portion of the road. . . . I looked first to my right and saw nothing. Then I looked to my left, and I saw nothing. Then I put my car in motion and started across the highway intending to turn left, and before I knew it I was hit. I seen the lights just like a flash hit me, I sure did." Plaintiff also testified: "(A)s I made my turn I seen a flash of light come into the side of my car. . . . As I started out into the intersection, I said I was making a left turn. I would say I was going three to five miles an hour, as I started into the intersection. My car had an automatic transmission. As to where my automobile was at the time these lights came into the side of it, I was making a left turn, the front end was a couple feet across the center of the road . . . I said I never did see it except just a flash, a light hitting me in the center." Plaintiff's wife, who was with him, testified that she also saw nothing.

According to plaintiff, he could see from two hundred and fifty to two hundred and sixty-five feet to the south where the road curved to the east. According to the investigating officer, a motorist stopped on the east side of the intersection could see three hundred feet to the south. The plaintiff's automobile was damaged on the left side from the front fender and bumper to the front door. The main impact was behind the left front wheel. The front bumper, the grill, and both front fenders of defendant's 1950 Ford were damaged and pushed back.

The investigating officer testified that he found dirt and debris in the northbound lane of the Cedar Grove-Efland Highway in the northeast quadrant of the intersection. There was a straight line of heavy skid marks, one hundred and twenty-six feet long south of the debris. Marks thirty-three feet long led northwesterly from the debris to the defendant's car which had stopped north of the intersection on the western edge of the road headed north. The plaintiff's car came to rest north of the intersection on the eastern edge of the road thirty feet from the debris, also headed north. The marks leading from the debris to the plaintiff's vehicle "were caused by the car sliding sideways." After the collision, plaintiff was lying beside the defendant's automobile with his feet underneath the right side of that car. He had sustained serious injuries.

Plaintiff told the investigating officer that he stopped at the stop sign on the County Home Road, looked both ways, saw nothing coming, and just as he pulled into the intersection defendant's car hit him; that it was coming so fast he had no time to do anything. Defendant told the patrolman that he approached the intersection at fifty miles per hour; that he saw the lights of plaintiff's car at the stop sign and took his foot off the gas; that when he saw the car was stopped he accelerated again; and that just as he got to the intersection the plaintiff pulled out in front of him. The area about the intersection was farm country and the weather was clear and dry. On cross-examination plaintiff stated that he did not deny that the collision could have occurred where the officer said the debris was but he did not think so; that he did not know exactly in feet where his car was on the highway when it was struck.

At the conclusion of plaintiff's evidence the defendant moved for judgment as of nonsuit. This motion was overruled. Defendant offered no evidence but withdrew his counterclaim and renewed his motion for nonsuit which motion was again denied. The jury answered the issues in favor of the plaintiff. From judgment entered on the verdict the defendant appealed assigning as error, *inter alia,* the failure of the court to allow his motion for judgment as of nonsuit.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant, Jr., for plaintiff.

Jordan, Wright, Henson & Nichols by William D. Caffrey for defendant.

PER CURIAM. The reciprocal duties of motorists approaching an intersection from dominant and servient highways have been often stated. *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373.

This intersection collision occurred in a rural area where the maximum legal rate of speed was fifty-five miles per hour. Defendant told the investigating officer that he was driving only fifty miles per hour. Since neither the plaintiff nor his wife ever saw the defendant's approaching automobile, plaintiff relies on the one hundred and twenty-six feet of skid marks south of the debris and the thirty-three feet of scuff marks which led north from the debris to the plaintiff's car to establish excessive speed on the part of the defendant. We do not think the evidence will support an inference that defendant was exceeding the speed limit. *Williamson v. Randall,* 248 N.C. 20, 102 S.E. 2d 381. It is noted that ordinarily a car going fifty miles per hour requires two hundred and eleven feet in which to stop on a hard, dry, level surface.

However, irrespective of any negligence on the part of the defendant, plaintiff's evidence clearly reveals contributory negligence which will bar his recovery. The lights of defendant's approaching vehicle were visible for two hundred and sixty-five to three hundred feet before it reached the intersection. After stopping a foot and one half from the intersection, plaintiff drove a total distance of approximately twelve feet — as he concedes in his brief — and was struck. We think the evidence discloses that he failed to see what he should have seen.

Reversed.

DUKE POWER COMPANY, PETITIONER v. GERA P. SYKES AND WIFE, RUBY E. SYKES, RESPONDENTS.

(Filed 12 June 1964.)

APPEAL by petitioner from *Hall, J.*, January 1964 Civil Session of ORANGE.

Petitioner appeals from a judgment imposing liability for the amount fixed by a jury as fair compensation for easements acquired in the construction of petitioner's electric transmission line from Jamestown to Eno.

William I. Ward, Jr., Carl Horn, Jr., Sawyer & Loftin and Graham & Levings for petitioner appellant.

Bryant, Lipton, Bryant & Battle for respondent appellees.

PER CURIAM. All of the assignments of error are directed to this question: What is the rule which a jury should use when determining the compensation a public service corporation must pay when it takes an easement in the property of another? The rule was concisely stated in *Proctor v. Highway Commission*, 230 N.C. 687, 55 S.E. 2d 479. The rule there stated has been reiterated in many subsequent cases. 2 N.C. Index 203, n. 64. Tersely stated, the gauge for measurement is the difference in market value before and after the taking. The court so instructed the jury.

Petitioner does not assign as error the rule as given. It merely contends the jury might have misunderstood and used a rule of measurement more favorable to defendants. When the charge is considered as an entirety, rather than as detached sentences, it is, in our opinion, in-

conceivable that a jury should have misunderstood. Petitioner has not shown prejudicial error. *Redevelopment Commission v. Hinkle,* 260 N.C. 423, 132 S.E. 2d 761.

No error.

W. W. HORTON, A. G. WHITENER, WHITENER REALTY COMPANY, INC., WOODWORKERS SUPPLY COMPANY, INC., ET AL., ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS OF THE CITY OF HIGH POINT v. REDEVELOPMENT COMMISSION OF HIGH POINT, P. HUNTER DALTON, JR., JAMES H. MILLIS, FRED W. ALEXANDER, DALE C. MONTGOMERY, CLARENCE E. YOKELEY; AND CITY OF HIGH POINT, A MUNICIPAL CORPORATION, CARSON C. STOUT, MAYOR, ARTHUR G. CORPENING, JR., ROY B. CULLER, R. D. DAVIS, J. H. FROELICH, H. G. ILDERTON, B. G. LEONARD, F. D. MEHAN, AND LYNWOOD SMITH.

(Filed 10 July 1964.)

1. Appeal and Error § 38—

Exceptions and assignments of error not discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Jury § 5; Municipal Corporations § 4—

Where all acts of an Urban Redevelopment Commission in regard to the redevelopment plan in suit are substantially in evidence and set out in the record, and there is no allegation that defendants acted arbitrarily or capriciously, whether such acts disclose a compliance with the requirements of the Urban Redevelopment Law does not present an issue of fact to be determined by a jury but presents a question of fact or law for the determination of the court.

3. Appeal and Error § 19—

Only those exceptions which present a single question of law should be grouped under one assignment of error.

4. Same—

The bringing forward of exceptions exactly as they appear in the record, without further argument or citation of authority, does not comply with the rules.

5. Same—

An assignment of error and the discussion in the brief should contain references to the printed pages of the record at which the apposite exception appears.

6. Appeal and Error § 49—

Where no exceptions are taken to the admission of evidence or to the findings of fact, or if taken, are not preserved, the findings are presumed to be supported by competent evidence and are binding on appeal.

7. Municipal Corporations § 4—

The evidence in this case *is held* sufficient to support a finding of the lower court that the area of defendant municipality embraced within the redevelopment plan in suit is a blighted area as defined in G.S. 160-456(q).

8. Same—

Evidence as to the number of families displaced in the execution of an urban redevelopment plan, the number of dwelling units available in public housing, and the number of private units that would be on the market, *is held* to show adequate provision for the relocation of persons who would be displaced by the execution of the plan and that the Federal Government had made adequate appropriation to pay relocation expenses.

9. Same; Taxation § 8—

Expenditures for street improvements, traffic controls, water and sewer lines, and electrical distribution lines are for necessary municipal expenses within the meaning of Article VII, § 6, of the Constitution of North Carolina, and their character as such is not altered by the fact that such expenditures are made in connection with the execution of an urban redevelopment plan.

10. Same—

Neither an urban redevelopment project, nor parks, playgrounds, recreation centers in connection therewith or independent thereof, are for necessary municipal expenses within the meaning of Article VII, § 6, of the Constitution of North Carolina, and a municipality may not spend tax revenue or pledge its credit for such purposes without a vote of the people.

11. Same—

A municipality is not required to submit an urban redevelopment plan to a vote of the people provided it finances its obligations thereunder from revenue derived from sources other than taxes.

12. Taxation § 5; Constitutional Law § 7—

G.S. 160-466 merely provides an alternative method for the sale of bonds issued by an Urban Redevelopment Commission, and is constitutional, certainly in regard to bonds and notes for which the city itself is not obligated.

13. Municipal Corporations § 4; Taxation § 6—

G.S. 160-470, authorizing a municipality to levy taxes and issue bonds "in the manner prescribed by law" in aid of an urban redevelopment plan, is constitutional, since the statute limits the right to levy taxes or to issue bonds to the "manner prescribed by law," which requires the observance of the constitutional limitations that a municipality may not expend any funds except for a public purpose and may not levy taxes or issue bonds except for necessary expenses without a vote of the people.

14. Same—

A municipality may not donate lands purchased with tax money for an unnecessary purpose without a vote.

15. Municipal Corporations § 29; Taxation § 7—

A municipality may not issue bonds to construct off-street parking lots until there has been an adjudication in a manner provided by law that the construction of such parking lots is for a public purpose in that particular municipality. G.S. 160, Article 34.

16. Municipal Corporations § 4; Taxation § 34—

Since a municipality may not spend any revenue derived from taxes as local grants-in-aid for an urban redevelopment project without a vote unless such expenditures are for a necessary municipal purpose, and since a municipality is required by statute to provide a legal and feasible plan for the financing of its obligations in connection with a redevelopment project, G.S. 160-463(d)(7), a municipality should be restrained from the expenditure of any funds or revenues in furtherance of such plan until it is judicially determined that its proposed grants-in-aid are from non-tax revenue and are within its power to provide.

17. Same—

Where there is no evidence to show that the county has in any way committed itself to spend a stated amount for additional school construction within the area of a redevelopment project, the municipality is not entitled to assert such sum as a local grant-in-aid in connection with an urban redevelopment plan.

18. Same; Appeal and Error § 55—

Where there are no findings as to whether a proposed pedestrian plaza over the tracks of a railroad as a part of an urban redevelopment project could be classified as a park project and therefore for a public purpose or, if judicially determined to be a public purpose, whether the right to construct the plaza could be acquired by eminent domain, G.S. 160-456(q2), the cause must be remanded for findings necessary to a determination of the question.

HIGGINS, J., concurring in result.

PARKER, J., joins in concurring opinion.

APPEAL by plaintiffs from *Gwyn, J.*, September 1963 Civil Session of GUILFORD (High Point Division).

This is an action to restrain the defendants from proceeding with the execution of the Redevelopment Plan for the East Central Urban Renewal Area Project No. N. C. R-23, unless or until the voters of the City of High Point shall approve the expenditure of the funds required to be contributed by the City of High Point in connection with the execution and completion of the project.

The individual and corporate plaintiffs are all taxpayers of the City of High Point; some of them own real property in the city, and at least one of the individual plaintiffs owns real property within the proposed redevelopment area.

The defendants are the Redevelopment Commission of the City of High Point (including the members of the Commission) and the City of High Point (including the Mayor and members of the City Council).

Summarizing the plaintiffs' complaint, they allege the creation of the Redevelopment Commission, preparation of a Redevelopment Plan for the East Central Urban Renewal Area, and the approval and adoption of the plan by the City Council of the City of High Point. These allegations are admitted. Plaintiffs further allege:

(1) That the Redevelopment Commission does not now have, and did not have when the City Council approved the project, a lawful plan for financing the project as required by G.S. 160-463(d) (7);

(2) that the Commission has no feasible plan for the relocation of displaced families as required by G.S. 160-463(d) (9);

(3) that the project is too broad in scope to qualify as slum clearance or blighted area under General Statutes 160, Article 37;

(4) that ad valorem tax money has been and will be spent, that taxes must be levied and bonds issued, debts contracted, faith pledged and credit loaned to finance the project, which is not a necessary expense within the meaning of Article VII, Section 7 (as amended, Article VII, Section 6) of the Constitution of North Carolina, and that no vote of the people has been held to approve such expenditures;

(5) that G.S. 160-470 is unconstitutional in that it allows the City of High Point to levy taxes and issue bonds for a non-necessary purpose without a vote of the people;

(6) that G.S. 160-466(d) is unconstitutional in that it authorizes the Commission to issue bonds without a vote of the people, and in that it is an unlawful delegation of authority by the General Assembly to the Redevelopment Commission in violation of Article II, Section 1 of the Constitution of North Carolina; and

(7) that plaintiffs have suffered and will suffer irreparable damage to their constitutional and property rights, and are adversely and directly affected by the Urban Redevelopment Law.

Plaintiffs seek:

(1) A permanent injunction against carrying out Project No. N. C. R-23;

(2) a declaration that G.S. 160-470 and G.S. 160-466(d) are unconstitutional; and

(3) a permanent injunction against contracting any debt by which the faith and credit of the City of High Point is pledged or the levying and collection of taxes to be used for any purpose in connection with this project, except necessary expenses, without a vote of the people.

The court below heard the evidence and found the facts without a jury. From the facts found and conclusions of law drawn therefrom, the court rendered the following judgment:

"NOW, THEREFORE, upon the foregoing findings of fact and law, it is ORDERED, ADJUDGED AND DECREED:

"(1) That the plaintiffs' prayer for judgment to generally restrain the City of High Point and the Redevelopment Commission of High Point from proceeding with the redevelopment plan for the East Central Urban Renewal Area be, and the same is hereby, denied; (2) that the City of High Point be, and it is hereby, permanently restrained and enjoined from making expenditure of any revenues directly derived from taxes for the purpose of providing any local grants-in-aid, either cash or non-cash, in support and furtherance of the redevelopment plan for the East Central Urban Renewal Area, except and unless such expenditures should be for purposes classified as 'necessary' by the Supreme Court of North Carolina, it being the intent and purpose of this judgment that the City of High Point shall not be restrained from expending revenues derived from taxes for any necessary public purpose irrespective of the fact that any such expenditure may be directly or indirectly connected with said redevelopment plan, and it is further the intent and purpose of this judgment that the City of High Point shall not be restrained from expending revenues not derived from taxes for any public purpose irrespective of the fact that any such expenditure may be directly or indirectly connected with said redevelopment plan; and (3) the costs of this action are taxed against the defendant, the City of High Point."

The plaintiffs appeal, assigning error.

Harriss H. Jarrell for plaintiff appellants.

Knox Walker; Haworth, Riggs, Kuhn & Haworth for defendant appellees.

DENNY, C.J. The record on this appeal contains 475 pages, and the exhibits in addition thereto consist of over 1,600 pages, 48 maps and 31 photographs. The appellants set out 52 assignments of error in the

record, purportedly based on 162 exceptions. It is apparent that it would be impractical to undertake to discuss these assignments of error and the exceptions relied upon thereunder *seriatim*. We shall undertake, however, to discuss those questions raised which we deem necessary to an appropriate disposition of the appeal.

This case was here at the Spring Term 1963, on appeal from an order sustaining a demurrer to the complaint. The opinion reversing the order of the Superior Court sustaining the demurrer is reported in 259 N.C. 605, 131 S.E. 2d 464. The pertinent allegations in the plaintiffs' complaint are set out in the opinion on the former appeal.

The appellants do not attack the constitutionality of the Urban Redevelopment Law, Chapter 160, Subchapter VII, Article 37 of the General Statutes of North Carolina. The constitutionality of this article has been upheld by this Court in the case of *Redevelopment Commission v. Bank*, 252 N.C. 595, 114 S.E. 2d 688.

Appellants' assignments of error Nos. 4, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 28, 29, 30, 31, 32, 36, 38, 39, 40, 41, 43, 44 and 50 will be deemed abandoned since in the brief no reason or argument is stated or authorities cited in support of any of these assignments. Rule 28 of the Rules of Practice in the Supreme Court, 254 N.C. at page 810.

Plaintiffs' assignments of error Nos. 2 and 3 are to the refusal to submit to the jury the issues tendered by the plaintiffs and to the discharge of the jury.

In our opinion, the questions sought to be raised by the plaintiffs are questions of fact rather than issues of fact. As heretofore pointed out, while the appellants do not attack the constitutionality of the Urban Redevelopment Law *per se*, they did contend in the court below and sought to show, as they do here, that the Redevelopment Commission (hereinafter called Commission) and the City of High Point (hereinafter called City) have failed to comply with the Urban Redevelopment Law in certain respects. Everything the Commission and the City have done in connection with the project involved is set out in the record consisting of the plan, its approval by the City as required by G.S. 160-463, and the modifications of the plan made after its original adoption by the Commission which have been approved by the City as prescribed by G.S. 160-463(k). All the actions challenged which have been taken by the Commission and the City are set out in writing and for the most part were introduced in evidence by the plaintiffs.

Moreover, there is no allegation in the plaintiffs' complaint charging the Commission or the City with having acted arbitrarily or capriciously in such manner as to amount to an abuse of discretion.

In the case of *In re Housing Authority,* 235 N.C. 463, 70 S.E. 2d 500, this Court said: "Indeed, so extensive is this discretionary power of housing commissioners that ordinarily the selection of a project site may become an issuable question, determinable by the court, on nothing short of allegations charging arbitrary or capricious conduct amounting to abuse of discretion. * * *" Such conduct was alleged, and the Court further said:

"Conceding, as we may, that the issuable question thus presented was a question of fact reviewable by the presiding judge (*Railway Co. v. Gahagan,* 161 N.C. 190, 76 S.E. 696; McIntosh, North Carolina Practice and Procedure, pp. 542, 543), nevertheless it was within the discretionary power of the judge to submit the question to the jury for determination. * * *"

Likewise, in the case of *Housing Authority v. Wooten,* 257 N.C. 358, 126 S.E. 2d 101, the respondents alleged that the conduct of the petitioner in selecting and seeking a condemnation of their property was arbitrary, capricious, fraudulent and unreasonable. Upon an adverse ruling of the Clerk, the respondents appealed to the Superior Court and demanded a jury trial upon all issues of fact raised by the pleadings. This request was denied and an order affirming the order of the Clerk was entered. Upon appeal to this Court the order entered by the trial judge was affirmed.

These assignments of error are overruled.

Assignment of error No. 52 is as follows: "The court erred when it signed the judgment, which did not enjoin the defendants from borrowing and spending borrowed money and thereby continuing to execute Project N. C. R-23 until such time as the citizens are allowed to vote on the expending of their money."

This single assignment of error purports to be based upon exception No. 122, to the refusal of the court below to sign either of the two judgments, one tendered by the plaintiffs and the other by the defendants, and upon exception No. 123 taken to the signing and filing of the judgment. In addition to the foregoing exceptions, exception No. 124, to the discharge of the jury, is listed, as well as exceptions Nos. 125 through 162, these latter exceptions being exceptions to the court's findings of fact and conclusions of law. Moreover, these exceptions are brought forward and copied in the brief exactly as they appear in the record under this one assignment and with no further argument or citation of authority set forth in the brief. This assignment of error is overruled on authority of *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d

785. We have heretofore disposed of the question with respect to plaintiffs' right to a jury trial under assignments of error Nos. 2 and 3.

In the *Dobias* case, *Barnhill, C.J.*, speaking for the Court, said: "An assignment of error must present a single question of law for consideration by the court." It is then pointed out that under assignment No. 2 in the case, it was proper to group seven exceptions under one assignment of error since "(e)ach and every exception is directed to the question whether under the circumstances of this case the communications between Dr. Dobias and his attorney are privileged and evidence thereof is inadmissible over the objection of the plaintiffs. * * *

"On the other hand, * * * under assignment No. 4, the plaintiffs seek thereby to challenge the sufficiency of the evidence to support seven separate and distinct findings of fact. The evidence which tends to support one finding is not relied on to support the others. Different evidence relates to different findings. * * * Hence this assignment attempts to raise seven different questions and is therefore nothing more than a broadside assignment of error which is insufficient to bring into focus the sufficiency of the testimony to support any particular findings of fact made by the court below."

Furthermore, beginning with exception No. 124 and continuing through No. 162, neither the single assignment of error, as it appears in the record, nor appellants' brief contain any reference to the printed pages where these exceptions appear in the transcript. This does not comply with Rule 28, *supra; Cudworth v. Insurance Co.*, 243 N.C. 584, 91 S.E. 2d 580; *Shepard v. Oil & Fuel Co.*, 242 N.C. 762, 89 S.E. 2d 464.

Where no exceptions have been taken to the admission of evidence or to the findings of fact, or if taken but not properly preserved, such findings are presumed to be supported by competent evidence and are binding on appeal. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486, and cited cases. This assignment of error is overruled.

The appellants contend that the area included in the project under consideration is not a "blighted area."

A "blighted area" is defined in G.S. 160-456(q) (1963 Cumulative Supplement), as "an area in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile

delinquency and crime, and is detrimental to the public health, safety, morals or welfare; provided, no area shall be considered a blighted area nor subject to the power of eminent domain, within the meaning of this article, unless it is determined by the planning commission that at least two-thirds of the number of buildings within the area are of the character described in this subsection and substantially contribute to the conditions making such area a blighted area * * *."

The court below found that the Redevelopment Plan for the East Central Urban Renewal Area, adopted by the Commission and the City, contains approximately 510 acres, and that within the project area there are located 1,385 buildings and more than two-thirds of the number of buildings therein, by reason of a combination of dilapidation, deterioration, age, obsolescence, inadequate provisions for ventilation, light, air, sanitation and open spaces, high density of population and overcrowding, and other conditions which endanger life and property, substantially impair the sound growth of the High Point community, are substantially conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and are otherwise substantially detrimental to the public health, safety, morals and welfare. There is ample evidence to support this finding.

Upon adoption of the Redevelopment Plan, application was made to the Federal Government (hereinafter called Government) by the Commission for financial assistance in effecting the plan. A written agreement was entered into, and the Government agreed to provide two-thirds of the net cost of effecting the plan and it is provided therein that the additional one-third of the net cost of effecting the plan will be provided through local grants-in-aid. It is specifically provided-ed in the agreement that the Government will not make the final payment on account of the Project Capital Grant until local grants-in-aid equalling one-third of the net project cost have been made or specific provision therefor has been made.

The court below further found as a fact that the estimated gross cost of effecting the plan will be $11,813,764; that it is estimated the gross cost of effecting the plan will be reduced by $2,432,800 derived from the sale of lands and properties acquired in effecting the plan; that the net cost of the plan will be $9,380,964; and that the City's part of the net cost of the project will be $3,126,988.

It was found as a fact that the City has heretofore expended the sum of $80,537 for street improvements, traffic controls, water and sewer lines, and electric distribution facilities, benefiting the project area; that Guilford County has spent $261,423 for school construction, benefiting the project area.

It is further estimated that additional credit will be received by the Commission for this project for the following improvements to be made on or before 31 December 1967:

"(a) $475,750.00 for additional school construction by Guilford County;

"(b) $720,485.00 for construction of off-street parking facilities by the City to be financed by Revenue Bonds repayable solely from parking lot revenues, which bonds will not be general obligation bonds pledging the faith and credit of the City of High Point; and

"(c) Credit of $27,526.00 for donation to the Commission by the City of certain land parcels now owned by the City within the Project Area and needed in order to effect the Plan.

"(14) It is estimated that additional public improvements totalling $2,079,367.00 will be made by the City on or before December 31, 1967, of which amount $1,551,267.00 will be credited against and supply all remaining local grants-in-aid; $528,100.00 of said improvements will be ineligible for credit as local grants-in-aid because not directly benefiting the Project Area.

"(15) No direct cash contribution by the City to the Commission is now contemplated or planned.

"(16) All cost of public improvements and other items of credit for local grants-in-aid as set forth in findings of fact Nos. 12, 13 and 14 (except ineligible items mentioned in finding of fact No. 14) will be included in computing the gross project costs.

"(17) The City and the Commission have entered into a written 'Cooperation Agreement' under date of November 9, 1962, a copy of which was introduced in evidence by the defendants without objection as defendants' Answer Exhibit No. 1. The Cooperation Agreement sets forth the entire obligation assumed by the City with respect to providing local grants-in-aid. As specifically set forth in the Cooperation Agreement, the additional local grants-in-aid required amounting to $1,551,267.00 (as we calculate the above credits already allowed and those to be allowed from currently available nontax revenues of the City, the aggregate sum of such credits is $1,561,267 instead of $1,551,267) are to be provided only from currently available nontax revenues of the City, Revenue Bonds which do not pledge the faith and credit of the City and from other lawfully available sources, and to the extent the City is unable to provide the additional local grants-in-aid from said sources, the obligation of the City of High Point under the Cooperation Agreement terminates and becomes null and void. * * *

"(19) The City of High Point will have available during its current fiscal year ending June 30, 1964, estimated nontax revenues as follows (based upon actual nontax revenues in preceding fiscal years of the City):

"(a) Net profit from the sale of electric current, $944,517.84.

"(b) ABC Store profits from stores in Greensboro and Jamestown, $94,976.92; and

"(c) Interest on invested surplus funds, $34,437.19, making total nontax revenues for 1962-1963 of $1,073,931.95. * * *

"(20) The City has over a period of many years carried out from year to year a program of capital improvements (such as construction of streets, water lines, sewer lines, municipal buildings, etc.) financed from current revenues, including actual expenditures for such purposes of $724,144.16 in 1960-1961, $897,244.67 in 1961-1962, $1,123,399.51 in 1962-1963 and budget appropriations for said purposes of $1,031,430.00 in 1963-1964.

"(21) The City has the financial ability to provide all additional local grants-in-aid contemplated in the Plan and the Cooperation Agreement from current nontax revenues of the City appropriated from year to year by programming its capital improvements so as to concentrate upon making local improvements which benefit the project area and such programming of capital improvements by the City is part of the plan for financing the execution of the Plan. * * *

"(28) A total of eighty-four (84) preliminary loan notes in the total face amount of $3,300,000.00 were sold by the Commission on May 3, 1963, to Chemical Bank New York Trust Company at the interest rate of 1.65% per annum. A true copy of the form of said notes (exclusive of Serial Number and amount and without signatures) was introduced in evidence without objection as Plaintiffs' Exhibit No. 19. By their terms, each of said notes is to be repaid 'solely from funds provided by the United States of America pursuant to the requisition agreement,' said notes 'do not constitute a debt or indebtedness of the State or of any town, city, county, municipality or political entity or subdivision therein or thereof, within the meaning of any constitutional, statutory, local law or charter provision,' and payment of said notes is unconditionally guaranteed by pledge of the full faith and credit of the Government to the payment thereof. * * *

"(31) There is at present no proposal for the levying or collection of taxes or for the use of tax derived revenues in effecting said plan.

"(32) No proceeds from bonds pledging the faith or credit of the City or the Commission within the meaning of Article VII, Section 6,

North Carolina Constitution have been expended for the direct purpose of effecting said plan.

"(33) There is at present no proposal to issue and sell bonds which pledge the faith or lend the credit of the City or Commission within the meaning of Article VII, Section 6, North Carolina Constitution, proceeds from which will be used to directly effect said plan and there is no imminent danger that bonds pledging the faith and credit of the City or the Commission will be sold or issued in order that proceeds therefrom may be used to directly effect said plan.

"(34) Neither the City nor the Commission has made any agreement or taken any action which in fact creates a debt, pledges the faith or lends the credit of either the City or the Commission within the meaning of Article VII, Section 6, North Carolina Constitution.

"(35) The plan of financing, as set forth in the Plan, supporting documentation, and Cooperation Agreement, provides for two-thirds of the net project cost to be provided by financial assistance from the Government and one-third to be provided by local grants-in-aid; the plan of financing contemplates that to the extent credits for local grants-in-aid are not already or otherwise available, such local grants-in-aid will be provided by the City; and the City, through the Cooperation Agreement, has undertaken to provide the local grants-in-aid needed in effecting the plan to the extent of its ability to finance such local grants-in-aid from currently available nontax revenues, Revenue Bonds that do not pledge the faith and credit of the City and other lawful sources; and although the Cooperation Agreement provides for all local grants-in-aid to be provided by December 31, 1967, time is not of the essence with respect thereto.

"(36) The plan of relocation, as set forth in the Plan and supporting documentation, and as approved by the City and implemented by the Commission, provides that no persons will be displaced until or unless adequate housing or business space is provided or unless such persons by their own unlawful conduct make their removal necessary; provides proper and suitable standards to determine acceptability of relocation sites; provides for payment of moving expenses of displaced persons; and contains reasonable assurance that relocation sites will be available as needed. In addition, the Commission has employed a full time relocation director and has programmed its schedule of acquisition and removal so as to minimize the needs for relocation sites as the project progresses."

The appellants contend that no adequate provision has been made for the replacement of displaced families. There is no contention made

or question raised with respect to the displacement of business enterprises.

The evidence tends to show that of the 1,385 structures in the project area, 1,061, or 77 per cent, have deficiencies; that, of this deficient property, only 420 residential structures and 64 commercial or industrial structures will be acquired by the Commission for clearance. The remaining deficient structures within the project area will be repaired and brought up to the required standard under the basic renewal treatment of conservation and rehabilitation.

The evidence further tends to show that adequate provision has been made for the relocation of displaced persons through the cooperation of the public housing authorities and local real estate agencies, and that the Government has made an adequate additional appropriation to pay relocation expenses.

The evidence further reveals that 221.3 acres within this project will be developed for residential use, and that houses will be built on approximately 107.3 acres thereof by private developers, which houses will be built for rental or sale. Under the plan, not all families will be displaced in any one year. It is estimated that not more than fifty families will be displaced during the first year the plan is put in operation. There is evidence to the effect that of the approximately 459 non-white families to be displaced, there will be 275 units available in public housing and 1,720 private rental units will be on the market. There is no merit to plaintiffs' contention in this respect.

It appears from the project plan that all improvements to be made in connection therewith by the City, on or before 31 December 1967, are for street improvements, traffic controls, water and sewer lines and electric distribution lines, except for parks, off-street parking facilities, the Pedestrian Plaza Development, and the donation of land. All the above facilities to be provided by the City, except off-street parking facilities, the Pedestrian Plaza Development, a series of parks, and the donation of land, fall in the class of necessary expenses within the meaning of Article VII, Section 6 of the Constitution of North Carolina, and the expenses necessary for the construction thereof may be provided for by the levy of ad valorem taxes. On the other hand, parks, playgrounds and recreation centers are not necessary municipal expenses within the meaning of the above-cited section of our Constitution; however, funds spent for such projects are for a public purpose. *Horton v. Redevelopment Commission, supra; Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292; s.c., 239 N.C. 138, 79 S.E. 2d 486; *Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702 (which case overrules *Atkins v. Durham,* 210 N.C. 295, 186 S.E. 330); *Brumley v. Baxter,* 225 N.C.

691, 36 S.E. 2d 281, 162 A.L.R. 930; *Twining v. Wilmington,* 214 N.C. 655, 200 S.E. 416. While such projects are for a public purpose, taxes may not be levied therefor without a vote of the people. Furthermore, an urban redevelopment project is not a necessary municipal expense, but expenditures made in furtherance thereof constitute a public purpose. *Horton v. Redevelopment Commission, supra.* Even so, the fact that a municipality constructs streets, lays water and sewer lines, installs traffic controls and electric facilities within an urban redevelopment area, will not change such construction and installations from a necessary to an unnecessary expense of the municipality.

As we interpret the pleadings and the appellants' brief, the plaintiffs seriously object to only one thing in connection with this project, and that is the refusal of the City to submit the Redevelopment Plan to a vote of the people for approval or disapproval.

The City is not required to submit the approval or disapproval of this project to the voters, provided it can finance its obligations thereunder from revenues derived from sources other than taxes.

The appellants further contend that G.S. 160-466(d) is unconstitutional. The General Assembly has authorized the Commission to sell bonds in the manner set out in G.S. 160-466. However, such bonds are payable:

"(1) Exclusively from the income, proceeds, and revenues of the redevelopment project financed with the proceeds of such bonds; or

"(2) Exclusively from the income, proceeds, and revenues of any of its redevelopment projects whether or not they are financed in whole or in part with the proceeds of such bonds; provided, that any such bonds may be additionally secured by a pledge of any loan, grant or contributions, or parts thereof, from the federal government or other source, or a mortgage of any redevelopment project or projects of the commission.

"(b) Neither the commissioners of a commission nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof. The bonds and other obligations of the commission (and such bonds and obligations shall so state on their face) shall not be a debt of the municipality, the county, or the State and neither the municipality, the county, nor the State shall be liable thereon, nor in any event shall such bonds or obligations be payable out of any funds or properties other than those of said commission acquired for the purpose of this article. * * *"

It appears from the record and the findings of fact set out therein that the Commission, on 3 May 1963, pursuant to the foregoing statute,

issued and sold 84 notes in the total face amount of $3,300,000, at an interest rate of 1.65% per annum, which sum is apparently being expended for the purchase of property in the redevelopment area. To what extent this has been done does not appear on the record before us. In any event, the Commission has not been given the power to bind the City in any manner with respect to the payment of said notes. Moreover, subsection (d) of the statute does nothing more than provide alternative methods for the sale of bonds issued by the Commission, and further provides that no such bonds shall be sold at less than par and accrued interest. The statute, in our opinion, is not unconstitutional and we so hold.

Likewise, the appellants contend that G.S. 160-470 is unconstitutional. This statute reads as follows: "Any municipality located within the area of operation of a commission may appropriate funds to a commission for the purpose of aiding such commission in carrying out any of its powers and functions under this article. To obtain funds for this purpose, the municipality may levy taxes and may in the manner prescribed by law issue and sell its bonds."

Under this statute, a municipality cannot legally levy a tax in connection with an urban redevelopment project for any purpose other than for streets, water, sewer and other such services as would constitute necessary expenses of the municipality, irrespective of whether or not a redevelopment project existed. A city may appropriate funds derived from sources other than taxation for any lawful public purpose.

Pursuant to the following statement in this statute, to wit: "To obtain funds for this purpose, the municipality may levy taxes and may in the manner prescribed by law issue and sell its bonds," a municipality could not issue and sell its bonds except in the manner prescribed by law, and the law requires that bonds issued to finance a project which is for a public purpose but not a necessary expense must be approved by the voters of the municipality if such bonds are obligations of the municipality. But here, no bonds of the City of High Point, pledging its faith and credit, are authorized to be sold pursuant to the Redevelopment Plan or pursuant to the judgment of the court below. This statute is not unconstitutional.

We realize that the Commission and the City have been substantially delayed in connection with the execution of the Redevelopment Plan involved by reason of this litigation, including the two appeals to this Court. However, as much as we would like to finally dispose of this litigation without further delay, there are five items for which the City intends to claim credit that will necessitate further inquiry, including additional findings:

(1) The City is without authority to donate the land referred to hereinabove for credit under the Redevelopment Plan, which land is valued at $27,526, unless that land was procured by the City from funds other than from ad valorem taxes. *Yokley v. Clark*, 262 N.C. 218, 136 S.E. 2d 564. There is no evidence bearing on this question in the record.

(2) The City proposes to issue Revenue Bonds pursuant to the Revenue Bond Act of 1938, now General Statutes, Chapter 160, Article 34, as amended by Chapter 703 of the 1951 Session Laws of North Carolina, in the sum of $720,485 to construct four off-street parking lots.

In *Henderson v. New Bern*, 241 N.C. 52, 84 S.E. 2d 283, the parties sought to have this Court decide whether or not the proposed provision for off-street parking was for a public purpose. The City of New Bern proposed to expend, over a period of years, "funds derived from sources other than taxation for the construction and maintenance of said parking facilities." This Court said: "The defendant has passed no resolution finding public necessity and convenience, made no appropriation, G.S. 160-399(c), adopted no ordinance, designated no nontax fund to be used in furtherance of the proposed plan, or taken other action necessary to place it in position, as near as may be, to pursue this alleged proprietary undertaking. It asserts that no tax-source funds will be used. Yet it proposes, and the order entered permits, the use of funds derived through on-street parking facilities. *Britt v. Wilmington*, 236 N.C. 446, 73 S.E. 2d 289. In effect, the defendant has been set free to take such action, without specific direction, as it deems essential upon its mere promise that it will take such action. But this will not suffice. The plaintiffs are entitled to be heard and to have the court say, after such action is taken, whether defendant has met the test. Furthermore, only in this manner may we render any decision that will serve to guide and direct defendant and the other municipalities of the State.

"For the purpose of this appeal we may and do concede — without deciding — that conditions in a municipality may be such that the maintenance of off-street parking facilities is for a public purpose in that particular municipality. It cannot be said, however, that every hamlet, village, and town of the State, irrespective of size or local conditions, may maintain off-street parking facilities as a proprietary public-purpose function of the municipality, the legislative declaration to the contrary notwithstanding. Of necessity the question must be made to depend in each instance upon local conditions as found and declared by the municipality in resolutions duly adopted after notice and an opportunity for local citizens to be heard. * * *"

G.S. 160-200(31) (1963 Cumulative Supplement) now provides that revenue from on street parking meters may be used to construct and maintain off-street parking facilities and may be pledged to amortize bonds or other evidence of debts used for such purposes as defined in G.S. 160-414(d).

There is nothing in the record before us to indicate compliance by the City with any of the requirements laid down in *Henderson v. New Bern, supra,* as prerequisites to a determination of the question whether or not the City of High Point really needs the additional four parking lots, consisting of an aggregate total of 278,100 square feet, for parking facilities for 915 cars.

(3) We have been unable to find any evidence to sustain the statement in the plan that Guilford County will expend $475,750 for additional school construction for the benefit of this area on or before 31 December 1967. The only reference thereto that we have been able to find is a statement in the plan, as follows: "Relative benefit to the Project for each of the schools has been based on the population projection shown on Code R 224, Exhibit H, and substantiated by a letter shown as Code R 224, Exhibit J." However, we have been unable to find such letter shown as Code R 224, Exhibit J. Furthermore, there is nothing in the above statement to indicate that Guilford County has in any way committed itself to expend the above amount for the benefit of this project.

(4) Frankly, we are unable to determine whether or not the proposed Pedestrian Plaza Development, which calls for building a covering over the tracks of the Southern Railway Company for a distance of approximately 2½ blocks in the heart of the City, at a cost of $1,132,875, can be classed as a park project; or if it is intended to be constructed for the primary benefit of downtown merchants and other business establishments. It is clear the proposed area to be covered will be separated by at least two streets, which will make the plaza consist of three separate areas. It is tentatively proposed to construct a park and an open-air restaurant on one of these areas, a nursery and a park in one, and a park, specialty shops and an off-street parking lot on the other. We express no opinion on whether or not this expenditure would be for a public purpose in the absence of further findings.

Moreover, there are no findings of fact from which it may be determined that the Pedestrian Plaza project can be carried out even if it can be classified as a public purpose. In a "Rehabilitation, Conservation and Reconditioning area," no individual tract, building or improvement shall be subject to the power of eminent domain, within the meaning of the Urban Redevelopment Law (G.S., Ch.. 160, Art. 37),

unless it is "blighted" property *and* substantially contributes to the condition endangering the area. G.S. 160-456(q2). *Quaere:* Is the railroad property subject to condemnation? If not, does the Southern Railway Company agree to the construction of the pedestrian plaza over its tracks? There is evidence in the record strongly suggesting it does not.

(5) There is an item of $528,100 included in the Cooperation Agreement between the City and the Commission which we cannot determine without further findings as to whether the items which go to make up this amount fall within the class of necessary expenses or even for a public purpose. Section (5) of this Agreement provides: "The City agrees to furnish, or cause to be furnished, all ineligible portions of site improvement costs, necessary supporting facilities and removal costs estimated at $528,100.00 at no expense to the project."

It is apparent, we think, that the City is financially able to provide the local grants-in-aid contemplated under the Plan and the Cooperation Agreement from current nontax revenues of the City appropriated from year to year through 31 December 1967, provided the five items referred to above are resolved favorably to the City.

The court below properly restrained the City from expending any revenues derived from taxes for the purpose of providing any local grants-in-aid, either cash or noncash, in the execution of the Redevelopment Plan, except and unless such expenditure should be for purposes classified as a necessary expense by the decisions of this Court.

Plaintiffs herein sue as taxpayers of the City of High Point, not as owners of property within the redevelopment area. There is evidence that at least one of the plaintiffs own property in the area, but he seeks no relief in this action by reason of damage to, interference with or taking of his property by reason of the redevelopment plan. The issues raised by the complaint and properly presented by this appeal have been discussed above. If and when any owner of property within the redevelopment area has suffered damage to, interference with or a taking of his property, or has been subjected to condemnation proceedings with respect thereto, he may resort to the courts for protection of his property and property rights from wrongful, illegal or unconstitutional action or for damages arising from such action.

It will be observed that the validity of the greater portion of the local grants-in-aid set up in the redevelopment plan is not determinable on this record, and remains to be determined. The total amount involved in these questionable local grants-in-aid is $2,884,736. A redevelopment plan must provide a "method of financing of acquisition of

the redevelopment area, and of all other costs necessary to prepare the area for redevelopment." G.S. 160-463(d)(7). The method must, of course, be legal and feasible.

Defendants should be restrained from the expenditure on account of the Redevelopment plan of any funds or revenues whatsoever (and the pledging of the credit of the City of High Point), except nontax funds for the payment of salaries and expenses necessary to maintain the *status quo,* until the inquiries hereinbefore listed are judicially made and the matters therein involved are determined to be valid and possible of achievement.

Ordinarily we would not look beyond the determinations hereinabove required. But the matters involved in this case are of serious public concern, and for this reason we take note here of possibilities. It may be determined that one or more of the local grants-in-aid involved in the inquiries are invalid, impossible of accomplishment, or incapable of certainty of accomplishment. In such case the responsible authorities may desire to modify the plan, G.S. 160-463(k), in one or more of the following respects: (1) substituting valid and feasible local grants-in-aid for those found to be invalid or impossible of accomplishment; (2) reducing the redevelopment area; (3) submitting a workable plan to the electors of the City of High Point.

This cause will be remanded for further proceedings in accordance with this opinion, and those portions of the judgment of the court below in conflict with this opinion are vacated.

Error and remanded.

HIGGINS, J., concurring in result:

The foundation in redevelopment is a valid plan for the project. Requirements for such a plan are set out in G.S. 160-463. Among other things, the Act provides: "(c) A commission shall not acquire real property for a development project unless the governing body of the community has approved the redevelopment plan as hereinafter prescribed."

"(d) The redevelopment commissioners' redevelopment plan shall include, without being limited to, the following: . . . (6) a statement of proposed changes in street layouts or street levels, (7) a statement of the estimated cost and method of financing of acquisition of the redevelopment area and of all other costs necessary to prepare the area for redevelopment."

They are discussed in *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391, and *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688.

Redevelopment, slum clearance, urban renewal, are public purposes but they are not necessary public purposes. For that reason the municipality may not spend tax money and may not go in debt to finance the plan unless authorized by vote. Article VII, Section 6, North Carolina Constitution. The Redevelopment Commission filed its plan, which the City approved. The City must, according to the plan, bear one-third the cost of the project. The planners estimate this cost to be approximately twelve million dollars. We may assume they were not in anywise inclined to overestimate the cost. When the value of the property is fixed by agreement, or, in the absence of such agreement, by a condemnation proceeding, the estimate will probably be a fraction of the actual cost. This likelihood should be taken into account in passing on the provisions for financing the project. Just compensation must be paid whatever the final cost may be.

It appears obvious that the public expenditures for improvements already made before the plan was prepared and approved cannot be considered as a part of the financial arrangement for carrying out the plan. Does the plan disclose an arrangement to finance the City's one-third of the cost involved in the project?

The authorities assume the expenditure of public funds for off-street parking facilities is a necessary public expense. It is doubtful if there is authority for the expenditure even as a public purpose, and no authority for assuming that it is a necessary public purpose. See *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289.

The City of High Point and the Redevelopment Commission filed a joint answer in which they set up the method by which they propose to finance the project. The City proposes to pay its part of the cost in the following manner:

> "(a) The City of High Point will receive credit for the sum of $80,537.00 spent by the City of High Point during the two-year period next preceding approval of the redevelopment plan by the United States of America, said expenditures having been for improvements to streets, traffic controls, water, sewer and electric distribution facilities benefiting the project area.
>
> "(b) The City of High Point will also receive credit for the sum of $261,423.00 spent by Guilford County during the two-year period next preceding approval of the redevelopment plan by the United States of America, said expenditure having been for school construction benefiting the project area.
>
> "(c) The City of High Point will receive credit for the sum of $475,750.00 for new school construction benefiting the project area

which Guilford County plans to carry out within the period ending December 31, 1967.

"(d) A credit of $730,485.00 will be received by the City of High Point for off-street parking facilities to be provided and financed by revenue bonds issued by the City of High Point, said bonds to be repaid solely from revenues received from said off-street parking facilities, so that said bonds will not create a debt, pledge of faith or loan of credit on the part of the City of High Point or the Redevelopment Commission of High Point within the meaning of Article VII, Section 7, of the North Carolina Constitution.

"(e) The City of High Point will receive credit in the sum of $27,526.00 for donation of various parcels of land now owned by the City of High Point to the Redevelopment Commission of High Point for use in effecting the Redevelopment Plan.

"(f) The remainder of the participating share of the City of High Point, amounting to $1,551,267.00, will be provided by direct installation of certain capital improvements benefiting the project area, including storm sewers, neighborhood parks, grading for new street construction, street lighting, traffic controls, street paving and construction of a pedestrian plaza. The City of High Point plans to pay for said capital improvements from its non-tax revenues by appropriations made from year to year from currently available non-tax revenues."

This is a pledge to be satisfied by future revenues and not an appropriation of money on hand.

How much of the foregoing is now, or is likely hereafter, to be available to pay a landowner for his property? How much does the plan require the City to put into the fund out of which the landowner is to be paid? *Not one cent.*

Remembering the City, without voter approval, cannot use tax funds to meet obligations except for a necessary public purpose, the question arises whether the City's obligations under this plan meet legal requirements. Examination of each item in the plan discloses that $80,537.00 has been expended on street improvements, traffic controls, water and sewer and electric distribution facilities. The City claims credit for the amount. The City claims a credit for $261,423.00 expended by Guilford County for school construction *planned* by Guilford County for the period *ending December 31, 1967*. The City claims credit for $730,485.00 for "off-street parking facilities to be provided and financed by revenue bonds issued by the City of High Point, said bonds to be

repaid solely from revenue received from said off-street parking facilities." In other words, High Point will refuse to pay the bonds if the parking facilities fail to produce sufficient revenue for that purpose. The meaning is, the City will issue revenue bonds but will limit their payment to income from a facility which has not yet been built and limit its obligations to profits which are purely speculative. The outcome at best is a business uncertainty. May the City issue and sell bonds for this unnecessary purpose even though it fixes an escape from liability if the parking meters do not pay the debt?

The City also takes credit for $27,526.00, "for donation of various parcels of land now owned by the City of High Point to the Redevelopment Commission." Presumably the land was purchased with tax money, so its conveyance to the Commission is the expenditure of tax money for a public — but not for a necessary public purpose. *Yokley v. Clark*, 262 N.C. 218.

Finally, the City's closing contribution to the plan, "amounting to $1,551,276.00, will be provided by direct authorization of certain capital improvements benefiting the project area, including storm sewers, grading for new street construction, neighborhood parks, street lighting, traffic controls, street paving and construction of a pedestrian plaza."

For the pedestrian plaza the City takes credit for $1,150,875.00. There is serious legal question whether the plaza can qualify as a public purpose, and I know of no authority under which it may be considered a necessary public purpose for which tax money may be used or a debt incurred.

Where does the City's one-third of the cost of this project come from? The plan provides it is presently contemplated that the City's share shall be made up by the listed items discussed in the Court's opinion and herein previously referred to. For a time it was difficult for me to understand how High Point was able to sell the Federal authorities on a scheme by which the City's one-third of the cost consisted of paper work — the recital of expenditures by the City and by Guilford County in years gone by; and by improvements the County has on the planning board through 1967. The answer to the riddle, I think, is to be found in Section (d) of the City's contract with the Commission in which it agrees to pay cash for all of its one-third of the cost, less any qualifying grants in aid which it lists. With (d) in the contract the City must offer a qualifying grant in aid or put up cash. The scheme is to pay cash not in the treasury and hence is a pledge of the City's credit not permitted by Article VII, Section 6, of the State Constitution. The City of High Point plans to pay for said capital improvements by appropriations made from year to year from

currently available non-tax revenues. The pledge is for payment out of future receipts and not from presently available funds. Article VII, Section 6, of the State Constitution forbids the expenditure of tax funds for unnecessary purposes without voter approval. It likewise prevents a pledge of the City's faith and credit to be fulfilled by future receipts, regardless of the source. "The opportunity to spend matching funds from the Federal Government and from other sources without voter approval are attractive to many county and city governing authorities. But if the proposed appropriation is for an unnecessary public expense (as in this case) the town and county officials are without authority to use tax money or to incur debt in furtherance of the project." *Yokley v. Clark, supra.*

The urban redevelopment law and the decisions of this Court have given ample notice that the City must show present ability to finance the project. This may be done by the use of funds on hand derived from sources other than taxation, or the City must have the present authority to get the money by means other than by pledging the credit of the City. This is so because the filing of the plan prevents the owner of the property from dealing with it as his own. He cannot improve it, or rent it, or sell it, except at the hazard of being ejected at the will of the Commission. His property is virtually frozen by the plan. The filing of a lawful plan is equivalent to a restriction of the owner's right to use his property as of the date of the taking of any interest therein. The law wisely provides that authorities may not acquire property until the plan shows financial ability to complete the project. The taking of private property is in derogation of a common law right of the owner, and the act which authorizes the taking must be strictly construed.

The law requires that the plan disclose a satisfactory arrangement for displaced persons. The plan in substance provides: (1) They will be permitted to rent new facilities as they are available in the project, (2) the Relocation Director will refer them to reliable firms, rental agencies, etc., (3) ". . . the local newspapers will be studied carefully for advertisements for units for rent or for sale," and the information will be passed on to the Relocation Director; (4) the urban renewal staff employees and city employees will be instructed to report all the "for rent" or "for sale" signs they notice throughout the city. Finally, here is the concluding paragraph of the Plan: "All families will be urged to notify the Relocation Director before they move. If a family does move without notifying the Relocation Director of their new address, they will be traced through the following sources of information: schools, post office, telephone company, last known place of em-

ployment, neighbors, friends and utilities companies. A family will not be considered 'lost' until all possible sources of information have been checked, and no information as to their whereabouts is available."

It may be of some comfort to a displaced family (forcibly removed from its home or apartment, or business) to know that the Director will be concerned and will go to considerable pains to find out where they are before he finally marks them off as "lost." Such is the provision for displaced persons.

In passing on the validity of the present plan, it must be borne in mind the City contracts to provide one-third of the cost — whatever it may be. This plan does not put one penny in the fund out of which the owner of property may receive pay for that which has been taken from him.

It is subject to some doubt whether the proposed plan, even if properly financed and proper provisions were made for displaced persons, could qualify at all as a slum clearance, or urban renewal project. It partakes of an effort to rebuild a substantial part of the City of High Point out of Federal funds, the City's one-third to consist of bookkeeping entries rather than of money in the fund. Under the Constitution, however, the City may not, without a vote, use tax money on hand. It may not pledge its faith or credit either to borrow money for the present payment or to meet future payments. These things may be done only after voter approval.

The record in this case is deficient in many particulars. Disputed issues and questions of fact are not pinpointed by proper exceptions and assignments of error. The plan, however, is attached to the petitioners' complaint and made a part of it. The respondents' answer showing the method of financing, is a part of their pleadings and a part of the record proper. The methods of financing proposed fail to meet the minimum requirements of G.S. 160-463. This failure appears upon the face of the pleadings. Legal precedent requires this Court to take notice of this deficiency *ex mero motu. Redevelopment Commission v. Hagins, supra; Skinner v. Transformadora,* 252 N.C. 320, 113 S.E. 2d 717; *Woody v. Picklesimer,* 248 N.C. 599, 194 S.E. 2d 273; *Fuquay Springs v. Rowland,* 239 N.C. 299, 79 S.E. 2d 774.

I vote to reverse the judgment below and to return this proceeding to the Superior Court of Guilford County for an order restraining the City and the Commission from proceeding further until the plan complies with the requirements of the statute, or is approved by the voters of the City.

PARKER, J., joins in concurring opinion.

MOREHEAD *v.* HARRIS.

SYLVIA HARRIS MOREHEAD, JOHN WESLEY HARRIS, WAYMAN HARRIS, AND WILEY HARRIS, JR., PLAINTIFFS V. DAISY HARRIS, MARY LOUISE PRICE, NOW MARY LOUISE PRICE BOQUIST, AND HER HUSBAND, RICHARD E. BOQUIST, HELEN MOORE PRICE, NOW HELEN MOORE PRICE HOOPER, AND HER HUSBAND, PHILLIP M. HOOPER, DEFENDANTS,

AND

CORA JANE LEA, EXECUTRIX OF DAISY HARRIS ESTATE, CORA JANE LEA (CORA E. LEA), LETTIE ORA WALKER (ORA LEA WALKER), FLORENCE LEA FULLER AND HER HUSBAND, SAMUEL FULLER, EFFIE LEA SNIPES AND HER HUSBAND, AMOS SNIPES, BESSIE LEA HAYES AND HER HUSBAND, JAMES HAYES, GEORGIA LEA LYNN, BANKS LEA AND HIS WIFE, ATLANTA G. LEA, MABRY LEA AND HIS WIFE, EUNICE H. LEA, MAEBELLE VINCENT WAGSTAFF AND HER HUSBAND, HUBERT WAGSTAFF, EDNA HARRIS GARRETT AND HER HUSBAND, MURPHY GARRETT, AND THE FOLLOWING NIECES AND NEPHEWS OF THE DEFENDANT, DAISY HARRIS, DECEASED: WILMA WALKER, NELLIE WALKER, ELIZABETH WALKER, EUGENE WALKER, HILLARY WALKER, GRADY BROOKS WALKER, VIVIAN CORBETT, WALTER ELMER CORBETT, PRISCILLA CORBETT, LUTHER CORBETT, WILLIE LEA VINCENT, ADA VINCENT, JENEVA VINCENT, LOUISE VINCENT, NESSIE VINCENT, DONALD VINCENT, DEMASTER VINCENT, BEATTY OR BADDIE VINCENT, AND ALL OTHER HEIRS AT LAW OF DAISY HARRIS, DECEASED, AND ALL SPOUSES, GUARDIANS, ADOPTED PARENTS, EXECUTORS, ADMINISTRATORS AND REPRESENTATIVES AND ALL OTHER PERSONS WHO ARE OR MAY BE INTERESTED AS HEIRS, DEVISEES, GRANTEES, ASSIGNEES, LIENORS, GRANTORS, TRUSTEES, FIRMS, CORPORATIONS, WHO MAY BE INTERESTED IN THE SUBJECT OF THIS ACTION, ALL OF WHOSE NAMES AND PLACES OF RESIDENCE ARE UNKNOWN TO THE PLAINTIFFS, ADDITIONAL DEFENDANTS.

(Filed 10 July 1964.)

1. Mortgages and Deeds of Trust § 28—

Where the widow in possession of property and entitled to dower therein purchases at the foreclosure sale of a deed of trust which had been executed by her and her husband, as between herself and the heirs at law she acquires title solely for the protection of her dower and holds the fee for the benefit of the heirs at law.

2. Adverse Possession § 15—

The deed to a widow purchasing at the foreclosure sale of the property is color of title, notwithstanding that her title is impressed with a trust in favor of the heirs at law, but the fact that the deed is color of title does not in itself constitute her possession thereunder adverse.

3. Adverse Possession § 22—

The conveyance of the property by the person in possession is evidence that the possession was in the character of owner.

4. Adverse Possession § 16—

The rule that possession under an instrument constituting color of title will be extended to the outermost boundaries of the description in the in-

strument applies when the conveyance is of a single tract, but where the instrument conveys two separate tracts, and the grantee goes into possession of only one of them, the constructive possession of the grantee will not be extended to the other tract, even though the tracts be contiguous.

5. Adverse Possession § 8—

Where the widow in possession of the first of two tracts subject to a mortgage purchases at the foreclosure of the mortgage and remains in possession of the first tract, the foreclosure deed is color of title, but she has no possession thereunder, adverse or otherwise, as to the second tract, and her actual possession of the first tract will not be held adverse to the heirs, her dower not having been allotted, in the absence of some open and positive change in the character of her possession sufficient to show that she was claiming the right to possession in the character of owner.

6. Registration § 5—

An innocent purchaser under the registration laws is one who purchases without notice, actual or constructive, of any defect in his grantor's title and who pays a valuable consideration.

7. Same—

The burden of proof is on the party claiming to be an innocent purchaser to so show.

8. Same—

A purchaser is charged with notice, not only of the existence and legal effect of every instrument in his grantor's chain of title but, if there is anything therein which would put a reasonable person upon inquiry, of all matters which such reasonable inquiry would have disclosed. Nevertheless he need look only to the muniments of title and he is not required to take notice and examine collateral records, instruments, or documents which are not muniments of his title and which are not referred to by any instrument in his chain of title.

9. Same—

Where the widow, appointed administrix, purchases the *locus* at the foreclosure sale under a deed of trust executed by herself and her husband, and then deeds a part of the locus to defendant's grantor, *held* the muniments in defendants' chain of title do not show that the husband was dead at the time of foreclosure or that the purchaser at the foreclosure sale was the widow administratrix, and therefore an examiner would be entitled to assume that the foreclosure cut off any interest of the husband or those claiming under him, and so defendants are not chargeable with the equity of the husband's heirs.

10. Same—

Even though a grantor cannot convey an estate of greater dignity than the one he has, an innocent purchaser for value is protected by the registration statute and takes free from equities which might have been enforced against his grantor but of which he has no actual or constructive notice.

11. Dower § 8—

Where the widow remains in possession after the death of her husband, the heirs are entitled at any time to have dower allotted and take possession of the property outside the dower allotment, and equity will not aid them in asserting their rights if they are not diligent but are guilty of unreasonable delay in asserting them.

12. Adverse Possession § 7—

The possession of one tenant in common is in law the possession of all his cotenants unless and until there has been an actual ouster or a sole adverse possession for 20 years from which an ouster would be presumed.

13. Same—

Less than 20 years prior to the institution of this action defendants' grantor acquired by deed, as an innocent purchaser, an undivided interest in the *locus in quo*. Defendants drained and graded the land and occasionally cleared it of rubbish and mowed it, and leased a right of way for ingress and egress across it, collected the rents and paid the taxes. *Held:* Such possession did not amount to an ouster of defendants' cotenants and therefore such possession for a period of less than 20 years does not ripen title in them as to the interest of their cotenants.

APPEAL by all defendants, except Edna Harris Garrett and husband, Murphy Garrett, from *Shaw, J.*, September 9, 1963, Regular Civil Session of GUILFORD (Greensboro Division).

This is an action involving title to land.

The *locus in quo* consists of two adjoining lots situate on the west side of, and abutting, Retreat Street in the city of Greensboro. These lots are referred to, in the amended complaint, as parcel No. 1 and parcel No. 2, and contain about $\frac{2}{5}$ and $\frac{1}{5}$ acres, respectively.

Hannah Harris deeded parcel No. 2 to Wiley Harris on 20 September 1893. Wiley Harris made his home on this lot and was living there at the time of his death.

Wiley Harris' title papers to parcel No. 1 are: (1) Deed from Thomas C. Hoyle, trustee, dated 15 December 1919, for a 5/6 undivided interest; (2) deed from Lizzie Black, dated 16 August 1921, for a 1/12 undivided interest; (3) deed from Edna (Harris) Garrett, dated 18 March 1920, for a 1/12 undivided interest — her husband did not join in the deed; he is living and is a party to this action.

Emma Harris, first wife of Wiley Harris and mother of plaintiffs herein, died in 1923. Wiley Harris married Daisy Lea in 1924; no children were born to this union. Wiley Harris and wife, Daisy, executed and delivered to Thomas C. Hoyle a deed of trust, dated 14 November 1927, conveying parcel No. 2 and 5/6 undivided interest in parcel No. 1 to secure an indebtedness of $200 to C. W. Bradshaw.

Wiley Harris died intestate on 3 May 1933 without having paid the indebtedness to Bradshaw. His widow, Daisy, qualified as administratrix of his estate on 31 May 1933. In her application she estimated the value of the real estate to be $1000. The personalty consisted of household furniture and $118.80 insurance. She was allotted a year's allowance of $300; the furniture was assigned to her at a value of $155, and a deficiency assessment of $145 was made against the estate. There was no allotment of dower in the real estate.

On 26 August 1933, Thomas C. Hoyle, trustee, sold, pursuant to the power of sale in the deed of trust, at public auction after due advertisement the land described in the deed of trust, and Daisy became the last and highest bidder at the price of $217.07. On 9 September 1933 said trustee executed and delivered to Daisy Harris a deed for parcel No. 2 and 5/6 undivided interest in parcel No. 1, purporting to vest in her a fee simple title to these lands. The trustee's final report of the sale, approved by the clerk of superior court, shows that the price $217.07 covered exactly the unpaid part of the indebtedness to Bradshaw plus costs of foreclosure.

The final account of the administratrix was filed and approved 12 June 1934. It showed receipts of $273.80, consisting of the furniture and insurance, and disbursements of $457.07, including $117.07 to Hoyle, trustee, "in Foreclosure of Wiley Harris property."

After Wiley's death, Daisy continued to live in the house on parcel No. 2. The house and lot were enclosed by a fence. On 1 June 1946, Daisy deeded to Grace Construction Company a part of parcel No. 1, purporting to convey the fee clear of any outstanding interest. And on 5 May 1947 Grace Construction Company deeded this portion of parcel No. 1 to Mary Louise Price (Boquist) and Helen Moore Price (Hooper).

Daisy Harris died testate on 6 February 1960, after this action had been instituted on 11 June 1956. In her will she devised the "house and lot located on Retreat Street in Greensboro" to her sisters, Cora Jane Lea and Lettie Ora Walker.

This action was instituted by Sylvia Harris Morehead, John Wesley Harris, Wayman Harris and Wiley Harris, Jr., the children and heirs at law of Wiley Harris. After the institution of the action Wiley Harris, Jr. died intestate without issue. The theory of plaintiffs' complaint is that Daisy Harris purchased the property for their benefit and to protect her dower, and that she and those claiming under and through her hold the legal title in trust for them.

The case was first tried at the January 1961 Session before Olive, J. (now E.J.). Trial by jury was waived. The judge found facts, and

concluded that the purchase by Daisy at the foreclosure sale was for the protection of her dower and for the benefit of plaintiffs as heirs at law of Wiley Harris, Daisy's possession was not adverse to plaintiffs, the deed to Mary Louise Price and Helen Moore Price conveyed only the dower interest of Daisy with respect to the land therein described, and plaintiffs are the owners of parcels Nos. 1 and 2 in fee. On appeal to Supreme Court it was found that certain persons having or claiming an interest had not been made parties, and certain facts necessary to a full and complete determination had not been found. The cause was remanded to superior court for the making of additional parties and for retrial. See *Morehead v. Harris,* 255 N.C. 130, 120 S.E. 2d 425.

All persons who have or might claim an interest in the lands have been made parties and are represented by counsel. The pleadings have been amended in certain respects. The cause came on again for hearing at the September 1963 Session of Guilford County Superior Court (Greensboro Division) before Shaw, J., and a jury. Judgment was entered, decreeing that plaintiffs are the owners in fee and entitled to the possession of parcel No. 2 and 11/12 undivided interest in parcel No. 1, that Edna Harris Garrett is the owner in fee and entitled to possession of 1/12 undivided interest in parcel No. 1, and that none of the other parties to the action have any right or title to the premises or any part thereof.

Additional facts and matters of pleading essential to an understanding of the legal questions raised by the appeal are set out in the opinion. The deeds, deed of trust and other documents referred to hereinabove are all recorded.

Shuping & Shuping for plaintiffs.

Paschal & McNeely for defendants Edna Harris Garrett and Murphy Garrett.

Hoyle, Boone, Dees & Johnson for defendants Boquist and Hooper.

Herbin, Conoly & Forsyth for Additional Defendants.

MOORE, J. Defendants' assignments of error bring into focus four crucial rulings of the court below.

(1). The trial judge instructed the jury that Daisy Harris could not acquire the real estate of her late husband, Wiley Harris, at the foreclosure sale by Thomas C. Hoyle trustee, to the exclusion of plaintiffs, the heirs at law of Wiley Harris, and "any title that she acquired by . . . purchase at said sale, she held as trustee for herself as widow and the plaintiffs as heirs at law."

At the time Daisy Harris purchased at the foreclosure sale she was the qualified and acting administratrix of the estate of Wiley Harris, and as his widow was entitled to dower in his real estate. No dower had been or was ever allotted.

An administrator acts in a fiduciary capacity in the control, custody and disposition of the property and assets of the estate and he cannot, through divided personality, become a purchaser at his own sale to his own profit and the detriment of those for whom he is trustee. *Development Co. v. Bearden,* 227 N.C. 124, 41 S.E. 2d 85. A trustee or other fiduciary cannot purchase at his own sale. There is a conflict of interest between administrator and purchaser — it is the duty of the former to get the best price possible, and it is the interest of the latter to obtain the property as cheaply as possible. *Froneberger v. Lewis,* 79 N.C. 426. If an administrator purchases at his own sale, the sale is not absolutely void, but is voidable at the suit of the heir or heirs irrespective of actual fraud. The burden is upon the administrator to overcome the equity of the heirs. *Davis v. Jenkins,* 236 N.C. 283, 72 S.E. 2d 673. If the administrator fails to carry that burden, the sale will be declared void, not because of the presence of fraud, but because of the danger of fraud. *Froneberger v. Lewis, supra.*

If the sale is affirmatively sanctioned and ratified by the heirs or beneficiaries, it will be declared valid. *Gurganus v. McLawhorn,* 212 N.C. 397, 193 S.E. 844; *Froneberger v. Lewis, supra.* If property is sold at a judicial sale made pursuant to an action to foreclose a mortgage, in which action all interested persons are parties, the fiduciary may purchase with leave of court and obtain a good title if full value is paid and the transaction is free of fraud. *Bolton v. Harrison,* 250 N.C. 290, 108 S.E. 2d 666.

There is a class of cases which form an exception to the rule that a fiduciary may not purchase property at his own sale. Whenever the administrator, trustee or other fiduciary has a personal interest in the trust property, then he must, of course, have the right to protect that interest, and if to bid for and buy the property be necessary to protect it, he will be allowed to do it *for that purpose. Froneberger v. Lewis, supra.* A mortgagee may buy to protect his debt. *Jones v. Pullen,* 115 N.C. 465, 20 S.E. 624. So may the creditor in a deed of trust. *Monroe v. Fuchtler,* 121 N.C. 101, 28 S.E. 63. A widower may purchase to protect his curtesy right. *Wilson v. Vreeland,* 176 N.C. 504, 97 S.E. 427. And a widow may purchase to protect her dower. *Winchester v. Winchester,* 178 N.C. 483, 101 S.E. 25. But as against heirs or beneficiaries the rights of the fiduciary under the purchase extends only to the protection of the interest for which the purchase was made.

A fiduciary may bid and take property to himself as trustee for the benefit of the estate to prevent loss to the estate. A trustee who acquires an outstanding title is considered in equity as having acquired it for the benefit of the *cestui que trust. Pearson v. Pearson,* 227 N.C. 31, 40 S.E. 2d 477.

Daisy Harris did not bid at her own sale. The sale was made by the trustee named in the deed of trust. But the rule which prohibits a fiduciary from purchasing at his own sale applies where the sale is brought about by another. *Pearson v. Pearson, supra.*

If a life tenant purchases the property at a sale to satisfy an encumbrance, he cannot hold such property to his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner. If the life tenant pays more than his proportionate share, he simply becomes a creditor of the estate for that amount. *Creech v. Wilder,* 212 N.C. 162, 193 S.E. 281. Dower is a life estate. If the doweress, life tenant, purchases at a sale to satisfy an encumbrance, she cannot hold the property to her exclusive benefit, but will be deemed to have purchased for the benefit of herself and the remaindermen. *Farabow v. Perry,* 223 N.C. 21, 25 S.E. 2d 173.

Defendants do not plead an estoppel, and do not allege or offer evidence tending to prove sanction or ratification of the sale on the part of plaintiffs.

The court's peremptory instruction that Daisy Harris, as between her and the plaintiffs, took the property under the foreclosure deed for the protection of her dower and for the benefit of plaintiffs, is proper under the facts disclosed in the record.

The cases cited by defendants in support of their contention that the foreclosure deed vested in Daisy Harris a fee simple title are distinguishable. *Wilson v. Vreeland, supra,* was an action for breach of covenant of warranty instituted by one claiming title under the widower-purchaser; the latter's relationship and liability to the heirs is not involved. *Winchester v. Winchester, supra,* involves a suit by a junior mortgagee to set aside a sale at which the widow was purchaser. In *Jessup v. Nixon,* 186 N.C. 100, 118 S.E. 908, the heirs sought to have voided the sale at which the widow purchased to protect her dower; they did not seek to have a trust declared. *Privette v. Morgan,* 227 N.C. 264, 41 S.E. 2d 845, was an action to set aside for fraud a special proceeding under which the widow purchased.

(2). The court below ruled in effect that Daisy Harris' possession of the subject property was not adverse to plaintiffs, and no issue of adverse possession on her part was submitted to the jury. Defendants

plead adverse possession for seven years under color of title, G.S. 1-38, and adverse possession for twenty years, G.S. 1-40.

The deed from Hoyle, trustee, to Daisy Harris is color of title. *Farabow v. Perry, supra.* Her conveyance to Grace Construction Company in fee and her devise of parcel No. 2 to her sisters in fee make clear that she claimed the *locus in quo* as her own individual property. It is undisputed that she was in the actual and exclusive possession of parcel No. 2 from the death of her husband in 1933 to 1956 — twenty-three years.

There is no evidence that Daisy Harris was in possession of, made use of, or exercised any dominion over parcel No. 1. When one enters into possession under colorable title which describes the land by definite lines and boundaries, his possession is extended, by operation of law, to the outer boundaries of his deed. *Vance v. Guy,* 223 N.C. 409, 27 S.E. 2d 117. But where two or more adjoining tracts of land are conveyed in one, or separate, deeds by separate and distinct descriptions, the actual possession by grantee of one of the tracts for seven years is not constructively extended to the other tract or tracts so as to ripen title thereto by adverse possession. *Lumber Co. v. Cedar Works,* 168 N.C. 344, 84 S.E. 523; *Loftin v. Cobb,* 46 N.C. 406; *Carson v. Mills,* 18 N.C. 546. The facts in this case do not justify any inference that Daisy Harris was in the adverse possession of parcel No. 1 or any part thereof.

But she was in the actual possession of parcel No. 2. The question to be determined is whether this possession was adverse to plaintiffs. If the possession was not adverse, her occupancy for more than twenty years did not perfect title in her. Furthermore, a deed, which is color of title, does not draw to the grantee-occupant of the land described therein the protection of the statute of limitations where the requisites of *adverse possession* are not present. *Farabow v. Perry, supra.*

Upon the death of her husband, Daisy remained in possession pursuant to her right of dower. A widow is not a tenant in common with the heirs at law; her estate is superimposed upon the estate of the heirs and is superior thereto. Even so, when she remains in possession of the whole estate under an unallotted dower right, her possession is the extension of the possession of her husband, is not deemed to be adverse to the heirs, and is in subserviency to their title. *Sheppard v. Sykes,* 227 N.C. 606, 44 S.E. 2d 54; *Ramsey v. Ramsey,* 224 N.C. 110, 29 S.E. 2d 340; *Forbes v. Long,* 184 N.C. 38, 113 S.E. 575; *Graves v. Causey,* 170 N.C. 175, 86 S.E. 1030. If a widow, in possession of the land of her deceased husband under an unallotted dower right, purchases the land at a sale to satisfy an encumbrance, the deed thus obtained by her, where there is no evidence that the character of her

possession was in any manner changed thereby and no evidence of unequivocal notice having been given the rightful heirs of any intention to hold adversely to them, is insufficient to convert the possession of the widow, previously not adverse to the heirs, into possession adverse to them. *Farabow v. Perry, supra.* The widow can obtain no right against the heirs by virtue of the statute of limitations, at least not without some open, positive change of possession, accompanied by some manifestation of an unequivocal purpose to hold adversely. *Graves v. Causey, supra.* See also *Sheppard v. Sykes, supra.*

A life tenant who allows property to be sold to satisfy taxes or other encumbrance cannot acquire a title adverse to the remainderman or reversioner by purchasing at the sale. *Creech v. Wilder, supra.* And as stated above, dower is a life estate. *Trust Co. v. Watkins,* 215 N.C. 292, 1 S.E. 2d 853; *Holt v. Lynch,* 201 N.C. 404, 160 S.E. 469; *Chemical Co. v. Walston,* 187 N.C. 817, 123 S.E. 196.

There is no evidence that the nature of Daisy Harris' possession of parcel No. 2 ever changed, that she by unequivocal word or act ever gave notice that she was holding this parcel adversely, or that her possession thereof was inconsistent with the enjoyment of a life estate. The court below did not err in ruling that her possession was not adverse to plaintiffs.

(3). The trial judge ruled, as a matter of law, that Mary Louise Price Boquist and Helen Moore Price Hooper (hereinafter referred to as defendants Price) were not innocent purchasers for value without notice of plaintiffs' equities in the portion of parcel No. 1 described in the deed to them from Grace Construction Company, and that said deed vested in them only the dower interest of Daisy Harris in said portion. He gave the jury a peremptory instruction to this effect.

Defendants Price allege that they were innocent purchasers and took title in fee. "A person is an 'innocent purchaser' when he purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith." *Lockridge v. Smith,* 206 N.C. 174, 173 S.E. 36. Valuable consideration or "value" is a fair consideration, not necessarily up to full value, but a price paid which would not cause surprise. *Worthy v. Caddell,* 76 N.C. 82. The burden of proof of the "innocent purchaser" issue is upon those claiming the benefit of this principle — in this case the defendants Price. *Hughes v. Fields,* 168 N.C. 520, 84 S.E. 804; *Lumber Co. v. Trading Co.,* 163 N.C. 314, 79 S.E. 627; *Cox v. Wall,* 132 N.C. 730, 44 S.E. 635.

The testimony bearing upon the issue is summarized as follows: John Wesley Harris, plaintiff, testified that he left his father's home in 1920, he had been back only once since his father's death and that was

the same year his father died (1933), he did not visit Daisy, he had never gone out there and claimed the property and has made no effort to take possession, and he did nothing about the property until 1960. Sylvia Harris Morehead, plaintiff, testified that she lived in the vicinity of the property many years after her father died, she went to see Daisy four or five times in May and June, 1933, after her father died, the only other time she went there was in 1946 when her brother Ernest died, she never called on Grace Construction Company and informed them she owned the property, she never saw Mr. Price (father of defendants Price) before the first trial of this case, she never told him the plaintiffs owned the property, he did not see her when he was negotiating the purchase of the property, and she never told Daisy the plaintiffs owned the property. J. P. Price, father of defendants Price, testified that he was agent for his daughters in the purchase and management of the property, he visited the property about a dozen times in 1946 for the purpose of determining its value looking to its purchase, there were no structures or improvements of any kind on it, his daughters paid about $12,000 for this property and about twelve acres which bounded it on the west, he leased it to Greensboro Broadcasting Company for a right of way to its radio tower, an unpaved road was laid out across it and used in connection with the tower, he had the lot drained and graded, he collected the rent and paid the taxes, no one ever came to him and claimed title to the property, none of the plaintiffs ever notified him of any claim, he never saw any of the plaintiffs until the first trial of this case, he has not at any time discussed this property or anything connected with the property with any of the plaintiffs, and he has not had any conversation of any nature with any of the plaintiffs. Helen Moore Price Hooper, defendant, testified that the purchase and management of the property was handled entirely by her father, she has lived in Reidsville for the past sixteen years, her sister Mary Louise has lived in Minnesota for eight years.

The foregoing testimony permits the inference that at the time of the purchase by defendants Price no third party was in possession giving notice of a possible conflicting claim of title (*Perkins v. Langdon,* 237 N.C. 159, 74 S.E. 2d 634; *Insurance Co. v. Dial,* 209 N.C. 339, 183 S.E. 609; *Smith v. Fuller,* 152 N.C. 7, 67 S.E. 48), neither defendants Price nor their agent had actual notice of plaintiffs' equities, they paid a valuable consideration and purchased in good faith.

It seems clear that the court below made the challenged ruling on the theory that the record of the administration of the Wiley Harris estate was constructive notice to Grace Construction Company and defendants Price that Wiley Harris died intestate survived by children, heirs

at law, and at the time of the purchase by Daisy Harris at the foreclosure sale she was the widow of Wiley Harris and administratrix of his estate. In so concluding the court fell into error.

"A person is as a general rule charged with notice of what appears in the deeds or muniments in his grantor's chain of title, including . . . instruments to which a conveyance refers . . . Under this rule, the purchaser is charged with notice not only of the existence and legal effects of the instruments, but also of every description, recital, reference, and reservation therein. . . . If the facts disclosed in a deed in the chain of title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed." 55 Am. Jur., Vendor and Vendee, § 708, pp. 1083-4; *Randle v. Grady,* 224 N.C. 651, 32 S.E. 2d 20. See also *Chandler v. Cameron,* 229 N.C. 62, 47 S.E. 2d 528; *Blankenship v. English,* 222 N.C. 91, 21 S.E. 2d 891; *Insurance Co. v. Knox,* 220 N.C. 725, 18 S.E. 2d 436; *Wynn v. Grant,* 166 N.C. 39, 81 S.E. 949; *Wittkowsky v. Gidney,* 124 N.C. 437, 32 S.E. 731. "One who uses a deed in the necessary deduction of his title, which discloses an equitable title in another, is affected with notice of the trust." *Holmes v. Holmes,* 86 N.C. 205; *Thompson v. Blair,* 7 N.C. 583. A purchaser is presumed to have examined each recorded deed or instrument in his line of title and to know its contents. He is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title. *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. One need only to look to the muniments of title. Vitiating facts must appear in deraigning title, on the face of deeds in the chain of title, and in one of the muniments of title. *Smith v. Fuller, supra.*

The records of the administration of the estate of Wiley Harris are not a muniment of the Price title. The links in that chain of title, so far as this case is concerned, are the three deeds to Wiley Harris, deed of trust from Wiley Harris and wife, Daisy, to Hoyle, trustee, foreclosure deed from Hoyle, trustee, to Daisy Harris, deed from Daisy Harris to Grace Construction Company, and deed from that company to defendants Price. The deed of trust is regular in form and, of course, Wiley Harris was living at the time of its execution. The foreclosure deed is regular on its face, and there is nothing in the recitals or in the trustee's report of sale to give notice that Wiley Harris was dead or that Daisy Harris was a widow or the administratrix of her husband's estate. One examining the record title had the right to assume that the foreclosure cut off any interest of Wiley Harris and those claiming under and through him. The fact that Daisy Harris purchased at the foreclosure sale was not a badge of fraud or indicia of trust. Even when

a husband pays the purchase price of land and has the conveyance made to his wife, no trust results — the law presumes a gift of the land to the wife. *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418. There is no requirement that a purchaser examine the records of the administration of the estate of a grantor, who, during his lifetime, made a conveyance of the property, unless some reference in the chain of title puts him on notice that the title is affected thereby. The only inquiry, with respect to the status of Daisy Harris, defendants Price were required to make was whether in 1946 when she conveyed to Grace Construction Company she had a living husband.

Harris v. Lumber Co., 147 N.C. 631, 61 S.E. 604, is a case in point. The facts are: Testator deeded a tract of land to his son A in February 1892. He died in December 1892, and A qualified as executor of his will. By his will he devised a part of the tract of land in question to another son B. In 1903 A deeded to C the timber on the entire tract and the timber deed was recorded. Thereafter B sued A to remove cloud from his title; there was judgment for B and A did not appeal — C was not a party to this suit. B then sued C for damages for the cutting of timber on his part of the land. C pleaded that he was an innocent purchaser for value. This Court affirmed judgment in favor of C, and said (Letters are here substituted for names): "A obtained title to the land by deed from his father in February, 1892, and when defendant (C) took its deed from A there was no subsequent conveyance or encumbrance from A registered. It was not required to examine the book of Wills to see whether (the father) had attempted to devise to B a part of the land which he had conveyed to A."

Where a mortgagee buys at his own sale through an agent and the agent conveys to a bona fide purchaser for an adequate consideration, the latter takes a good title if he purchases before suit to set aside the sale is instituted. *Lockridge v. Smith, supra;* 37 Am. Jur., Mortgages, § 675, p. 125. When a purchaser has no notice of equities other than those disclosed by the public record, a cancelled mortgage is no notice to him of a mortgagor-mortgagee relationship between a grantor and grantee in his chain of title. *Smith v. Fuller, supra.*

We have taken note of the authorities relied on by plaintiffs; they are not applicable here. *Creech v. Wilder, supra,* involves the assignment of a bid at a mortgage foreclosure sale. Husband mortgaged his property and his wife joined to release dower. Thereafter the husband died and his wife was administratrix of his estate, paid all debts except the mortgage, and filed her final account in which she personally assumed the payment of the mortgage debt. The mortgage was foreclosed and the wife was the successful bidder. She assigned her bid to

defendant. The heirs sued to have defendant declared trustee for them. In reversing a judgment of nonsuit this Court said: "The assignee of a bid takes the same interest his assignor had, and stands in his shoes and is subject to whatever may be ordered against the original bidder and whatever defenses may be interposed against the latter." Further: "The records of administration and of report termed 'Final Account' were constructive notice to the world." It is noted here that what is said with respect to the status of the assignee of a bid is apparently in conflict with the language in *Lockridge v. Smith, supra,* at page 181. The holding of the *Creech* case on this point, if it is, as it seems, an exception to the "innocent purchaser" rule, will be limited to the factual situation there presented. Furthermore, the ground alleged therein for imposing a trust is fraud. The statement in the opinion that the records of administration "are constructive notice to the world" makes use of a general legal postulate which must be considered in the light of the circumstances to which it is applied. It means nothing more than such records are notice to all who are required by law to take notice of them.

It is true that a grantor cannot convey to his grantee an estate of greater dignity than the one he has. *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479; *Creech v. Wilder, supra.* But where the defense of "innocent purchaser" is interposed and there has been a bona fide purchase for a valuable consideration, the matter which debases the apparent fee must have been expressly or by reference set out in the muniments of record title or brought to the notice of the purchaser in such a manner as to put him upon inquiry. An innocent purchaser takes title free of equities of which he had no actual or constructive notice. Parenthetically, if an innocent purchaser conveys to one who has notice, the latter is protected by the former's want of notice and takes free of the equities. *Arrington v. Arrington,* 114 N.C. 151, 19 S.E. 351.

About thirteen years elapsed from the death of Wiley Harris to the conveyance by Daisy Harris to Grace Construction Company. Until dower is allotted the right of possession is in the heirs, not the widow. *Morton v. Lumber Co.,* 178 N.C. 163, 100 S.E. 322. At any time after the death of Wiley Harris plaintiffs could have had the widow's dower allotted (G.S. 30-12), could have had from the courts a declaration of their rights made a public record in the chain of title, and could have taken possession of all the property outside the dower allotment. Equity aids the diligent, not those who sleep on their rights.

On this record defendants Price were entitled to a peremptory instruction on the "innocent purchaser" issue. There must be a new trial on this issue.

(4). The court ruled that the plea of adverse possession for seven years under color of title and twenty years without color, interposed by defendants Price, was not supported by the evidence, and it declined to submit an issue or issues of adverse possession to the jury.

This phase of the case is of importance here because of the outstanding 1/12 interest of the plaintiffs and 1/12 interest of defendant Edna Harris Garrett in the tract conveyed to defendants Price. A purchaser must take notice of the outstanding undivided interest of a tenant in common disclosed by the instruments in the chain of title. *Chandler v. Cameron, supra.* The deed of trust and the foreclosure deed conveyed only 5/6 undivided interest — of this defendants Price had notice. The question is whether the evidence makes out a *prima facie* showing of adverse possession which would ripen title as to the 1/6 interest of the cotenants.

Daisy Harris had no actual possession of parcel No. 1. Grace Construction Company purchased the part of parcel No. 1 in question here in 1946. This action was filed in 1956. Even if the Construction Company and defendants Price were in adverse possession from 1946 to 1956, no title ripened under the twenty-year statute. G.S. 1-40. This leaves only the question of adverse possession under color of title.

The possession of one tenant in common is in law the possession of all his cotenants unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and claiming the land as his own, from which actual ouster would be presumed. *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Winstead v. Woolard,* 223 N.C. 814, 28 S.E. 2d 507. The silent occupation of the whole property by one tenant in common, without an account to, or claim by the others, is not in law an actual ouster. "There may be an entry or possession of one tenant in common which may amount to an actual ouster so as to enable a co-tenant to bring ejectment against him, but it must be by some clear, positive and unequivocal act equivalent to an open denial of his right and to putting him out of seizin." *Dobbins v. Dobbins,* 141 N.C. 210, 53 S.E. 870. For case of actual ouster, see *Graves v. Causey, supra.* In the absence of an *actual ouster,* the ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years, and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. *Bullin v. Hancock,* 138 N.C. 198, 50 S.E. 621; *Page v. Branch,* 97 N.C. 97, 1 S.E. 625.

Defendants Price did not reside on the land, nor did their agent or tenant. They placed no buildings or structures thereon. They had it drained and graded and occasionally cleared it of rubbish and mowed it. They leased to Greensboro Broadcasting Company an unpaved road or right of way for ingress and egress to and from a radio tower on adjacent property, collected the rents and paid taxes. Such possession and use did not amount to an actual ouster; it was merely the silent occupation of the property, without an account to or claim by the other tenants in common. The possession was not for as much as twenty years, the period necessary to raise the presumption of ouster. The court properly refused to submit the issue of adverse possession.

The trial and judgment below have established the following rights with respect to the lands involved in this action, and these rights are hereby affirmed by us:

(1) Plaintiffs are the owners in fee simple of parcel No. 2.

(2) Plaintiffs are the owners in fee simple of 11/12 undivided interest in that part of parcel No. 1 not embraced in the description in the deed from Daisy Harris to Grace Construction Company, dated 1 June 1946, and recorded in Book 1122, page 385, Registry of Guilford County.

(3) Defendant Edna Harris Garrett is the owner in fee simple of 1/12 undivided interest in that part of parcel No. 1 not embraced in the description in said deed from Daisy Harris to Grace Construction Company.

(4) Defendant Edna Harris Garrett is the owner in fee simple of 1/12 undivided interest in the tract of land described in said deed from Daisy Harris to Grace Construction Company.

(5) Plaintiffs are the owners in fee simple of not less than 1/12 undivided interest in the tract of land described in said deed from Daisy Harris to Grace Construction Company.

The cause is remanded for a new trial upon the issue raised by defendants Price in their allegation that they are innocent purchasers for value.

The costs of this appeal will be paid one-half by plaintiffs and one-half by defendants Cora Jane Lea and Lettie Ora Walker.

Error and remanded.

A. G. CARVER v. NORMAN R. LYKES.

(Filed 10 July 1964.)

1. Malicious Prosecution § 2—

In this jurisdiction actions for malicious prosecution may be based not only upon criminal prosecutions but also civil proceedings which involve an arrest of the person, seizure of property, or the loss of a legally protected right.

2. Same—

A real estate broker may maintain an action for malicious prosecution against a person who maliciously and without probable cause institutes proceedings before the Real Estate Licensing Board, which terminated in favor of the broker, charging conduct constituting ground for revocation or suspension of the broker's license. G.S. 93A-6.

3. Malicious Prosecution § 13—

Damages for malicious prosecution include loss of business, injury to reputation, mental suffering, and expenses reasonably necessary in defending the charge against plaintiff, together with any other loss proximately resulting from defendant's malicious prosecution, and, if actual malice is established, the jury may also allow punitive damages.

4. Malicious Prosecution § 4—

The right of action for malicious prosecution is based upon the malicious institution of a proceeding without probable cause, irrespective of any specific motive or purpose in instituting the proceeding, and therefore in an action for malicious prosecution based upon the institution of proceedings for the revocation of a real estate broker's license, an instruction to answer the issue whether defendant instituted the proceedings in the affirmative if the jury found that defendant filed the complaint with the licensing Board and did so for the purpose of revoking or suspending plaintiff's license, is erroneous.

5. Pleadings § 29—

The admission in the answer of the truth of the predicate facts of an issue establishes such facts, and therefore if the issue is submitted to the jury the court should instruct the jury to answer it in accordance with the admitted facts. G.S. 1-159.

6. Brokers and Factors § 4—

A real estate broker engaged to sell land for the owner owes the owner the duty to exercise reasonable care and diligence to effect a sale to the best advantage of the owner, which he cannot do without first determining the reasonable market value of the land, and the owner has the right to rely upon the broker's knowledge and advice without making an independent investigation.

7. Same—

Where the owner of land shows a substantial discrepancy between the price obtained by the broker and the market value of the property, the

owner may recover of the broker for the broker's negligence in failing to obtain an adequate price.

8. Evidence § 58—

In cross-examining a witness, counsel may not ask the witness, in the absence of actual proof as to the sales price, if the witness did not know that a certain individual sold his property for a stated sum, since the predicate facts in the question are not established by any evidence.

9. Appeal and Error § 41—

The admission of incompetent evidence over objection is rendered harmless by the admission of other evidence of the same import without objection.

10. Brokers and Factors § 4—

Evidence of prices paid by a power company for other lands in the vicinity is without probative force in establishing the fair market value of defendant's land when such other lands were not purchased on the open market but were acquired under threat of condemnation, and further when such other lands are dissimilar in size, condition, frontage on public highways, improvements, etc. Nor was it the duty of the broker to find out at what prices the power company had obtained such other properties.

11. Same—

Evidence tending to show that plaintiff broker, in selling to a power company, obtained the highest price the power company would pay without resorting to condemnation, and without evidence of any conflict in interest or bad faith on the part of the broker or evidence of any probative force that the price obtained for plaintiff's land from the power company was substantially less than the market value, is insufficient to be submitted to the jury on the owner's counterclaim against the broker for negligence of the broker in failing to exercise reasonable diligence to obtain the best price possible.

12. Same—

A broker may not be held liable by the owner for mere error of judgment in advising sale at a stipulated price, there being no evidence of bad faith on the part of the broker or that he had any interest in procuring a sale at less than the fair market value.

13. Same—

A contract of purchase and sale sent the purchaser with stipulation that the deposit made by the purchaser would be used to defray the expense of a survey if the purchaser did not take the property, *held* competent in evidence, even though not executed by the purchaser, to corroborate the purchaser's testimony that he did not agree to pay for the survey and to contradict the broker's testimony that he did.

14. Same; Vendor and Purchaser § 7—

Where there is conflict as to whether the agreement of the purchaser to buy the tract in question was exclusive or inclusive of an encircling road, containing approximately two acres, shown on the map, it is error for the

court to instruct the jury in effect that the purchaser would be entitled to a return of his deposit upon the inability of the seller to tender an unencumbered title to the entire tract including the road.

APPEAL by plaintiff from *McLean, J.*, July 1963 Civil Session of BUNCOMBE.

Plaintiff, a resident of Asheville and licensed since 1937 as a real estate broker, instituted this action against the defendant to recover damages for an alleged malicious prosecution growing out of charges defendant filed against him with the North Carolina Real Estate Licensing Board which were dismissed by the Board after a hearing. Defendant admitted he filed the charges against plaintiff but denied all other material allegations in the complaint. He alleged two causes of action as counterclaims against the plaintiff: (1) that plaintiff had negligently failed to obtain an adequate price for land which he had engaged plaintiff to sell to the Carolina Power and Light Company; and (2) that plaintiff wrongfully retained five hundred dollars which defendant had deposited with him on the purchase price of other land, the title to which proved defective.

The evidence relating to plaintiff's cause of action and the defendant's two counterclaims was so intermingled at the trial that completely separate statements of each would be impossible without excessive repetition. The background of the case is this:

Defendant, a resident of Arizona, owned 13.2 acres in Buncombe County which he had purchased for $1,500.00 through the plaintiff broker in 1954. The Carolina Power and Light Company required this property, along with about sixty-five adjacent tracts totaling approximately twelve hundred acres, for the construction of a lake and a steam generating plant. Two realtors employed by the Power Company respectively appraised defendant's property at $5,280.00 and $6,000.00 and, on December 13, 1960, it offered him $7,000.00 for his property. When defendant refused the offer, the Power Company instituted condemnation proceedings. Defendant thereupon telephoned plaintiff from Arizona and asked him to effect a satisfactory settlement with the Power Company if he could and, if he could not, to arrange with an attorney to represent him in the proceeding. In October 1960 the defendant had discussed with plaintiff his negotiations with the Power Company and had then asked him to be on the lookout for other property to replace his land which the Power Company was taking.

After receiving defendant's telephone call, plaintiff went on the land with the Power Company's two appraisers in an unsuccessful attempt

to have them increase their appraisal. Thereafter he had several conferences with the attorney for the Power Company following which it made a final offer of $9,900.00, or $750.00 an acre, for defendant's property. Plaintiff reported this offer to the defendant in Arizona and strongly recommended that he accept it. He told him that the Power Company would not pay more and, in his opinion, if defendant went to court he would ultimately lose money after paying an attorney's fee. As a result, defendant reluctantly authorized plaintiff to sell the property at $750.00 an acre without further investigation as to the "going rate" to the Power Company of property in the vicinity, although he was still of the opinion that he should receive more. He and his wife executed a deed to the Power Company which nonsuited the condemnation proceedings. Defendant paid plaintiff a five percent commission on this sale. Thereafter, defendant became dissatisfied with the price which plaintiff had obtained for him when he heard from his sister what other landowners had received for their property.

Plaintiff testified that he was thoroughly familiar with the defendant's land and knew the value of the property adjoining it. He had checked some of the sales which other landowners in the vicinity had made to the Power Company and, in his opinion, the defendant received more for his property than its actual market value. He also stated that he had no connection whatever with the Power Company and owned no stock in it.

Defendant testified that when he engaged plaintiff by telephone to continue his negotiations with the Power Company plaintiff said, "I will get top dollar for you," and defendant told him he thought his property was worth $2,000.00 an acre. After the sale he inquired whether plaintiff had investigated other sales to the Power Company in the vicinity of his land and plaintiff replied, "I didn't check them . . . I don't have to check it; I know what it is worth." On August 9, 1961 the defendant employed J. F. Gooch, a licensed real estate appraiser, to appraise the property he had sold. Gooch appraised it at $16,800.00, or approximately $1,300.00 an acre. Defendant stated that in his own opinion the property was worth between $1,600.00 and $2,000.00 per acre.

In October 1960, as a prospective replacement for the property the Power Company was taking, plaintiff's employees had shown defendant a wooded hilltop containing approximately twelve acres in the D. E. Morgan subdivision known as Mountain Heights. The subdivision map showed this tract encircled by an unopened street. Neither Morgan nor plaintiff knew the actual location of the property but plaintiff pointed out its approximate boundaries to the defendant. All

parties understood that a survey would be required to locate both the twelve-acre tract and the street. Plaintiff testified: ". . . I sold him to begin with, this line here, the inside, and we estimated it at twelve acres." Defendant agreed to buy the property at $700.00 an acre and complete the sale when the Power Company paid him for his 13.2 acres. Mr. Morgan insisted that defendant put up a deposit of $500.00 to evidence his good faith.

Plaintiff's evidence with reference to defendant's second counterclaim is as follows: On one occasion, defendant wrote plaintiff that he had "been doing a lot of thinking about putting up that $500.00" because he would lose it if he did not take the property. On October 25, 1960 plaintiff wrote defendant that Morgan had asked for the deposit because the survey would cost around $500.00 and that he had turned the deposit over to him for that purpose although it was not customary to do this until a sale was consummated. Plaintiff enclosed with this letter a contract of purchase and sale for defendant to sign but he never did so. Plaintiff told defendant prior to the survey that if he took the property Morgan would pay for the survey and the entire deposit would be applied to the purchase price; otherwise, defendant would pay for the survey and lose that much of his deposit. The survey cost $451.00.

After the survey had been made, plaintiff went with defendant to the site and pointed out each stake to him. Defendant then said that he would take the property and that he also wanted the encircling street, making a total of 14.6 acres. Mr. Morgan agreed that defendant could have the street at the same price per acre. Defendant instructed plaintiff to have an attorney examine the title. The attorney passed the title to the twelve acres inside the road on July 22, 1961, but he refused to certify the title to the encircling road because, in his opinion, it had not been properly withdrawn from dedication. Thereafter, defendant used this as an excuse not to take the entire hilltop property and bought other land in Henderson County. On August 7, 1961 the plaintiff sent defendant a check for $49.00 which represented the difference between the cost of the survey and the deposit of $500.00. Defendant declined to cash the check.

Defendant's evidence with reference to his second counterclaim tended to show that in the beginning, as a result of plaintiff's representations, he thought the twelve-acre tract of the Morgan property as shown on the subdivision map "constituted a whole little mountain" and not just the hilltop. Plaintiff's employee did not inform him that the entire mountain contained seventy-five to one hundred acres. When he discovered that twelve acres embraced only the crest he became

"disinterested." Even so, after the survey he agreed to buy the twelve acres and the two acres in the encircling street, if the title to the tract was good. When the attorney refused to certify the title to the street, he decided that without those two additional acres he would not have the privacy he wanted, and he immediately notified plaintiff that he would not take the property.

After talking to the plaintiff on two occasions about how much more other landowners in the vicinity had received from the Power Company for their property than he, defendant made a third visit to plaintiff's office to demand the return of his $500.00 deposit on the land. Then, for the first time, plaintiff informed him that he was to pay for the survey whether or not he bought the property. Defendant told him that he had never agreed to pay for the survey and this was not his understanding.

On November 16, 1961, defendant filed with the Real Estate Licensing Board two verified complaints which charged, in effect, (1) that by reason of gross negligence or a conflict of interest, plaintiff had misrepresented to defendant the value of lands he had authorized him to sell to the Power Company and had "lied" to him about his prospects of getting more money for the property in a condemnation proceeding than in a voluntary sale; (2) that plaintiff misrepresented the acreage in the Morgan tract of land which he was trying to sell to defendant; and (3) that plaintiff had refused to return defendant's five hundred dollar deposit when defendant "could not get a guaranteed title on the property as surveyed," and that plaintiff had lied to him about the matter. (Enumeration ours.)

On December 5, 1961 the Board notified plaintiff of the charges defendant had filed against him and that, as a result of the charges, a hearing would be held on January 26, 1962 to determine whether his real estate broker's license should be revoked or suspended under the provisions of G.S. 93A-6. At defendant's request, and over the plaintiff's objection, the matter was continued until June 29, 1962 at which time a public hearing was held in the Buncombe County Courthouse in Asheville.

At the trial plaintiff offered in evidence a transcript of defendant's testimony at the hearing. According to the transcript, defendant had testified that although he had no proof of it, he had heard that plaintiff owned "quite a bit of stock in the Carolina Power & Light Company"; that the rumor made him very suspicious and he was charging him with a conflict of interest. He also said that plaintiff knew he could not buy the Morgan property until the Power Company had paid him for the 13.2 acres and that plaintiff was more anxious to effect a sale

for his friend Morgan than he was to get "top dollar" for defendant from the Power Company.

The transcript further showed that at the hearing defendant withdrew any charge that plaintiff had *intentionally* misrepresented the Morgan property to him. With reference to the survey of that property he testified: "He (Morgan) wanted it surveyed in order to sell it to me, and if I had not contracted to purchase it, he would not have had it surveyed. I expected him to pay the survey bill of $451. I didn't buy the property because it was misrepresented to me was my reason and that was incidental, it didn't meet my needs."

At the hearing before the Board plaintiff was represented by counsel; defendant was not. After considering the evidence offered by the defendant, the Board granted plaintiff's motion to dismiss the defendant's charges against him.

During the trial, over plaintiff's general objection, defendant's counsel read to the jury a portion of the unsigned contract which accompanied plaintiff's letter to the defendant of October 25, 1960. It provided that the Morgan land to be conveyed to the defendant should be "surveyed with the outside of said street and to be sold on an acreage basis. Said survey to be made by the parties of the first part (the Morgans) and to be paid for by the parties of the first part." Without objection, this further provision was read to the jury: "It is further understood and agreed that parties of the first part will deed to the party of the second part the land above described, with a good and warranty title, free and clear of all encumbrances except 1962 taxes. . . . (I)f, for any reason, the party of the second part fails to perform strictly in accordance with the above contract, the said Five Hundred Dollars ($500.00) shall be forfeited as liquidated damages and this contract shall become null and void."

Ten issues were submitted to the jury which denied any recovery to the plaintiff and awarded defendant $2,500.00 in damages on his first counterclaim and $500.00 on his second. From judgment entered on the verdict the plaintiff appealed.

Harold K. Bennett and Don C. Young for plaintiff.
Redden, Redden & Redden for defendant.

SHARP, J.

(1) *Plaintiff's Action.*

The common law action for malicious prosecution was originated as a remedy for unjustifiable criminal prosecutions. However, in North Carolina and many other states, the right of action has been extended

to include the malicious institution of civil proceedings which involve an arrest of the person or seizure of property or which result in some special damage. *Ely v. Davis,* 111 N.C. 24, 15 S.E. 878; *Jerome v. Shaw,* 172 N.C. 862, 90 S.E. 764; *Estates v. Bank,* 171 N.C. 579, 88 S.E. 783 (*lis pendens*); *Nassif v. Goodman,* 203 N.C. 451, 166 S.E. 308 (Involuntary bankruptcy); *Brown v. Estates Corp.,* 239 N.C. 595, 80 S.E. 2d 645 (Malicious and wrongful attachment); 3 Strong, N. C. Index, *Malicious Prosecution* § 2.

The weight of authority in this country now supports the view that, under certain circumstances, an action for malicious prosecution may be predicated upon the prosecution, institution, or instigation of an administrative proceeding where such proceeding is adjudicatory in nature and may adversely affect a legally protected interest. *National Surety Co. v. Page,* 58 F. 2d 145 (4th Cir. 1932); *Melvin v. Pence,* 130 F. 2d 423 (D.C. Cir.); 143 A.L.R. 149; Restatement, *Torts* § 680 (1938); 34 Am. Jur., *Malicious Prosecution* § 19.1 (Supp. 1963); Prosser, *Torts* § 99 (1955); See also *Toft v. Ketchum,* 18 N.J. 280, 113 A. 2d 671, 673.

In *Melvin v. Pence, supra, Rutledge, J.,* pointed out:

> ". . . Much of the jurisdiction formerly residing in the courts has been transferred to administrative tribunals, and much new jurisdiction involving private rights and penal consequences has been vested in them. In a broad sense their creation involves the emergence of a new system of courts, not less significant than the evolution of chancery. The same harmful consequences may flow from the groundless and malicious institution of proceedings in them as does from judicial proceedings similarly begun. When one's livelihood depends upon a public license, it makes little difference to him whether it is taken away by a court or by an administrative body or official. Nor should his right to redress the injury depend upon the technical form of the proceeding by which it is inflicted. The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty."

It follows that one who instigates or procures investigatory proceedings against another before an administrative board which has the power to suspend or revoke that other's license to do business or practice his profession, is liable for the resulting damage if (1) the proceeding was instituted maliciously; (2) without probable cause; and (3) has terminated in favor of the person against whom it was initiated. In such a suit for malicious prosecution the plaintiff may recover

for any resulting loss of business, injury to reputation, mental suffering, expenses reasonably necessary to defend himself against the charge, and any other loss which proximately resulted from the defendant's wrongful action. If actual malice is established the jury may allow punitive damages. *Brown v. Estates Corp., supra; Pressley v. Audette,* 206 N.C. 352, 173 S.E. 905; *Newton v. McGowan,* 256 N.C. 421, 124 S.E. 2d 142.

G.S. 93A-1 makes it unlawful for any person to act as a real estate salesman or broker without first obtaining a license from the North Carolina Real Estate Licensing Board. G.S. 93A-6 empowers the Board to suspend or revoke such license for such misconduct as therein specified. It also provides that upon the filing of a written, verified complaint which makes out a *prima facie* case of such misconduct, the Board *shall,* after due notice, hold a hearing and investigate the actions of the realtor whose conduct has been called into question.

Of course, before a defendant can be held liable in any action for malicious prosecution it must appear that he prosecuted, instituted, or instigated the administrative proceeding of which the plaintiff complains. This fact, unless admitted, must be established by the first issue. In the trial below the jury disposed of plaintiff's action by a negative answer to the first issue which was stated: "Did the defendent institute and prosecute an action before the North Carolina Real Estate Licensing Board against the plaintiff to revoke or suspend his Broker's Real Estate License, as alleged in the Complaint?" With reference to this issue the court charged the jury as follows:

> "So the Court instructs you, members of the jury, that if you find from this evidence and by its greater weight, that the defendant did file with the Board the complaints in question, and *that at the time he did so that he did so for the purpose of revoking the license, revoke or suspend the broker's or real estate license of the plaintiff,* Mr. Carver, then it would be your duty to answer this first issue YES. If you do not so find, you will answer it NO, or, if upon a fair and impartial consideration of all the facts and circumstances in the case, if you find the evidence of equal weight, you will answer it NO." (Italics ours).

The plaintiff's assignment of error to the foregoing portion of the charge must be sustained. The defendant testified that in filing the charges it was never his purpose to cause a revocation of plaintiff's license; that he was merely "bringing to the attention of the Board what Mr. Carver had done" to him. However, the charges filed by defendant required the Board to investigate the plaintiff's conduct and,

if found to be true, they constituted grounds for the revocation of his license under G.S. 93A-6. Having thus invoked the statute, the defendant may no more say that in filing the complaint it was not his purpose to jeopardize the plaintiff's license than a defendant in any ordinary malicious prosecution action would be heard to say that in swearing out a warrant it was not his purpose to convict the person he had charged with crime. "The instigation of an administrative proceeding is sufficient where the institution of the proceeding actually follows from it." 34 Am. Jur., *Malicious Prosecution* § 19.1 (Supp. 1963). Moreover, the defendant's motive or purpose in instituting the proceedings in question is not material on the first issue. The defendant admitted in his answer that he filed with the Board the written, verified charges against the plaintiff which are set out in paragraphs 6 and 7 of the plaintiff's complaint. The only question rightly involved on the first issue was whether defendant instituted the proceedings of which plaintiff complained — not whether he intended to cause the revocation or suspension of plaintiff's license by so doing. In this case plaintiff's instigation of the proceedings is not an issue. His admission in the answer established that he had done so. G.S. 1-159; *Davis v. Rigsby,* 261 N.C. 684, 136 S.E. 2d 33; *Fairmont School v. Bevis,* 210 N.C. 50, 185 S.E. 463. The first issue in this case, if submitted, should have been answered YES by the court. For the error in the charge with reference to it there must be a new trial.

(2) *Defendant's First Counterclaim.*

Plaintiff's thirtieth assignment of error is to the failure of the court to sustain his motion for judgment as of nonsuit as to defendant's first counterclaim. In defendant's words at the trial, the basis of his first counterclaim was that plaintiff "was grossly negligent because he didn't go around to the neighbors and find out either what was offered by the Carolina Power and Light Company for the property or what transactions had taken place and actually what prices" neighboring property brought.

> "A real estate agent with whom property is listed for sale or exchange acts in a fiduciary capacity, if he accepts the proffered employment. It is his duty to obtain for his principal the largest price possible, or in case of an exchange the most advantageous trade." *Devine v. Hudgins,* 131 Me. 353, 163 A. 83.

The duty which a real estate broker engaged to sell land owes to his principal is stated in 12 Am. Jur. 2d, *Brokers* § 96 as follows:

> "As a general rule, a broker who is not a mere middleman, but is employed by a principal to act as his agent in a transaction, is

bound to exercise reasonable care and skill, or the care and skill ordinarily possessed and used by other persons employed in a similar undertaking. He must exert himself with reasonable diligence in his principal's behalf, and is bound to obtain for the latter the most advantageous bargain possible under the circumstances of the particular situation. Thus, a broker employed to sell property has the specific duty of exercising reasonable care and diligence to effect a sale to the best advantage of the principal — that is, on the best terms and at the best price possible." See also Annot., Liability of real-estate broker to principal for negligence in carrying out agency, 94 A.L.R. 2d 468; 12 C.J.S., *Brokers* § 26.

It was, as defendant contends, the plaintiff's duty to determine the reasonable market value of defendant's property before attempting to effect a sale of it and, under the circumstances, he had the right to rely upon plaintiff's knowledge and advice without making an independent investigation himself. In cases involving real estate brokers, where the negligence of the broker in obtaining an adequate price is set up, either as the basis for a cause of action in tort against him or as a defense to his action to recover a commission, courts have ruled in favor of the property owners where there was evidence of a substantial variation in the real value of the property and that obtained by the broker. *Smith v. Carroll Realty Co.*, 8 Utah 2d 356, 335 P. 2d 67; *Russell Grain Co. v. Bainter*, Kan., 223 S.W. 769; *Stuart v. Stumph*, 126 Ind. 580, 26 N.E. 553; *Myers v. Adler*, 188 Mo. App. 607, 176 S.W. 538.

To show a substantial variation in the real market value of defendant's 13.2 acres and the price obtained by the plaintiff, plaintiff was asked on cross-examination, over the objection and exception of his counsel and without any foundation whatever having been laid for the questions, if he did not know that the Power Company had paid Dan Moody $1,375.00 an acre for property in the vicinity of defendant's; Meece, Buckner, Swicegood, and Butler, $1,200.00 an acre; and Austin, $800.00 for one-half an acre. Plaintiff replied that he had no such knowledge. Thereafter, on the direct examination of other witnesses for defendant, evidence that the aforementioned individuals had received the stated sums per acre was admitted without objection along with evidence as to the price paid by the Power Company to a number of other individuals for tracts, or parts of tracts in the project area, ranging in size from one-half an acre to four hundred acres. The prices per acre varied from less than $500.00 to more than $4,000.00. Some of the tracts contained one or more dwellings or improvements of various kinds. Some fronted on the public highway. All apparently were substantially dissimilar in either size, condition, location, or im-

provements to the defendant's property, which had no frontage on a public road and no buildings of any kind on it. It was subject to rights of way for both telephone and electric power lines running north and south across the middle of the property.

Under the rule laid down in *Barnes v. Highway Commission,* 250 N.C. 378, 394, 109 S.E. 2d 219, and most recently restated in *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265, this evidence was clearly incompetent to establish the value of defendant's land. In the first place, all of the sales to the Power Company were made under the threat of condemnation and were forced rather than voluntary sales. *Highway Commission v. Pearce,* 261 N.C. 760, 762, 136 S.E. 2d 71. Their sales prices were not, therefore, a fair indication of market value.

> ". . . (E)vidence of amounts paid by the condemnor for property similarly situated, in the absence of extraordinary circumstances, is inadmissible, because such sales are involuntary and therefore, under the substantive law, run counter to the essential ingredient of fair market value. . . ." II Wigmore on Evidence, (3d ed.) § 463 (Supp. 1962).

Secondly, the judge heard no evidence in the absence of the jury or otherwise made any attempt to determine whether there was a sufficient similarity between the properties to render such evidence competent. So far as the record discloses, proximity of location and the Power Company's requirement of the properties constituted the only similarity between defendant's land and those with which he attempted to compare its value. Furthermore, it was also error to permit the cross-examination of plaintiff by such questions as "Do you know he (Moody) sold two acres to Carolina Power and Light Company for $1,375.00 an acre?" The "utmost freedom of cross-examination" to test a witness' knowledge of values, mentioned in *Barnes v. Highway Commission, supra,* does not mean that counsel may ask the witness if he doesn't know that a certain individual sold his property for a stated sum with no proof of the actual sales price other than the implication in his question. *Bennett v. R. R.,* 170 N.C. 389, 87 S.E. 133, 16D L.R.A. 1074. Where such information is material it is easy enough to establish by the witness himself, whether a certain property has been sold to his knowledge and, if so, whether he knows the price. If he says he does not know, his lack of knowledge is thus established by his own testimony and doubt is cast on the value of his opinion. *Highway Commission v. Privett,* 246 N.C. 501, 506, 99 S.E. 2d 61. If he asserts his knowledge of the sale and, in response to the cross-examiner's ques-

tion, states a totally erroneous sales price, is the adverse party bound by the answer or may he call witnesses to establish the true purchase price? Unless per chance the purchase price of the particular property was competent as substantive evidence of the value of the property involved in the action, it would seem that the party asking the question should be bound by the answer. To hold otherwise would open a Pandora's box of collateral issues.

However, in this case substantially all the evidence tending to establish the purchase price of the other properties went into the record at one time or another without objection. "The admission of this evidence without objection rendered harmless the previously admitted evidence of similar import over objection." *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56. Nevertheless, this evidence as to the purchase price of property, sold under threat of condemnation and not shown to be similar to the defendant's, was without probative value on the question whether plaintiff had obtained an adequate price for the land or the best bargain possible for defendant. This being true, defendant's evidence that plaintiff had told him "he did not bother to find out" at what price the Power Company had obtained other property in the community likewise does not bear upon the question.

The testimony of defendant and that of Mr. Gooch both tended to show that the price which plaintiff obtained for defendant's property was inadequate. Notwithstanding, all the evidence was that plaintiff obtained the "top dollar" which could have been obtained from the Power Company without resorting to condemnation proceedings. Plaintiff concedes that he strongly advised the defendant to accept the Power Company's offer rather than risk the delay, uncertainties, and expense incident to a condemnation proceeding. Whether, in advising settlement in preference to litigation plaintiff erred in judgment, we can never know. In any event, defendant concurred in his judgment albeit, he says, reluctantly. We must assume that as an intelligent, forty-five year old citizen with several sizeable business interests, and experience as a freelance writer, plaintiff had some familiarity with jury trials and the hazards of litigation.

The record discloses no evidence that plaintiff had at any time ever represented the Power Company or owned any stock in it. Defendant failed to prove that plaintiff had any "conflict of interest," that he acted in bad faith, or that he was guilty of any negligence which was the proximate cause of loss to him. If the evidence could be held to justify an inference that plaintiff made an error of judgment which, under the circumstances, it cannot, it still would not constitute actionable negligence.

". . . A broker is not liable for a mere mistake of judgment that did not result from a failure to know or do that which a person of ordinary prudence, under similar circumstances, would know or do. . . . So long as the agent acts honestly, in good faith, according to his best skill and judgment, and without negligence in ascertaining and reporting actual facts and conditions available to him at the time, he may not be held liable for an alleged mistake of judgment merely because some one is willing afterwards to swear that a prolongation of the chaffering would have achieved greater results. The law imposes no such responsibility upon an agent." *Smith v. Fidelity & C. Trust Co.*, 227 Ky. 120, 12 S.W. (2d) 276, 62 A.L.R. 1353.

The plaintiff's motion to nonsuit defendant's first counterclaim should have been allowed, and plaintiff's assignment No. 30 is sustained.

(3) *Defendant's Second Counterclaim.*

Neither the pleadings, evidence, nor the issues brought the contentions which the parties now make with reference to the second counterclaim into sharp focus at the trial. Defendant alleged that he agreed to purchase approximately 12.5 acres of land which the plaintiff represented to him as an entire "little mountain"; that he deposited $500.00 with plaintiff to show his good faith and to bind the trade, and instructed him that it should be applied on the purchase price if the title to the property was good; that the title to a portion of the land was not good and the 12.5 acres did not include the entire "little mountain"; that he demanded the return of his deposit which the plaintiff refused.

Defendant contends, and his evidence tended to show, that when a survey revealed the true size and location of the 12.5 acres, which plaintiff had thought contained the entire mountain of seventy-five to one hundred acres, he still agreed to buy it provided he could also obtain the land shown on the map as an encircling road which contained approximately two acres. This brought the amount of land which defendant agreed to purchase to 14.6 acres. He contends that after it was discovered Morgan could not convey a good title to the road, he no longer wanted the "misrepresented" hilltop without it. Thereupon, he demanded and became entitled to the return of his deposit.

The document which plaintiff mailed defendant on October 25, 1960 with the request that he sign it as the contract between the parties, was clearly competent to corroborate the defendant's testimony that he was not to pay for the survey and to contradict the plaintiff even though it was never executed.

In defense of this counterclaim, the plaintiff contends, and his evidence tended to show, (1) that it was understood between all the

parties that defendant was to pay for the survey in any event but, if he bought the property, his entire deposit of $500.00 would be credited on the purchase price; and (2) that the deposit was made to bind defendant's contract to purchase the original 12.5 acre tract, to which the title is unquestionably good and which defendant had obligated himself to take before he attempted to buy the road, and that he forfeited the deposit when he changed his mind and reneged on the agreement. Plaintiff makes this second contention in spite of the fact that he remitted to the defendant the difference between the cost of the survey and the amount of the deposit, $49.00.

As determinative of the second counterclaim, the court, without objection from either party, submitted the following two issues, both of which the jury answered YES.

> "9. Did the plaintiff and defendant enter into a contract of purchase and sale for the Morgan land, as alleged in the answer?
>
> "10. If so, did the plaintiff wrongfully withhold and refuse to turn over to the defendant the $500.00 deposit, as alleged in the answer?"

In his charge the court treated the defendant's contract to purchase the 12.5 acre tract and the contract to buy the two acres included in the encircling road as one and indivisible. He charged the jury that if it found that the agreement between the plaintiff and defendant was that defendant would purchase "the Morgan lands" if the title was good, and if it were not, that he would receive back his deposit of $500.00, it would answer the ninth issue YES; otherwise NO. The judge then instructed the jury that if it answered the ninth issue YES it would answer the tenth issue YES. The last instruction was clearly both erroneous and prejudicial. It completely ignored the plaintiff's two defenses to the counterclaim. Furthermore, under the theory on which his Honor submitted the ninth issue to the jury, the instruction assumed that the title to the Morgan property was defective. Plaintiff had made no such admission and the burden was on the defendant to satisfy the jury by the greater weight of the evidence that *the title to the land he had agreed to buy* was defective. See *Improvement Co. v. Guthrie,* 116 N. C. 381, 21 S.E. 952; Annot., 169 A.L.R. 87. The credibility of defendant's evidence bearing upon this point was for the jury. There must be a new trial on the second counterclaim. This disposition of the case makes it unnecessary to consider the other numerous assignments of error.

On plaintiff's cause of action —

New trial.

On defendant's first counterclaim —
Reversed.
On defendant's second counterclaim —
New trial.

IN THE MATTER OF ANNE ROYAL CARTER.

(Filed 10 July 1964.)

1. Injunctions § 13—

Upon the hearing of an order to show cause, a court may not grant relief entirely distinct from that specifically asked by movant.

2. Same; Colleges and Universities—

Where, after remand of a cause involving the suspension of a student at the University of North Carolina, an order to show cause why the record should not be returned to the Superior Court is issued on allegation that the administrative agencies had misinterpreted the order of remand and were not proceeding in accordance therewith, the only question before the court is whether the cause should be returned to the court or not, and all adjudications in the order outside the scope of this inquiry must be stricken on appeal.

3. Colleges and Universities—

Under the Constitution and statutes of this State, the management of the University of North Carolina is delegated to and invested in the Board of Trustees, and the Board of Trustees may make all necessary and proper and reasonable rules and regulations for the orderly management and government of the University of North Carolina and for the preservation of discipline of its students. Constitution of North Carolina Art. IX, § 6; G.S. 116-1; G.S. 116-3; G.S. 116-4; G.S. 116-10; G.S. 116-11.

4. Same; Administrative Law § 4—

Certiorari lies to review an order of the Board of Trustees of the University of North Carolina affirming the suspension of a student from the University for cheating, since the Board of Trustees is not an agency in the legislative or judicial branches of the government, nor an agency governed by G.S. Ch. 150, and therefore no other statutory provision exists for review of its actions. G.S. 143-307.

5. Colleges and Universities—

It would seem that the Board of Trustees of the University of North Carolina and its Executive Committee has authority under the Constitution of North Carolina and applicable statutes to delegate to the faculty and administrative officers of the University and to the student government organized under a written constitution a limited authority to act in mat-

ters pertaining to student discipline so long as the Board retains final jurisdiction.

6. Same— Order held to remand cause for further proceedings and not to entitle student to summary exoneration.

When, upon review of an order of the Trustees of the University of North Carolina affirming the suspension of a student for cheating, the judge of the Superior Court recites that all of the evidence failed to rebut the presumption of innocence in favor of the student and that her conviction was therefore not in accordance with due process and that to deny her readmission on the evidence would be arbitrary and capricious, but the order does not reverse the decision of the Board of Trustees but remands the cause for further specific proceedings, and no appeal is taken from the order, *held* the remand is authorized by G.S. 143-315 and the order is not a final determination of the rights of the parties and does not entitle the student to summary exoneration from the charge of cheating by the administrative authorities of the University, but remands the cause for further proceedings by the administrative authorities.

APPEAL by petitioner Anne Royal Carter from an order in chambers by *Williams, J.*, signed 1 November 1963, and filed 18 November 1963. WAKE.

In stating the facts Anne Royal Carter will hereafter be referred to as petitioner; the Board of Trustees of the University of North Carolina as respondent; the Women's Honor Council of the Women's Council of Student Government of the University of North Carolina as Honor Council; and the Faculty Committee on Student Discipline of the University of North Carolina as Faculty Committee.

Petitioner was a student at the University of North Carolina. On 20 May 1961 she was served with a summons to appear on 22 May 1961 before the Honor Council on a charge that on 17 May 1961 she had violated the Honor Code, in that she had cheated on a Latin I make-up quiz by not taking the make-up quiz specifically made out for her. The summons served on her stated in part:

"Article II, Section 4(c) of the Constitution provides:

"1. The presumption of innocence until guilt is proved.

"2. You have the right to due notice and fair hearing. You will NOT be tried within 72 hours of the date of the service of this summons unless you inform the person serving this summons that you desire earlier trial.

"3. You may have the privilege of assistance by a member of the Council if you desire such aid. You should indicate your desire for counsel to the server of this summons. The privilege of assistance by a member of the Council will be deemed waived if not

exercised by you prior to the trial. Any Council member serving in this capacity is automatically disqualified from voting on your case.

"4. You have the right to face your accuser.

"5. You have a right to summon witnesses through the Council."

On 22 May 1961 the Honor Council found her guilty as charged, and its sentence was suspension from the University of North Carolina.

The following appears from respondent's minutes, special session of the Executive Committee, Governor's Office, 15 April 1957:

"'(President Friday) recommended that the following amendment be made to the Code of the University:

"'Among the duties of the faculty and Chancellor in each of the component institutions of the University of North Carolina shall be included the duty to exercise full and final authority in the regulation of student conduct and in matters of student discipline in that institution; and in the discharge of this duty, delegation of such authority may be made to established agencies of student government and to administrative or other officers of the institution in such manner and to such extent as may by the faculty and Chancellor be deemed necessary and expedient; provided, that in the discharge of this duty it shall be the duty of the faculty and Chancellor to secure to every student the right of due process and fair hearing, the presumption of innocence until found guilty, the right to know the evidence and to face witnesses testifying against him, and the right to such advice and assistance in his own defense as may be allowable under the regulations of the institution as approved by the Faculty and Chancellor. In those instances where the denial of any of these procedural rights is alleged it shall be the duty of the President to review the proceedings.'

"(This recommendation was approved by the Executive Committee.)"

On 22 May 1961 petitioner wrote a letter to Dr. William B. Aycock, Chancellor of the University of North Carolina, protesting her innocence, and requesting a review of her case to the end that a mistake of the Honor Council be corrected. On 29 May 1961 Dr. Aycock wrote her a letter stating in substance that her appeal for a review had been denied, which meant he could find no reason to place her case in the hands of the Faculty Committee for a new hearing; and that since

there is some indication she desired to pursue the matter further, an appeal from his decision not to grant another hearing should be made to his superior, Dr. William C. Friday, President of the University of North Carolina.

Petitioner appealed from Dr. Aycock's decision to Dr. William C. Friday, President of the University of North Carolina. Dr. Friday affirmed Dr. Aycock's decision, on the ground that upon a review of petitioner's appeal he saw no denial of due process.

Petitioner then appealed to the Executive Committee of respondent from Dr. Friday's decision. On 10 July 1961 the Executive Committee affirmed the decision of the Honor Council, the decision of Dr. Aycock, and the decision of Dr. Friday.

From the decision of the Executive Committee, petitioner appealed to respondent's full Board meeting on 26 February 1962. At this meeting respondent's full Board passed a resolution appointing a Special Committee of the Board of Trustees and directing it "to make a thorough investigation of this entire matter and hear all interested parties and make its report and recommendations to the full Board of Trustees at its next meeting."

The report of the Special Committee to respondent's full Board appears in the record on pages 71 through 82, both inclusive. This report shows that the Special Committee conceived its duty was to examine the procedures and machinery in disciplinary matters at the University of North Carolina, and to determine whether or not procedure had been followed in petitioner's case which insured her a fair hearing and due process in arriving at the determination that petitioner was guilty of the offense with which she was charged. The Special Committee, after stating in substance in its report that there had been no denial of due process or fairness in the handling of petitioner's case, used this language:

> "We feel, therefore, after making a full and complete investigation of this matter and hearing all interested parties, that the Board of Trustees should take no action; that the question of the readmission of Miss Carter to the University at Chapel Hill should be left where it has been placed by the Trustees and where it properly belongs — with the Chancellor and faculty at Chapel Hill."

On 28 May 1962 respondent's full Board adopted the report of its Special Committee.

On 2 June 1962 petitioner filed with the clerk of the superior court of Orange County an application for a writ of *certiorari*. On 7 June

1962 petitioner filed with the clerk of the superior court of Wake County a petition for Judicial Review of a Final Administrative Decision of the Board of Trustees of the University of North Carolina, pursuant to Article 33, Chapter 143, of the General Statutes of North Carolina. Respondent filed an answer to petitioner's application and petition.

By consent of petitioner's counsel and of respondent's counsel, the Attorney General of North Carolina, petitioner's application for a writ of *certiorari* and her petition for Judicial Review were consolidated for hearing before Judge Heman R. Clark, presiding over 17 September 1962 Term of Wake County superior court. On 21 September 1962 Judge Clark entered an order stating in effect that he had jurisdiction to review the decision of respondent's Board as petitioned for, and that he should order further hearings of evidence to properly review the proceedings. Whereupon, he ordered that the hearing be continued to 5 November 1962 in the Wake County superior court. To this order no exception was noted.

The hearing set for 5 November 1962 was continued to 15 November 1962. Judge Clark had a *de novo* hearing. He heard the testimony of Dr. William B. Aycock; the sworn testimony of John S. Catlin, an instructor in Latin at the University of North Carolina, who gave petitioner the make-up quiz and made the accusation against her; the testimony of Dr. Albert I. Suskin, head of the Latin Department of the University of North Carolina; the testimony of petitioner; and the unsworn testimony of Priscilla Wyrick, Chairman of the Women's Honor Council of the University of North Carolina, and of Tony Thompson, clerk, who wrote up the trial of the Honor Council. Counsel for petitioner was present and participated in the hearing, as well as Ralph Moody, a Deputy Attorney General of North Carolina.

Judge Clark entered an order in the hearing on 28 December 1962. His order states near its beginning "that petitioner challenged the legality of the decision of the Board on two grounds:

> "(1) That the Trustees could not lawfully delegate final authority in matters of suspension of students properly enrolled in the University and therefore recognition of suspension of a student council is unconstitutional.
>
> "(2) That in this case there was no competent, material and substantial evidence to support a finding that the petitioner was guilty of the charge of cheating, and therefore the Board of Trustees acted arbitrarily in approving the decision of the council suspending her from the University on these grounds."

Judge Clark in his order, after stating the legal powers vested in respondent's Board of Trustees, and the amendment made to the Code of the University on 15 April 1957, which is set forth in full above, concluded "that the petitioner's contention that the decision of the Board was an unconstitutional delegation of authority is without merit in her case."

Then Judge Clark in his order, after reviewing the evidence given before him, concluded "that all of the evidence offered against Miss Carter fails to rebut the presumption of innocence. * * * To deny her readmission solely on grounds of the suspension for cheating on the evidence in this case would, in the opinion of this Court, be arbitrary and capricious."

Then his order concludes as follows:

> "Following the hearing in this Court, the Chancellor, through the Assistant Attorney General representing the Trustees, suggested that this case be remanded for further consideration in view of the evidence not known on review. This procedure appears entirely appropriate.
>
> "NOW, THEREFORE, this cause is remanded to the Board of Trustees of the University of North Carolina and the Board is directed to refer the matter to the proper administrative authority for a review of the proceeding, including the additional evidence disclosed in this Court and for such other and further administrative action as is appropriate."

No exception was taken by any party to this order, and no appeal by any party from this order was made.

On 3 June 1963 petitioner made a motion before Judge Clawson L. Williams, presiding over Wake County superior court, that an order be issued to the Board of Trustees of the University of North Carolina to show cause why the record in this proceeding should not be returned to the court, and an order issued, pursuant to G.S. 143-315, reversing the Women's Honor Council and the suspension of petitioner from the University, and directing the correction of the University records accordingly, and that such other appropriate action should be taken by the court in the premises. On the same date Judge Williams issued an order for the Board of Trustees of the University of North Carolina to appear before him in the Wake County superior court on 18 June 1963, and show cause, if any it has, why petitioner's motion, which is set forth in the show cause order, should not be allowed.

On 14 June 1963 the parties in this proceeding entered a stipulation to the effect that the hearing of the show cause order should be con-

tinued to 27 June 1963, and in the event that the matter could not be heard by Judge Williams on that date, then it may be heard by Judge Williams, in or out of chambers, out of term, out of the county and out of the district, at such place and time as it may be heard by Judge Williams and as agreed by the parties through their counsel.

The hearing was held by Judge Williams on 26 July 1963 in chambers at Sanford, North Carolina, when and where petitioner was represented by her counsel, and respondent was represented by Ralph Moody, a Deputy Attorney General of North Carolina. The hearing was on the record, motion, order to show cause, answer to motion, reply to the answer, and argument of counsel. Judge Williams entered an order in the hearing on 1 November 1963, which was filed on 18 November 1963. Judge Williams' order, after reciting that part of Judge Clark's order of 28 December 1962 wherein it is stated "this cause is remanded to the Board of Trustees of the University of North Carolina and the Board is directed to refer the matter to the proper administrative authority for a review of the proceeding, including the additional evidence disclosed in this Court and for such other and further administrative action as is appropriate," goes on to state:

> "* * * pursuant to said order of Judge Clark the Board of Trustees of the University of North Carolina by resolution referred this proceeding to the Chancellor of the University of North Carolina at Chapel Hill for appropriate action and said Chancellor referred this proceeding to the Faculty Committee on Student Discipline for the purpose of carrying out the order of Judge Clark; that the Chairman of the Faculty Committee on Student Discipline, Professor James R. Caldwell, notified the petitioner on May 29, 1963, that said Committee would hold a *de novo* hearing in this matter and that additional evidence would be taken in the proceeding with other information as to the membership of the said Committee and the status of counsel * * *."

After these recitals Judge Williams' order decrees as follows, in substance:

One. The suspension of petitioner from the University by the Honor Council is stayed, unless and until the same shall be restored upon the final termination of this proceeding.

Two. This entire matter shall be heard *de novo* by the Faculty Committee on Student Discipline of the University, which shall make findings of fact and conclusions as to whether petitioner's suspension from the University should be sustained, or whether her suspension is

not supported by substantial evidence or for other valid reasons should be vacated.

Three. In the conduct of the hearing by the Faculty Committee on Student Discipline, it shall use, review and incorporate in its hearing the entire record in the hearing before Judge Clark. In addition, it shall hear all other relevant evidence offered by petitioner and respondent. Petitioner and respondent shall be entitled to counsel, and petitioner shall have the right to subpoena and cross-examine any witnesses that have heretofore testified in this proceeding.

Four. No member of the student body and no designated officers of Student Government of the University of North Carolina at Chapel Hill shall sit with or as members of the Faculty Committee on Student Discipline during the hearing. The Faculty Committee on Student Discipline in the conduct of the hearing shall not be limited by the technical rules of a court of law, but the hearing shall be conducted in a manner to protect basic constitutional rights of petitioner under the laws and constitution of Student Government and according to basic principles of due process of law.

Five. The Faculty Committee on Student Discipline shall make a full report and record of its hearing, its findings of fact, its conclusions and determination, and file it in the office of the clerk of the superior court of Wake County for such other and further proceedings as may be deemed appropriate by the court and in accordance with law. Within 30 days after the filing of the report, either party may file objections and exceptions to it.

Six. Until petitioner exhausts the available hearing before the Faculty Committee on Student Discipline, the court holds as a matter of law that petitioner has not exhausted her administrative remedies.

Seven. Petitioner's motion and order to show cause heretofore issued in this proceeding is dismissed.

From this order of Judge Williams, petitioner appeals to the Supreme Court.

John T. Manning for petitioner appellant.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody for respondent appellee.

PARKER, J. Petitioner assigns as error Judge Williams' order, in that it is broader than the show cause order, and includes "a re-examination of questions and issues of fact and law on which Judge Clark's order was based, and it modifies, reverses, and sets aside in part the

lawful final order of Judge Clark, duly entered on December 28, 1962, and to which latter order neither petitioner nor respondent objected, excepted, or appealed."

Petitioner further assigns as error Judge Williams' order, in that it did not grant her the relief she sought in her motion and the show cause order based thereon.

The only question before Judge Williams at the hearing on the show cause order was for respondent to appear before him and show cause, if it can, "why the record in this matter should not be returned to the court, and an order, pursuant to G.S. 143-315, be issued by the court reversing the Women's Honor Council and the suspension of the petitioner, Anne Royal Carter, and directing the correction of the University records accordingly and such other and further action as may be taken by the court in the premises." *Williamson v. High Point,* 214 N.C. 693, 200 S.E. 388; *Carroll v. Board of Trade,* 259 N.C. 692, 131 S.E. 2d 483; *Boyd v. Louisville & Jefferson County Planning and Zoning Comm.,* 313 Ky. 196, 230 S.W. 2d 444; 60 C.J.S., Motions and Orders, §§ 20, 39(b), 53; 37 Am. Jur., Motions, Rules and Orders, § 38.

Petitioner's motion for a show cause order asks for specific relief and that other appropriate relief should be taken by the court in the premises, and the show cause order commands respondent to appear before him and show cause, if it can, why the specific relief therein set forth should not be granted, "and such other and further action as may be taken by the court in the premises." The words in the show cause order for respondent to show cause, if it can, why general relief should not be granted do not mean that Judge Williams was empowered by the show cause order to grant movant, if she prevailed, every possible relief, but only such as is necessarily incidental to, and not entirely distinct from, that specifically asked. *Williamson v. High Point, supra; Carroll v. Board of Trade, supra;* 60 C.J.S., Motions and Orders, § 39(b).

Petitioner in her brief uses language to this effect, except when quoted: Judge Williams' order should be vacated, and respondent "should be directed to comply with the provisions of the Judgment or Order of Judge Clark on December 28, 1962," in that "it dismissed the charge against the petitioner appellant as invalid, found that the evidence did not overcome her presumption of innocence, [and] directed that she be exonerated from the charge of cheating by proper ADMINISTRATIVE AUTHORITIES."

The real and sole question before Judge Williams on the hearing of his show cause order was whether Judge Clark's order of 28 December

1962 found petitioner not guilty and directed that she be exonerated from the charge of cheating by proper administrative authorities of the University of North Carolina at Chapel Hill, and if so, whether he should enter an order enforcing such a construction of Judge Clark's order. All of Judge Williams' order, other than his dismissal of petitioner's motion and the order to show cause, which we will discuss later, is broader than his order to show cause, grants relief not allied to, and entirely distinct from, that specifically asked by movant, is erroneously incorporated in his order, and is ordered stricken from his order. Therefore, its correctness or incorrectness is not before us for determination.

The Attorney General in his brief raises the grave question as to whether Judge Clark had any jurisdiction under Art. 33, Ch. 143, of the General Statutes of North Carolina, "Judicial Review of Decisions of Certain Administrative Agencies," the statute on which he based his authority for decision. It is hornbook law that if the superior court acts without jurisdiction, on appeal the Supreme Court acquires no jurisdiction, and will *ex mero motu* dismiss the case or proceeding. *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445.

G.S. 143-307 provides:

> "Any person who is aggrieved by a final administrative decision, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this article."

G.S. 143-306 is as follows:

> "DEFINITIONS. — As used in this article the terms
>
> (1) 'Administrative Agency' or 'agency' shall mean any State officer, committee, authority, board, bureau, commission or department authorized by law to make administrative decisions, except those agencies in the legislative or judicial branches of government, and except those whose procedures are governed by chapter 150 of the General Statutes, or whose administrative decisions are made subject to judicial review under some other statute or statutes containing adequate procedural provisions therefor.

(2) 'Administrative decision' or 'decision' shall mean any decision, order, or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an opportunity for agency hearing."

Article IX, § 6, of the North Carolina Constitution provides:

"The General Assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen, shall be vested all the privileges, rights, franchises and endowments thereof in anywise granted to or conferred upon the trustees of said University; and the General Assembly may make such provisions, laws, and regulations from time to time, as may be necessary and expedient for the maintenance and management of said University."

The General Assembly repeated this constitutional provision *ipsissimis verbis* in G.S. 116-1. G.S. 116-3 provides: "The trustees of the University shall be a body politic and corporate, to be known and distinguished by the name of the 'University of North Carolina,' and by that name shall have perpetual succession and a common seal * * *." This statute then states in detail the powers vested in the Trustees of the University, among which is the ability to sue and be sued in all courts whatsoever. G.S. 116-4 provides for the election of 100 Trustees of the University of North Carolina by the General Assembly. G.S. 116-10 provides: "The trustees shall have power to make such rules and regulations for the management of the University as they may deem necessary and expedient, not inconsistent with the constitution and laws of the State." G.S. 116-11 provides: "The trustees shall have power to appoint from their own number an executive committee which shall be clothed with such powers as the trustees may confer."

Under the constitution and statutes of this State, the management of the University of North Carolina is delegated to and vested in its Board of Trustees. Consequently, the Board of Trustees of the University of North Carolina may make all necessary and proper and reasonable rules and regulations for the orderly management and government of the University of North Carolina entrusted to its care and for the preservation of discipline of students therein in accordance with the rules and regulations made. *Gott v. Berea College,* 156 Ky. 376, 161 S.W. 204, 51 L.R.A. (N.S.) 17; *Tanton v. McKenney,* 226 Mich. 245, 197 N.W. 510, 33 A.L.R. 1175; *Board of Trustees of University of Mississippi v. Waugh,* 105 Miss. 623, 62 So. 827, L.R.A. 1915D 588,

Ann. Cas. 1916E 522 (This case was appealed to the Supreme Court of the United States, and the opinion of the Supreme Court of Mississippi was affirmed. 237 U.S. 589, 59 L. Ed. 1131); *McGinnis v. Walker,* Ohio App., 40 N.E. 2d 488; *Foley v. Benedict,* 122 Tex. 193, 55 S.W. 2d 805, 86 A.L.R. 477; 55 Am. Jur., Universities and Colleges, § 19; 14 C.J.S., Colleges and Universities, § 26.

We have set forth above in the statement of facts and delegation of authority by the Executive Committee of the Board of Trustees of the University of North Carolina to the faculty and Chancellor in each of the component institutions of said University to perform "the duty to exercise full and final authority in the regulation of student conduct and in matters of student discipline in that institution; and in the discharge of this duty, delegation of such authority may be made to established agencies of student government and to administrative or other officers of the institution in such manner and to such extent as may by the faculty and Chancellor be deemed necessary and expedient; provided, that in the discharge of this duty it shall be the duty of the faculty and Chancellor to secure to every student the right of due process and fair hearing, the presumption of innocence until found guilty, the right to know the evidence and to face witnesses testifying against him, and the right to such advice and assistance in his own defense as may be allowable under the regulations of the institution as approved by the Faculty and Chancellor."

Dr. William B. Aycock, Chancellor of the University of North Carolina at Chapel Hill, testified as a witness before Judge Clark in the hearing on 15 November 1962. It would seem from his testimony that the faculty and Chancellor of the University of North Carolina at Chapel Hill delegated authority in writing to establish agencies of student government there in respect to student conduct and matters of student discipline, and that there is a written student constitution of the University of North Carolina at Chapel Hill. These written instruments were offered in evidence before Judge Clark, but are not set forth in the record. We are fortified in our opinion by the following stipulation made by the parties:

> "It shall not be necessary to print as a part of the record on appeal the minutes and resolutions of the Board of Trustees of the University of North Carolina at Chapel Hill, or of the Executive Committee thereof, delegating limited authority to the faculty and administrative officers of the University of North Carolina at Chapel Hill to act in all matters and procedures pertaining to student discipline, so long as it retains final jurisdiction, nor shall it be necessary to print any regulations or procedures of said

> administrative officials nor the provisions of the Student Constitution pertaining to student government or student discipline; it is stipulated and agreed that cheating on an examination or quiz is adequate cause, if established, for expulsion or suspension from the University of North Carolina and that petitioner was aware of this at the time she was admitted to the University of North Carolina * * *."

It would seem that the above delegation of authority by the Executive Committee of the Board of Trustees of the University and by the Board of Trustees of the University was proper and constitutional. *John B. Stetson University v. Hunt,* 88 Fla. 510, 102 So. 637. See *Teeter v. Horner Military School,* 165 N.C. 564, 81 S.E. 767.

In *Tanton v. McKenney, supra,* which was heard on *certiorari* to review a judgment denying a writ of mandamus to compel defendant to reinstate plaintiff in the state normal school after refusal to readmit her because of alleged improper conduct, the Supreme Court of Michigan said:

> "Inherently the managing officers have the power to maintain such discipline as will effectuate the purposes of the institution. * * * The right to attend our public schools is beyond question. That such right is tempered by, and subject to, proper regulations in the furtherance of discipline, is likewise beyond question. That, in the absence of an abuse of discretion, the school authorities, and not the court, shall prescribe proper disciplinary measures, is, we think, settled by the text-writers and the adjudicated cases."

From a consideration of Article IX, § 6, of our State Constitution, and of G.S. 116-1, 116-3, 116-4, 116-10, and 116-11, it is beyond dispute that the State of North Carolina, both by Constitution and by statute, has clothed the Board of Trustees of the University with authority to make such rules and regulations as they deem necessary and expedient for the management of the institution and for the preservation of student discipline therein, and it follows that the administrative decision of the full Board of Trustees of the University of North Carolina on 28 May 1962 adopting the report of its Special Committee that "the Board of Trustees should take no action; that the question of the readmission of Miss Carter to the University at Chapel Hill should be left where it has been placed by the Trustees and where it properly belongs — with the Chancellor and faculty at Chapel Hill" was the administrative decision of a State board authorized by the Constitution and statutes of the State to make administrative decisions, and this

was not an agency in the legislative or judicial branches of government, and not an agency governed by G.S. Ch. 150 (The Uniform Act for Licensing Agencies), and that there is no other applicable statute, other than G.S. Ch. 143, Art. 33, which contains adequate provisions for judicial review of petitioner's case. There can be no doubt that this decision of the full Board of Trustees on 28 May 1962 was rendered in a proceeding in which the legal rights of petitioner are affected; that the decision of the full Board of Trustees on 28 May 1962 in effect sustaining the action of the Women's Honor Council of Student Government of the University of North Carolina and of the Chancellor of the University at Chapel Hill and of the President of the University was required by law or constitutional right to be made after an opportunity for an agency hearing; and that petitioner had exhausted all administrative remedies made available by statute or the Board of Trustees before she applied for a judicial review pursuant to G.S. Ch. 143, Art. 33. In our opinion, and we so hold, G.S. Ch. 143, Art. 33, applies, and Judge Clark had jurisdiction to hear and determine petitioner's application for judicial review by virtue of this statute.

G.S. 143-315 provides:

> "SCOPE OF REVIEW; POWER OF COURT IN DISPOSING OF CASE. — The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.
>
> "If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification."

Petitioner has misconceived the effect of Judge Clark's order dated 28 December 1962. It is true Judge Clark's order states that in his

opinion "all of the evidence offered against Miss Carter fails to rebut the presumption of innocence," and in addition "her conviction therefore was not in accordance with due process under the Resolution of the Board or provision of the Student Constitution," and "to deny her readmission solely on grounds of the suspension for cheating on the evidence in this case would, in the opinion of this Court, be arbitrary and capricious," but his order does not reverse the decision of the full Board of Trustees. Judge Clark's order is not a final order determinative of the rights of the parties, as contended by petitioner, because his order remands the case for further specific proceedings, as he was authorized to do by G.S. 143-315. Consequently, Judge Williams properly dismissed petitioner's motion and the order to show cause theretofore issued by him.

Whether Judge Clark exceeded the scope of review vested in him by G.S. 143-315 is not before us for determination, because the parties neither excepted to nor appealed from his order, and the time for appeal has long passed. This part of Judge Clark's order stands in full force and effect:

> "Following the hearing in this Court, the Chancellor, through the Assistant Attorney General representing the Trustees, suggested that this case be remanded for further consideration in view of the evidence not known on review. This procedure appears entirely appropriate.
>
> "NOW, THEREFORE, this cause is remanded to the Board of Trustees of the University of North Carolina and the Board is directed to refer the matter to the proper administrative authority for a review of the proceeding, including the additional evidence disclosed in this Court and for such other and further administrative action as is appropriate."

This part of his order the Board of Trustees of the University of North Carolina will proceed with reasonable promptness to carry out. It appears from a recital in Judge Williams' order that at the time of his order the Board of Trustees had initiated proceedings to carry out Judge Clark's order.

Petitioner has two other assignments of error to Judge Williams' order, both in respect to the procedure to be followed upon his remand of petitioner's case for a rehearing. Both of these assignments of error present academic questions, because for the reasons stated above Judge Williams committed error in incorporating these matters in his order, and they will be stricken from his order.

The result is this: An order will be entered in the superior court of Wake County, when this opinion is certified down, striking from Judge Williams' order all it decrees and adjudges, except "that petitioner's motion and order to show cause heretofore issued in this cause be, and the same is hereby dismissed," which shall be affirmed. This leaves in effect and in force that part of Judge Clark's order quoted in the second paragraph of this opinion before this paragraph, to which there is neither exception to nor appeal from by the parties.

Modified and affirmed.

J. B. McCALLUM, JR., ADMINISTRATOR OF THE ESTATE OF MRS. MAY McCALLUM v. OLD REPUBLIC LIFE INSURANCE COMPANY.

(Filed 10 July 1964.)

1. Appeal and Error § 60—

Decision on appeal becomes the law of the case and is controlling upon the second trial.

2. Appeal and Error § 49—

In a trial by the court upon waiver of jury trial, the rules as to the admission and exclusion of evidence are not so strictly enforced.

3. *Reformation of Instruments* § 6— Evidence held competent as tending to show mistake and absence of ratification or estoppel.

This action was instituted to reform a certificate of loan insurance in regard to the effective and expiration dates so as to make them effective for the period of one year from the date of the loan. Plaintiff introduced in evidence the group policy, which provided that insurance should become effective on the lives of all insured debtors effective concurrently with the inception of each debtor's indebtedness. Testimony by the borrower's agent who procured the loan and insurance that his principal did not see the certificate, did not know that the effective date as typewritten on the policy antedated the loan by some three days, that the agent did not know its date, that he did not consent to the date actually written in the certificate, and that he and his principal had borrowed money in previous years from the lender and that the effective dates of the certificates in the previous years coincided with the dates the indebtednesses were incurred, *held* competent as tending to show that the effective date written in the policy was contradictory to the previous understanding of the parties, was caused by mutual mistake or mistake superinduced by inequitable conduct, and that the agent's failure to examine the certificate and ascertain its date was not attributable to want of due diligence, and that there was no ratification or estoppel.

4. Reformation of Instruments § 1—

Whether a party seeking reformation will be denied relief on the ground that he was negligent in failing to read the instrument and discover the mistake at the time the instrument was executed depends on the facts and circumstances of each particular case, including whether the rights of innocent parties intervened and whether the reformation of the agreement will not prejudice the other party but merely require him to conform to the agreement actually made.

5. Bills and Notes § 5.1—

Approval of an application for a loan by the lender cannot create a debt on the part of the applicant before he receives the proceeds of the loan, notwithstanding the note is signed by the borrower and bears the date of the application rather than the date the loan is actually made, which date is set up on the books of the lender as the date of the loan and the date from which interest is charged.

6. Appeal and Error § 49—

Findings of fact of the court are conclusive on appeal when the findings are supported by competent evidence.

7. Trial § 57—

In a trial by the court under agreement of the parties, the court is required to find and state only the ultimate facts. G.S. 1-185.

8. Trial § 56—

Where different reasonable inferences can be drawn from the evidence in a trial by the court under agreement of the parties, the determination of which inference shall be drawn from the evidence is for the court.

9. Insurance § 7—

In this action to reform a certificate of insurance issued under a group policy on the lives of borrowers, evidence that the premium was paid for a twelve-month period, that the effective date of the certificate as typewritten thereon antedated the time the loan was actually made by three days, together with evidence of prior custom between the parties, etc., *is held* sufficient to overrule insurer's motion to nonsuit.

APPEAL by defendant from *McKinnon, J.*, September Civil Session 1963 of ROBESON.

Civil action to reform and enforce a certificate of insurance issued under a Creditor's Group Insurance Policy.

From a judgment that plaintiff recover from defendant upon the certificate of insurance, as reformed, the sum of $3,000 with interest thereon from 2 January 1960 until paid, together with the costs, defendant appeals.

Henry & Henry and Vance B. Gavin for defendant appellant.

King & Cox by Jennings G. King for plaintiff appellee.

PARKER, J. This is the second appeal in this case. In the first trial of this case in the superior court of Robeson County, at the August Civil Term 1962, a judgment was entered sustaining a demurrer to the amended complaint. We reversed the judgment sustaining the demurrer. *McCallum v. Insurance Co.*, 259 N.C. 573, 131 S.E. 2d 435.

When the case was heard again in the superior court of Robeson County, plaintiff's amended complaint was the same amended complaint plaintiff had in the first trial. In the opinion on the first appeal, there is a full summary of the essential allegations of fact of the amended complaint. For an understanding of these essential allegations of fact in the amended complaint, reference should be had to our opinion on the first appeal. It would be supererogatory to repeat them in this opinion.

Defendant filed an answer to the amended complaint in which it alleged in substance as a bar to any recovery by plaintiff, that the certificate of insurance issued to plaintiff's intestate was identical in all respects with the insurance applied for, and was as intended by the parties; that there was no mutual mistake of the parties, and no fraud on its part coupled with mistake on the part of plaintiff's intestate, which would entitle plaintiff to the equity of reformation; that plaintiff's intestate accepted the certificate of insurance as applied for and issued; that she never notified defendant within a reasonable time or at any time that the certificate of insurance was not as intended, though she was able to read and had full opportunity to read it, and consequently ratified and accepted the certificate of insurance as delivered to her; and that plaintiff claiming through his intestate is estopped to challenge the plain language, intent and purpose of the certificate of insurance.

On the first appeal we were concerned only with pleadings. When the case was heard the second time, the parties, pursuant to G.S. 1-184 *et seq.*, waived a jury trial, and stipulated that Judge McKinnon should hear the evidence, find the facts, make conclusions of law, and render judgment accordingly.

FINDINGS OF FACT

This is a summary of Judge McKinnon's essential findings of fact (the enumeration of paragraphs is ours):

1. Old Republic Credit Life Insurance Company on 15 September 1954 issued its group life policy #47-8803-1, whereby in consideration of the application for policies and the payment of premiums it insured the lives of certain debtors of Production Credit Association of Co-

lumbia, Columbia, South Carolina, now by Act of Congress merged with Federal Intermediate Credit Bank of Columbia. (The pleadings state the name of defendant as "Old Republic Life Insurance Company." We have before us a copy of the group policy # 47-8803-1 which was issued on 15 September 1954 by "Old Republic Credit Life Insurance Company." The parties entered into the following stipulation before Judge McKinnon: "The corporate name of the defendant was formerly the Old Republic Credit Life Insurance Company. It is now Old Republic Life Insurance Company, and the same corporation which was formerly known as the Old Republic Credit Life Insurance Company.") Lumberton Production Credit Association is an agency of Federal Intermediate Credit Bank of Columbia, and persons indebted to Lumberton Production Credit Association were eligible for credit insurance under the terms, provisions, and conditions of said group policy #47-8803-1, and, upon application therefor, as debtors to Lumberton Production Credit Association, were entitled to purchase credit life insurance and receive its certificate of insurance under said group policy.

2. Mrs. May McCallum, plaintiff's intestate, and her son, J. B. McCallum, Jr., the plaintiff, were familiar with the loan procedures of the Association by reason of prior dealings with it.

3. On 30 December 1958 plaintiff, individually, and his intestate acting through him requested the Lumberton Production Credit Association to make them a loan in the sum of $3,000 payable on 1 October 1959, which was secured, in part, by a crop lien and chattel mortgage upon property owned by each of them, and, in part, by a certificate of insurance upon the life of plaintiff's intestate in the sum of $3,000 to be issued by defendant to the Association under the Creditor's Group Insurance Policy. The employees of the Association typed and delivered to plaintiff an insurance application form dated 30 December 1958, and a note and crop lien and chattel mortgage bearing a similar date.

4. The typewritten application, note, crop lien and chattel mortgage were delivered to plaintiff on 30 December 1958 in the office of the Association in the town of Lumberton, so that he might carry them to the town of Maxton to be executed and delivered by his intestate at a later date. On the same day plaintiff carried these written instruments to the home of his intestate in the town of Maxton and left them there to be executed by her.

5. All these written instruments were executed by Mrs. May McCallum, his intestate, in the town of Maxton, and were duly witnessed

by and acknowledged before a notary public. Mrs. May McCallum was then 83 years of age. She had suffered two strokes and had been confined to her bed for about two years. She continued to be so confined until her death on 2 January 1960. Ordinarily she could read and write, but due to her physical condition she could not see well enough to read and was physically unable to write from 30 December 1958 to the date of her death.

6. Sometime in the afternoon or evening of 31 December 1958, plaintiff went by his mother's house and picked up the papers which he had left there the previous day for her to execute. Her signature appeared to have been signed to the papers by means of her mark. He placed the note, crop lien, chattel mortgage, and application for insurance in an envelope addressed to the Lumberton Production Credit Association at Lumberton and mailed the envelope in Maxton on the afternoon or early evening of 31 December 1958.

7. Under the mail schedule in force on 31 December 1958, a letter addressed to Lumberton and mailed in the Maxton Post Office on the afternoon or evening of that day could have been sent to Lumberton on a Star Route which picked up the mail about 6 o'clock the next morning, or it could have been placed on the mail train which was scheduled to leave Maxton for Lumberton at 9:30 o'clock the next morning. There was no other mail schedule to Lumberton.

8. 1 January 1959 was a legal holiday which was observed by the Lumberton Post Office as a legal holiday and also by the Lumberton Production Credit Association as a legal holiday. The Lumberton Production Credit Association did not open for business on that day.

9. The loan application, the note, the crop lien and chattel mortgage, and the application for insurance were not received in the office of the Lumberton Production Credit Association prior to 2 January 1959. The application of plaintiff and his intestate for a loan of $3,000 was approved by the Association's executive committee, and entries of that approval were made on 31 December 1958, prior to the return to the Association of the executed note, crop lien, chattel mortgage, loan application, and application for insurance.

10. The group creditor's life insurance policy issued to the Federal Intermediate Credit Bank of Columbia, under which certificates were issued to both plaintiff's intestate and plaintiff, specifically provided that: "Insurance shall become effective on the lives of all insured debtors of the creditor under the terms and conditions hereinafter provided, effective concurrently with the inception of each such debtor's indebt-

edness, and shall continue until the expiration date stated in the certificate evidencing the insurance issued under this policy to *each* such debtor." (The italicized word "each" by inadvertence is omitted from the findings of fact in the record, but it does appear in the copy of group policy #47-8803-1, which was sent forward with the record.)

11. The Manual of Insurance (instructions) issued to the Lumberton Production Credit Association, pursuant to which the certificate was issued, provided:

> "SECTION 8 — EFFECTIVE DATE OF INSURANCE
>
> "(a) The effective date of the insurance will be the date of the approval of the loan; and the premiums shall be calculated from date of approval. The first disbursement may be the insurance premium."

12. On 3 January 1959 the Lumberton Production Credit Association issued to plaintiff its check for the net proceeds of the loan, and the loan was then set up on the books of the Association. No entry with reference to the loan had been made on the books of the Association prior to 3 January 1959, and interest did not accrue upon the loan until 3 January 1959, even though the note was dated 30 December 1958.

13. On 3 January 1959 defendant executed and delivered to Mrs. May McCallum, plaintiff's intestate, under the terms of its creditor's group insurance policy, Certificate PLD No. 520,909, a copy of which marked Exhibit A is attached to the amended complaint; and the Lumberton Production Credit Association thereupon deducted from the proceeds of the loan and remitted to defendant the sum of $150, which represented the premium thereon for one full year. The certificate insured the life of Mrs. May McCallum for a period of one year in the sum of $3,000, payable to the Association as its interest might appear, and provided that the remainder of the insurance, if any, in the event of her death, should be paid to her estate, or in lieu thereof and at the option of the defendant, to any relative by blood or connection by marriage or to any other person equitably entitled thereto by reason of having incurred expenses occasioned by her maintenance or her illness or her burial.

14. The loan applied for by J. B. McCallum, Jr., and Mrs. May McCallum was approved on December 31, 1958, and thereafter Certificate No. 520,908 was issued to:

Debtor:
J. B. McCallum, Jr.

Age:
57
Effective Date:
12/31/58
Amount:
$3,000.00
Expiration Date:
12/31/59
Premium:
$45.00
Creditor:
Lumberton Production Credit Association
Months:
12

Certificate PLD No. 520,909 was issued to:

Debtor:
Mrs. May McCallum
Age:
83
Effective Date:
12/31/58
Amount:
$3,000.00
Premium:
$150.00
Expiration Date:
12/31/59
Creditor:
Lumberton Production Credit Association
Months:
12 Mo.

The words — with the exception of the names of the insured — were a part of the printed form of each certificate. The figures in each certificate were inserted therein by the use of a typewriter.

15. The certificates of creditor insurance, together with a check for the net proceeds of the loan, were mailed to and received by plaintiff for himself and his mother, and were retained by them without any question or objection until sometime after the death of Mrs. May McCallum. This check was duly cashed and the proceeds were used for the purposes for which the loan was made.

16. At the time the certificate of insurance was issued to Mrs. May McCallum, the Association's employees followed a procedure under which the insurance certificate was not written until the date upon which the loan was actually made; but when the loan was made, the insurance certificate was then typed and completed, and the date upon which the loan application had been approved was inserted as the effective date. This procedure was followed in the issuance of Certificate PLD No. 520,909. Neither Mrs. McCallum nor plaintiff had knowledge or notice at any time of the instructions given by the defendant to the Association.

17. The loan of $3,000 to plaintiff and his intestate was repaid as follows: $1,500 on 24 September 1959, $1,500 on 29 October 1959, and interest of $139.70 on 4 December 1959. The stock of the borrower in the Association was sold 11 December 1959. The crop lien and chattel mortgage were cancelled of record 18 December 1959. No question was raised and no complaint made that the entire transaction was not as agreed upon and the insurance was not issued as agreed and was not in all respects in conformity with the application therefor, or that premium had been paid for any other or different term than that contracted for, or that any agreement of the parties was not complied with, until after the death of Mrs. May McCallum. Plaintiff has never made any contention that the certificate of credit insurance issued to him was not in all respects in accordance with the agreement of the parties. Plaintiff at all times in making the application for the loan, receiving and applying the proceeds thereof, and repaying the loan, was, as it related to his intestate, the duly constituted and acting agent of his intestate, because she had authorized him to conduct the business, secure the loan, use the proceeds, and ratified his acts and conduct, and is bound thereby. Plaintiff, both individually and as agent of his intestate, was experienced and capable of transacting the business with the Association and defendant, and of understanding the meaning and effect of the language used in consummating the agreement. Plaintiff in conducting this business for his mother represented that his mother was capable, competent, qualified, and responsible to enter upon and carry out business transactions.

18. Lumberton Production Credit Association had been advised by the Federal Intermediate Credit Bank that, upon approval of application for loan by the executive committee, in the absence of bad faith on the part of the borrower, it was "a binding contract" to make a loan.

19. A rider attached to and made a part of group policy #47-8803-1 provided that where the records of the creditor disclosed that a debtor, whose application for a loan was approved by the creditor, had requested life insurance protection and through error or omission the company was not notified, that the debtor would "nevertheless be protected to the same extent as if proper notice had been given and an insurance certificate had been issued."

20. On 3 January 1959 the Lumberton Production Credit Association mailed to plaintiff an envelope postmarked 2:30 p.m., which contained Certificate PLD No. 520,909, a check dated 3 January 1959 for $2,638.25, representing the net proceeds of the loan, and a statement showing the disbursement of the loan proceeds. At the time plaintiff received the envelope, he examined the statement and took out the check, but did not read the certificate of insurance. The statement attached to the check showed the following:

"Amount of Advance		$3,000.00
Deductions:		
Loan Service Fee	$ 21.75	
Class A Stock	145.00	
Group Life Insurance, Mrs. May McCallum	150.00	
Group Life Insurance, J. B. McCallum, Jr.	45.00	
Total Deductions		361.75
Amount of Check		$2,638.25"

21. The inception of Mrs. McCallum's indebtedness was 3 January 1959, the day the executed loan application, note, chattel mortgage, and application for insurance were received by and acted upon by the Association, and no indebtedness existed before that date.

22. The employees of the Association acted pursuant to the Manual of Insurance issued by the defendant in dating the certificate of insurance "December 31, 1958," and in providing an expiration date of "December 31, 1959"; but this was contrary to the intentions of the

parties and to the terms of the group insurance policy of the defendant, and was a mistake on the part of the employees of the Association, the agent of the defendant.

23. Plaintiff left the certificate of insurance in an envelope in a drawer of his desk at his home. His intestate did not read the certificate of insurance at any time during her life and could not have read it if she had attempted to do so.

24. After Mrs. May McCallum's death on 2 January 1960, plaintiff got out her certificate of insurance and found for the first time that its effective date was given as 31 December 1958. He then made demand upon defendant for payment of the certificate of insurance, which demand for payment defendant refused.

CONCLUSIONS OF LAW

"FIRST: On January 3, 1959, Mrs. May McCallum paid to the defendant the sum of $150 in full payment of the premium upon the certificate of insurance then issued to her for a period of one full year; and the defendant — having received and retained the premium — was legally obligated to furnish to her a full year's insurance coverage.

"SECOND: The date of the inception of the indebtedness of Mrs. May McCallum and J. B. McCallum, Jr., to the Lumberton Production Credit Association was January 3, 1959, when the loan was made, when the relationship of debtor and creditor was first established, when interest upon the loan began to accrue, and when the transaction was first set up upon the books of the Association.

"THIRD: Under the express provisions of the master policy issued by the defendant, the insurance upon the life of Mrs. McCallum did not become effective until the date of the inception of her indebtedness, which was January 3, 1959; and the defendant was under a legal duty to furnish her insurance coverage for a period of one full year thereafter.

"FOURTH: The certificate of insurance was not issued until January 3, 1959; Mrs. McCallum's application for insurance was not received by the Lumberton Production Credit Association prior to January 2, 1959; there was no mutual agreement between the parties that the effective date of the certificate should be December 31, 1958; and the defendant could not have incurred any legal liability under the certificate prior to the receipt of her application for insurance on January 2, 1959.

"FIFTH: Neither Mrs. May McCallum nor J. B. McCallum, Jr., had any notice or knowledge of the practice followed by the Lumberton Production Credit Association, under the direction of the defendant, of inserting the date upon which the loan was approved as the effective date of the certificate of insurance; and — in the absence of such notice or knowledge — neither of them was bound by the action of the Association in inserting December 31st, 1958, as the effective date of the insurance certificate.

"SIXTH: The defendant's unauthorized action in dating the effective date of the certificate back to December 31st, 1958 — without the knowledge or consent of the insured — deprived Mrs. May McCallum of the full year's coverage for which she had paid and to which she was entitled, and thereby produced an inequitable result; and such action constituted inequitable conduct upon the part of the defendant, entitling the plaintiff to reformation of the certificate.

"SEVENTH: Neither Mrs. May McCallum nor J. B. McCallum, Jr., her Agent, was negligent in assuming that the certificate of insurance would be issued in accordance with the previous custom and practice of the parties.

"EIGHTH: Neither Mrs. May McCallum nor J. B. McCallum, Jr., her Agent, was guilty of negligence in failing to read the certificate to ascertain whether it bore an effective date prior to the time that the loan was made and the certificate was issued, so as to bar their right to recover.

"NINTH: The plaintiff is entitled to have the certificate reformed by inserting January 3, 1959, as the effective date, and by inserting January 3, 1960, as the expiration date of the certificate."

Based upon his findings of fact and conclusions of law, Judge McKinnon ordered and adjudged as follows:

"FIRST: That Certificate PLD No. 520,909, issued by the defendant to the Lumberton Production Credit Association on January 3rd, 1959, upon the life of Mrs. May McCallum be reformed by striking therefrom the figures: '12/31/58', which appear after the effective date, and the figures: '12/31/59', which appear after the expiration date, and by inserting in place thereof the figures: '1/3/59' and the figures: '1/3/60,' so that the certificate will read: 'Effective date 1/3/59 — expiration date 1/3/60.'

"SECOND: That the plaintiff have and recover of the defendant upon said certificate, as reformed, the sum of $3,000, with

interest thereon from January 2, 1960, until paid, together with the costs of this action, to be taxed by the Clerk."

Defendant assigns as error that Judge McKinnon, over its objections, permitted plaintiff to testify in substance as follows: Mrs. May McCallum, his mother, never saw the certificate of insurance issued to her and did not know it had been dated 31 December 1958. He acting in behalf of his mother did not know that 31 December 1958 had been written in the certificate of insurance issued to her as the effective date thereof; and he acting for her never consented that 31 December 1958 should be written in the certificate of insurance as the effective date thereof. He and his mother borrowed money from Lumberton Production Credit Association in 1954, 1955, and 1956, and that the effective dates of the certificates of insurance issued during those years were the same dates the checks were issued.

Plaintiff in his amended complaint alleges in substance: All the parties intended that the certificate of insurance issued to his mother should be issued and dated at the time the loan was actually made, and should be for a term of 12 months. That the certificate of insurance issued to her, as written, did not truly and correctly embody the agreement between Mrs. May McCallum and defendant. That the figures "12/31/58" and the figures "12/31/59" were inserted in the certificate of insurance issued to his mother here by mutual mistake on the part of the parties, or that defendant inserted such figures with intent to defraud his intestate by dating the policy back to a time when it could not have been in force and effect.

In our former decision in this case, which is the law of the case, *Hodges v. Hodges*, 257 N.C. 774, 127 S.E. 2d 567, the Court said:

> "The Court said in *Insurance Co. v. Lambeth*, 250 N.C. 1, 15, 108 S.E. 2d 36, 45, quoting from *Williams v. Insurance Co.*, 209 N.C. 765, 769, 185 S.E. 21, 23, and citing additional authorities in support of the quotation from that case: '"It is well settled that in equity a written instrument, including insurance policies, can be reformed by parol evidence, for mutual mistake, inadvertence, or the mistake of one superinduced by the fraud of the other or inequitable conduct of the other." *Williams v. Insurance Co.*, 209 N.C. 765, 769, 185 S.E. 21; 29 Am. Jur., Insurance § 241; 44 C.J.S., Insurance §§ 278, 279; 7 Appleman, Insurance Law and Practice, § 4256.' To the same effect, 76 C.J.S., Reformation of Instruments, § 30; 45 Am. Jur., Reformation of Instruments, § 62.
>
> "In 76 C.J.S., Reformation of Instruments, § 29, b, (1), pp. 371-2, it is said: 'Fraud or inequitable conduct, to warrant relief by

way of reformation, has been held to consist in doing acts, or omitting to do acts, which the court finds to be unconscionable, as * * * in drafting, or having drafted, an instrument contrary to the previous understanding of the parties and permitting the other party to sign it without informing him thereof * * *.'"

It is well-settled law that when the parties waive a jury trial, the rules of evidence as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668. Regardless of that rule of law, considering that the group policy #47-8803-1, under which the certificate of insurance here was issued to plaintiff's intestate, contained this language, "Insurance shall become effective on the lives of all insured debtors of the creditor under the terms and conditions hereinafter provided, effective concurrently with the inception of each such debtor's indebtedness, and shall continue until the expiration date stated in the certificate evidencing the insurance issued under this policy to each such debtor"; that the inception of Mrs. May McCallum's indebtedness to the Association was 3 January 1959, when the Association issued its check and interest began to accrue on the loan; and the other attendant facts and circumstances, we are of opinion that the challenged evidence was competent and material for two purposes: One. As tending to show that the writing into the certificate of insurance issued to Mrs. May McCallum here of the effective date "12/31/58" and of the expiration date "12/31/59," instead of the effective date 1/3/59 and of the expiration date 1/3/60, was contrary to the previous understanding of the parties, and was caused by mutual mistake or was caused by the mistake of plaintiff and his mother superinduced by inequitable conduct of the Association and defendant. Two. As tending to show that when the Association and defendant inserted the effective date of the certificate of insurance issued to Mrs. May McCallum here antedating the certificate of insurance before the inception of her indebtedness to the Association, contrary to the previous understanding of the parties and without informing Mrs. May McCallum and plaintiff, her agent, thereof, and contrary to what it had done on loans made to them in 1954, 1955, and 1956, plaintiff's failure as agent of his mother to examine the certificate of insurance issued to his mother here when he received it and to see the effective and expiration dates is not traceable to that want of diligence which may fairly be expected from a reasonable and prudent man, and that there was no ratification or waiver or estoppel by plaintiff, as his mother's agent, or unreasonable delay by him as her agent in applying for redress after notice of the mistake, so as to bar a recovery by him in this action, particularly as such evidence tends to

show that no rights of innocent third parties are involved, and defendent will not be prejudiced by reformation of the effective date and the expiration date of the certificate of insurance issued to Mrs. May McCallum so as to conform to the agreement and intention of the parties, because it will merely be required to pay what it contracted to pay, and for which insurance it has been paid a premium of $150. It is manifest from the findings of fact that Mrs. May McCallum, due to her physical condition, was unable to read the certificate of insurance issued to her here. In the former opinion in this case it is said:

> "We have held in *Bank of Union v. Redwine,* 171 N.C. 559, 88 S.E. 878, and in *Finishing and Warehouse Co. v. Ozment, supra* [132 N.C. 839, 44 S.E. 681], that a person's failure to read an instrument before signing it does not necessarily or always prevent reformation. To the same effect see 45 Am. Jur., Reformation of Instruments, § 79; 29 Am. Jur., Insurance, p. 712; Anno. 81 A.L.R. 2d, pp 16-18; 76 C.J.S., Reformation of Instruments, pp. 399-400; Malone, 'The Reformation of Writings under the Law of North Carolina,' 15 N.C.L.R. 155, 174-6. On page 176 Malone, after reviewing a number of our decisions, states: 'Certainly the rule that failure to read is a positive bar to recovery cannot be accepted at its face value.' "

See also: Couch on Insurance, 2d Ed., Vol. 1, § 8:2, Dating Policy, quoted in *McCallum v. Insurance Co., supra;* 45 Am. Jur., Reformation of Instruments, § 75; 29 Am. Jur., Insurance, § 351; 76 C.J.S., Reformation of Instruments, §§ 31, 32, and 46.

Whether or not a party seeking reformation will be denied relief on the ground that he was negligent depends on the facts and circumstances of the particular case. *Setzer v. Old Republic Life Insurance Co.,* 257 N.C. 396, 126 S.E. 2d 135, heavily relied on by defendant, was a case in which this Court affirmed a judgment below sustaining a demurrer to the complaint, and is factually distinguishable from the instant case. *Coppersmith v. Insurance Co.,* 222 N.C. 14, 21 S.E. 2d 838, and other cases cited in defendant's brief, and relied upon by it, are also factually distinguishable from the instant case.

Defendant assigns as error this finding of fact: "The inception of Mrs. May McCallum's indebtedness was on January 3, 1959, the day the executed loan application, note and chattel mortgage, and application for insurance were received by and acted upon by the Association; and no indebtedness existed before that date." This assignment of error is overruled.

This finding of fact is supported by the following competent evidence: Plaintiff testified to the effect that the check for $2,638.25 received by him from the Association was dated 3 January 1959. Mrs. Betty Ivey, a witness for plaintiff and an employee of the Association, testified on direct examination: "The Association only charged interest on the loan from the date the money was actually advanced, not from the date of the note but from the date the man received it." She testified on cross-examination: "We only charged interest for the time he actually had the loan." Merelle Harris, a witness for plaintiff and secretary-treasurer of the Association, testified: "A loan is set up on the books of the Association as a loan the date that it is closed, not when the application is approved." There can be no indebtedness without a debt. Surely, no one can seriously contend that the mere approval of an application for a loan by a lender creates an indebtedness on the part of the applicant before he receives one dollar of the loan applied for. This challenged finding of fact is supported by competent evidence and is conclusive on appeal. *Bizzell v. Bizzell, supra.*

We have examined all defendant's assignments of error to Judge McKinnon's essential findings of fact and find that all his essential findings of fact are supported by competent evidence, and consequently conclusive on appeal. In a trial by the court under agreement of the parties, the court is required to find and state only the ultimate facts. G.S. 1-185; *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885. When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the court. *Hodges v. Hodges, supra.* Judge McKinnon's essential findings of fact are not contradictory, as contended by defendant. All defendant's assignments of error to the findings of fact are overruled.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of plaintiff's evidence; defendant offered no evidence.

In the former appeal in this case, this Court held that the amended complaint stated a cause of action to reform the certificate of insurance issued to Mrs. May McCallum in regard to the period of coverage. In the hearing before Judge McKinnon, plaintiff introduced evidence tending to support the allegations of fact in his amended complaint, which considered in the light most favorable to him was sufficient to support a favorable finding for him on any issues raised by the pleadings. Consequently, Judge McKinnon properly overruled defendant's motion for judgment of compulsory nonsuit. *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486.

Defendant assigns as error Judge McKinnon's conclusions of law second, fourth, fifth, sixth, seventh, and eighth, and this part of the third, "which was January 3, 1959," and the last word in this conclusion, "thereafter." All these assignments of error are overruled.

Judge McKinnon's essential findings of fact are abundantly supported by competent legal evidence, and his findings of fact support his conclusions of law, which are correct on the facts and circumstances found by him to exist in the instant case, according to the law stated in the opinion on the former appeal and the opinion in this case, and they in turn support his judgment. No error of law appears upon the face of the record proper.

All defendant's assignments of error, whether discussed above or not, have been carefully examined, and all are overruled. The judgment below is

Affirmed.

CAROLINA POWER & LIGHT COMPANY, PETITIONER v. JACK BEN CREASMAN AND WIFE, NORMA K. CREASMAN, AND BUNCOMBE COUNTY, NORTH CAROLINA, DEFENDANTS.

(Filed 10 July 1964.)

1. Eminent Domain § 7a—

The petition in condemnation proceedings should describe the land sought to be condemned by reference to uncontroverted monuments, and condemnor absent an amendment, may ordinarily acquire only the property described, G.S. 40-12, and it is not according to the usual course and practice for controversy as to the location of the land to be settled in the condemnation proceedings.

2. Appeal and Error § 41—

An instruction, given at the end of a protracted trial, that the jury should not consider certain incompetent evidence theretofore admitted over a period of days may not cure the error when it is apparent that the instruction could not have erased the prejudicial effect from the minds of the jurors.

3. Eminent Domain § 6—

Evidence of speculative and conjectural inconveniences from insects, fog, ashes, smoke, etc., anticipated from the maintenance of condemnor's dam and power plant, is incompetent.

4. Eminent Domain § 5—

Where respondent, in the use of his land, has treated it as an entity, it must be so considered when condemnor takes a part thereof, and the

respondent is entitled to compensation for the fair market value of the land taken and for the permanent injuries to the remaining property by reason of the severance and also by reason of the use to which the land taken may or probably will be put, but he is not entitled to compensation for damages sustained to his remaining land by reason of the use to which condemnor puts its other lands located in the vicinity, since these damages do not result from the taking but are common to all property in the neighborhood.

5. Eminent Domain § 6—

In the condemnation by a power company of a small part of respondent's land solely for the purpose of access to water impounded by dams in connection with its power plant, evidence of depreciation in value of defendant's remaining land incident to the maintenance and operation of the power plant and railroad for the transportation of coal thereto, the change in the nature of the locality from residential to industrial, and the maintenance of the dam and the lake, is incompetent, since such damages are common to the entire locality and do not result to respondent's remaining land from the taking of the small portion thereof.

6. Trial § 33—

An erroneous instruction in regard to the law must be held for error notwithstanding it is contained in the statement of a contention.

7. Eminent Domain § 12—

The court is authorized to tax counsel fees as a part of the cost in eminent domain proceedings only in regard to counsel appointed by the court to protect the rights of parties unknown. G.S. 40-19, G.S. 40-24.

APPEALS by petitioner and by respondents Creasman from *McLean, J.*, September 1963 Session of BUNCOMBE.

This is a condemnation proceeding in which petitioner, in connection with its construction, maintenance and operation of a new steam plant for the generation of electricity on Powell Creek in Limestone Township, Buncombe County, North Carolina, sought to acquire the fee simple title to a portion of the land in said township owned by Jack Ben Creasman and wife, Norma K. Creasman, subject to unpaid taxes due and owing to Buncombe County. Hereafter, the Creasmans will be referred to as respondents.

The parcel of land petitioner sought to condemn is described in the petition as follows:

"Beginning at a stake in the western margin of Heywood Road, the southeastern corner of J. J. Creasman and the northernmost corner of the Second Tract described in the deed recorded in Book 813, page 63, Buncombe County Registry, and runs thence, with and along the southeastern line of J. J. Creasman and the northwestern line of said Second Tract S. 51° 58′ 27″ West 20.90 feet

to a stake; thence South 9 deg. 42' 28" East 57.44 feet to a stake in the western margin of Heywood Road; thence, with and along the western margin of said road, North 5 deg. 34' 1" East 69.82 feet to the point of beginning, containing .012 acre, as shown on a map of Colburn & Gove, Engineers, entitled 'J. B. Creasman property, Limestone Twp., Buncombe Co., N.C.,' copy of which is attached to and made a part of this petition for condemnation."

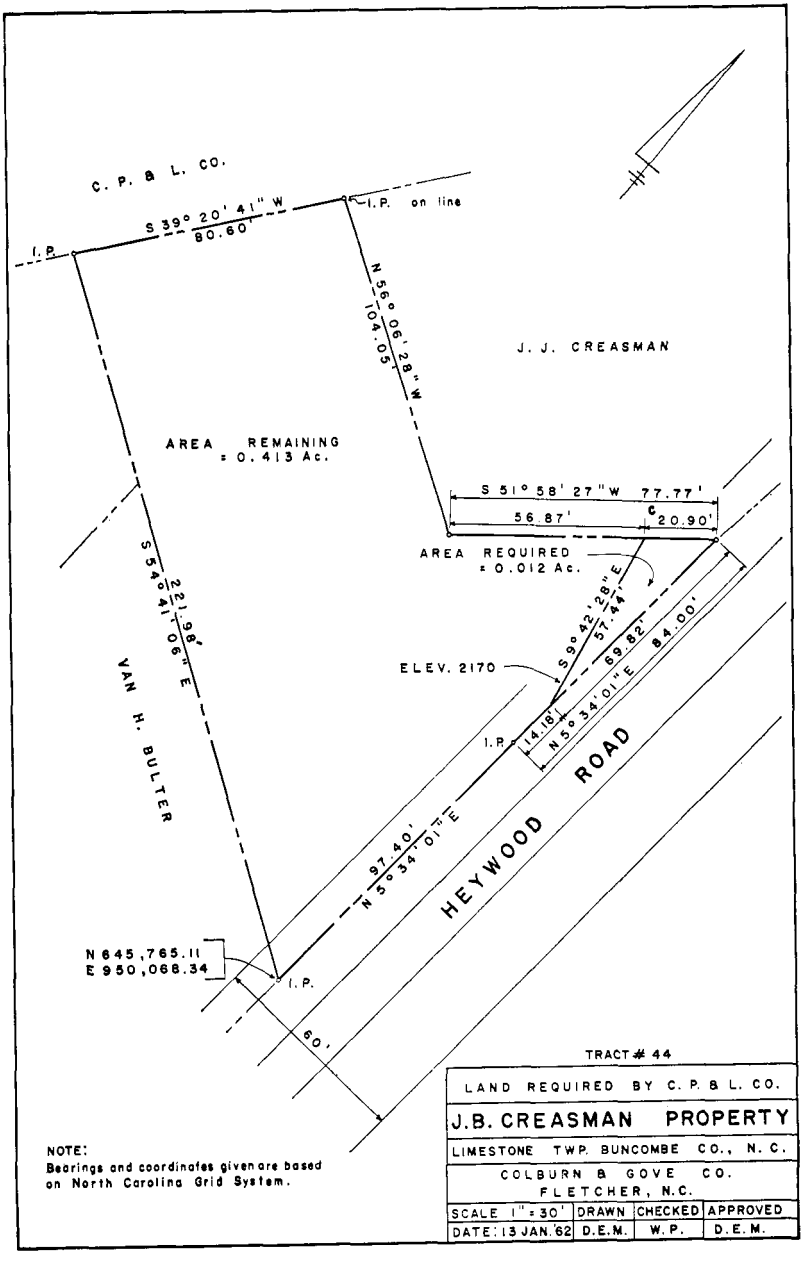
The map attached to the petition and introduced in evidence as petitioner's Exhibit A is reproduced on the next page.

Respondents, in their amended answer, admitted ownership of the lands described in the petition, "with all the appurtenances thereunto belonging."

As a further answer and "CROSS-CLAIM," respondents alleged in substance: (1) Respondents own in fee simple the lands described as two (adjoining) tracts in the deed recorded in Book 813, page 63, Buncombe Registry, "which lands abut the west side of Heywood Road for a distance of 181.4 feet," and which, except as stated in the opinion, are the lands within the outer boundaries shown on Exhibit A. (2) They have "a special right of easement and user" in Heywood Road as a means of access from their lands northeast to U. S. Highway # 25, Skyland and Asheville. (3) Their "homeplace dwelling" and other improvements are situated on the "remainder of the lands," which "consists of approximately one-half of an acre." (4) Respondents' lands, improvements and easement, prior to condemnation of a portion thereof by petitioner and the closing of Heywood Road to travel northeast from their lands, had a fair market value of $15,000.00; but after said condemnation and closing of Heywood Road their lands have a fair market value of $6,000.00.

Commissioners appointed by the clerk in accordance with the procedure prescribed in G.S. Chapter 40 assessed respondents' damages at $1,150.00. Both petitioner and respondents filed exceptions to the Commissioners' report. The clerk overruled all exceptions, confirmed the report and ordered and adjudged "that the petitioner be, and it is hereby placed and put into possession of the lands and premises described in the petition." Both petitioner and respondents excepted to the clerk's order, appealed and demanded a jury trial.

In the superior court, after "(t)he Jury was duly chosen, sworn and impaneled and the pleadings read," — it was "STIPULATED AND AGREED by and between the petitioner and the respondents that the petitioner has a right to condemn the lands described in the petition as shown on the map, in that shaded portion shown on the map marked Petitioner's Exhibit 'A,' triangular in shape and containing 0.012


C. P. & L. CO.
I.P. on line
S 39° 20' 41" W
80.60
I.P.
N 56° 06' 28" W
104.05
J. J. CREASMAN
AREA REMAINING
= 0.413 Ac.
S 51° 58' 27" W 77.77'
56.87'
C
20.90'
AREA REQUIRED
= 0.012 Ac.
S 54° 41' 06" E
221.98'
S 9° 42' 28" E
57.44'
69.82'
84.00'
ELEV. 2170
VAN H. BULTER
I.P.
14.18'
N 5° 34' 01" E
97.40'
N 5° 34' 01" E
HEYWOOD ROAD
N 645,765.11
E 950,068.34
I.P.
60'
TRACT # 44
LAND REQUIRED BY C. P. & L. CO.
J.B. CREASMAN PROPERTY
LIMESTONE TWP. BUNCOMBE CO., N. C.
COLBURN & GOVE CO.
FLETCHER, N.C.
SCALE 1" = 30' | DRAWN | CHECKED | APPROVED
DATE: 13 JAN. '62 | D.E.M. | W.P. | D.E.M.
NOTE:
Bearings and coordinates given are based on North Carolina Grid System.

acres." Thereafter, much evidence was offered by both petitioner and respondents.

The issues submitted and the jury's answers appear in the record as follows:

"1. Do you find the margin of Heywood Road to be the line P-W-O, as contended by the Respondents? ANSWER: *Yes* or

"Do you find the margin of Heywood Road to be the line A-B-D, as contended by the Petitioner? ANSWER: —

"As shown on the map offered in evidence by the Petitioner, and marked Exhibit B.

"2. What amount are the defendants entitled to recover as compensation for the land acquired by the petitioner in this proceeding, including damages to the remaining lands of the defendants? ANSWER: *$5,400.*

"3. What amount, if any, of the compensation set forth in the second issue is attributable to the closing of Heywood Road? ANSWER: *None.*"

After recitals, the judgment provides:

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

"1. That the petitioner, Carolina Power & Light Company, its successors, lessees and assigns, be, and they are hereby vested with the fee simple title to the following particularly described lands and premises, to wit: Lying and being in Limestone Township, Buncombe County, North Carolina:

BEGINNING at a stake in the Western margin of Heywood Road (the said margin of said road being the edge of the stone surface of the roadbed of Heywood Road); said stake marking the point of intersection of said margin of said road and a line drawn on topographical elevation 2170; thence proceeding along and with the said margin of said road, the eastern boundary line of the property of Jack Ben Creasman and wife, Norma K. Creasman, North 5 deg. 34 min. 01 sec. East 120 feet, more or less, to a stake in said margin of said road, the common corner of the property of Jack Ben Creasman, *et ux,* and J. J. Creasman; thence proceeding along and with the southern line of the J. J. Creasman tract 42 feet, more or less, to the point where said line is intersected by topographical elevation line 2170; thence proceeding along and with topographical elevation line

2170 South 9 deg. 42 min. 28 sec. East 90 feet, more or less, to the place of the BEGINNING.

Containing 0.042 acre, more or less, and being a triangular strip bounded on the East by the margin of Heywood Road (the western edge of the stone surface of Heywood Road), on the North by the property of J. J. Creasman and on the West by topographical elevation line 2170, and being also the area defined on petitioner's Exhibit 'B,' by the points and lines marked W-O-X B-C-D; and

Being all of the property of Jack Ben Creasman and wife, Norma K. Creasman, lying east of and below the elevation of topographical elevation 2170 as projected and shown on petitioner's Exhibit 'B'.

TO HAVE AND TO HOLD the above described land and premises with all the appurtenances thereunto belonging or in anywise appertaining unto the petitioner, its successors and assigns forever, free and clear from all liens, claims and encumbrances of whatsoever kind and nature, and the defendants Jack Ben Creasman and wife, Norma K. Creasman, are hereby divested and barred of all right, title and interest in said described lands and premises."

Thereafter, the judgment provides for the payment by petitioner of the additional sum of $4,350.00 *(sic)* ($1,150.00 having been theretofore paid by petitioner into the office of the clerk), plus interest as set forth in detail, and costs.

Petitioner excepted and appealed.

The judgment also contained a provision in which the court denied *as a matter of law* an application by respondents that the court fix and allow fees to respondents' counsel and order payment thereof by petitioner. Respondents excepted to and appealed from this provision of the judgment.

Van Winkle, Walton, Buck & Wall and Herbert L. Hyde for petitioner.

Lamar Gudger, Sanford W. Brown and James P. Erwin, Jr., for respondents Creasman.

BOBBITT, J.

PETITIONER'S APPEAL

In condemnation proceedings, the petition, when filed by the condemnor, "must contain a description of the real estate which the corporation seeks to acquire." G.S. 40-12; 29 C.J.S., Eminent Domain § 259; 18 Am. Jur., Eminent Domain § 325. The condemnor must "first locate the property." *Gastonia v. Glenn*, 218 N.C. 510, 11 S.E. 2d 459. Ordinarily, absent an amendment, the only property a condemnor may acquire is that described in the petition. See 29 C.J.S., Eminent Domain § 322.

Here, the petition describes a parcel of land fronting 69.82 feet on the western margin of Heywood Road, containing (.012) 12/1000ths of an acre, while the judgment describes a parcel of land fronting 120 feet, more or less, on the western margin of Heywood Road, containing (.042) 42/1000ths of an acre. This unusual result was reached in the manner stated below.

No issue or controversy was raised by the pleadings or otherwise prior to the commencement of the trial concerning the location on the earth's surface of the parcel of land petitioner sought to condemn. However, during the testimony of Mr. Gove, petitioner's first witness, it became apparent that a controversy did exist as to the location of the western margin of Heywood Road. Mr. Gove, who prepared Exhibit A from a survey he made, testified, in effect, the western margin of Heywood Road as shown on Exhibit A is some eleven or twelve feet west of the western edge of the gravel or stone roadway. If so, the western margin of Heywood Road was west of an embankment and in a portion of the area treated as respondents' yard. Respondents asserted the western edge of the gravel or stone roadway was the western margin of Heywood Road.

Respondents contended: (1) The parcel of land petitioner sought to condemn is described in the petition as *beginning* in the western margin of Heywood Road. (2) Petitioner sought to condemn up to the line (elev. 2170) south 9° 42′ 28″ east 57.44 feet as shown on Exhibit A. (3) Petitioner sought to condemn a triangular parcel (.042 acre) enclosed by these lines: (a) the line south 9° 42′ 28″ east extended to the western edge of the gravel or stone roadway; (b) the line south 51° 58′ 27″ west extended to the western edge of the gravel or stone roadway; (c) a closing line along the western edge of the gravel or stone roadway 120 feet more or less (north 5° 34′ 01″ east).

Petitioner contended: It sought to condemn the parcel of land (.012 acre) described in its petition, having a frontage of 69.82 feet on the western margin of Heywood Road, and no more.

A map identified as Exhibit B was placed upon a blackboard. Originally, Exhibit B was only a greatly enlarged copy of Exhibit A. However, additional lines were drawn thereon and particular locations thereon were identified by letters. For present purposes, it is sufficient to say: The western margin of Heywood Road, if located as contended by respondents, was indicated on Exhibit B by the line P-W-O. The western margin of Heywood Road, if located as contended by petitioner and as shown on Exhibit A, was indicated on Exhibit B as the line A-D-B.

A controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding. It is for the condemnor to determine what land it seeks to condemn (*Morganton v. Hutton & Bourbonnais Company*, 251 N.C. 531, 112 S.E. 2d 111) and to describe it in its petition by reference to uncontroverted monuments. The court's efforts to resolve by stipulation the controversy as to what land petitioner sought to condemn were in vain. There was no amendment of the petition. In this situation, the court, over petitioner's objection, submitted the first issue. The only apparent purpose thereof was to have the jury determine what land petitioner sought to condemn. While decision is based on other grounds, it is noted that uncertainty as to what land was being condemned gave rise to uncertainty in much of the testimony relating to before and after fair market values of respondents' property.

Petitioner, prior to the next trial, should determine and identify on the earth's surface by uncontroverted monuments the land it seeks to condemn and amend its petition so as to describe this parcel of land.

Respondents offered much evidence tending to show the location, construction, etc., of their dwelling and other improvements on their lands. No part of such improvements are on the parcel (under either contention) petitioner seeks to condemn. All are on the remaining portion of .413 acre, more or less.

There was evidence tending to show the following:

Powell Creek flows west into the French Broad River. Petitioner constructed its dam across Powell Creek approximately twenty-five hundred feet east of the French Broad. The buildings constituting the power plant are 1000-1500 feet east of the dam. The power plant produces electricity from coal. The lake (Skyland Lake), "325 acres of water," is described as a "cooling lake." "(C)ooling water" is taken out of the lake at one point and pumped through the condensers. The condensed boiler steam then enters the cooling lake at a different point, circulates therein and becomes available for further use. The furnace of one boiler "is a bigger area than this Court Room." The smokestack

"is a concrete stack" and "is 393 feet high." When the water of Powell Creek is insufficient, additional water is pumped from the French Broad into Skyland Lake. A railroad line was constructed for the purpose of transporting coal to the power plant.

The male respondent testified: "The steam plant will be located one mile due west from my home." Another witness testified: "This smoke-stack is half a mile from (respondents') property." The male respondent testified: "My home is going to be some 600 feet from the railroad track." Another witness testified the railroad line was a thousand feet from respondents' property.

An arm of Skyland Lake (at normal water line) will be some forty feet from and within sight of respondents' property. The land petitioner seeks to condemn is being acquired as a means of access to the edge of Skyland Lake.

Formerly, respondents, proceeding north from their property along Heywood Road, crossed a bridge (422 feet north of their property) over Powell Creek and continued on Heywood Road until they reached U. S. Highway #25. Then they proceeded on #25 to Skyland or beyond to Asheville. Now Heywood Road dead ends a short distance north of respondents' property, having been barricaded after destruction of the bridge over Powell Creek, and respondents cannot now (on account of Skyland Lake) travel the said route to #25. The road presently available to respondents as a means of access to #25 necessitates travel for an additional mile or so if en route (north) to Skyland or Asheville rather than (south) to Hendersonville.

Although much evidence was admitted, over objections by petitioner, as to the matters referred to therein, the court instructed the jury as follows: ". . . I instruct you to disregard any and all testimony relating to anticipated inconveniences and damages of the defendants from insects, fogs, ashes blown from ash disposal area, fumes blown by the wind, appearance of steam plant, water pollution and noxious odors, the presence of coal smoke and the growth of algae and other matter in and along the edge of the lake, and any and all other speculative and conjectural matters." The instruction was correct. However, for reasons indicated below, the admission of the evidence was error. We apprehend this instruction, given at the end of a protracted trial, was insufficient to remove the prejudicial effect of a mass of incompetent evidence bearing upon the matters referred to in said instruction.

Much evidence was admitted, over objections by petitioner, to the effect respondents' water service and sewer service were less satisfactory after relocation of the lines due to the impounding of water to form Skyland Lake. The record shows the court, before charging the

jury, stated to counsel for petitioner that he would instruct the jury respondents could not recover compensation on account of the changes in the water and sewer lines. The court, through inadvertence, failed to give such instruction.

Much evidence was admitted, over objections by petitioner, as to the inconvenience caused by the closing of Heywood Road north of respondents' property on account of (1) the greater distance to the Skyland business area, (2) the greater distance to church, (3) a less convenient place for the children to board the school bus, etc. Evidence offered by petitioner tends to show the said portion of Heywood Road was closed and an alternate road provided by action of the Board of Commissioners of Buncombe County pursuant to G.S. 153-9(17). In this connection, attention is called to *Snow v. Highway Commission, ante,* 169, 136 S.E. 2d 678.

Much evidence was admitted, over objection by petitioner, to the effect the construction, maintenance and operation by petitioner of said steam plant, together with the dam, the lake, the railroad, etc., in a desirable rural residential community, seriously and adversely affected the fair market value of property in the community. Concerning such evidence, the court instructed the jury as follows: "They (respondents) say and contend that this was formerly residential property and that that was its highest and best use, was for residential property. They say and contend that the location of this lake, the location of the plant in the immediate vicinity or even some two or three thousand feet or further, you will recall the evidence about that, that it tends to change the residential nature of the neighborhood into an industrial area, so they say and contend that that decreases the value of their property and that they are entitled to have you assess the diminution in value caused by that." While couched in the language of a contention, this instruction implies clearly that these matters were for consideration by the jury as a basis for the awarding of damages. For reasons stated below, the admission of this evidence and the (quoted) instruction with reference thereto, constitute prejudicial error.

Just compensation, to which the landowner is entitled, is the difference between the fair market value of the property *as a whole* immediately before and immediately after the appropriation (condemnation) of a portion thereof. *Abernathy v. R. R.*, 150 N.C. 97, 63 S.E. 180; *Light Co. v. Carringer*, 220 N.C. 57, 16 S.E. 2d 453. Under our decisions, "the owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also *the damages thereby caused*, if any, to the

remaining land." (Our italics). *Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353; *Moses v. Morganton*, 195 N.C. 92, 99, 141 S.E. 484.

In *United States v. Grizzard*, 219 U.S. 180, 31 S. Ct. 162, 55 L. Ed. 165, 31 L.R.A. (N.S.) 1135, Mr. Justice Lurton said: "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder *resulting from that taking*, embracing, of course, *injury due to the use to which the part appropriated is to be devoted.*" (Our italics). This excerpt from Mr. Justice Lurton's opinion has been quoted with approval by this Court: *Power Co. v. Hayes, supra; Moses v. Morganton, supra; Ayden v. Lancaster*, 197 N.C. 556, 150 S.E. 40; *Light Co. v. Rogers*, 207 N.C. 751, 178 S.E. 575.

In *Boyd v. United States* (C.A. 8th), 222 F. 2d 493, Circuit Judge Johnsen, after quoting said excerpt from *Grizzard*, continues: "The use to which an appropriated part of a tract is to be devoted means, for purposes of any depreciating injury occasioned to its adjoining remainder, 'the uses to which the land taken may, or probably will, be put.' *Sharp v. United States*, 191 U.S. 341, 352, 24 S. Ct. 114, 116, 48 L. Ed. 211."

Decisions cited by respondents, considered below, are in accord with and applications of the rule stated above.

In *Durham v. Lawrence*, 215 N.C. 75, 200 S.E. 880, the city condemned a permanent easement consisting of a right of way (25 feet wide and extending 2161.7 feet) across defendants' land for a sewer outfall and pipe line and on said sewer line through defendants' land there were five manholes. This Court found no error in the statement by the trial judge of defendants' contention there was reasonable ground to apprehend the sewer lines would sometimes become stopped up between manholes and cause the manholes to overflow. Suffice to say, defendants' said contention related to damage to their remaining lands on account of the use of the right of way for the very purpose for which it was condemned.

In *Power Co. v. Hayes, supra*, it was held the owners "were entitled to recover compensation both for the land actually taken and for the permanent injuries caused to the remaining land *by the taking of a part thereof, and using same for impounding water thereon.*" (Our italics).

In *Power Co. v. Russell*, 188 N.C. 725, 125 S.E. 481, and in *Colvard v. Light Co.*, 204 N.C. 97, 167 S.E. 472, and in *Light Co. v. Carringer, supra*, the power company had condemned (appropriated) an easement across a tract of land. It was held the owner was entitled to recover

compensation for damages to his remaining property on account of the construction and maintenance of power lines on the condemned portion.

In *R. R. v. Manufacturing Co.,* 169 N.C. 156, 85 S.E. 390, the railroad company condemned a right of way over defendant's lands, upon which defendant had erected a mill, buildings for employees and other appurtenances. This Court held competent evidence as to noise, smoke, cinders, jarring, discomfort, inconveniences, and other like causes *incident to the running of the trains on the right of way,* as bearing upon the depreciation in value of the whole property on account of the use of the right of way for the purposes for which it was condemned. Of like import: *R. R. v. Armfield,* 167 N.C. 464, 83 S.E. 809.

The decisions cited in the preceding paragraph are in accord with the following: "When part of a tract of land is taken for a railroad, while the personal annoyance of the owner cannot be considered, the damage from the noise, smoke, soot, ashes, and vibration necessarily arising from the operation of the trains *upon the land taken,* so far as it affects the market value of the remaining land, is a proper element of damage. It has been held, however, that such damage must be peculiar to the remainder area and not such as is common to all neighborhood property." (Our italics) Nichols on Eminent Domain, Third Edition, Volume 4, § 14.2462, and cases cited; Lewis on Eminent Domain, Third Edition, § 710.

Where a tract of land has been used and treated as an entity, it must be so considered in assessing compensation for the taking of part of it. "If only a portion of a single tract is taken, the owner's compensation for that taken includes any element of value arising out of the relation of the part taken to the entire tract." *United States v. Miller,* 317 U.S. 369, 87 L. Ed. 336, 63 S. Ct. 276. "The rule supported by better reason and the weight of authority is that the just compensation assured by the 5th Amendment to an owner a part of whose land is taken for public use, does not include the diminution in value of the remainder, caused by the acquisition and use of adjoining lands of others for the same undertaking." *Campbell v. United States,* 266 U.S. 368, 69 L. Ed. 328, 45 S. Ct. 115, and cases cited; Annotation: 170 A.L.R. 721 and supplemental decisions.

The owner is entitled to compensation for damage, if any, to his remaining land, which "is a consequence of the taking" of a portion thereof, 18 Am. Jur., Eminent Domain § 265, that is, "for the injuries accruing to the residue from the taking," 29 C.J.S., Eminent Domain § 139, which includes damage, if any, resulting from the condemnor's use of the appropriated portion.

In *Boyd v. United States, supra,* the Government condemned, as part of the site for an air base, 15.7 acres of a farm, leaving the owners with their residence, outbuildings and 66.3 acres of land. The air base consisted of an area of 5,139.47 acres, the 15.7 acres being located at the extreme northern tip. It was held necessary, in order for the owners to recover compensation for damages to their remaining property, to show "some particular utilization of their 15.7 taken-acres in the project" that would constitute "a direct and identifiable element of depreciation," *e.g.,* the intended use thereof as a location for the storage of large gasoline tanks or ammunition. It was held the owners could not recover for depreciation caused by the location and operation of the air base generally and not "provably a product of their 15.7 taken-acres," for in this respect they would be "in no different position of damage than their neighbors, whose farms the air base adjoined, although none of their land had been appropriated for inclusion therein." In accord: *United States v. Kooperman* (C.A. 2nd), 263 F. 2d 331; *Winn v. United States* (C.A. 9th), 272 F. 2d 282; *Spring Valley Water Works & Supply Co. v. Haslach,* 202 N.Y.S. 2d 889.

Petitioner seeks to condemn a small (under either contention) triangular portion of respondents' lands. Respondents are entitled to recover compensation both for the land actually taken and for the permanent injuries to their remaining property caused by the severance and the use to which the land taken may, or probably will, be put.

Much of the evidence admitted over objections by petitioner (there are nearly 350 exceptions to rulings on evidence) concerns matters relating to general changes in the community, including the depreciation of the fair market value of residential property, caused by the construction, maintenance and operation by petitioner of said steam plant, together with the dam, the lake, the railroad, etc. Such damages, if any, as may be caused *thereby* to respondents' remaining property occur without reference to whether any portion of respondents' property is condemned. In short, they do not result from the taking of a portion of respondents' property.

This statement from *Spring Valley Water Works & Supply Co. v. Haslach, supra,* is appropriate to the present factual situation: "Therefore, it is clear that consequential damages to be awarded the owner for a taking of a part of his lands are to be limited to the damages sustained by him by reason of the taking of the particular part and of the use to which such part is to be put by the acquiring agency. No additional compensation may be awarded to him by reason of proper public use of other lands located in proximity to but not part of the lands taken from the particular owner. The theory behind this denial

of recovery is undoubtedly that such owner may not be considered as suffering legal damage over and above that suffered by his neighbors whose lands were not taken."

On petitioner's appeal, for error in the admission of incompetent evidence and in the instruction with reference to such evidence, petitioner is entitled to and is awarded a new trial.

RESPONDENTS' APPEAL

While the award of a new trial vacates the judgment and verdict, we deem it appropriate to consider and decide the question presented by respondents' appeal. Their appeal is from the provision in the judgment in which the court denied their application for an order fixing and allowing fees to their counsel and ordering payment thereof by petitioner. This provision of the judgment is considered and treated as if it were a separate order.

The court's ruling and order were correct. The counsel fees the court is authorized to tax in condemnation proceedings under G.S. 40-19 are fees to counsel appointed by the court "to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown" in accordance with G.S. 40-24. *R. R. v. Goodwin,* 110 N.C. 175, 14 S.E. 687; *Durham v. Davis,* 171 N.C. 305, 88 S.E. 433. Hence, the court "order" denying respondents' said application is affirmed.

On petitioner's appeal: New trial.

On respondents' appeal: Order affirmed.

JOHN H. TOONE v. JOHN BAXTER ADAMS, KENNETH E. DEAL AND RALEIGH BASEBALL, INC.

(Filed 10 July 1964.)

1. Negligence § 1—

Breach of contract cannot give rise to a cause of action in tort, nor may a contract substitute a different standard of care for that prescribed by the common law, but a contract may create a relationship between the parties out of which a duty arises, the breach of which may constitute negligence.

2. Games and Exhibitions § 3—

In this action by an umpire against a baseball club and its manager to recover for an assault made by a patron, the complaint alleged the relationship between the parties, and therefore allegations in the complaint

setting forth contractual duties of the club to the umpire in respect to his protection were properly stricken on motion.

3. Pleadings § 34—

Allegations which are irrelevant or evidentiary are properly stricken on motion. G.S. 1-153.

4. Negligence § 1; Games and Exhibitions § 3—

Rules governing the conduct of games may be admissible in evidence in proper instances as tending to show the care required of the parties in the relationship created by the contract, even though allegations in regard to such rules may properly be stricken from the complaint as being evidentiary.

5. Games and Exhibitions § 3—

Allegations to the effect that two policemen were escorting plaintiff umpire to the dressing room for protection when plaintiff was assaulted without provocation or warning by a patron at the game, *held* to affirmatively disclose that failure to provide police protection was not one of the proximate causes of the injury.

6. Negligence § 1—

The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care to protect others from harm, and if a person intentionally creates a situation which he knows, or should know, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another, he may be held liable for the resulting injury, but he may not be held liable if the wrongful act on the part of the other could not have been reasonably foreseen under the circumstances.

7. Games and Exhibitions § 3; Assault and Battery § 1— Baseball club and manager held not liable for assault made on umpire under facts.

Allegations to the effect that during the progress of a baseball game the manager of one of the teams on several occasions went on the field and violently protested the decision of the umpire, that the last time the umpire had to remove the manager from the game and the manager told the umpire that the umpire would receive no help from the manager nor from his players in getting off the field, that after the termination of the game the umpire walked unharmed to home plate then proceeded to an exit from the field and obtained two policemen to accompany him, and that while on the way with the policemen to the dressing room, a fan, without warning, made an unprovoked assault on him, *held* insufficient to state a cause of action against the manager or the ball club, since the manager was not present when the assault was made and therefore could not have incited its commission, nor could he have reasonably foreseen that his conduct in protesting the decision would at a later time cause a patron to make an assault.

APPEAL by plaintiff from *Walker, S. J.*, December 1963 Civil A Session of WAKE.

Plaintiff appeals from an order striking certain portions of his complaint and sustaining the defendants' demurrer to the complaint as thereafter amended.

The complaint, after the motion to strike had been allowed, alleged the following facts:

In June 1960 plaintiff was an umpire for the Carolina League, Inc. The defendant Raleigh Baseball, Inc., was a member of the Carolina League and, under its auspices, operated a baseball club known as the Raleigh Caps of which defendant Kenneth E. Deal was manager. On the night of June 16, 1960 plaintiff was acting as field umpire at a ball game between the Raleigh Caps and the Greensboro Yankees, both teams being members of the Carolina League. The game was being played in Raleigh and the paid attendance was 3,452. During the second inning, plaintiff had to make a decision whether a ball had been caught by a Raleigh outfielder. He ruled that the player had "trapped" the ball between his glove and the ground and thus it had not been caught. When plaintiff made this decision, defendant Deal charged onto the field and engaged in a verbal controversy with plaintiff. During the third inning plaintiff called a player of the Raleigh Caps out at first base. Again Manager Deal rushed onto the playing field and violently protested the decision. He threatened that if plaintiff made another decision with which he disagreed, he would behave in such a manner that plaintiff would be forced to eject him from the game and his ejection would result in extreme hostility towards plaintiff on the part of the partisan fans. Thereafter, during the ninth inning, plaintiff called a batter-runner safe at first base. The Raleigh players began arguing with plaintiff and defendant Deal again "charged on the field" and protested the decision. During the controversy, the Greensboro Yankees scored two runs and the man on first base advanced to second. The Raleigh players were pushing and shoving the plaintiff who requested defendant Deal to control his players. The request was deliberately disregarded. Deal cursed plaintiff and stated that plaintiff would now be forced to "run him out of the game." Plaintiff promptly informed Deal that he was removed from the game. Before leaving the field, Deal argued and protested for approximately ten minutes. He told plaintiff that he would receive no help from him or his players in getting off the field.

When the game ended fans poured over the right field fence onto the playing field, cursing and challenging plaintiff to fight. Despite these hostile demonstrations plaintiff walked unharmed to home plate where he met his associate umpire. They proceeded to the exit from the

playing field where they obtained two policemen to accompany them to the dressing room. On the way, defendant Baxter Adams, without any cause or provocation, and without warning, struck plaintiff a blow on his head thereby causing him injury.

Plaintiff alleged that the defendants Deal and Raleigh Baseball, Inc. owed him the duty to conduct themselves so as not to incite the fans against him and also to provide him with safe passage from the playing field "either by police or by other agents of the corporation" immediately after the game; that their breach of these duties proximately caused his injuries. He averred that defendants should reasonably have foreseen that Deal's arrogant conduct in charging upon the playing field and his threatening manner and attitude toward the plaintiff would incite a partisan crowd against plaintiff and result in an assault upon him by one or more persons. In conclusion, plaintiff alleged that his injuries were proximately caused by the joint "wilful, wanton, and malicious negligence of the defendants" Adams and Deal for which Raleigh Baseball, Inc. was also liable under the doctrine of *respondeat superior*. He prayed that he recover both compensatory and punitive damages.

In paragraph 6 of his complaint, plaintiff set out certain rules and regulations of the National Association of Professional Baseball Leagues under which the Carolina League operates. *Inter alia,* these rules provide that the home team shall furnish police protection sufficient to preserve order at a game; they authorize the umpire to remove managers, players, spectators, or employees from the game or field for a violation of the rules or unsportsmanlike conduct; and they declare that his "decisions which involve judgment" shall be final and that players or managers shall not object thereto. Upon motion of defendants, these rules and regulations were stricken from the complaint on the grounds that they were evidentiary. Those portions of the complaint wherein plaintiff referred to the rules were likewise stricken.

The defendant Adams filed no answer and judgment by default and inquiry was rendered against him. He is not a party to this appeal.

When the action came on for trial, defendants Deal and Raleigh Baseball, Inc. demurred *ore tenus* to the complaint for failure to state a cause of action in that (1) the alleged acts of Deal did not constitute a breach of any legal duty which the defendants owed to the plaintiff; (2) the facts alleged show no causal relation between the conduct of Deal and the assault by Adams; and (3) Deal could not reasonably have foreseen an assault by a spectator. The court sustained the demurrer and the plaintiff appealed.

Bailey, Dixon & Wooten for plaintiff.

Smith, Leach, Anderson & Dorsett for Kenneth E. Deal and Raleigh Baseball, Inc., defendants.

SHARP, J. The first question raised on this appeal is whether the rules and regulations of the National Association of Professional Baseball Leagues, included in the complaint as paragraph 6, were properly stricken. Plaintiff contends that the rules were properly included in the complaint because they constitute the contract which "governs the relationship between the plaintiff and the demurring defendants."

It is well settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach or in tort if he has been injured as a result of its negligent performance. *Gorrell v. Water Supply Co.*, 124 N.C. 328, 32 S.E. 720; *Jones v. Elevator Co.*, 234 N.C. 512, 67 S.E. 2d 492; *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551. The parties to a contract impose upon themselves the obligation to perform it; the law imposes upon each of them the obligation to perform it with ordinary care and they may not substitute a contractual standard for this obligation. A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty. *Council v. Dickerson, Inc., supra.* The contract merely furnishes the occasion, or creates the relationship which furnishes the occasion, for the tort. *Peele v. Hartsell,* 258 N.C. 680, 129 S.E. 2d 97; *Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893; 12 Am. Jur., *Contracts* § 458; 34 N.C.L. Rev. 253.

The allegation that plaintiff was an umpire for the Carolina League, Inc., of which these defendants were members, remains in the complaint, and establishes the relationship between the parties to this appeal for the purpose of demurrer. Out of this contractual relationship a legal duty devolved upon these defendants to use due care to protect the plaintiff and to refrain from endangering his personal safety while he was acting as their umpire. The inclusion of the specific rules of the Baseball League was, therefore, unnecessary to establish the relationship between these parties. Since the plaintiff, having sued in tort, must accept the standard of care prescribed by the common law, any contract provision prescribing a greater, lesser, or the same standard of care is not relevant to the issue of actionable negligence and should be stricken on motion. *Pinnix v. Toomey, supra.* Therefore, paragraph 6 of the complaint was properly stricken under the rule that a complaint should not contain irrelevant or evidentiary matter. G.S. 1-153.

This ruling, of course, relates only to the pleadings. It would not necessarily determine the admissibility of the stricken rules as *evidence* if this case were one for the jury. Rules governing the conduct of games, workmen in industry, and the operation of private business projects have, in proper cases, been held admissible on the theory that they constitute some indication of the care required under the circumstances and are properly considered by the jury in determining whether defendants' conduct measures up to the standard of the reasonably prudent man. See *Everett v. Goodwin,* 201 N.C. 734, 161 S.E. 316; Annot., 50 A.L.R. 2d 16.

The second question presented is whether plaintiff stated a cause of action against defendants for damages proximately caused by their breach of a duty arising out of the contractual relationship between them.

Plaintiff contends (1) that defendants breached the duty which the home team owed him as umpire, to provide adequate protection for his personal safety during and immediately after the game, and (2) that defendant Deal, acting within the scope of his employment by Raleigh Baseball, Inc., deliberately created an attitude of hostility and personal enmity towards plaintiff which aroused the partisan spectators and thereby incited Adams to commit the assault of which plaintiff complains.

For present day fans, a goodly part of the sport in a baseball game is goading and denouncing the umpire when they do not concur in his decisions, and most feel that, without one or more rhubarbs, they have not received their money's worth. Ordinarily, however, an umpire garners only vituperation — not fisticuffs. Fortified by the knowledge of his infallibility in all judgment decisions, he is able to shed billingsgate like water on the proverbial duck's back. Illustrative of this faculty is the storied conversation of three umpires who were discussing matters of mutual interest:

"Balls and strikes," said one, "I call them as I see them."

"Balls and strikes," said the second, "I call them as they are."

"They are not balls and strikes until I call them," decreed the third.

It is not necessary for us to decide whether a proper concern for the safety of an umpire today requires the members of the League for which he works to furnish an armed guard to protect him from the baseball public. In this case plaintiff is stymied by his allegation that two policemen and an assistant umpire were escorting him at the time he was assaulted by one irate fan out of an attendance of 3,452. How many policemen would he contend were reasonably required for his

adequate protection? Hindsight may indicate that greater vigilance was required of the two who were then acting as plaintiff's escort, but it does not disclose that more were needed to protect plaintiff from the one man who assaulted him. The allegations of the complaint affirmatively disclose that the lack of police protection was not one of the proximate causes of plaintiff's injury.

We come now to the next aspect of the second question. Viewed in the light most favorable to the plaintiff, do the allegations of the complaint justify the inference that Deal's conduct was the proximate cause of Adams' assault upon the plaintiff?

The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care to protect others from harm and a violation of that duty is negligence. It is immaterial whether the person acts in his own behalf or under contract with another. *Council v. Dickerson's, Inc., supra.* An act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another. Restatement, *Torts* §§ 302, 303. What is the application of this general statement of the law to the facts of this case?

"Civil liability for an assault and battery is not limited to the direct perpetrator of the act charged; it extends to any person who by any means encourages or incites that act or aids and abets it." 6 Am. Jur. 2d, *Assault and Battery* § 128. Accordingly, all those who participate directly or indirectly in an assault and battery are jointly and severally liable therefor whether or not they were actually present when the assault was committed. However, there can be no joint liability unless there was such procurement, instigation, or incitation as constitutes, in effect, concert of action. 6 C.J.S., *Assault and Battery* § 27. "One is not responsible for a beating inflicted by another, however wrongful it may be, simply because he thinks the punishment deserved, or is pleased at it, or thinks well of it. He must do something more." *Blue v. Christ,* 4 Ill. App. 351. Plaintiff makes no allegation that there was ever any personal contact or concert of action between Deal and Adams. Apparently, the theory of plaintiff's case is that Deal attempted to incite mob action but succeeded only in inciting Adams. The allegation of the complaint is that Deal intended that his actions should create an extremely hostile feeling toward the plaintiff. However, it does not follow that he actually intended or should reasonably have anticipated that one or more persons would assault plaintiff as a result.

> " 'One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too

> heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen or what, as it is sometimes said, is only remotely and slightly probable'." *Hiatt v. Ritter,* 223 N.C. 262, 25 S.E. 2d 756 (1943).

In *Krudwig v. Koepke,* 227 Wis. 1, 277 N.W. 670, plaintiff was held entitled to recover against two defendants, master and servant, for an assault by the servant when the master was "miles away." The master, as he had promised to do, paid the servant's fine when he was convicted of assault and battery in the criminal court. The court held both defendants liable in the civil action on the ground that the evidence established a conspiracy. In doing so, it made a distinction between *inciting* and *procuring* an assault:

> "In order that one may incite another, that is, to move another to action, to spur him on, persuade him, it is necessary that he be present at the scene of action; otherwise he is directing, ordering, or procuring. In one instance the initiative is with the actor, in the other the initiative is with the one directing, ordering or procuring. The distinction is a very narrow one. . . ."

Under these definitions the absent Deal could not have been guilty of inciting, and plaintiff does not contend that he procured the assault.

We have found no case in this jurisdiction or elsewhere which parallels this one, and counsel have cited us to none. A engages in an altercation with B. C looks on and becomes excited or enraged. Several minutes later C assaults B who then contends that A is liable for inciting C.

The case of *Ash v. 627 Bar, Inc.,* 197 Pa. Super 39, 176 A. 2d 137, is somewhat analogous. There, plaintiff was a patron in defendant's Bar where a shuffle-bowling game was in progress when arguments developed among the players. After plaintiff had bought one round of drinks the bartender demanded that he pay for more. When plaintiff refused, the bartender became furious and shouted, "If you don't get some more money on the bar, I'm going to beat you up." Plaintiff attempted to leave and the bartender started to run round the bar waiving his hands at plaintiff. Plaintiff was knocked unconscious and seriously injured by a blow from behind. The evidence does not reveal whether the blow came from another patron or the bartender. The Court, in holding the 627 Bar, Inc. liable for plaintiff's injuries, said that it had a duty to maintain an orderly place and to protect plaintiff from assaults and insults from employees and patrons both. The court declared that the blow which plaintiff received "was a fruit of the seeds of disorder sown by the bartender" whether it was he or a patron who felled him.

However, that case is clearly distinguishable from the case at hand. There, the injury to the plaintiff occurred almost simultaneously with the violent action of the bartender who, if he did not strike plaintiff himself, surely would have in the next instant had not another done so.

The unsportsmanlike conduct of Deal which plaintiff alleges incited Adams to violence was not contemporaneous with the assault. Indeed, Adams was not present on the field while Deal was protesting the plaintiff's decision and no injury was inflicted upon plaintiff during the course of those altercations, nor was Deal present when Adams struck plaintiff. He knew nothing of Adams' intentions toward plaintiff and an appreciable length of time had elapsed since the altercation which caused plaintiff to eject Deal from the game. To say that Deal's conduct was a proximate cause of the attack on plaintiff would be pure speculation. No one can say whether Adams' assault on plaintiff was his own reaction to the umpire's ruling, to the "rhubarb" created by Deal, to both, or whether he was merely venting pent-up emotions and propensities which had been triggered by the epithets, dares, or challenges of one or more of the 3,451 other fans attending the game.

In *Bird v. Lynn,* 10 B. Mon. (Ky.) 422 (1850), the defendant Bird, who lived at the home of defendants Mr. and Mrs. Jouett, "whipped the plaintiff because he was in the habit of saucing Mrs. Jouett." Apparently, in Kentucky in that day, the liability of Mr. Jouett depended on the liability of Mrs. Jouett who was not present at the time of the assault. In exonerating the Jouetts the Court used language appropriate to this case:

> "As Mrs. Jouett was not present when the trespass was committed, the word *encourage* seems to be not sufficiently definite to express the true ground of liability. If Mrs. Jouett had directed Bird to whip or beat the plaintiff, and he had done it in consequence, this would, undoubtedly, have been an encouragement of the trespass, which would make her a party. If she had said in Bird's presence that the plaintiff was a bad boy and deserved a whipping, or that he had mistreated her, and she wished somebody would whip him, in consequence of which Bird had beaten him, this might, in some sense, have been deemed an encouragement of the trespass, and yet, unless she had used this language for the purpose or with the intention of inciting Bird to commit the act and of thus producing or procuring the trespass, we apprehend that Bird, though in fact committing the act, in consequence of what she had said, should be regarded as a mere volunteer, and that she would not be a co-trespasser on the ground of having encour-

> aged the trespass. To make Mrs. Jouett liable as having encouraged the trespass by words used on a prior occasion, those words must have had a direct relation to the trespass, and have been calculated and intended to produce it by stimulating or exciting some person hearing them to do the act or procure it to be done. If it were sufficient that the act was done in consequence of the words spoken, then one person might be made a trespasser and even a felon against his or her consent, and by the mere rashness or precipitancy or overheated zeal of another, and the mere expression of just anger or resentment, or the statement of a fact calculated to excite indignation against an individual, and to create an opinion or desire that he should be chastised, might make the party using such expressions or making the statement liable for the inconsiderate act of another. Under the operation of such a principle, there would be no safety except in such universal caution and reserve as is neither to be expected nor desired."

In the instant case neither we nor a jury could say that the conduct of Adams was "the fruit of the seeds of disorder" sown by Deal. At the time Adams injured plaintiff he was acting voluntarily and of his own accord. He is legally and morally responsible for his own wrongful acts, and plaintiff has obtained a default judgment against him. The mere fact that both Adams and Deal may have become simultaneously enraged with the plaintiff for the same cause does not establish a concert of action. It would be an intolerable burden upon managers of baseball teams to saddle them with responsibility for the actions of every emotionally unstable person who might arrive at the game spoiling for a fight and become enraged over an umpire's call which the manager had protested. We hold that Adams' assault upon plaintiff was not so related to the unsportsmanlike conduct of Deal that it may be considered a natural and proximate result of it.

The judgment of the Superior Court sustaining the demurrer is Affirmed.

B. F. McMILLAN, CLERK OF THE SUPERIOR COURT OF ROBESON COUNTY, NORTH CAROLINA v. ROBESON COUNTY; V. J. GRIFFIN; D. D. McCOLL; JACK PAIT; GEORGE L. PATE; TRACY W. SAMPSON AND J. E. WATSON, AS THE BOARD OF COMMISSIONERS FOR ROBESON COUNTY; AND T. WADE BRUTON, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA.

(Filed 10 July 1964.)

1. Clerks of Court § 12—

The statutory authority for the clerk of the Superior Court to collect or receive moneys for fines, penalties, judgment costs, etc., carries with it the duty to pay the sums collected to the parties entitled thereto, G.S. 1-241, G.S. 2-3, which duty includes interest or earnings on the funds, and while the allocation of earnings to the persons entitled to the funds may present problems in accounting, that fact does not justify the deprivation of the owners of their property and their share of the earnings.

2. Constitutional Law § 23—

The constitutional provision that no person shall be deprived of his property except by the law of the land applies to interest or earnings on funds in the same manner as it applies to principal. Constitution of North Carolina, Art. I, § 17.

3. Constitutional Law § 24—

Notice and opportunity to be heard are required by both the Federal and State Constitutions before a citizen may be deprived of his property.

4. Same; Declaratory Judgment Act § 2— Cause remanded for necessary parties.

In this action by a clerk of the Superior Court to determine whether he should pay interest received from the investment of moneys from unclaimed court costs, fees, and judgment payments etc., into the general fund of the county in compliance with Ch. 881, S.L. 1955, as amended, *held*, judgment may not be entered when the University of North Carolina is not made a party for the purpose of determining what part of the interest earned, if any, was *escheats* or was abandoned property, Constitution of North Carolina, Art. IX, § 7, G.S. 116-23, or an opportunity for persons representing the owners of the funds to challenge the right of the county to take the earnings therefrom, and therefore the action is remanded for joinder of necessary parties. G.S. 1-260.

APPEAL by plaintiff from *McKinnon, J.*, in Chambers in ROBESON on April 24, 1964.

Plaintiff seeks a judgment determining the constitutionality of C. 881, S. L. 1955, as amended by C. 88, S. L. 1963. The parties waived a jury trial. These facts appear from the pleadings or stipulations.

Annual audits, as authorized by G.S. 2-46, are made by certified public accountants of the funds for which the Clerk of the Superior Court of Robeson County is, by that statute, required to account.

On January 6, 1964, the accountant filed with the board of county commissioners his report and audit covering the period December 1, 1962 — November 30, 1963. The audit, so far as pertinent to the question for decision, showed liabilities of $159,650.15, composed of:

UNDISTRIBUTED COURT COST COLLECTIONS:		
Civil Court Cost Dockets	$ 6,476.92	
Special Proceedings Cost Dockets	75,062.58	
Criminal Court Cost Dockets	14,311.74	
Trust Accounts Payable	2,450.65	
		$ 98,301.89
JUDGMENTS PAYABLE		51,414.19
MISCELLANEOUS ACCOUNTS AND UNDISTRIBUTED ITEMS		66.25
INTEREST COLLECTED FROM INVESTMENTS OF GENERAL FUNDS — UNDISTRIBUTED		9,842.82
DUE TO ROBESON COUNTY GENERAL FUND — Change Fund		25.00
TOTAL LIABILITIES		$159,650.15

Assets to balance the liabilities consisted of: (1) An uncollected account and cash amounting to $78.85; (2) deposit with First Union National Bank (checking account) $38,248.48; (3) five certificates of deposit, dated November 30, 1963, payable November 30, 1964, aggregating $61,682.82; and (4) U. S. Savings Bonds, Series E and J. These bonds cost $59,640.00. The maturity value of these securities is $82,000.

The item $9,842.82, shown as a liability, is composed of: (1) $2,372.42, interest received for the year ending November 30, 1963, and (2) $7,470.40, interest received prior to November 30, 1962.

On January 13, 1964, the Board of Commissioners of Robeson County adopted a resolution requesting plaintiff to pay to the general fund of the county the $9,842.82 earned prior to December 1, 1963. The right to request payment was based on the statute of 1955, as amended in 1963.

Plaintiff, fearful of his right to comply with the request, instituted this action for a judgment declaratory of the rights of the parties. The court held the statute valid and directed plaintiff to "pay into the General Fund of Robeson County all interest income and income revenues received from such investments and any profit from the resale

of such investments as may from time to time come into his hands." The court further adjudged: "[T]he plaintiff, herein, shall not be subjected to any civil liability to any person or party by reason of his carrying out and performing the provisions of this Judgment."

Plaintiff excepted and appealed.

Wm. E. Timberlake for plaintiff appellant.
Dickson McLean, Jr., for defendant appellees.

RODMAN, J. Chapter 881, S. L. 1955, is entitled "AN ACT AUTHORIZING THE BOARD OF COMMISSIONERS AND CLERK OF THE SUPERIOR COURT OF THE COUNTY OF ROBESON TO INVEST CERTAIN FUNDS." Section 1 of the Act relates to the investment of county moneys. Section 2 of the Act, with the 1963 amendments in italics, provides:

"Sec. 2. The Clerk of Superior Court of the County of Robeson is hereby authorized and empowered, in his discretion and with the approval of the board of commissioners of said county, to invest or reinvest any moneys representing unclaimed court costs, fees received, *and judgment payments and all moneys received* and held by him by color of his office, *excepting amounts held by him in specific trust or fiduciary accounts,* in United States Treasury certificates of indebtedness, notes, bonds or bills, or in obligations of any agency or instrumentality of the United States Government if the payment of principal and interest of such obligations is guaranteed by the United States of America, or in bonds or notes of the State of North Carolina. Said clerk may, with the approval of the board of county commissioners, sell any or all of such securities held for investment as provided herein at a price or prices not less than the market price thereof. The interest and revenues received upon such securities and any profit from the sale thereof shall be deposited in and become a part of the general fund of the county: *Provided, however, that if any valid claim with respect to such interest, revenues, or profit shall be asserted and presented to the Board of County Commissioners of Robeson County by any person, said board is hereby authorized to refund to such person out of the general fund of the county the amount of such claim.*"

The Clerk of the Superior Court is authorized to collect: fines, penalties and forfeitures, G.S. 2-42(22); moneys belonging to indigent orphans, G.S. 2-42(26), G.S. 2-53; judgments, G.S. 1-239; costs, including a jury tax, witness fees and fees due officers; insurance payable to minors or other incompetents, G.S. 2-52.

The foregoing statutory references relating to the duty of the Clerk of the Superior Court to collect moneys is not intended to be a complete resume of the statutes imposing this duty. They are merely illustrative. The duty to receive carries with it the duty to pay the sums collected to the parties entitled thereto, G.S. 1-241, G.S. 2-3.

The $98,301.89 listed in the audit as "Undistributed Court Cost Collections" consists of $6,476.92 "Civil Court Cost Dockets." The audit lists under this title 422 civil cases. It shows the name of the defendant, the amount on hand and the date of the last collection. The amounts on hand vary from less than $1.00 in some cases to $500.00 in another. The date of collection varies from November 6, 1949 to November 29, 1963.

Listed under the title "Special Proceedings Cost Dockets" is the sum of $75,062.58; this sum represents collections made in 555 special proceedings. The amounts collected and not distributed vary from less than $1.00 in two instances to as much as $7,099.26 in another instance where the only party listed is designated as a minor. The collections were made between December 16, 1942 and November 29, 1963.

Listed under the title "Criminal Court Cost Dockets" is the sum of $14,311.74; this sum represents undisbursed collections in 186 cases. The amounts collected in the different cases vary from a low of $1.00 to a high of $1,350.00. The dates of collection are as early as February 28, 1948 and as late as November 27, 1963.

Trust Accounts Payable: Under this title is listed $2,450.00; the audit shows this sum is owing to sixty different people. The amounts owing the different beneficiaries vary from a low of $1.50 to a high of $145.00. No other information is given. No reason is given for the failure to make payment to the beneficial owners.

Judgments Payable: Under this title is shown a liability of $51,414.19, representing collections in 145 cases. The audit merely shows the name of the plaintiff, the amount and date collected. The amounts collected vary from a low of $1.35 to a high of $2,206.00. The dates on which collections were made are as early as August 27, 1946 and as late as November 22, 1963.

It is manifest from the foregoing summary that allocation of the earnings which have accrued on the funds paid to the Clerk will present problems in accounting, but that fact does not justify depriving the owners of the funds of their share of the earnings. *Williams v. Hooks*, 199 N.C. 489, 154 S.E. 828; *Bordy v. Smith*, 34 N.W. 2d 331, 5 A.L.R. 2d 250; *United States v. Mosby*, 133 U.S. 273, 33 L. Ed. 625,

10 S. Ct. 327; *Rhea v. Brewster,* 107 N.W. 940, 8 Ann. Cas. 389; *Adams v. Williams,* Ann. Cas. 1912C, 1129, 30 L.R.A. (N.S.) 855; 43 Am. Jur. 120.

The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision, Art. I, Sec. 17, that no person shall be deprived of his property "but by the law of the land," applies to the earnings in the same manner, and with the same force, it applies to the principal.

Presumably the statute, on which defendants rely, was enacted on the assumption that it was a valid exercise of the power to take because of the absence of a lawful owner. The Legislature has the power, subject to constitutional limitations, to enact statutes relating to *escheats* or *bona vacantia.*

Penalties, forfeitures and fines are, by Art. IX, Sec. 5 of our Constitution, to be used for the support of the public schools. Was any part of the money demanded by defendants earned by fines or forfeitures? The record is silent.

Art. IX, Sec. 7 of our Constitution, declares that property accruing "from *escheats,* unclaimed dividends, or undistributed shares of the estates of deceased persons, shall be appropriated to the use of the University." What part, if any, of the funds earning income was *escheated?* If none was *escheated,* what portion, if any, was abandoned property? Does abandoned property belong in the same class with *escheated* property? May the Legislature deprive the University of unclaimed property? *University v. R. R.,* 76 N.C. 103; *University v. High Point,* 203 N.C. 558, 166 S.E. 511.

Are the earnings which the county claims derived from unclaimed fees, unclaimed judgment payments, and other unclaimed moneys held by the Clerk by color of his office, or is the word "unclaimed" restricted to court costs? When does the payment to the Clerk in satisfaction of a judgment, or the earnings of such payment, become "unclaimed?" Is a payment by an insurance company to the Clerk for a minor, or other incompetent beneficiary, in a policy of insurance, an unclaimed fund during the period of incompetency; if not, how soon after the disability is removed does it become an unclaimed fund? Do the earnings on such funds become unclaimed during the period of disability; if not, how soon after the disability is removed do they become unclaimed?

Bona fide claimants may not be deprived of an opportunity to be heard on these crucial questions. "The law of the land" and "due process of law" provisions of the North Carolina and U. S. Constitutions require notice and an opportunity to be heard before a citizen may be deprived of his property. *Marshall v. Lovelass,* 1 N.C. 412; *Phelps v.*

Chesson, 34 N.C. 194; *Parish v. Cedar Co.,* 133 N.C. 478, 45 S.E. 768; *Lumber Co. v. Lumber Co.,* 135 N.C. 742, 47 S.E. 757; sc, 137 N.C. 431, 49 S.E. 946; *Bd. of Education v. Johnston,* 224 N.C. 86, 29 S.E. 2d 126; *Re Melrose Ave.,* 136 N.E. 235, 23 A.L.R. 1233; *Hamilton v. Brown,* 161 U.S. 256, 40 L. Ed. 691, 16 S. Ct. 585; *Security Savings Bank v. California,* 263 U.S. 282, 68 L. Ed. 301, 44 S. Ct. 108, 31 A.L.R. 391; *Standard Oil Co. v. New Jersey,* 341 U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822; *Realty Associates of Portland, Oregon v. Women's Club,* 369 P. 2d 747; 1 Am. Jur. 2d, Abandoned Property, Sections 6, 11, 33 & 34.

"When declaratory relief is sought, all persons shall be made parties who have, or claim, any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." G.S. 1-260. Notwithstanding the clear and specific language of this statute, no one representing the owners of the funds has been afforded an opportunity to challenge the right of Robeson County to take the earnings on his moneys, nor has the University been afforded an opportunity to be heard. If the challenged statute is not in conflict with Art. IX, Sec. 7 of the N. C. Constitution, does it impair rights acquired by the University pursuant to G.S. 116-23.

The record before us fails to show any effort to locate the owners of the moneys received by plaintiff by color of his office. No reason is assigned for retaining, rather than disbursing, these funds. It does appear from the audit that $25,200.00 of U. S. Savings Bonds were purchased in May, 1952. They matured in May of this year. The moneys invested earned $9,800.00. In addition to these earnings, the county will collect this year as interest on the certificates of deposit in excess of $2,200.00. The record is barren of explanation for the delay in disbursing the moneys collected by the Clerk.

We think it apparent that the owners of the sums deposited with the Clerk will, when informed of the asserted right to sequester their earnings, fortify themselves with constitutional guaranties for the protection of their property. They must be accorded an opportunity to assert their rights. Plaintiff acted wisely in refusing the request of the county commissioners.

The extent, if any, to which the provisions of G.S. 1-70 may be utilized in bringing before the court parties necessary for a decision need not now be determined. No attempt has been made to comply with that statute. As to what is necessary in the way of notice, see: *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652.

The judgment is reversed and the cause remanded for compliance with the provisions of G.S. 1-260.

Reversed and remanded.

STATE v. B. B. WILSON, JR.

(Filed 10 July 1964.)

1. Constitutional Law § 29—

A valid indictment returned by a legally constituted grand jury is an essential of jurisdiction.

2. Constitutional Law § 29; Grand Jury § 1—

Where, on motion to quash the bill of indictment on the ground that members of defendant's race had been arbitrarily excluded from the grand jury, it appears that nearly one-fourth of the population of the county in question is of the Negro race and that only two or three Negroes had served on the grand jury of the county within the last seven years, there is a *prima facie* showing of discrimination, and testimony of county officials to the contrary is insufficient to overcome such *prima facie* showing, but there must be competent evidence of nondiscrimination, and if the evidence is conflicting, findings by the court. In the absence of such evidence the indictment must be quashed.

3. Same—

While the burden of proving discriminatory jury practices is upon defendant, this presumption does not relieve the prosecuting attorney of the duty of going forward with the evidence when the defendant has made out a *prima facie* case.

4. Same; Jury § 3—

Statutory provisions in this State, respecting the qualifications, selection, listing, drawing and attendance of jurors is fair and nondiscriminatory and meets all constitutional tests. G.S. 9-1, G.S. 9-3, G.S. 9-4, G.S. 9-7, G.S. 9-24. Constitution of North Carolina, Art. I, § 17; Fourteenth Amendment to the Constitution of the United States.

5. Same—

A person has no right to insist that he be indicted or tried by juries composed of persons of his race or on which persons of his race are represented in any proportion, but only that the juries be selected from all qualified persons regardless of race, and that no person of his race be systematically excluded therefrom.

6. Same—

A jury list is not perforce discriminatory because it is made from the tax list.

7. Same—

If former errors and practices in the selection of juries are eliminated, such former errors cannot effect the validity of an indictment returned after proper revisal of the system for the selection of jurors.

8. Indictment and Warrant § 16—

Quashal of an indictment for insufficient showing that members of defendant's race had not been arbitrarily excluded from the jury list does not entitle defendant to his discharge, but he may be held until an indictment is returned by an unexceptional grand jury.

APPEAL by defendant from *Martin, S. J.*, July 1963 Mixed Session of CLEVELAND.

This is a criminal case. Defendant, a Negro male, age 16, was indicted by the Cleveland County grand jury for the rape of a white woman. Plea: not guilty. Verdict: guilty, with a recommendation of life imprisonment. Judgment: imprisonment in State's prison for life.

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

Charles V. Bell for defendant.

MOORE, J. Before pleading to the indictment (*State v. Covington*, 258 N.C. 501, 128 S.E. 2d 827), defendant moved to quash the bill on the ground that members of his race had been for a long time systematically excluded from service on the grand juries of Cleveland County because of their race, and were systematically excluded from service on the grand jury which returned the true bill against him.

The true bill of indictment was found and returned on 8 July 1963. The trial was begun on 17 July 1963. The motion to quash was made 8 July 1963, and the hearing thereon was commenced 12 July 1963.

According to the 1960 Federal Census the population of Cleveland County is 66,048, of which number 15,250 are Negroes, 23%. Defendant's attorneys were permitted to inspect in open court the scrolls in the box containing the names of the jurors for the county, and they interposed no objection to the manner in which the names appeared on the scrolls. See *State v. Speller*, 229 N.C. 67, 47 S.E. 2d 537. Pursuant to instructions of the county commissioners, the then current jury list had been made under the supervision of the county auditor by copying the names from the county tax lists. There is a separate tax list for each township. The names of white and Negro taxpayers are in the same book for each township but are listed separately. The county auditor explained: "The reason we separate them is the State Board of Assessment requires that we make a separate report of poll tax as to

White and Negro and Indians, and the only reason we separate them is just for our own convenience in preparing this report." The names of taxpayers, white and Negro and male and female, with the exception of nonresidents and deceased persons, were included in the jury list. If taxes were listed to husband and wife, the names of both were put on the list. The list was cut into individual slips or scrolls of uniform size, each bearing only one person's name, and the scrolls were placed in the box. Names of taxpayers were included without regard to payment or nonpayment of taxes. The chairman of the Board of County Commissioners testified that the population of Cleveland County was 66,000 and he would assume that 20% of the Negroes are listed in the tax records. The county auditor stated that some names were marked off the list but he did not know how many Negro names were marked off, that it would be about the same per cent for Negroes as for whites. The clerk-typist who made the list said she didn't know how many Negroes were on the list, she would estimate the number at more than 500 and that if colored women owned property their names were included. The sheriff, who had served for 12 years and 3 years as deputy, stated: "I don't know how many Negroes have served on the grand jury, but I do know there has been a good many. . . . I really don't know whether a Negro woman in this county has ever served on the jury — grand or petit." One Negro served on the grand jury that returned the bill of indictment in question. Another served about a year earlier. The clerk of superior court testified that two or three Negroes had served on the grand jury during his seven years in office, but he had kept no record of it. Several Negro citizens testified that they were property owners and taxpayers but neither they nor their wives had ever been called for jury service. The county officials stated that in making the jury list there had been no discrimination on account of race.

The foregoing facts and testimony were introduced by defendant. The solicitor cross-examined defendant's witnesses, but offered no evidence. The judge made no findings of fact. With respect to the motion to quash, the record discloses no findings or ruling except the entry, "Motion denied." Upon many phases of the matter the evidence was uncertain and conflicting. In failing to find the material facts the court erred.

A valid indictment returned by a legally constituted grand jury is an essential of jurisdiction. *State v. Covington, supra.*

When, at a hearing upon a motion to quash the bill of indictment, there is a showing that a substantial percentage of the population of the county from which the grand jury that returned the bill was drawn is of the Negro race and that no Negroes, or only a token number, have

served on the grand juries of the county over a long period of time, such showing makes out a *prima facie* case of systematic exclusion of Negroes from service on the grand jury because of race. *Arnold v. North Carolina,* 12 L. Ed. 2d 77; *Eubanks v. Louisiana,* 356 U.S. 584; *Norris v. Alabama,* 294 U.S. 587. The mere denial by the officials charged with the duty of listing, selecting and summoning jurors that there was any intentional, arbitrary or systematic discrimination because of race, is not sufficient to overcome such *prima facie* case. *Hernandez v. Texas,* 347 U.S. 475; *Smith v. Texas,* 311 U.S. 128; *Norris v. Alabama, supra.* To overcome such *prima facie* case, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory. And if there is contradictory and conflicting evidence, the trial judge must make findings as to all material facts.

In *State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229, there was a motion to quash the indictment for racial discrimination in grand jury service. Defendant introduced evidence that there were on the tax lists 12,250 whites and 4,819 Negroes, and 5,583 whites and 2,499 Negroes were subject to poll tax, that one Negro had served on the grand jury in 24 years, another had been selected but was excused, the panels drawn for court sessions usually contained 3 or 4 Negroes, and at one time 4 or 5. The State offered no evidence. This Court held that the defendant had "failed to carry the burden of showing facts which would permit a reasonable inference of purposeful racial discrimination." The Supreme Court of the United States allowed *certiorari* and reversed the holding of this Court, stating in a *per curiam* opinion: "This evidence was uncontradicted, the State cross-examining the witnesses but offering no evidence." Further: "The judgment below must be reversed. The 'testimony in itself made out a *prima facie* case of the denial of the equal protection which the Constitution guarantees.' *Norris v. Alabama,* 294 U.S. 587, 591." *Arnold v. North Carolina, supra.*

In the instant case, it clearly appears that nearly one-fourth of the population of Cleveland County is of the Negro race, two or three Negroes have served on the grand juries of Cleveland County within the last seven years. According to the authorities above cited this makes out a *prima facie* case of discrimination, and the testimony of county officials that there had been no intentional or systematic exclusion of Negroes because of race is insufficient to overcome the *prima facie* showing. The court below found no facts and established no basis for a determination that defendant's *prima facie* case had been overcome. The Supreme Court of North Carolina is not a fact-finding tri-

bunal, and we are not in a position on the present state of the record to determine whether racial discrimination with respect to jury service has *in fact* been practiced in Cleveland County. It is quite probable that it has not; the presumption is that public officials have performed their duties in a fair, legal and constitutional manner.

The findings of fact of a trial judge, in a hearing on such motion to quash, are conclusive on appeal if supported by competent evidence. *State v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *State v. Speller, supra; State v. Henderson,* 216 N.C. 99, 3 S.E. 2d 357; *State v. Bell,* 212 N.C. 20, 192 S.E. 852. The findings of a trial judge will not be disturbed unless so grossly wrong as to amount to an infraction of constitutional guaranties. *State v. Cooper,* 205 N.C. 657, 172 S.E. 199. In *Akins v. Texas,* 325 U.S. 398, it is said: ". . . the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion . . ." Further: ". . . we accord in that examination (of the evidence) great respect to the conclusions of the state judiciary, *Pierre v. Louisiana,* 306 U.S. 354, 358. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.' *Lisenba v. California,* 314 U.S. 219, 238, or equal protection."

The burden of proving discriminatory jury practices is upon defendent. *State v. Covington,* 258 N.C. 495, 128 S.E. 2d 822; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *Akins v. Texas, supra.* But this does not relieve the prosecuting attorney of the duty of going forward with the evidence when the defendant has made out a *prima facie* case. Reliance solely upon the burden of proof rule and the consequent failure of the State to offer evidence usually results in denying the judge the benefit of the crucial facts and in arousing suspicion that there has been discrimination as alleged. In the instant case, for example, the evidence fails to show the number of white and Negro taxpayers, the number of white and Negro males subject to poll tax, the number of white and Negro women taxpayers, the number of white persons (male and female) on the jury list, the number of Negroes (male and female) on the jury list, the manner of drawing jury panels for sessions of court, whether any names drawn from the box for jury service were discarded, laid aside or deliberately not summoned, the manner of selecting grand juries, the panels actually drawn over a reasonable period prior to the current court session with disclosure of their racial composition, and lists of grand juries previously in service with disclosure of their racial composition. If these and other pertinent definite

facts were presented, trial judges could make clear findings of fact and more readily reach proper conclusions.

We are aware that to present such information time-consuming preparation and some expense will be involved. But the solicitor should not hesitate to request the court for allowance of preparation time when motions to quash are interposed. As to expense, we are of the opinion that the cost of such preparation will prove to be much less than the cost of a retrial of the case — a result so often experienced when the facts are not fully developed.

The statutory provisions of this State (G.S., Ch. 9) respecting qualifications, selection, listing, drawing and attendance of jurors is fair and nondiscriminatory and meet all constitutional tests. *Brown v. Allen,* 344 U.S. 443, 466-474. The statutes leave little to the exercise of official discretion, except that of the commissioners in passing upon the qualifications of prospective jurors in making the jury list, and that of the presiding judge in excusing attending jurors from service for good cause. The panel for a session of court is drawn from the box by a child not more than ten years of age. G.S. 9-3. When a panel is drawn for a session of court (G.S. 9-3; G.S. 9-4) no scroll drawn may be discarded except pursuant to G.S. 9-7. The right of rejection for want of good moral character or sufficient intelligence is available only to the commissioners when the list is being prepared. G.S. 9-1. See *State v. Speller, supra.* Only the presiding judge has authority to excuse a juror drawn for the session panel (except in those special instances, provided by statute, when the clerk may excuse. G.S. 9-19). Grand jurors are drawn from the regular session panel by a child not more than ten years of age. G.S. 9-24.

Since the matters dealt with in this opinion will probably recur often in our courts, the following rules of law will bear repetition. The provisions of the "Law of the Land" clause (Art. 1, § 17) of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States afford protection against discriminatory actions of officials in administering the law. *Norris v. Alabama, supra.* Representation on the juries in proportion to racial population is not required. A citizen has no right to insist that he be indicted or tried by juries composed of persons of his race, nor to have a person of his race on the juries which indict and try him. But he has the right to be indicted and tried by juries from which persons of his race have not been systematically excluded — juries selected from all qualified persons regardless of race. *Miller v. State, supra; State v. Brown,* 233 N.C. 202, 63 S.E. 2d 99; *State v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77; *Hernandez v. Texas, supra; Brown v. Allen, supra.* A jury list is not discriminatory

merely because it is made from the tax list. The tax list is perhaps the most comprehensive list available for the names of male citizens. *Brown v. Allen, supra.* But the commissioners are not limited to the use of the tax list (G.S. 9-1), and the use of other lists might result in the selection of more women jurors. "Former errors cannot invalidate future trials." *Brown v. Allen, supra.* If discrimination was formerly practiced, but the jury list was thereafter properly revised and the law administered without discrimination, the former errors and practices would not affect the validity of an indictment returned after proper revisal of the jury system.

In the absence of findings of fact sufficient in purport and content to overcome defendant's *prima facie* showing of racial discrimination, the bill of indictment must be quashed. While it is not for us to weigh the evidence and find facts, it seems extremely doubtful that the facts presented at the hearing on the motion to quash would support findings sufficient to overcome defendant's *prima facie* showing. The indictment is quashed. The verdict and judgment are vacated for want of a showing that the indictment was valid. It does not follow that defendant is entitled to his discharge. He may be held until an indictment is returned by an unexceptionable grand jury, upon which indictment he may be tried for the offense alleged. *State v. Speller, supra.*

Reversed.

STATE v. JOHN THOMAS AVENT;
STATE v. LACY CARROLE STREETER;
STATE v. FRANK McGILL COLEMAN;
STATE v. SHIRLEY MAE BROWN.
STATE v. DONOVAN PHILLIPS;
STATE v. CALLIS NAPOLIS BROWN;
AND
STATE v. JOAN HARRIS NELSON.

(Filed 10 July 1964.)

Constitutional Law § 20; Trespass § 10—

On authority of *Peterson v. Greenville,* 373 U.S. 244, 10 L. Ed. 2d 323, persons of the Negro race who refuse to leave a luncheonette department in a store after being ordered to do so by the proprietor in possession may not be convicted of trespass if the municipality in which the restaurant is situate has an ordinance prescribing segregation of the races in such places.

ON mandate from the Supreme Court of the United States, 373 U.S. 375, 10 L. Ed. 2d 420. This mandate from the Supreme Court of the United States was docketed in the Supreme Court of North Carolina as Case No. 650, Fall Term 1963, and as Case No. 649, Spring Term 1964.

This was a case tried at 30 June 1960 Criminal Term of DURHAM, in which seven criminal actions, based on seven separate indictments which are identical except that each indictment names a different defendant, were consolidated and tried together. The indictment in the case of defendant John Thomas Avent is as follows:

> "The Jurors for the State upon their oath present, that John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the county aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Company store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Company, owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he, the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Plea by all defendants: Not Guilty. Jury Verdict: All the defendants, and each one of them, are guilty as charged. From a judgment against each defendant, each defendant appealed to the Supreme Court of North Carolina.

This Court found No Error in the trial. 253 N.C. 580, 118 S.E. 2d 47. This opinion was filed 20 January 1961.

Defendants applied to the Supreme Court of the United States for a writ of *certiorari*, which was allowed 25 June 1962. 370 U.S. 934, 8 L. Ed. 2d 805.

On 20 May 1963 the Supreme Court of the United States rendered a *per curiam* opinion in this action, which is reported in 373 U.S. 375, 10 L. Ed. 2d 420, and is as follows:

"On Writ of *Certiorari* to the Supreme Court of the State of North Carolina.

"May 20, 1963. Per Curiam: The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for consideration in the light of *Peterson v. Greenville, supra,* p. 323 [373 U.S. 244, 10 L. Ed. 2d 323]. *Patterson v. Alabama,* 294 U.S. 600, 79 L. Ed. 1082, 55 S. Ct. 575.

"Mr. Justice Harlan dissented in part in an opinion appearing on p. 327, *supra* [373 U.S. 248, 10 L. Ed. 2d 327]."

In the Supreme Court of the United States, counsel were as follows:

"Jack Greenberg argued the cause for petitioners. With him on the brief were Constance Baker Motley, James M. Nabrit, III, William A. Marsh, Jr., F. B. McKissick, C. O. Pearson, W. G. Pearson, M. Hugh Thompson, William T. Coleman, Jr., William R. Ming, Jr., Louis H. Pollak, Joseph L. Rauh and Herbert O. Reid.

"Ralph Moody, Assistant Attorney General of North Carolina, argued the cause for respondent. With him on the brief was T. W. Bruton, Attorney General.

"Solicitor General Cox, by special leave of Court, argued the cause for the United States, *amicus curiae,* urging reversal. With him on the brief were Assistant Attorney General Marshall, Ralph S. Spritzer, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein and Richard K. Berg."

PARKER, J. In *Peterson v. Greenville,* 373 U.S. 244, 10 L. Ed. 2d 323, ten defendants were convicted in the recorder's court of the city of Greenville, South Carolina, for violating the trespass statute of that State. Each defendant was convicted and sentenced to pay a fine of $100, or in lieu thereof to be confined in jail for 30 days. An appeal to the Greenville county court was dismissed, and the Supreme Court of South Carolina affirmed. 239 S.C. 298, 122 S.E. 2d 826. The Supreme Court of the United States granted *certiorari.* 370 U.S. 935, 8 L. Ed. 2d 806. The facts were: The ten defendants, who are Negoes, on 9 August 1960 entered S. H. Kress store in Greenville and seated themselves at the lunch counter for the purpose, as they testified, of being served. The manager of the store did not request the police to arrest defendants;

he asked them to leave because integrated service was "contrary to local customs" of segregation at lunch counters and in violation of a Greenville city ordinance requiring separation of the white persons and colored persons in restaurants, hotels, cafes, eating houses, boarding houses, or similar establishments. Defendants refused to leave and were arrested. Chief Justice Warren in an opinion expressing the views of eight members of the Court that the convictions cannot stand said:

> "For the convictions had the effect, which the State cannot deny, of enforcing the ordinance passed by the City of Greenville, the agency of the State. When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators."

In *Patterson v. Alabama,* 294 U.S. 600, 79 L. Ed. 1082, the Court held:

> "The Supreme Court may, in recognizing a change in fact or law since the entry of judgment which affects the just disposition of the case, set aside the judgment and remand the case so that the state court may be free to act, although such change affects a non-Federal question."

When the Avent case was argued before us at the Fall Term 1960, there was nothing in the record, or in the briefs of counsel, or in the oral argument, to show, or even to suggest, that the city of Durham had an ordinance requiring separation of the white and colored races in licensed restaurants and public eating places. The first mention of the fact in the records of this case that the city of Durham did have such an ordinance appears on page 21 of petitioners' brief filed in the Supreme Court of the United States at the October Term 1962. In a note on page 21 of this brief it is stated: "The state did not rely on the ordinance at trial, nor was it adverted to on appeal."

Mr. Justice Harlan, concurring in the result in No. 71, and dissenting in whole or in part in Nos. 58, 66, 11, and 67, in the *Peterson v. Greenville* case, said this in respect to the Avent case (No. 11):

> "In this case it turns out that the City of Durham, North Carolina, where these 'sit-ins' took place, also had a restaurant segregation ordinance. In affirming these convictions the North Carolina Supreme Court evidently proceeded, however, on the erroneous

assumption that no such ordinance existed. 253 N.C. 580, 118 S.E. 2d 47.

"In these circumstances I agree with the Court that the case should be returned to the State Supreme Court for further consideration. See *Patterson v. Alabama,* 294 U.S. 600, 79 L. Ed. 1082, 55 S. Ct. 575. But disagreeing as I do with the premises on which the case will go back under the majority's opinion in *Peterson,* I must to that extent dissent from the opinion and judgment of the Court."

He attached a footnote to the Avent case as follows:

"Code of Durham (1947), c. 13, § 42: 'In all licensed restaurants, public eating places and "weenie shops" where persons of the white and colored races are permitted to be served with, and eat food, and are allowed to congregate, there shall be provided separate rooms for the separate accommodation of each race. The partition between such rooms shall be constructed of wood, plaster or brick or like material, and shall reach from floor to the ceiling. Any person violating this section shall, upon conviction, pay a fine of ten dollars and each day's violation thereof shall constitute a separate and distinct offense.' "

We now have before us a certified copy of the Durham city ordinance, which is *ipsissimis verbis* as quoted by Mr. Justice Harlan.

An examination of our opinion in this case, when it was first before us, shows that the facts in this case and in *Peterson v. Greenville* are substantially identical. It now appears from Mr. Justice Harlan's dissenting-in-part opinion in *Peterson v. Greenville* that the city of Durham had a segregation ordinance similar to the segregation ordinance of the city of Greenville. Consequently, the majority opinion in *Peterson v. Greenville* expressing the views of eight members of the Court requires that the verdict that all the defendants, and each one of them, are guilty as charged, and that the judgment against each defendant, be vacated, and that a judgment be entered sustaining each defendant's motion for judgment of compulsory nonsuit, and it is so ordered. When this opinion is certified down to the superior court of Durham County, a judgment will be entered in accordance with this opinion.

The mandate from the Supreme Court of the United States contains this language: "IT WAS FURTHER ORDERED that John Thomas Avent, *et al.* recover from the State of North Carolina Six Hundred and Two Dollars and Nine Cents ($602.09) for their costs herein expended."

Quaere: Does legislation or a municipal ordinance requiring white private owners and operators of restaurants, cafes, boarding houses, and other similar establishments, against their will, to furnish accommodations to, and to labor for in cooking and serving food to members of a race other than their own constitute a violation of the Thirteenth Amendment to the Constitution of the United States prohibiting "involuntary servitude"?

Reversed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1964

STATE v. EDWIN G. MOORE, II. (INDICTMENTS NOS. 23, 24 AND 25). (THREE CASES CONSOLIDATED FOR THE PURPOSE OF TRIAL AND APPEAL).

(Filed 23 September, 1964.)

1. Arson § 4— Circumstantial evidence of guilt of arson held sufficient to be submitted to jury.

The circumstantial evidence in this case, including evidence tending to show that defendant was heavily involved in debt and had certain cottages and a hotel, owned by him and operated as a unit, grossly over-insured, that some 33 hours after defendant left the unoccupied property fire was discovered in two of the cottages and before it could be brought under control fire broke out on the top floor of the hotel, and that after the fire in the hotel had been extinguished firemen found in various places in the hotel four candles which had been burning some 33 hours, that each candle had the wax about one inch from the base cut through to the wick and paper inserted in the slit in each candle and extending some several inches from the sides of the candles to other combustibles, *is held* sufficient to be submitted to the jury on the question of defendant's guilt in a prosecution for violating G.S. 14-62.

2. Criminal Law § 99—

Only evidence favorable to the State is considered on motion to dismiss.

3. Criminal Law § 48—

It is error to permit an investigating officer to testify that defendant refused to make any statement after accusation, and then permit the officer

to testify as to the incriminating circumstances he recounted to defendant and that he stated that he and his assistant firmly believed defendant guilty, since the statement by the officer of the belief of guilt cannot be interpreted as an admission of guilt by defendant, either directly or by implication.

4. Same—

Silence in the face of an accusation of guilt is competent as an implied admission only when a person who has firsthand knowledge makes an accusation based thereon in defendant's presence under circumstances calling for a denial if the accusation be untrue, and silence in the face of an accusation by an investigating officer is incompetent, defendant not being required to defend himself to an investigating officer.

5. Criminal Law § 39—

Where, in a prosecution for arson, the State has introduced evidence that candles, with a cut through the wax near the base, with paper inserted in the cuts and extending beyond the candles to other inflammables, were found burning in defendant's property, and has introduced testimony that in a test fire spread to the inflammables around such candles, it is competent for defendant to offer evidence of his expert witness, from knowledge and after tests, that the contraption would probably not start a fire.

APPEAL by defendant from *Copeland, S. J.,* April, 1963 Special Criminal Term, DARE Superior Court.

These criminal prosecutions were based on three bills of indictment: No. 23 charged that the defendant on April 25, 1961, unlawfully, feloniously and for the fraudulent purpose of collecting insurance did set fire to and burn two uninhabited houses designated as Cottages Nos. 1 and 2, situate near the Flagship Hotel in Dare County. No. 24 charged that the defendant on the same day and for the same purpose did set fire to and burn the Flagship Hotel. No. 25 charged that the defendant on the same day and for the same purpose did attempt to set fire to Cottage No. 3, or the middle cottage near the Flagship Hotel. All indictments charged that the title to the properties were in the defendant and his wife and were in their possession. The indictments were drawn under and in accordance with G.S. 14-62.

After arraignment and the entry of pleas of not guilty, the cases were consolidated and tried together. At the conclusion of the evidence for the State, verdict of not guilty was entered by the court as to the charge laid in indictment No. 23. Likewise, at the conclusion of all the evidence the court entered a verdict of not guilty as to the first count in No. 25.

The jury rendered verdicts of guilty on the charge of burning the Flagship Hotel and of attempting to burn the middle cottage. From judgments of imprisonment to run consecutively for a total of not less

than 11 nor more than 15 years, and to pay costs, the defendant appealed.

T. W. Bruton, Attorney General; Charles D. Barham, Jr., Assistant Attorney General for the State.

J. Henry LeRoy, G. Eric Rosden, Victor S. Bryant for defendant, appellant.

HIGGINS, J. The four buildings involved in the indictments were closely connected, and were operated as a single summer resort unit at Nag's Head, North Carolina. Cottages Nos. 1 and 2 were located nearest the ocean; the Flagship Hotel farthest away, and the middle cottage between them.

In May, 1960, the defendant and his wife purchased the four units and the furnishings therein from Elizabeth Parkerson who, by agreement, during that summer operated them for the defendant and his wife, both of whom lived in Washington, D. C. The purchase price for the properties was $60,000.00, of which $18,000.00 was paid in cash and mortgages executed for $48,000.00. At the time of the purchase, the buildings and furnishings were insured for $48,000.00. Evidence tended to show that they were worth about $40,000.00 and the land was worth $20,000.00.

At the end of the resort season a dispute arose involving Mrs. Parkerson's operation of the properties. She threatened to foreclose her mortgage for the balance due. Court proceedings involving accounting and foreclosure were instituted. As of April 25, 1961, the defendant had increased the insurance coverage for the buildings and contents from $48,000.00 to $83,000.00. His application for additional coverage of $37,800.00 had been denied. The defendant's indebtedness in Dare County and for his home near Washington amounted to approximately $110,000.00.

At the end of the 1960 resort season the properties involved in these indictments were closed. On weekends the defendant frequently went to Nag's Head and worked in renovating, repairing, and cleaning up the properties. On at least three occasions he had John Henry Bynum accompany him from Washington to assist in the work. However, on the weekend of April 15, Bynum did not accompany him. So far as the evidence discloses, during that weekend he worked alone about the buildings. On April 21, the defendant and Bynum returned to Nag's Head and worked mainly in opening the buildings, airing the furniture, cleaning and painting the first floor of the hotel. Bynum worked on the ground floor and did not go to the second or third floors except just be-

fore closing, and then only to take a vacuum cleaner. Before closing, at about 7:30 on the after noon of the 23rd, the defendant and Bynum fastened all windows and blinds on the first floor of the hotel. However, some of the windows did not have blinds, and table cloths, rugs and bed clothing were nailed over these windows and over the glass in the door to prevent outsiders from observing the inside of the building. On prior occasions these extra precautions were not taken.

After completing the closing operations, Bynum went alone to the middle cottage to change clothes for the trip back to Washington. After the change, he stopped by a drugstore for a coca-cola. He went back to the drugstore after one for the defendant. Bynum testified he was away from the defendant during this time for about 10 minutes. The defendant testified that he and Bynum were not separated at any time. Both agreed they left for Washington about 7:30 p.m. on the 23rd.

At 4:30 a.m. on April 25, the Coast Guard discovered that Cottages Nos. 1 and 2 were on fire. Before the fire could be brought under control, both cottages were completely destroyed. While the members of the fire department were still on the scene, a fire broke out on the top floor of the hotel. Members of the fire department forced an entry and extinguished the fire which had caused damage to the top floor and to the roof. A five-gallon can of kerosene with the top missing was near enough to the flames on the third floor that the fluid was hot and smoking. A cap which fitted the can was found on the desk or filing cabinet on the first floor. After putting out the fire, the firemen found four lighted candles in the hotel: one in a closet on the third floor; one in a breezeway between the second and third floors; one in the kitchen on the first floor, and one in the storeroom near the kitchen. The firemen then forced an entry into the middle cottage and found a lighted candle surrounded by mattresses and bedding and other inflammables.

These five candles were about two inches in diameter. They were shown to have been manufactured by Will and Baumer, designed to burn for 72 hours, and intended for use in religious and funeral services. Each of these candles had a cut through the wax all the way to the wick about one inch from the bottom. Inserted in the slit in each case were pieces of paper extending several inches from the sides of the candles. The papers were secured to the candle by scotch tape. Immediately surrounding each candle, in contact with the paper taped to it, were other newspapers and combustible materials. All these candles were lighted at the time of discovery and had burned down to within about one inch of the inserted papers.

On the first floor of the hotel, on or about a desk, table and filing cabinet, the firemen found a scotch tape dispenser still containing about one inch of tape similar to that which secured the paper inserts in the candles. A sharp knife and parts of the Sunday edition of the New York Times of March 5 and a pair of rubber gloves were on or in the desk.

The State Bureau of Investigation and Sheriff's Department conducted experiments with 72-hour candles similar (and similarly rigged) to those discovered in the hotel and in the middle cottage. When the candle burned to the inserted papers they and the surrounding combustible materials immediately caught on fire. A full length 72-hour candle would leave approximately one inch unburned after 33 hours. The inserts were approximately one inch from the bottom in the candles recovered still burning in the hotel and in the middle cottage. Approximately 33 hours had elapsed between the time the defendant left the hotel and the time the fire was discovered.

According to the State's theory, the defendant, heavily involved in debt, had the property grossly overinsured, prepared the candle fire sets during his visit alone on the weekend prior to the fire; that he brought Bynum with him the following weekend to be available as a witness in case he was a suspect, and that while Bynum was changing clothes and procuring the drinks, defendant lighted the candles, intending that the fires from them would occur many hours after he had returned to Washington and destroy all evidence of the manner in which the fire originated.

The defendant's theory was that an enemy, for revenge, actually planted the candles in the manner in which they were discovered for the purpose of pointing the finger of suspicion at the defendant; that the fire did not start from candles.

Admittedly, the State relied on circumstantial evidence. In such cases the rules for testing the quantum of proof necessary (1) to carry a case to the jury, and (2) thereafter to warrant the jury in returning a verdict of guilty, are set forth in *State v. Thompson*, 256 N.C. 593, 124 S.E. 2d 728; *State v. Horner*, 248 N.C. 342, 103 S.E. 2d 694; *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431; *State v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904; and *State v. Johnson*, 199 N.C. 429, 154 S.E. 730. Repeating the rules would serve no useful purpose here. When tested by these rules, we hold the evidence was sufficient to go to the jury and to survive the motion for a directed verdict of not guilty. The defendant's evidence is pertinent only on the question of guilt or innocence. Evidence favorable to the State is considered on motion to dismiss.

The defendant insists the trial court committed errors in admitting and excluding evidence over his objection. We deem it necessary to discuss only two instances.

Mr. Epps, an investigator of the State Bureau of Investigation, and Mr. A. T. Moore, an investigator in the State Fire Marshall's office, went to Washington on September 19, met with the defendant, and with respect to what took place at the meeting, Mr. Epps testified:

"Investigator Moore stated to the defendant Moore, at the beginning of the interview, that we came to Washington and thought we would come by and sit down and have a talk with him and give him an opportunity to make a statement of what had happened at his hotel down in North Carolina.

"Q. Now, what statement, if any, did you or Mr. Moore make to him accusing him of any responsibility with this fire as a result of your own investigation?

Objection — Overruled — Exception

Defendant's Exception #38.

"A. The defendant Moore then stated that 'I don't think it is proper to make a statement at this time.' We then told him that we had received candles and had them examined by the FBI Laboratory, and that in our opinion he was responsible for the fire, and he said, in substance, Do you think I set it on fire?

"COURT: Hold it just one minute. Stop right there and let me get that down. All right, go ahead.

"To the foregoing statement in the presence of the jury the defendant excepts.

"A. He said, 'You think I did it, don't you?' I said, 'Yes, sir, it is not any doubt in our minds that you are the man responsible for the fire at the Parkerson Hotel.' He stated, 'Well, what are you prepared to do at this time?' At that particular moment we didn't answer.

"Motion to strike the answer. Overruled — Exception.

Defendant's Exception #40.

"A. We made the accusation in different words on two other occasions during the interview. After the last accusation he stated again, 'What are you prepared to do? Did you come prepared to take me back to North Carolina if I make a statement or don't make a statement?' I said, 'Yes, sir, we came prepared to take you back whether you make a statement or not.'

Motion to strike — Overruled — Exception.

Defendant's Exception #43.

"A. He did not say yes or no.

"Q. He made no statement either way?

"Objection — Overruled — Exception — Defendant's Exception # 46."

After the defendant declined to make any statement, the court, by means of a question, permitted the officer to say, "We told him that we had received candles and had them examined by the FBI Laboratory and that in our opinion he was responsible for the fire . . ."

Not only did the court overrule the objection and permit the officer to make the statement about his and his assistant's firm belief, but stopped the proceedings until he could write down the question and the answer; thus inadvertently emphasizing the importance of the evidence. In addition, the court permitted the officer to say, "Yes, it is no doubt in our minds that you are the man responsible for the fire at Parkerson's Hotel." The court denied the defendant's motion to strike. The foregoing is challenged by defendants Assignment of Error No. 4, based on Exceptions 38, 39, 40 and 46. By no fair interpretation may the foregoing be considered an admission of guilt, either directly or by silence.

A suspect is not required to defend himself or prove his innocence to investigating officers. When they accuse him, he may decline their invitation to plead to their charge. Ordinarily, silence, or refusal or failure to deny may be shown only when an accusation is made in the presence of an accused — not by investigating officers who get their information second-hand — but only by someone who has first-hand knowledge and makes a charge based thereon which the occasion, the nature of the charge, and the surrounding circumstances would call for a denial if the accusation were untrue. *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619; *State v. Temple,* 240 N.C. 738, 83 S.E. 2d 792; *State v. Wilson,* 205 N.C. 376, 171 S.E. 338. Assignment of Error No. 4 is sustained. The court committed error in permitting the officer to testify as the record discloses.

In support of his theory that the fire did not start from candles, the defendant offered the testimony of Mr. Prussing, admitted to be an expert in fire investigations involving petroleum products. The candles involved are largely petroleum products. He heard all the testimony, saw and examined the five candles found burning in the buildings. He made experiments and based on the assumption the jury should find

the candles had burned as shown and that they were rigged as shown, he offered to testify and would have testified, if permitted to do so, as follows:

"Q. From your professional opinion as an expert, is it likely that a fire would result from this kind of contraption?

"(If permitted, witness would have answered: 'Most likely not; I have tried it and it is my conclusion from the experiment that it is most unlikely.')

"Q. Have you tried whether or not a contraption by experiment whether or not a contraption consisting of a candle of a two-inch diameter, candle with a cut around up to the wick near the bottom and with newspaper inserted, would light the newspaper outside the ring of the candle?

"(If permitted, witness would have answered: 'It is my opinion, based on experiments and observation, that it would be unlikely for paper so inserted to burn outside of the ring of the wax. It will burn inside and then go out.')"

The State had introduced the candles in the settings in which they were found. The officers made a test and testified that the fire spread from the inserted papers to the combustible materials surrounding them. The defendant's expert witnesses, from knowledge and after tests, offered to testify that such a contraption would probably not start a fire. The exclusion of this evidence was error.

The long and tedious trial on the whole was ably conducted and in accordance with established and approved rules. However, for the two errors here discussed, the defendant is entitled to a

New trial.

GRACE BROWN TANEY v. FERD BROWN.

(Filed 23 September, 1964.)

1. Appeal and Error § 22—

Where there are no exceptions to the admission of evidence or to the findings of fact, the findings are presumed to be supported by competent evidence, and an exception to the refusal of defendant's motion for judgment of compulsory nonsuit does not present the question whether the findings are supported by competent evidence. G.S. 1-183.

2. Appeal and Error § 21—

An exception to the signing of the judgment presents the questions whether the facts found support the conclusions of law and the judgment entered thereon and whether any error of law appears on the face of the record.

3. Negligence § 11—

Only contributory negligence which is a proximate cause or one of the proximate causes of the injury under judicial investigation is of legal import.

4. Automobiles § 41h—

Findings to the effect that the driver of a truck intending to enter an intersecting rural road, without warning or signal, turned to the left so that his left front wheel crossed the centerline of the highway for a distance of a yard, that at that time the truck driver knew or should have known that a car, which was attempting to pass, had reached a point where its front was about even with the left door of the cab, and that the driver of the car confronted by the emergency turned to the left to avoid the truck, resulting in loss of control of the car and the injury in suit, *held* to support the conclusion of law that the truck driver was guilty of actionable negligence.

5. Negligence § 7—

Proximate cause is a question of fact to be determined from the attendant circumstances, and when conflicting inferences of causation arise from the evidence the question is for the determination of the jury or, in a trial by the court under agreement of the parties, for the determination of the court.

6. Trial § 57—

In a trial by the court under agreement of the parties, it is the duty of the court to weigh the evidence and find the facts, including inferences of fact to be found from the facts in evidence.

7. Automobiles § 42a— Facts held to support conclusion that defendant's negligence was sole proximate cause of injury.

In this trial by the court under agreement of the parties, unchallenged findings of fact to the effect that plaintiff attempted to pass defendant's truck along a straight highway when there was no oncoming traffic, that when plaintiff reached a point some 75 or 100 feet from the rear of the truck she blew her horn, that as plaintiff drew abreast of the truck so that the front of her car was opposite the left door of the cab of the truck, the truck driver, without warning or signal, suddenly turned left, preparatory to entering an intersecting rural road, so that his left front wheel was some one yard over the centerline of the highway, and that plaintiff, confronted by the sudden emergency, turned to her left, lost control of her car, proceeded along the left shoulder across the entrance of the rural road, got back on the highway and ran off the right side of the highway and struck a tree, *held* to support the legal conclusion that the negligence of the truck driver was the sole proximate cause of the injury so that, even if the court was in error in concluding that the intersection of the rural road was not

an intersecting highway within the meaning of G.S. 20-150(c), such error was not prejudicial, since the facts support the legal conclusion that any contributory negligence on the part of plaintiff did not proximately contribute to the injury and therefore was not of legal import.

APPEAL by defendant from *McLean, J.*, May-June 1964 Session of HENDERSON.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of defendant, commenced in the general county court of Henderson County.

Defendant in his answer denies negligence and alleges as further defenses: (1) that plaintiff's negligence was the sole proximate cause of her injuries, and (2) plaintiff's contributory negligence.

When the action came on to be heard in the general county court, the parties, pursuant to the provisions of G.S. 1-184 *et seq.*, waived trial by jury. After hearing the evidence of plaintiff and defendant, W. R. Sheppard, judge of that court, made findings of fact, the crucial ones of which we summarize, except when quoted:

About 5 p.m. on 12 April 1963, defendant was driving an International flat-bed truck loaded with eight tons of fertilizer in a westerly direction on U. S. Highway 158 about 13 miles west of the city of Reidsville at a speed of 25 to 30 miles per hour. At the same time, plaintiff was driving a Mercury automobile, owned by her husband, in the rear of and behind defendant's truck, traveling in the same direction. While both motor vehicles were traveling west on a long stretch of straight highway and at a point where plaintiff could see at least a thousand feet beyond defendant's truck and when there was no oncoming traffic, plaintiff drove her automobile across the white center line over into the eastbound traffic lane and began an attempt to overtake and pass defendant's truck. She accelerated the speed of her automobile to 50 to 55 miles an hour, and when she reached a point in the eastbound traffic lane about 50 or 75 or 100 feet from the rear of defendant's truck, she blew her horn. Defendant gave no sign or signal of any kind. When she reached a point beside defendant's truck and was running abreast with it, and when the front of her automobile was about even with the left door of the cab where defendant was seated at the wheel of his truck, defendant suddenly and without warning or signal turned his front wheels to the left and drove across the center line of the highway with his left front wheel a distance of one yard. When plaintiff realized defendant was attempting to turn left into a rural highway, she acted in an emergency and suddenly turned her front wheels to the left to avoid being hit by defendant's truck. In do-

ing so, she lost control of her automobile. While out of control, her automobile proceeded on along the shoulder of the highway, across the entrance into the highway of the rural road, got back over on the right side of the highway, and ran off the highway and struck a tree.

Defendant's truck was equipped with a side rear-view mirror so that he could see to his rear at all times without obstruction. He knew plaintiff's automobile was in his rear. He knew or he should have known that she was attempting to overtake and pass his truck. He knew or he should have known that plaintiff's automobile had reached a point abreast of his truck with the front of her car at or near the left cab door of his truck. Instead of giving way to the right, he turned his wheels to the left and crossed the center white broken line to a distance of three feet beyond the center of the highway.

As plaintiff's automobile and defendant's truck were going westward on U. S. Highway 158, there was a sign or symbol on its north shoulder facing east about 500 to 600 feet east of the rural road "with a yellow background with a black line perpendicular with U. S. Highway 158 and intersected another black line from the left at right angle with said highway with no explanation appearing thereon as to its meaning; there was a white broken line in the center of Highway 158; there was no yellow or barrier lines in either lane and there was no 'Do Not Pass' signs on either shoulder." At the point where rural road 2347 meets Highway 158, there was a sign reading "Guilford County," beneath which there was a sign with the number of rural road 2347. Some distance westward from the rural road, there was a sign on the north shoulder of U. S. Highway 158 with "158 West" appearing thereon.

At the point where plaintiff was attempting to pass defendant's truck, defendant knew there was no yellow line in her lane and there was no "Do Not Pass" sign on the shoulder of the highway. At the time of this accident, the State Highway Commission had a plan and policy of designating and marking such intersections with a yellow line in the appropriate lane extending back 500 feet from the intersection, with a sign on the shoulder at the beginning of the line with the words "Do Not Pass" painted thereon.

By reason of the automobile striking the tree, plaintiff sustained serious and permanent injuries, which are set forth with particularity, and in addition, has incurred medical expenses of $2,500 and reasonably anticipates additional and necessary medical expenses in the amount of $1,500.

Based upon his findings of fact, Judge Sheppard made the following conclusions of law, which we summarize, except when quoted:

Defendant was negligent in the operation of his truck in that he was attempting to make a left turn at a time and under circumstances and conditions when he knew or should have known a left turn could not be safely made. He was making a left turn at a time when he knew or should have known plaintiff was driving her automobile abreast or almost abreast of his truck in the traffic lane opposite from him in an attempt to overtake and pass his truck, and instead of giving way to the right he turned to the left and crossed the white center line with his left front wheel for a distance of three feet. In doing so, he created an emergency and a perilous situation for plaintiff and caused her suddenly to turn her wheels to the left to avoid being struck by his truck and thereby lost control of the automobile. "As a matter of law that the intersection of the rural road with Highway 158 was not an 'Intersecting highway' within the meaning of the law." Defendant's negligence was the immediate, direct, and sole proximate cause of plaintiff's injuries. By reason of defendant's negligence, plaintiff has sustained damages in the amount of $29,000.

Whereupon, Judge Sheppard entered judgment that plaintiff recover from the defendant the amount of $29,000, together with her costs, and further decreed that certain doctors be allowed an expert witness fee, and that the commissioner who took their depositions should be paid, all of which is to be taxed as part of the costs.

Defendant appealed to the superior court assigning as errors the denial of his motion for judgment of compulsory nonsuit entered at the close of plaintiff's evidence and renewed at the close of all the evidence, and the signing of the judgment.

On appeal to the superior court, Judge McLean entered judgment overruling all defendant's assignments of error and affirming the judgment of the general county court. From Judge McLean's judgment, defendant appeals to the Supreme Court.

McMichael, Griffin & Rankin and Crowell & Crowell by Hugh P. Griffin, Jr., for defendant appellant.

Whitmire & Whitmire by R. Lee Whitmire for plaintiff appellee.

PARKER, J. When this action came on to be heard in the general county court, the parties, pursuant to the provisions of G.S. 1-184 *et seq.*, waived trial by jury. On defendant's appeal to the superior court, Judge McLean overruled all of defendant's assignments of error and affirmed the judgment of the general county court. Defendant assigns as errors Judge McLean's denial of his motion for judgment of compulsory nonsuit made at the close of plaintiff's case and his denial of a

like motion renewed at the close of all the evidence, and his entering a judgment affirming the judgment of the general county court.

Defendant has no exception to the admission of evidence or to the findings of fact or to the conclusions of law. Consequently, such findings of fact are presumed to be supported by competent evidence and are binding upon appeal. *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590; *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486; *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759. By reason of such facts above stated, defendant's motion for judgment of compulsory nonsuit renewed at the close of all the evidence does not "present the question as to whether or not the findings of fact are supported by competent evidence." *Goldsboro v. R. R., supra;* G.S. 1-183; *Clifton v. Turner,* 257 N.C. 92, 125 S.E. 2d 339.

This Court said in *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870: "Likewise, since no exceptions were taken to the findings of fact or conclusions of law, the exception to the refusal of the court to grant the appellants' motion for judgment as of nonsuit presents no question for review with respect to the findings of fact or the conclusions of law. *Goldsboro v. R. R., supra* [246 N.C. 101, 97 S.E. 2d 486]. The exception to the signing of the judgment, however, does present these questions: (1) Do the facts found support the conclusions of law and the judgment entered thereon, and (2) does any error appear upon the face of the record?"

Defendant contends in essence that the findings of fact do not support the conclusion of law that the defendant's negligence "was the immediate, direct, and sole proximate cause of the injuries and damage sustained by the plaintiff," and the judgment entered in her favor. He contends that the sole and only conclusion of law that can be made upon the findings of fact is that plaintiff was negligent in attempting to pass defendant's truck at an intersection in violation of G.S. 20-150(c), and in not reducing her speed and keeping her automobile under control in violation of G.S. 20-141(c), and that such negligence proximately contributed to her injuries, and that such a necessary conclusion of law will not support a judgment in plaintiff's behalf, but will only support a judgment barring any recovery by her in this action.

Defendant further contends that the facts found do not support the conclusion of law "that the intersection of the rural road with Highway 158 was not an 'Intersecting highway' within the meaning of" G.S. 20-150(c).

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. *Short v. Chap-*

man, 261 N.C. 674, 136 S.E. 2d 40. "The very term 'contributory negligence' *ex vi termini* implies or presupposes negligence on the part of the defendant." *Scenic Stages v. Lowther,* 233 N.C. 555, 64 S.E. 2d 846.

The unchallenged findings of fact amply support the conclusion of law that defendant was guilty of actionable negligence. *Insurance Co. v. Cline,* 238 N.C. 133, 76 S.E. 2d 374; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538; *Howard v. Bingham,* 231 N.C. 420, 57 S.E. 2d 401.

A question presented for decision is: Do these unchallenged findings of fact support the legal conclusion that defendant's negligence was the immediate, direct, and sole proximate cause of plaintiff's injuries? What is the 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,* 252 N.C. 520, 114 S.E. 2d 360. But in the instant case the waiver of a jury trial by the parties invested the trial judge with the dual capacity of judge and juror, and it was his duty to weigh the evidence, find the facts, and upon the conflicting inferences of causation of plaintiff's injuries here to draw the inferences; the ultimate issue was for him. *Turnage Co. v. Morton,* 240 N.C. 94, 81 S.E. 2d 135; *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668; *Everette v. Lumber Co.,* 250 N.C. 688, 110 S.E. 2d 288.

Conflicting inferences of causation of plaintiff's injuries arise from the unchallenged findings of fact here, and a jury trial having been waived by the parties it was for the judge to find the ultimate issue.

The unchallenged findings of fact show that while plaintiff's automobile and defendant's truck were traveling west on U. S. Highway 158 about 13 miles west of the city of Reidsville, and at a point where plaintiff could see at least a thousand feet beyond defendant's truck, and when there was no oncoming traffic, she drove her automobile across the white center line of the highway into the eastbound traffic lane and accelerated the speed of her automobile to 50 to 55 miles an hour to overtake and pass defendant's truck traveling at a speed of 25 to 30 miles an hour. That when she reached a point in the eastbound traffic lane about 50 or 75 or 100 feet from the rear of defendant's truck, she blew her horn. Defendant gave no sign or signal of any kind. When she reached a point beside defendant's truck and was running abreast with it, defendant suddenly and without warning or signal turned his front wheels to the left and drove across the center line of the highway with his left front wheel a distance of one yard. When she realized he was attempting to turn left into a rural road, she suddenly turned her front wheels to the left to avoid being hit by his truck. That in doing so she lost control of her automobile, and her au-

tomobile out of control *proceeded on along the shoulder of the highway, across the entrance into the highway of the rural road,* got back over on the right side of the highway, and ran off the highway and struck a tree.

The unchallenged findings of fact warrant the inferences that plaintiff could reasonably assume that she could pass defendant's truck in safety before the vehicles reached any intersection, and that she would have done so had it not been for defendant's improvident and negligent act in suddenly driving his truck onto the left half of the highway; that defendant's negligence caused her to lose control of her automobile and that her automobile proceeded on along the shoulder of the highway, across the entrance into the highway of the rural road, got back over on the highway and ran off the highway and struck a tree, resulting in her injuries; that this followed so quickly and is so connected with defendant's negligence in the operation of his truck that it constituted a direct chain of events resulting from defendant's negligence; that defendant under the facts found could reasonably foresee that consequences of an injurious nature would probably result from his negligence; and that such negligence on defendant's part was the immediate, direct, and sole proximate cause of plaintiff's injuries. The judge so concluded, and his conclusion is supported by the unchallenged findings of fact.

The unchallenged findings of fact would permit, but they do not compel, the conclusion that plaintiff attempted to pass defendant's truck at an intersection in violation of G.S. 20-150(c) and G.S. 20-141(c), and that her negligence in doing so proximately contributed to her injuries. However, the trial judge, a jury trial having been waived, did not draw this conclusion.

Conceding, without deciding, that the legal conclusion "that the intersection of the rural road with Highway 158 was not an 'Intersecting highway' " within the meaning of G.S. 20-150(c) is not supported by the findings of fact and is erroneous, it was not sufficiently prejudicial to upset the judgment below, because the legal conclusion that defendant's negligence was the immediate, direct, and sole proximate cause of plaintiff's injuries, which finds support in the unchallenged findings of fact, is a legal conclusion to the effect that even if plaintiff were negligent, her negligence did not proximately contribute to her injuries.

The unchallenged findings of fact support the legal conclusions, and they in turn support the judgment. All defendant's assignments of error are overruled, and the judgment below is

Affirmed.

STATE v. FRANCIS ELLIS.

(Filed 23 September, 1964.)

1. Bastards § 1—

The question of paternity is merely preliminary in a prosecution under G.S. 49-2, since the wilful failure to support, and not begetting the child, is the offense.

2. Bastards § 8—

In a prosecution for wilful refusal to support an illegitimate child the statutes contemplate the submission of issues to the jury, and while an affirmative finding on the issue of paternity will not alone support conviction, the offense is a continuing one, and the accused is not entitled to have the question of paternity re-litigated in a subsequent prosecution for the offense.

3. Same—

In a prosecution under G.S. 49-2, the court may enter judgment, without a general verdict of guilty, upon a finding by the jury that defendant is the father of the illegitimate child in question and has wilfully refused, after demand, to support said child, or the court may instruct the jury that upon affirmative findings upon these issues the jury should enter a general verdict of guilty, and enter judgment upon such verdict.

4. Criminal Law § 119—

In this State a judgment in a criminal prosecution may rest upon a general verdict or a special verdict.

5. Same—

A special verdict is one in which the jury finds the ultimate material facts, usually by written recital, and if the facts found constitute the offense charged the court may declare the defendant guilty and enter judgment accordingly without a general verdict of guilty, and such judgment does not violate the provisions of Article I, §§ 11 and 13 of the Constitution of North Carolina.

6. Same—

A special verdict must find sufficient facts to permit the conclusion of law upon which the judgment rests, and is fatally defective if a material finding is omitted.

7. Bastards § 8—

A finding by the jury that defendant is the father of the illegitimate child in question and that defendant wilfully neglected and refused to support and maintain said illegitimate child, is fatally defective as a special verdict, since such verdict omits any finding that such wilful refusal subsisted after demand was made upon defendant and before the institution of the prosecution.

APPEAL by defendant from *Riddle, S. J.*, April 1964 Session of McDOWELL.

This is a criminal action in which defendant is charged in an indictment with nonsupport of his illegitimate child. G.S. 49-2.

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

"Is the defendant, Francis Ellis, the father of the child, Patricia Ann Pace, begotten upon the body of Marlon Ann Pace?

"Answer: Yes.

"Has the defendant, Francis Ellis, wilfully neglected and refused to support and maintain said illegitimate child, Patricia Ann Pace, begotten upon the body of Marlon Ann Pace?

"Answer: Yes."

Upon the foregoing verdict the court entered judgment providing imprisonment for 2 years, and suspending the prison sentence for 5 years upon condition defendant pay the costs and $10 per week for the support of the said child.

Defendant appeals.

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

Everette C. Carnes for defendant.

MOORE, J. Defendant assigns as error the absence of a specific verdict of "guilty." He takes the position that a verdict will not support a judgment against him unless the issues of paternity and wilful nonsupport are answered against him and, in addition, a general issue as to guilt. This contention is in accord with the holdings of this Court in a number of recent cases.

We are disposed, however, to re-examine this rule and the reasons upon which it is based, with a view to determining whether we will strictly adhere thereto in prosecutions for violations of G.S. 49-2.

In *State v. White,* 225 N.C. 351, 34 S.E. 2d 139 (1945), judgment against defendant was reversed on the ground that evidence of "wilfulness in the failure or neglect to support the illegitimate child" was lacking. In a concuring opinion *Barnhill, J.* (later C.J.), joined by *Winborne, J.* (later C.J.), and *Denny, J.* (now C.J.), stated:

> "The trial judge submitted issues but inadvertently failed to instruct the jury that if they answered both issues in the affirmative they should, upon the facts thus found, return a verdict of guilty, and the jury failed to return a verdict on the principal issue of guilt or innocence.

"It is fundamental with us that a defendant charged with crime, other than a petty misdemeanor, who pleads not guilty, can be punished only after conviction by a jury. Art. I, §§ 11 and 13, N. C. Const. As there was no verdict of guilty, the court was without power to impose sentence."

It seems likely, though the concurring opinion does not so state, that the Justices were influenced by the history of the subject-matter. Prior to 1933 the statutes in this legal area were known as "bastardy" laws. Consolidated Statutes, §§ 265-276. Actions pursuant thereto were civil rather than criminal. *State v. Liles,* 134 N.C. 735, 47 S.E. 750. In 1933 the bastardy laws were repealed and G.S. 49-2 was enacted. This is a criminal statute. *State v. Cook,* 207 N.C. 261, 176 S.E. 757 (1934). In advocating the necessity of a specific finding on the issue of guilt or innocence in actions involving the new statute, the members of the Court undoubtedly felt that the criminal nature of the statute and actions pursuant thereto should be underscored and all uncertainty with respect thereto removed.

Winborne, J. (later C.J.), speaking for a unanimous Court in *State v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857 (1952), in which the paternity and nonsupport issues were answered adversely to defendant but no general verdict of guilty had been returned, said: ". . . since there is no verdict as to the guilt of defendant on the facts found as to the offense charged, there must be a new trial on the second issue,— with instruction that if the same be answered 'yes' the jury should return a verdict of guilty, or guilty as charged."

In *State v. Love,* 238 N.C. 283, 77 S.E. 2d 501, the matter is more fully stated as follows:

". . . the practice has been, and is to submit to the jury issues, first, as to defendant's paternity of the child, and, secondly, as to willful neglect or refusal of defendant to support and maintain his child, and a third, as to guilt of defendant. See *S. v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333; *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728; *S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9; *S. v. Bowser,* 230 N.C. 330, 53 S.E. 2d 282; *S. v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857."

". . . three issues are required to be submitted in a single case, and . . . the trial court should instruct the jury to consider them in the order in which they appear, that is; That the issue of paternity should be considered first. That if it be answered in the negative, the other issues would not be considered. But if answered in the affirmative, the jury would proceed to consider the second issue, as to willful nonsupport; that if it be answered in the

negative, the answer to the third issue would be 'not guilty.' But if the first and second issues be answered in the affirmative, the jury would answer the third issue 'guilty'; that is, the answer to the third issue would follow as a matter of law."

A very recent case in which the procedure outlined in *Love* was followed is *State v. Knight,* 256 N.C. 687, 124 S.E. 2d 855.

Because of the nature and effect of the elements involved in G.S. 49-2, it would be difficult to properly try a case pursuant to that statute without submitting to the jury either oral interrogatories or written issues. Furthermore, G.S. 49-7 seems to contemplate the submission of issues. The only prosecution contemplated under this statute is grounded on the wilful neglect or refusal of a parent to support his or her illegitimate child. The mere begetting of the child is not a crime. The question of paternity is incidental to the prosecution for the crime of nonsupport — a preliminary requisite to conviction. If a jury find that the accused is parent of the child but has not wilfully failed or refused to support the child, there can be no conviction for no crime has been committed. But G.S. 49-2 creates a continuing offense. The determination of paternity will stand; and upon a prosecution for a subsequent wilful neglect or refusal to support, the accused is not entitled to have the question of paternity re-litigated. *State v. Coppedge,* 244 N.C. 590, 94 S.E. 2d 569; *State v. Chambers,* 238 N.C. 373, 78 S.E. 2d 209; *State v. Robinson, supra.*

This brings us to the question, whether the submission of the general issue of guilt or innocence which, according to *State v. Love, supra,* must be answered by direction of the trial judge, is essential to support a judgment.

The verdict of the jury on the issues of paternity and nonsupport is in the nature of a special verdict. It is firmly established in this jurisdiction by precedent and statute that verdict in criminal cases may be either general or special. In arriving at a general verdict, the jurors take the law as given by the court and apply the law to the facts as they find them to be and reach a general conclusion, usually "guilty" or "not guilty." "A special verdict is that by which the jury finds the facts only, leaving the judgment to the court." G.S. 1-201. Ordinarily, the form of a special verdict is a written recital of the jury's findings of the ultimate material facts. See *State v. High,* 222 N.C. 434, 23 S.E. 2d 343; *State v. Sasseen,* 206 N.C. 644, 175 S.E. 142. It was originally a requirement in this jurisdiction that the special verdict state that the jury finds the accused guilty if in the opinion of the court, upon the facts found, he is guilty, and not guilty if in the opinion of the court

the facts found do not establish guilt. *State v. Wallace,* 25 N.C. 195. In *State v. Moore,* 107 N.C. 770, 12 S.E. 249, it is said: "The jury rendered no verdict of guilty or not guilty; they simply found that certain facts stated by them were true. It was not the province of the court to find that defendant was guilty or not guilty. It should have said that the facts did or did not constitute the offense charged in the warrant, and the verdict of the jury should have been rendered by them in accordance with the opinion of the court. This is well settled, and it is strange, indeed, that courts so frequently, no doubt by mere inadvertence, fail to observe the law in such respect." However, in *State v. Ewing,* 108 N.C. 755, 13 S.E. 10, it was held that where there is a special verdict, finding the material facts, no general verdict of guilt or innocence is necessary. The Court explained: "It very obviously appears from the record that the jury intended to, and certainly did, render a special verdict embodying all of the material facts of the case. This they did, and no more; and this it was their province to do. This verdict remains . . . and the judgment of the court is founded upon it. The jury could not go further and render two verdicts — one special and the other general — so that both might prevail at the same time. To do so would involve practical absurdity." Further: "On the argument it was brought to our attention that some confusion and inconsistency have prevailed in numerous decisions of this Court in respect to special verdicts in criminal cases. We have examined the cases cited, and others, and upon mature consideration we think it better that, upon the special verdict in a case, the court should simply declare its opinion that the defendant is guilty or not guilty, and enter judgment accordingly. Indeed, the simple entry of judgment in favor of or against the defendant would be sufficient. . . . It is plain and convenient, will prevent further conflict of decision, and should be observed." The Court had previously held to the same effect in *State v. Moore,* 29 N.C. 228, but later cases were in conflict with the Moore decision, and the question was not finally set at rest until the decision in *Ewing. Ewing* has been followed and cited with approval in *State v. Gulledge,* 207 N.C. 374, 177 S.E. 128; *State v. Ditmore,* 177 N.C. 592, 99 S.E. 368; *State v. Robinson,* 116 N.C. 1046, 21 S.E. 701; *State v. Gillikin,* 114 N.C. 832, 19 S.E. 152; *State v. Spray,* 113 N.C. 686, 18 S.E. 700. The language of G.S. 1-201 is in accord. Either practice would be sufficient but that approved in the *Ewing* case is "the better one." *State v. Gillikin, supra.*

The verdict in the instant case differs from the usual special verdicts in that issues were submitted and answered. The submission of interrogatories or issues has been rare in criminal cases. In *State v.*

Belk, 76 N.C. 10, an assault case, "Instead of submitting the case to the jury on the general issue of not guilty and with instructions as to the law appropriate to the evidence, the Judge submitted certain questions to the jury and these, with their findings in reply, are regarded by the Judge . . . as a special verdict." The Court comments: "We think this practice is one not to be advised in criminal cases. It will be found inconvenient and moreover, it tends to impair the undoubted right of juries to find general verdicts, or at least to discourage its exercise." However, the submission of issues was not condemned. As stated above, the submission of issues in prosecutions under G.S. 49-2 is, as a practical matter, almost a necessity. Of course, if the question of paternity has been previously determined adversely to the accused, the case could well be tried solely upon the general issue of guilt.

We hold that a verdict upon the issues of paternity and nonsupport if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of Art. I, §§ 11 and 13, of the Constitution of North Carolina, requiring trial and verdict by jury in criminal cases. "A special verdict is in itself a verdict of guilty or not guilty, as the facts found in it do, or do not, constitute in law the offense charged." *State v. Stewart,* 91 N.C. 566, 568. We emphasize, however, that we do not rule out the procedure outlined in *State v. Love, supra,* and cases tried in accordance with that procedure will not be held erroneous by reason of such procedure.

A special verdict is defective, however, if a material finding is omitted. Such verdict must find sufficient facts to permit of the conclusion of law upon which the judgment rests. *State v. Barber,* 180 N.C. 711, 104 S.E. 760; *State v. McCloud,* 151 N.C. 730, 66 S.E. 568; *State v. Bradley,* 132 N.C. 1060, 44 S.E. 122. Herein lies the defect in the verdict below. In order to support a finding of wilful nonsupport of an illegitimate child by the father, the State must prove beyond a reasonable doubt that the mother of the child, or under certain circumstances the director of public welfare, has, after the child was born and before the prosecution was commenced, made demand upon the father for support and after such demand and before prosecution the father wilfully neglected and refused to provide adequate support according to his means and condition and the necessities of the child. *State v. Perry,* 241 N.C. 119, 84 S.E. 2d 329; *State v. Sharpe,* 234 N.C. 154, 66 S.E. 2d 655; *State v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157.

The nonsupport issue submitted to the jury in the instant case is: "Has the defendant . . . wilfully neglected and refused to support and maintain said illegitimate child . . .?" The affirmative answer to this

question does not supply the information as to whether demand was made or, if made, whether it was before or after the prosecution was commenced. The above issue should be compared with the second issue in *State v. Love, supra:* "Did the defendant wilfully fail to support the said child between the time of its birth on March 22, 1951, and April 22, 1951 (date of issuance of warrant), after notice and request for support?" See also *State v. Dixon,* 257 N.C. 653, 127 S.E. 2d 246. Even in *Love* and *Dixon* the issues might prove insufficient as special verdicts.

Because of the deficiency of the findings in the special verdict in the instant case there must be a new trial. There was sufficient evidence by the State on all aspects of the case to withstand defendant's motion for nonsuit and the motion was properly overruled. In fairness to the learned judge who tried the case below we point out that he instructed the jury, "If you answer the two (issues) Yes, then you would have found from the evidence beyond a reasonable doubt that the defendant is guilty as charged." But the evidence and the charge do not cure a defect appearing on the face of the record proper.

The paternity issue is sufficient and the affirmative answer thereto establishes the fact that defendant is the father of the child, Patricia Ann Pace. Defendant is not entitled to a new trial on this issue. *State v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857.

We note that defendant was given a sentence of two years. Six months is the maximum sentence permitted by the statute. G.S. 49-8.

New trial.

JOHN T. TAYLOR, JR., PETITIONER v. WEST VIRGINIA PULP & PAPER COMPANY, RESPONDENT.

(Filed 23 September, 1964.)

1. Highways § 12—

A land owner is entitled to establish a cartway over the lands of another if he has no proper access to a public way and if he satisfies the court that it is necessary, reasonable and just that he have such private way. G.S. 136-69.

2. Water and Water Courses § 5—

A stream navigable in fact is navigable in law, and its capacity for trade and travel in the usual and ordinary modes is the test and not the extent or manner of such use, and therefore evidence that logs were rafted down

a creek to a river is sufficient to sustain a finding that the creek is navigable.

3. Highways § 12 —

A person entitled to a private way across the lands of another under G.S. 136-69 is not entitled as a matter of law to select his route or to access to existing private roads on respondent's land, regardless of how expedient and economical the use of the private roads would be to him, but the location of the right of way is the task of a jury of view with its determination reviewable by the court.

4. Same—

The statutes providing for the establishment of cartways reasonably necessary for access to a public road are in derogation of the rights of private property and must be strictly construed. G.S. 136-68, G.S. 136-69.

5. Water and Water Courses § 5—

A navigable stream is a public way.

6. Highways § 12—

Petitioner instituted this proceeding to establish a cartway over the lands of respondent to transport his timber to market. The evidence disclosed that petitioner had access to a navigable creek and that timber had theretofore been transported by means of the creek. *Held:* While access to a navigable stream would not in every instance be sufficient, the finding of the court that in this particular situation such means of transportation was adequate is conclusive when supported by evidence, and the existence of such adequate access precludes the relief sought. G.S. 136-69.

7. Same—

Petitioner, for the purpose of transporting timber to market, sought a cartway to private roads on respondent's land with right to use the private roads to the public highway. Respondent offered to permit petitioner the right to construct a cartway by the shortest route to either one or the other of the public highways adjacent respondent's land. *Held:* The tender of an adequate permissive way meets the requirements of G.S. 136-69, and petitioner is not entitled to connect with respondent's private roads.

APPEAL by petitioner from *Cowper, J.*, January 1964 Session of DARE.

Proceeding under G.S. 136-69 to condemn a cartway.

Petitioner (Taylor) and respondent (Pulp & Paper Company) both own timberland in Dare County. Petitioner's tract contains approximately 1,600 acres and is entirely surrounded by respondent's tract of about 612,000 acres. U. S. highways No. 64 and No. 264 traverse respondent's property, but no public road touches petitioner's property.

Measured from the closest point, petitioner's property is approximately 6⅛ miles south from Highway No. 64 and 5¾ miles west from No. 264. Respondent has constructed a number of dirt roads into and around its property for the purpose of cutting and removing timber

and pulpwood, suppressing fire, and reforesting. Some of these roads connect with highways No. 64 and No. 264 and extend to points not far distant from petitioner's tract, the nearest being approximately 150 yards from it. Occasionally during the hunting season respondent's roads are open to hunters. Otherwise, the public is prohibited from using them and they are obstructed by locked cables. The hazard of fire is always a major concern to respondent.

Petitioner, desirous of cutting and marketing timber and pulpwood from his property, instituted this proceeding for the avowed purpose of having laid off to him a cartway "leading from the nearest boundary of petitioner's lands in a generally northern direction to and over the dirt road heretofore constructed and used by defendant to the public highway." He alleged that he had no reasonable access to his property except across the lands of respondent. Answering, respondent denied that it was necessary for petitioner to have a cartway over its property. It alleged that he already had adequate access over a sixty-foot right of way leading from the northwest corner of his tract over respondent's land to Mill Tail Creek, a navigable stream emptying into Alligator River. In its answer, however, it tendered him the use of a designated thirty-foot strip of land across its property to Highway No. 264 for the purpose of constructing a road to be used jointly by the parties for five years. At the end of that time all petitioner's rights in the road would end.

By reply, petitioner admitted that he owned a sixty-foot right of way to Mill Tail Creek, but averred that it was neither practical nor economically feasible to remove timber by this route. He also alleged that to build a road over the right of way tendered by respondent would be "economically impossible when considered with the amount of land and timber owned by petitioner."

The parties waived hearing before the clerk and agreed that the proceeding should be transferred to the Superior Court, where the judge should determine all issues of fact arising on the pleadings. Upon the trial petitioner's evidence tended to show:

There are 1.5 million feet of merchantable timber on his tract, which is swampland. He desires to cut the timber now mature and to grow future crops of timber. It is almost a mile from his land to Mill Tail Creek. To log over his appurtenant easement, he would have to build a railroad or a canal to the creek and employ a tug or a motor-driven barge to transport the logs from there to Alligator River. It would be more economical to log his tract with trucks over respondent's existing roads than to barge the logs. The market value of his timber would not justify the expense of building the road which respondent suggested.

Respondent's evidence tended to show:

In 1951 or 1952 logs were taken, by a railroad constructed to Mill Tail Creek, over the sixty-foot easement from the northwestern corner of the tract petitioner now owns. From there they were rafted to a sawmill at Buffalo City. In 1954, approximately four million feet of pine were taken from a tract immediately to the west of the Taylor property over the same right of way to Mill Tail Creek, whence to Elizabeth City by barges.

Respondent's lands are bounded on the north by Albemarle Sound, on the west by Alligator River, and on the east by Croatan Sound. Because of the swampy terrain and large areas of peat soil, road-building costs have varied from three to ten thousand dollars a mile. Both construction and maintenance costs are extremely high, and the roads cannot be used at certain times of the year. When in use at any time they require constant repairs. The road petitioner is most eager to use, Mill Tail Road, runs 8-4/10 miles across its property from Highway No. 64 almost to petitioner's land. Respondent objects to petitioner's use of any of the roads which it has constructed.

During the trial, respondent stipulated that it will permit petitioner to construct a cartway over its lands, *other than over its private roads,* from the nearest point on his land to either Highway 264 or Highway 64, provided the road be constructed not more than thirty feet in width and respondent be permitted to use it in common with petitioner. At the conclusion of the evidence the judge made detailed findings of fact, which included (1) that the sixty-foot right of way from petitioner's lands across respondent's lands to Mill Tail Creek affords petitioner adequate means of transportation for the removal of timber from his lands as contemplated by G.S. 136-69, and (2) that respondent's tender of an easement also meets the requirements of G.S. 136-69 as a necessary and proper access to petitioner's lands.

Pursuant to these findings, Judge Cowper concluded as a matter of law that respondent is not entitled to the establishment of any cartway or to the use of any of respondent's private roads. From the order dismissing the proceedings, the petitioner appealed.

LeRoy, Wells & Shaw for petitioner.
Rodman and Rodman for respondent.

SHARP, J. The assignments of error properly made raise only this dual question: Are the judge's findings of fact supported by the evidence and, if so, do they support the judgment?

As one taking action preparatory to cutting and removing standing timber from his land, petitioner is entitled to condemn a cartway over respondent's property, provided (1) there is no public road or other adequate means of transportation affording him necessary and proper access to his own property, and (2) he satisfies the court that it is necessary, reasonable and just that he have such a private way. G.S. 136-69. Respondent's evidence that ten years ago logs were transported over the sixty-foot easement to Mill Tail Creek and rafted down it to Alligator River is sufficient to sustain his Honor's finding of fact that Mill Tail Creek is a navigable stream. "If a stream is 'navigable *in fact* . . . it is navigable in *law*.' Gould on Waters, (3 Ed.), sec. 67. The capability of being used for purposes of trade and travel in the usual and ordinary modes is the test and not the extent and manner of such use." *State v. Twiford,* 136 N.C. 603, 48 S.E. 586; *accord, State v. Baum,* 128 N.C. 600, 38 S.E. 900; *Swan Island Club, Inc. v. White,* 114 F. Supp. 95 (E.D.N.C.), *aff'd sub nom. Swan Island Club, Inc. v. Yarbrough,* 209 F. 2d 698 (4th Cir.). There is no evidence in the record to suggest that Mill Tail Creek is not still navigable. Therefore, it appears that petitioner does, in fact, have access to his lands albeit by water. If such access affords adequate and proper means of ingress and egress he is not entitled to another and different way by land even though it would prove more convenient and economical. *Pritchard v. Scott,* 254 N.C. 277, 118 S.E. 2d 890; *Kanupp v. Land,* 248 N.C. 203, 102 S.E. 2d 779; *Warlick v. Lowman,* 104 N.C. 403, 10 S.E. 474; *Plimmons v. Frisby,* 60 N.C. 200.

Petitioner argues that the "facts epitomize the necessity, reasonableness, and justice of a cartway from petitioner's land to and over respondent's existing road (Mill Tail Road) to the public road," and that the court erred in not so finding. We hold otherwise. Even a petitioner qualifying under G.S. 136-69 for a private way over the lands of another is not entitled to select his route or to use existing private roads on a respondent's land *as a matter of right,* however expedient and economical their use would be to him. The location of the way is the task of a jury of view, but its acts are reviewable by the court. *Candler v. Sluder,* 259 N.C. 62, 130 S.E. 2d 1; *Garris v. Byrd,* 229 N.C. 343, 49 S.E. 2d 625. Mill Tail Road, over which petitioner seeks to acquire an easement, has been constructed and is maintained by respondent at great cost. Its use by petitioner as a logging road would increase both maintenance and supervision costs for respondent and, once established as a cartway for petitioner's use, it would also become a quasi-public road. *Parsons v. Wright,* 223 N.C. 520, 27 S.E. 2d 534.

If the Pulp and Paper Company had constructed no roads whatever on its property and Taylor required a road across it, he would perforce have to construct his own road. Unless the only avenue over a respondent's land reasonably adequate for access to a petitioner's property happened to be a road already constructed by the respondent, a petitioner entitled to a cartway would have no right, as a matter of law, to the use of that particular road. Otherwise, a petitioner is in no more favored a position because a respondent has constructed a road across his property than he would be if no such road existed. G.S. 136-68 and G.S. 136-69 are in derogation of the rights of private property and must be strictly construed. *Brown v. Glass,* 229 N.C. 657, 50 S.E. 2d 912.

The judge who heard the evidence upon the parties' waiver of a jury trial has found that Taylor has adequate means of access for the removal of his timber by the sixty-foot right of way appurtenant to his tract and by Mill Tail Creek. A navigable stream is a public highway. *Gaither v. Hospital,* 235 N.C. 431, 70 S.E. 2d 680; *Cromartie v. Stone,* 194 N.C. 663, 140 S.E. 612. Certainly, access to a navigable stream would not in every instance afford an adequate outlet for the purposes enumerated in G.S. 136-69 and thus preclude relief under it. Here, however, the judge has found that it does. He has also found that respondent's offer to petitioner of an easement to either Highway 64 or Highway 264 over its lands, other than by its private roads, provides for petitioner another adequate and proper means of ingress and egress for the removal of his timber. An adequate permissive way meets the requirements of G.S. 136-69. *Garris v. Byrd, supra.*

The court's ruling that petitioner has failed to establish that it is necessary, reasonable, and just that he have a cartway over the lands of respondent necessarily followed its finding that the petitioner already has an adequate way or ways. The court's findings are supported by competent evidence and are therefore as conclusive as the verdict of a jury. Petitioner simply failed to carry his burden of proof to the satisfaction of the judge below, and both he and we are bound by the judge's findings. *In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795.

In the trial below we find

No error.

W. W. BREVARD, ADMINISTRATOR OF THE ESTATE OF BRENDA BREVARD (TAYLOR), FORMERLY BRENDA BREVARD v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., A CORPORATION.

(Filed 23 September, 1964.)

1. Pleadings § 2—

Plaintiff must allege facts necessary to constitute his cause of action so as to disclose the issuable facts upon which his right to relief depends, and mere allegation of legal conclusions is insufficient.

2. Insurance § 65—

In an action to recover under an insurance policy, the burden is upon plaintiff to allege and prove coverage and the burden of showing exclusion from coverage is upon insurer.

3. Pleadings § 19—

The rule of liberal construction does not permit the court to read into a pleading facts which it does not contain.

4. Same—

A demurrer admits the truth of the facts properly pleaded but does not admit inferences or conclusions of law.

5. Insurance § 65— Allegations held not to show ground for liability of insurer for unpaid balance of judgment for personal injury.

This action against insurer was instituted to recover the unpaid balance of a judgment for personal injury which had theretofore been obtained against the estate of the driver of a car and against insured under the doctrine of *respondeat superior*, insured not being the owner of the car. The complaint alleged that insurer had issued certain policies of liability insurance and that such policies covered the liability of the insured "arising out of the aforesaid judgment," but nowhere alleged the provisions of the policy which plaintiff contended obligated insurer to pay the unpaid portion of the judgment against insured. *Held:* The mere allegation that the policies covered insured's liability arising out of the judgment constitutes a conclusion of law, and insurer's demurrer on the ground that the complaint fails to state a cause of action against it was properly sustained.

APPEAL by plaintiff from *Pless, J.*, in Chambers at Marion, North Carolina. From HENDERSON.

Plaintiff seeks to recover from the defendant the unsatisfied portion of a judgment procured by plaintiff in the Superior Court of Buncombe County, North Carolina, at the September Session 1963, against Harley W. Meredith, Sr. and Mary Ray Meredith, administratrix of the estate of Harley W. Meredith, Jr.

The plaintiff alleges in his complaint that his intestate, Brenda Brevard, was riding as a passenger in a motor vehicle which was struck while being driven on Highway No. 9, near Montreat, North Carolina, by a 1957 Ford automobile operated by Harley W. Meredith, Jr., on

19 December 1960, and that she received injuries as the result of this collision which caused her to be disabled and to incur expenses.

Brenda Brevard, through her next friend, instituted the civil action referred to above based upon allegations that Meredith, Jr. was operating the 1957 Ford automobile as the agent of Meredith, Sr. and at said time was in the scope of said employment and about his master's business.

Brenda Brevard later married and thereafter died prior to the trial of the Buncombe County action and her administrator was substituted as party-plaintiff.

Judgment was obtained against Meredith, Sr. and the estate of Meredith, Jr. in the sum of $7,500. The sum of $708.33 was paid and credited on the judgment. Execution has been issued against Meredith, Sr. and returned unsatisfied.

Plaintiff alleges that sometime prior to 19 December 1960 the defendant sold and issued to Harley Watson Meredith, Sr., two policies of automobile liability insurance in the sum of $25,000 each, covering a 1949 Buick two-door automobile and a 1959 Cadillac coupe; that these policies were issued on 29 August 1960, bearing a counter-signature date of 28 September 1960, copies of said policies being attached as exhibits to the complaint.

The jury verdict, incorporated in the judgment entered in the Buncombe County action, which judgment is also attached as an exhibit to the complaint in this action, is to the effect that Harley W. Meredith, Sr. was not the owner of the 1957 Ford automobile and did not maintain it as a family purpose vehicle. The plaintiff recovered judgment against Meredith, Sr. pursuant to the doctrine of *respondeat superior.*

When Meredith, Sr. called on the defendant to defend the Buncombe County action, it refused to do so on the ground that the foregoing policies of liability insurance did not cover the 1957 Ford.

The allegations in the complaint in this action, upon which the plaintiff bases his cause of action, are as follows:

"That the aforesaid insurance policy or policies covered the named assured Harley Watson Meredith for the liability rising out of the aforesaid judgment and that by entry of said judgment the defendant became and is now legally obligated to pay the damages recovered in said judgment thereby, and the defendant is obligated to the extent of the limits of the policies hereinbefore pleaded to this plaintiff and is indebted to this plaintiff in the sum of $6,791.67 plus accrued interest and the court costs in said action."

This action was originally instituted in the General County Court of Henderson County, North Carolina. The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and respectfully shows the court:

"1. The complaint fails to allege whether the 1957 Ford automobile said to have been driven in paragraph 11 of the complaint by Harley W. Meredith, Jr., was an 'owned automobile' as defined in the insurance policy attached to the complaint.

"2. The complaint fails to allege that the said 1957 Ford automobile was a 'non-owned automobile' as defined in the policy of insurance attached to the complaint.

"3. In the absence of the allegation by the plaintiff and the corresponding proof that the said 1957 Ford was an 'owned automobile' or 'non-owned automobile' as those terms are defined in the policy of insurance attached to the complaint, the plaintiff cannot recover in this action."

The demurrer was overruled and a writ of *certiorari* was granted in the Superior Court of Henderson County to review the ruling in the General County Court.

His Honor J. Will Pless, Jr., Resident Judge of the Twenty-ninth Judicial District, upon hearing the matter on 29 June 1964, reversed the ruling of the General County Court and sustained the demurrer.

The plaintiff appeals, assigning error.

William J. Cocke; Prince, Jackson, Youngblood and Massagee for plaintiff appellant.

Carpenter, Webb & Golding for defendant appellee.

DENNY, C.J. As we construe the complaint in this action, the plaintiff seeks to recover against the defendant based on the terms of the judgment entered in the action between the plaintiff and Meredith, Sr. and the administratrix of the estate of Meredith, Jr.

The mere fact that the plaintiff obtained a judgment against Meredith, Sr. does not necessarily obligate this defendant to pay such judgment, and nowhere in the complaint does the plaintiff set out the provisions contained in the insurance policies which he contends obligates the defendant to pay the unsatisfied portion of the plaintiff's judgment.

If the defendant is liable to plaintiff, its liability accrues under the provisions set out in the insurance contracts between the defendant and its insured.

The defendant contends that the plaintiff has failed to allege facts sufficient to bring himself within the coverage provided in the insurance policies involved in any respect.

It is said in Blashfield, Cyclopedia of Automobile Law and Practice, Volume 6, Part 2, Section 4113.15: "It is essential for plaintiff, in his pleading, to allege a loss within the coverage of the insurance contract. He must allege a loss for which he is entitled to be indemnified. * * *

"The plaintiff should do more than merely incorporate in his pleading allegations in the nature of legal conclusions indicating that the loss sued for was covered by the contract of insurance, and ordinarily he should set out facts sufficient to enable the court to decide that his claim is included within the coverage of the policy or contract. * * *"

In Strong's North Carolina Index, Volume 3, page 600, Pleadings, it is said: "* * * (A) cause of action consists of the facts alleged in the complaint, and plaintiff must allege such facts necessary to constitute his cause of action so as to disclose the issuable facts determinative of plaintiff's right to relief. And recovery must be had, if at all, on the theory of liability set forth in the complaint. * * * Mere allegation of the legal conclusion which the pleader conceives should be drawn from the evidence he intends to offer is insufficient. * * *" *Broadway v. Asheboro,* 250 N.C. 232, 108 S.E. 2d 441; *Hinton v. Whitehurst,* 214 N.C. 99, 198 S.E. 579; *Baker v. R. R.,* 205 N.C. 329, 171 S.E. 342.

In an action to recover under an insurance policy, the burden is on the plaintiff to allege and prove coverage. On the other hand, the burden of showing an exclusion from coverage in on the insurer. *Abernethy v. Hospital Care Ass'n.,* 254 N.C. 346, 119 S.E. 2d 1; *Thomas & Howard Co. v. Insurance Co.,* 241 N.C. 109, 84 S.E. 2d 337; *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285.

In *Bowen v. Darden, supra,* this Court pointed out that a cause of action upon which a plaintiff chooses to rely should be stated in the complaint "in a clear and concise manner, G.S. 1-122, so that the defendants will not be left in doubt as to how to answer and what defense to make. *Hussey v. R. R.,* 98 N.C. 34 (3 S.E. 923). The pleadings must raise the precise issues which are to be submitted to the jury, *Hunt v. Eure,* 189 N.C. 482, 127 S.E. 593, so that the court itself may not be left in a quandary as to the cause of action it is trying. *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648."

"The rule of liberal construction does not require or permit us to write in the complaint allegations which are not there." *Carolina Builders Corp. v. New Amsterdam Casualty Co.,* 236 N.C. 513, 73 S.E. 2d 155.

A demurrer admits as true the allegations of the facts contained in the complaint but does not admit inferences or conclusions of law. *Stamey v. Membership Corp.*, 247 N.C. 640, 101 S.E. 2d 814; *Freel v. Center, Inc.*, 255 N.C. 345, 121 S.E. 2d 562.

In our opinion, the general allegations in the complaint in this action, to the effect that the policies involved herein "covered the named assured Harley Watson Meredith for the liability rising out of the aforesaid judgment," constitutes a conclusion of law and that such conclusion is not admitted by the demurrer.

The case of *Hall v. Casualty Co.*, 233 N.C. 339, 64 S.E. 2d 160, did not involve a controversy over the ownership of the automobile, nor the question as to whether or not it was covered by the policy issued by the defendant. In the *Hall* case the motor vehicle involved in the collision by reason of which the third party plaintiff recovered her judgment, was the particular motor vehicle described in the policy. Such is not the case in the present action. Plaintiff does not allege that either of the automobiles described in the policies involved was involved in the accident out of which the plaintiff's cause of action arose, but alleges that the automobile in which Brenda Brevard, plaintiff's intestate, was riding was involved in a collision with a 1957 Ford automobile which was being driven not by the insured Meredith, Sr. but by Meredith, Jr.

In our opinion, the ruling of the court below should be sustained.

Affirmed.

DONALD LUTHER BURGESS, BY HIS NEXT FRIEND THEODORE BURGESS v. HUGH GIBBS.

(Filed 23 September, 1964.)

1. Courts § 2—

It is the duty of a court on plea, motion, or *ex mero motu*, to dismiss a proceeding whenever it becomes apparent that the court is without jurisdiction of the matter.

2. Same—

Every court necessarily has inherent judicial power to inquire into, hear and determine questions relating to its jurisdiction, whether of law or fact.

3. Appeal and Error § 49—

Findings of fact by the court which are supported by competent evidence are binding and conclusive on appeal notwithstanding there may be evidence *contra*.

4. Courts § 2; Master and Servant § 84—Court properly dismisses action upon finding facts disclosing original jurisdiction of Industrial Commission.

Where, in an action in the Superior Court to recover for personal injuries, defendant alleges as a plea in bar that the Industrial Commission has exclusive original jurisdiction, and the court finds upon supporting evidence that plaintiff and defendant were co-employees and that the injuries in suit occurred while defendant was transporting plaintiff from work to his home, and that the transportation was furnished by the employer as a part of the employment, *held*, the findings support the conclusion that the Industrial Commission has exclusive original jurisdiction, and it was not error for the court, without the intervention of a jury, to dismiss the action as a matter of law for want of jurisdiction. G.S. 97-10.1.

APPEAL by plaintiff from *McLean, J.*, April-May 1964 Session of RUTHERFORD.

Civil action to recover damages for personal injuries allegedly caused by defendant's actionable negligence in the operation of a pickup truck, in which plaintiff was riding as a passenger.

Defendant in his answer admits that plaintiff, an infant, was riding as a passenger in a pickup truck operated by him, that plaintiff sustained a slight injury while riding therein, but denies that he was guilty of any negligence in its operation.

As a further answer, defendant alleges as a plea in bar to plaintiff's action his immunity to suit and his nonliability under the provisions of G.S. 97-9 and G.S. 97-10.1 of the N. C. Workmen's Compensation Act. As a further defense, defendant alleges that the cause of plaintiff's injuries was an unavoidable accident.

Judge McLean, after the jury was empaneled and in its absence, heard evidence in respect to defendant's plea in bar. He made the following findings of fact, which we summarize, none of which are excepted to by plaintiff except those enclosed in parentheses:

Plaintiff was injured on 1 February 1963. On and before that date, plaintiff and defendant were employees of Charles McGuinn, who operated a mercantile establishment, consisting of a supermarket, a hardware store, and a service station in this State, and had on and before that date five or more regularly employed employees in such business. McGuinn and his employees were subject to and bound by the provisions of the N. C. Workmen's Compensation Act, and McGuinn had a policy of compensation insurance on said employees.

(McGuinn usually and ordinarily carried plaintiff to his home at the close of business, if he did not have other means of transportation, as a part of his employment.)

On the week before 1 February 1963, McGuinn was out of the State and had delegated to defendant during his absence the duties ordinarily performed by him. On a prior occasion during McGuinn's absence, defendant had carried plaintiff home from the supermarket when it closed. On 1 February 1963 defendant, after the close of business, was carrying plaintiff from his place of employment by McGuinn to his home. (The transportation of plaintiff by defendant on 1 February 1963, and on a prior occasion, was in furtherance of defendant's employer's business, and pursuant to authority and direction given him by McGuinn. Plaintiff's employment by McGuinn continued until he was returned to his home by his employer or his agent, unless plaintiff elected to secure other transportation. At the time of plaintiff's injuries, defendant was in the course and scope of his employment and about his employer's business in transporting plaintiff from his place of employment to his residence.) Defendant has filed notice of claim for compensation, but plaintiff has not.

Based upon the facts found by him, Judge McLean made conclusions of law to this effect: Plaintiff and defendant are bound by and subject to the provisions of the N. C. Workmen's Compensation Act, and a policy of workmen's compensation insurance was in effect at the time of plaintiff's injuries. (Plaintiff's injuries are the result of an accident arising out of and in the course and scope of his employment by McGuinn, and that by virtue of the provisions of G.S. 97-9 and G.S. 97-10.1, defendant, a fellow employee of plaintiff, is entitled to immunity from suit at common law by plaintiff for his injuries, and plaintiff's exclusive remedy for his injuries is against McGuinn, his employer, and his insurance carrier for compensation as provided in the N. C. Workmen's Compensation Act.) Plaintiff excepted to the judge's conclusions of law set forth in parentheses.

Whereupon Judge McLean entered judgment decreeing that defendant's plea in bar be sustained and that plaintiff's action be dismissed.

Plaintiff excepted and appealed.

Hamrick & Hamrick by J. Nat Hamrick for plaintiff appellant.

Meekins, Packer & Roberts by Landon Roberts for defendant appellee.

PARKER, J. Among other defenses, the answer of the defendant alleges as a plea in bar to plaintiff's action his immunity to suit at com-

mon law by plaintiff in this case and his nonliability under the provisions of G.S. 97-9 and G.S. 97-10.1 of the N. C. Workmen's Compensation Act.

A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity. *High v. Pearce,* 220 N.C. 266, 17 S.E. 2d 108. If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit. *In re Davis,* 248 N.C. 423, 103 S.E. 2d 503. "This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. * * * So, *ex necessitate,* the court may, on plea, suggestion, motion, or *ex mero motu,* where the defect of jurisdiction is apparent, stop the proceeding." *Branch v. Houston,* 44 N.C. 85.

When the trial judge in the absence of the jury heard and decided all questions relating to the court's jurisdiction to entertain the instant action, he followed the sound rule that every court necessarily has inherent judicial power to inquire into, hear and determine the questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction. *Jones v. Oil Co.,* 202 N.C. 328, 162 S.E. 741; *Miller v. Roberts,* 212 N.C. 126, 193 S.E. 286; *Dellinger v. Clark,* 234 N.C. 419, 67 S.E. 2d 448; *Gilbert v. David,* 235 U.S. 561, 59 L. ed. 360; *Prack v. Weissinger,* 276 F. 2d 446; *Murphy v. Campbell Soup Co.,* 40 F. 2d 671; *Gill v. Sovereign Camp, W.O.W.,* 209 Mo. App. 63, 236 S.W. 1073; *Dolese Bros. v. Tollett,* 162 Okl. 158, 19 P. 2d 570; *Bridges v. Wyandotte Worsted Co.,* 243 S.C. 1, 132 S.E. 2d 18; *Brenner v. Great Cove Realty Co.,* 190 N.Y.S. 2d 337; 21 C. J. S., Courts, § 113, p. 174.

In *Bridges v. Wyandotte Worsted Co., supra,* the Court said:

> "The issue of jurisdiction is basically one of law. It involves the determination by the court of its right to proceed with the litigation. A decision of this question by the court deprives a litigant of no right to a jury trial of the issue of liability because, if the court has no jurisdiction, the litigants have no rights which they may assert in that court. The right to have a jury pass upon the controverted factual issues must of necessity relate to the assertion of the right of the litigant which has been allegedly violated, which presupposes a court having jurisdiction to grant the relief sought. The determination of the jurisdictional question by the court is not a denial of any constitutional right of a litigant to a jury trial, but simply a determination of the forum in which those rights may properly be asserted. The decision of the question of whether the

court has jurisdiction is a preliminary one to the determination of the merits of the cause, and is for the court to decide."

Young v. Mica Co., 212 N.C. 243, 193 S.E. 285, was an action to recover damages for an alleged wrongful death. Defendant averred a plea in bar on the ground that the Industrial Commission had exclusive jurisdiction by virtue of the N. C. Workmen's Compensation Act. On the question of jurisdiction there was conflicting evidence. This Court said: "On this conflicting evidence it was proper for the fact to be determined by submission of an issue to the jury." However, the Court does not say this was necessary.

In *Gilbert v. David, supra,* the district court, after hearing testimony from both parties on the question of plaintiff's residence, dismissed the suit on the sole ground of want of jurisdiction. It was contended that the court erred in not submitting the issue of jurisdiction to the jury. The United States Supreme Court said: "But while the court might have submitted the question to the jury, it was not bound to do so; the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject."

Jurisdictional questions arising upon motions to quash the service of process on supposed agents of foreign corporations have repeatedly been held by us to present questions for the court. *Israel v. R. R.*, 262 N.C. 83, 136 S.E. 2d 248; *Farmer v. Ferris*, 260 N.C. 619, 133 S.E. 2d 492; *Dumas v. R. R.*, 253 N.C. 501, 117 S.E. 2d 426; *Brown v. Coal Co.*, 208 N.C. 50, 178 S.E. 858; *Lumber Co. v. Finance Co.*, 204 N.C. 285, 168 S.E. 219.

Plaintiff's assignments of error to the court's findings of fact are overruled, because an examination of the evidence in the record before us shows that all challenged findings of fact are supported by competent evidence. Consequently, the challenged findings of fact are binding and conclusive upon us, notwithstanding if there be evidence *contra. Farmer v. Ferris, supra; Lumber Co. v. Finance Co., supra; Brown v. Coal Co., supra;* Strong's N. C. Index, Vol. 1, Appeal and Error, pp. 138-9.

Plaintiff's assignments of error to the court's conclusions of law and to the judgment are overruled.

G.S. 97-2(2) of our Workmen's Compensation Act defines the term "employee," so far as relevant here, thus: "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed * * *."

The judge's findings of fact show that plaintiff and defendant were both employees of McGuinn, that McGuinn and his employees were subject to and bound by the provisions of the N. C. Workmen's Compensation Act, and McGuinn furnished transportation to plaintiff to his home after his hours of employment as a real incident to his contract of employment, and consequently plaintiff was in the course of his employment when injured, because he had a right to the transportation. *Jackson v. Bobbitt,* 253 N.C. 670, 117 S.E. 2d 806; *Lassiter v. Telephone Co.,* 215 N.C. 227, 1 S.E. 2d 542.

The facts found by the judge show that plaintiff was injured in the course and scope of his employment while riding in an automobile driven by defendant, a fellow employee of plaintiff, who at the time was carrying plaintiff to his home in the conduct of his employer's business and pursuant to authority and direction given him by his employer. Under facts found by the court, plaintiff may not hold defendant liable in an action at law for negligence, since defendant was a person conducting the business of his employer within the purview of the immunity provision of G.S. 97-9. *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. The rule stated in *Warner v. Leder, supra,* has been applied and recognized in *McNair v. Ward,* 240 N.C. 330, 82 S.E. 2d 85; *Johnson v. Catlett,* 246 N.C. 341, 98 S.E. 2d 458.

Judge McLean's findings of fact are supported by competent evidence, and they support the judge's conclusions of law that plaintiff cannot maintain his action at common law against defendant, his co-employee, and that plaintiff's exclusive remedy is against McGuinn, his employer, and his insurance carrier for compensation as provided in the N. C. Workmen's Compensation Act, G.S. 97-10.1, which conclusions of law are correct, and they in turn support the judge's judgment sustaining defendant's plea in bar and dismissing plaintiff's action for want of jurisdiction of the court over the subject matter of the action.

Affirmed.

H. C. LILLEY, JR. v. MANNING MOTOR COMPANY, INC., AND FORD MOTOR COMPANY, INC.

(Filed 23 September, 1964.)

1. Sales § 5—

Ordinarily, an express warranty excludes an implied warranty, and while there are exceptions to this rule, a stipulation in the express warranty excluding implied warranties is held valid in almost all cases.

2. Same; Automobiles § 5— Replacement or adjustment of defective parts in accordance with terms of warranty precludes liability on part of seller.

Plaintiff declared upon an express warranty against defect in materials and workmanship in the car purchased by him, which warranty stipulated it should be fulfilled by the dealer replacing free of charge any defective part. The uncontradicted evidence tended to show that the dealer replaced or adjusted as far as the purchaser would permit every defective part called to his attention, but that the purchaser refused to permit him to replace or adjust additional items and did not advise him of other asserted defects. *Held:* Nonsuit was properly entered, since under the terms of the warranty the seller was entitled to notice of defects and an opportunity to remedy any deficiencies, there being no contention of a failure of consideration.

APPEAL by defendant, Manning Motor Company, Inc., from *May, S. J.*, February 1964 Civil Session of BEAUFORT.

Action for damages for breach of warranty of quality, incident to the sale of an automobile.

Plaintiff sued Manning Motor Company, Inc., (hereinafter referred to as defendant) and the Ford Motor Company, Inc. The action against Ford Motor Company was dismissed on demurrer. Plaintiff did not appeal but pursued his action against Manning alone.

The evidence, in the light most favorable to plaintiff, is briefly summarized as follows:

On 9 June 1962 plaintiff purchased from defendant a new Ford automobile. Defendant delivered to plaintiff the following warranty:

> "THIS IS YOUR FORD DEALER'S NEW CAR WARRANTY
> Ford Motor Company has warranted to the Dealer who, pursuant to his sales agreement with the Company, hereby, on his own behalf, warrants to the Purchaser each part of this 1962 Ford car to be free under normal use and service from defects in material and workmanship for a period of twelve months from the date of delivery to the Purchaser or until it has been driven for twelve thousand miles, whichever comes first.

> This warranty shall be fulfilled by the Dealer (or if the Purchaser is traveling or has moved to a different locality, by any Authorized Dealer) replacing at his place of business, free of charge including related labor, any such defective part.
>
> This warranty shall not apply to tires or tubes (appropriate adjustments for them being provided by their manufacturers) or to normal maintenance services (such as engine tune-up and brake inspection) or to normal replacement of service items (such as filters, spark plugs, and ignition points).
>
> This warranty is expressly in lieu of any other express or implied warranty, including any implied warranty of merchantability or fitness, and of any other obligation on the part of the dealer."

Plaintiff used the car for the purpose, among others, of making daily deliveries of newspapers to subscribers on a route about 65 miles in length. Within two weeks the tread on the rear tires was worn off and the rear housing was out of line. When the car had been driven less than 1500 miles the brake linings in the front wheels were worn out and the cigarette lighter would not work. At 5000 to 6000 miles the headliner (lining in the top) fell down. At 6000 to 7000 miles the bearings in the front wheels were badly worn. Plaintiff complained to defendant, from time to time, of these defects, and defendant thereupon replaced the tires, rear housing and brake linings and bearings in the front wheels, put the headliner back in place and repaired the cigarette lighter, all at no cost to plaintiff. Thereafter, plaintiff complained that the paint on the hood was coming off, showing a different color of paint underneath, and that the headliner was soiled when defendant put it back in place. Defendant offered to replace the hood and headliner, but plaintiff refused to permit it, saying that only a new car would satisfy him. Plaintiff testified that the transmission and some other parts were later found to be defective, that the transmission was defective from the beginning — no complaint was made to defendant as to these parts. Plaintiff retained and used the car, and has paid for it in full. Plaintiff testified: "Anything I complained about they (defendant) tried to fix to my satisfaction," and "Mr. Manning did the best he could every time I took the car back to him to work on it or repair it or try to make good what was wrong."

The jury awarded plaintiff $900 damages and judgment was entered accordingly. Defendant appeals.

Carter & Ross for plaintiff.

Norman, Rodman & Hutchins and Junius D. Grimes, Jr., for defendant.

MOORE, J. Plaintiff bottoms his suit upon the principle that where the property purchased is a mechanical device the buyer has a reasonable time in which to operate and test it and, if it is found that the machine does not fill the specifications of the contract and warranty, he may continue to keep and use it and may maintain an action for damages for breach of the warranty. *Hajoca v. Brooks*, 249 N.C. 10, 105 S.E. 2d 123; *Hendrix v. Motors, Inc.*, 241 N.C. 644, 86 S.E. 2d 448; *Potter v. Supply Co.*, 230 N.C. 1, 51 S.E. 2d 908; *Huyett & Smith Mfg. Co. v. Gray*, 124 N.C. 322, 32 S.E. 718. It is the plaintiff's position that the automobile was substantially defective when delivered, this constituting a breach of the warranty, and that he was entitled to and did recover the difference between the reasonable market value of the automobile as warranted and as delivered. *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780; *Underwood v. Car Co.*, 166 N.C. 458, 82 S.E. 855. The case was apparently tried in accordance with the plaintiff's theory.

Defendant assigns as error the denial of its motion for involuntary nonsuit. This presents the crucial question whether the evidence makes out a prima facie case of breach of warranty on the part of defendant.

We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them. The failure of a purchaser to comply with the conditions of the warranty is fatal to a recovery for breach thereof. *Service Co. v. Sales Co.*, 261 N.C. 660, 667, 136 S.E. 2d 56; *Petroleum Co. v. Allen*, 219 N.C. 461, 14 S.E. 2d 402; *Guano Co. v. Live Stock Co.*, 168 N.C. 442, 84 S.E. 774.

In the instant case the written warranty was introduced in evidence and relied on by plaintiff. It provides: "This warranty is expressly in lieu of any other express or implied warranty, including any implied warranty of merchantability or fitness, and of any other obligation on the part of the dealer." There are exceptions to the rule that an express warranty excludes implied warranties of quality. *Fertilizer Works v. Aiken*, 175 N.C. 398, 95 S.E. 657; 164 A.L.R., Anno. — Express and Implied Warranties, pp. 1325-6. But stipulations negativing implied warranties have been held valid in almost all cases throughout the country that seem to have passed on that point. *Petroleum Co. v. Allen, supra; Guano Co. v. Live Stock Co., supra;* 117 A.L.R., Anno. — Sale — Negation of Implied Warranties, pp. 1352-1355. Therefore, the only warranty binding on defendant is the written warranty.

Defendant warranted "each part of this 1962 Ford to be free from defects in material and workmanship for a period of twelve months

from the date of delivery . . . or until it has been driven for twelve thousand miles, whichever comes first." It is further provided that "This warranty shall be fulfilled by the Dealer . . . replacing at his place of business, free of charge including related labor, any such defective part."

Both parties are bound by this special warranty. A failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action thereon. *Petroleum Co. v. Allen, supra; Farquhar Co. v. Hardware Co.,* 174 N.C. 369, 93 S.E. 922; *Main Co. v. Griffin,* 141 N.C. 43, 53 S.E. 727. Under the terms of the warranty defendant was entitled to notice of defects in the parts of the automobile and to be given an opportunity to remedy the deficiencies. The uncontradicted evidence is that defendant replaced or adjusted every defective part called to his attention, and which plaintiff would permit him to replace or adjust. Plaintiff refused to permit him to replace the hood and headliner, and plaintiff thereafter made no further complaints to defendant. There is no evidence that the replacements made by defendant were unsatisfactory. At the trial plaintiff acknowledged that defendant did everything he was requested to do with respect to the replacement of parts. Plaintiff prevented defendant from further complying with the terms of the warranty; this is fatal to plaintiff's action. *Insurance Co. v. Chevrolet Co., supra;* 77 C. J. S., Sales, § 340, p. 1235.

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. *Service Co. v. Sales Co., supra; Williams v. Chevrolet Co.,* 209 N.C. 29, 182 S.E. 719. But plaintiff does not base his action upon failure of consideration. On the contrary he alleges that the automobile was of substantial value at the time of its delivery.

Defendant's motion for judgment of involuntary nonsuit should have been allowed.

Reversed.

STATE v. DELLA TAYLOR SMITH, No. 3011.
AND
STATE v. DELLA TAYLOR SMITH, No. 3091.

(Filed 23 September, 1964.)

1. Disorderly Conduct and Public Drunkenness—

A bill of indictment charging that defendant "unlawfully and wilfully did appear in a public place in a rude and disorderly manner and did use profane and indecent language in the presence of two or more persons" is insufficient to charge a violation of G.S. 14-197, since it fails to charge that the indecent or profane language was spoken on a public road or highway and in a loud and boisterous manner.

2. Arrest and Bail § 6—

In order to charge a violation of G.S. 14-223, the warrant or bill of indictment must identify the officer by name and indicate the official duties he was discharging or attempting to discharge and should point out, in a general way at least, the manner in which defendant is charged with having resisted, delayed or obstructed such officer.

3. Trespass § 13—

A bill of indictment charging that defendant did unlawfully, wilfully and intentionally fail and refuse to leave private property after having been ordered to do so by the person in lawful possession, is sufficient to charge a criminal trespass.

4. Criminal Law § 149—

Where defendant appeals on the record proper upon his contention that the indictments upon which he was convicted were fatally defective, and files a petition for *certiorari* in the event judgment is not arrested in any one or more of the bills, the petition will be allowed upon the bill which is free from fatal defect.

APPEAL by defendant from *Morris, J.,* June Session 1964 of MARTIN.

This defendant was tried and convicted on two bills of indictment which were consolidated for trial.

Bill of indictment No. 3011 contains two counts. The first count charges that the defendant "unlawfully and wilfully did appear in a public place in a rude and disorderly manner and did use profane and indecent language in the presence of two or more persons." The second count charges that the defendant "did obstruct, and delay a police officer in the performance of his duties by resisting arrest, to wit, striking said officer and hitting him with her fists and scratched him with her fingernails, against the form of the statute," *et cetera.*

Indictment No. 3091 charges that the defendant "unlawfully and wilfully and intentionally did fail and refuse to leave the premises of Everett Oil Company after having been ordered to do so by Roscoe Everett, partner, against the form of the statute," *et cetera.*

From a verdict of guilty on all three counts and from the judgments imposed, the defendant appeals on the record proper, assigning error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard for the State.
Albion Dunn, M. E. Cavendish for defendant.

DENNY, C.J. A warrant was issued against the defendant by a justice of the peace on 6 April 1964, charging that on the above date the defendant was disorderly and used profane language in the presence of two or more persons and did resist arrest, *et cetera.* The charges in the warrant were substantially in the same language as that set out in bill No. 3011, quoted hereinabove. The defendant, according to the record, made a motion for a jury trial and was ordered to appear for trial in the Recorder's Court of Martin County at Williamston, North Carolina, on 13 April 1964.

What disposition was made of these charges in the Recorder's Court does not appear in the record. Consequently, the record does not disclose how the Superior Court obtained jurisdiction thereof, if in fact it has obtained jurisdiction. However, Chapter 113 of the Session Laws of 1945, section 2, requires that in any criminal case in the Recorder's Court of Martin County, upon demand for a trial by jury by the defendant or the prosecuting attorney representing the State, the recorder shall transfer such case to the Superior Court of Martin County for trial.

Therefore, in the interest of justice and to prevent undue delay in disposing of the defendant's challenge to the validity of the respective counts in bill No. 3011, we hold that both counts in this bill are fatally defective.

We held in the case of *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140, that a warrant charging that defendant unlawfully and wilfully violated the laws of North Carolina "by disorderly conduct by using profane and indecent language," is insufficient to charge the statutory crime denounced by G.S. 14-197, which reads as follows: "If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days."

In the *Thorne* case we said the warrant was defective in that "(it) omits at least three elements of the statutory offense. It fails to state that the defendant used indecent or profane language (1) on a public

road or highway, or (2) in the hearing of two or more persons, or (3) in a loud and boisterous manner." The bill of indictment in the instant case does not allege that the defendant used indecent or profane language on a public road or highway, nor that such language was made in a loud and boisterous manner.

Likewise, the second count in this bill of indictment, which purports to charge the offense of resisting an officer, is fatally defective and the State so concedes. A warrant or bill of indictment charging a violation of G.S. 14-223 must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out, in a general way at least, the manner in which the defendant is charged with having resisted, delayed, or obstructed such officer. *S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774. See also *S. v. Dunston,* 256 N.C. 203, 123 S.E. 2d 480; *S. v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734; *S. v. Harvey,* 242 N.C. 111, 86 S.E. 2d 793; *S. v. Scott,* 241 N.C. 178, 84 S.E. 2d 654; *S. v. Jenkins,* 238 N.C. 396, 77 S.E. 2d 796; *S. v. Raynor,* 235 N.C. 184, 69 S.E. 2d 155.

The judgments entered on the verdicts based on the counts in bill of indictment No. 3011 are arrested.

On 15 April 1964, Roscoe Everett caused a warrant to be issued for the arrest of the defendant on the charge of trespass. The language used in the warrant charging the defendant with trespass was substantially the same as the language contained in bill No. 3091, set out hereinabove.

The justice of the peace who issued the warrant stated that hearing was waived, and entered an order requiring the defendant to appear for trial in the Recorder's Court of Martin County at Williamston, North Carolina, on the 4th day of May 1964. There is nothing in the record to indicate that the defendant demanded a jury trial in this case. Nor does the record disclose how this case reached the Superior Court.

The defendant has filed a petition for writ of *certiorari* in the event judgment is not arrested in any one of these bills of indictment.

Petition is allowed as to the verdict and judgment imposed pursuant to the charge of trespass contained in bill No. 3091. The case on appeal is to be served on the solicitor and docketed in this Court in ample time to be heard at this Term.

The solicitor may procure proper bills on purported charges in bill No. 3011, if and when the Superior Court obtains jurisdiction, if so advised.

Judgment is arrested on the verdicts based on counts in Bill No. 3011.

Petition for *certiorari* allowed in the trespass case, bill No. 3091.

STATE BOARD OF PUBLIC WELFARE; R. EUGENE BROWN, COMMISSIONER OF PUBLIC WELFARE; THE STATE BOARD OF ALLOTMENTS AND APPEAL, CONSISTING OF: HOWARD MANNING, CHAIRMAN OF THE STATE BOARD OF PUBLIC WELFARE; R. EUGENE BROWN, COMMISSIONER OF PUBLIC WELFARE, AND MRS. MYRA J. MITCHINER, DIRECTOR OF PUBLIC ASSISTANCE v. THE BOARD OF COMMISSIONERS OF SWAIN COUNTY.

(Filed 23 September, 1964.)

1. Taxation § 20—

The Federal statute exempting the area within an Indian Reservation from taxation is valid, since title to the property is vested in the United States and is held by it pursuant to a governmental function. 25 U.S.C.A. 331.

2. Constitutional Law § 20; Indians—

Indians residing in a reservation within the State are citizens of the United States, this State, and of the County in which the reservation is situate, and are entitled to equal benefit and protection of the laws. Fourteenth Amendment to the United States Constitution.

3. Counties § 1; Social Security—

The General Assembly has the power to impose the duty upon the counties to raise a part of the matching funds for Social Security payments. G.S. 108-23, G.S. 108-24.

4. Same; Indians—

The fact that a large part of a county consists of an Indian Reservation owned by the United States and exempt from taxation does not affect the duty of the county to pay its part of the matching funds for Social Security payments to Indians residing within its boundaries, there being no statutory provision impairing the rights of the Indians to benefits under the Social Security Act as implemented by statute in this State. G.S. 108-20, G.S. 108-47, G.S. 108-73.2, G.S. 108-73.18.

APPEAL by plaintiffs from *McLean, J.*, July-August 1964 Regular Session of SWAIN.

Plaintiffs seek by this action to compel Swain County to provide by taxation, or otherwise, funds necessary to defray its part of the Old Age Assistance, Aid to Dependent Children, Aid to the Totally and

Permanently Disabled, and Medical Assistance programs for the citizens of that County as required by Article 3, Chapter 108 of the General Statutes.

Defendant, in its answer, says the County "stands ready and willing to impose and collect all taxes required by law to be collected from its taxpaying citizens, but defendant is advised and believes that it is illegal and unconstitutional for it to impose and collect taxes from its taxpaying citizens to provide welfare programs for citizens who are specifically exempt from taxation, and whose only claim to the benefit of tax funds from Swain County is that of geographical proximity." This assertion of non-liability is based on allegations that members of the Eastern Band of Cherokee Indians who live on the Cherokee Indian Reservation in Swain County "do not pay any taxes whatever to the County of Swain and are non-taxable citizens."

Swain County's portion of the welfare funds to be expended in the current year for the benefit of Indians residing on the Reservation amounts to $10,894.24.

Judge McLean, being of the opinion that Swain County could not be required to contribute to funds to be expended for the benefit of those residing on the Reservation, refused to require Swain County to make the payment. Plaintiffs excepted and appealed.

Attorney General Bruton and Deputy Attorney General Moody for plaintiff appellants.

E. B. Whitaker and Robert Leatherwood, III, for defendant Swain County.

RODMAN, J. Congress in 1935 enacted what, in substance, is now C. 7, Title 42, U.S.C.A. That statute, popularly known as "The Social Security Act," contemplates appropriations by the Federal and State Governments to funds for use in aiding the impoverished who, because of age, youth, blindness or other specified handicap, are unable to make adequate provisions for their own needs. The statute imposes no obligations on the states to contribute. Each state has an election. Citizens of states which fail to contribute are not entitled to benefits.

The Federal Social Security Act requires participating states to submit plans to the Secretary of Health, Education and Welfare. 42 U.S.C.A. 301, 601, 1201, 1351. The plans submitted can not be approved unless they conform to minimum federal requirements. So far as here pertinent, the provisions for participation in the various funds are identical. For that reason, we refer only to the provisions for old age assistance. The plan can not be approved if it contains: "* * * Any

resident requirement which excludes any resident of the state who has resided therein five years during the nine years immediately preceding the application for old age assistance and has resided therein continuously for one year immediately preceding the application; or * * * any citizenship requirement which excludes any citizen of the United States." 42 U.S.C.A. 302.

A substantial part of Swain County is an Indian Reservation, title to which is vested in the United States, for the benefit of members of the Eastern Band of Cherokee Indians of North Carolina, pursuant to the provisions of the Act of 4 June 1924, C. 253, 43 Stat. 376, incorporated as a note to 25 U.S.C.A. 331, pages 255 *et seq.* By the express provisions of that Act, the tribal property held in trust by the United States is exempt from taxation. This exemption is valid because the property is held by the United States in the exercise of a governmental function. *United States v. Wright,* 53 F. 2d 301. The property has the same status as a post office, a customs office, a government hospital, an army base or navy yard.

Members of the Eastern Band of Cherokee Indians residing on the Reservation are citizens of the United States and of Swain County, North Carolina. The contention that the Cherokee Indians are citizens of a foreign nation, and for that reason are not entitled to the benefit and protection of the laws of this State, is not well founded. The Fourteenth Amendment to the United States Constitution, sec. 1; *S. v. McAlhaney,* 220 N.C. 387, 17 S.E. 2d 352; *S. v. Wolf,* 145 N.C. 440, 59 S.E. 40; *Eastern Band of Cherokee Indians v. U. S.,* 117 U.S. 288, 29 L. Ed. 880, 6 S. Ct. 718; *U. S. v. Wong Kim Ark,* 169 U.S. 649, 42 L. Ed. 890, 18 S. Ct. 456; *Kawakita v. U. S.,* 343 U.S. 717, 96 L. Ed. 1249, 72 S. Ct. 950.

North Carolina "accepted and adopted" the provisions of the Federal Social Security Act in part in 1937, G.S. 108-20 and 108-47. Other portions were adopted in 1949, G.S. 108-73.2; and in 1963, G.S. 108-73.18. There is no provision in our statute which impairs the rights of a Cherokee Indian to the benefits created by the joint action of the State and Federal Governments.

When the legislature accepted the provisions of the Federal Social Security Act, it placed the burden of matching federal funds in part on the State and in part on the counties. G.S. 108-23 and G.S. 108-24. Similar provisions are made for State and county contributions to the other funds. The legislature had the power to impose this duty on the counties. *Martin v. Comrs. of Wake,* 208 N.C. 354, 180 S.E. 777; *Railroad v. Beaufort County,* 224 N.C. 115, 29 S.E. 2d 201; *R. R. v. Duplin County,* 226 N.C. 719, 40 S.E. 2d 371. The mere fact that some citi-

zens of Swain County, who receive payments from the welfare funds, reside on property which is exempt from taxation does not relieve Swain County from the burden imposed on it by the legislature. *Acosta v. San Diego County,* 272 P. 2d 92. That fact might warrant legislative relief but the decision is legislative -- not judicial.

It should be noted that only the property held by the United States, and not that owned by Indians as individuals, is exempt from state taxation. *Thomas v. Gay,* 169 U.S. 264, 42 L. Ed. 740, 18 S. Ct. 340.

The amount which Swain County must contribute to the welfare funds is not in controversy. By express statutory language, G.S. 108-24, it was the duty of the Commissioners to pay Swain County's portion of the funds. The court erred in declining to order defendant to perform its duty.

Reversed.

CHARLES N. COLLINS AND ROBERT L. RAY v. R. L. COLEMAN & COMPANY.

(Filed 23 September, 1964.)

1. Descent and Distribution § 1; Evidence § 4—

Proof of the death of a person raises a presumption that such person died intestate and, nothing else appearing, such person's real estate passes to her descendants. G.S. 29-1(1).

2. Taxation § 38—

Proof that a person died intestate in January 1930 renders void an attempted foreclosure of tax liens for the years 1930 and 1931 when neither notice of listing nor foreclosure has been accorded intestate's heirs at law. G.S. 105-208.

3. Judgments § 19—

A judgment rendered against a person who was dead at the time of the institution of the action is void.

4. Quieting Title § 2—

Plaintiff's proof of a common source of title and that the defendants claim under a tax foreclosure against the title of such common source, with further proof that the tax foreclosure was void, precludes nonsuit.

APPEAL by plaintiffs from *Froneberger, J.,* February 1964 Civil Session of BUNCOMBE.

This is an action to remove a cloud from plaintiffs' title. At the conclusion of plaintiffs' evidence, the court allowed defendant's motion to nonsuit. Plaintiffs excepted and appealed.

S. Thomas Walton for plaintiffs.
Loftin & Loftin for defendant.

RODMAN, J. Plaintiffs allege: They are the owners in fee of Lot No. 9 of the Horney's-Hayes subdivision, as shown in Plat Book 5, p. 112, Register's office of Buncombe County; defendant has a lien on the property as assignee of the county's claim for taxes. They tendered the amount admitted to be owing.

Defendant denied plaintiffs owned the land; additionally it alleged: "That on September 29, 1934, an action was instituted in the Superior Court of Buncombe County against Effie Selby and husband for the purpose of foreclosing any interest Effie Selby had or may have had in the lot of land described in plaintiffs' complaint for failure to pay taxes lawfully levied and assessed for the years 1930 and 1931, the said action being entitled *'Board of Tax Supervision for Buncombe County v. Effie Selby and husband.'*

"That thereafter, the Superior Court of Buncombe County acquired jurisdiction of the defendant, Effie Selby, and acquired jurisdiction of the *res,* and that by subsequent orders and decree, all right, title and interest that the then owner had or may have had was foreclosed and sold and by *mesne* conveyances the title thereto was vested in the Board of Tax Supervision for Buncombe County, and the commissioner duly appointed in said action so instituted in the Superior Court of Buncombe County did, on October 7, 1940, convey all right, title and interest thereto to the Board of Tax Supervision for Buncombe County who thereafter and for valuable considerations, on August 2, 1962, conveyed the same to R. L. Coleman & Company and this answering defendant's indefeasible fee simple title as against all persons became vested in this defendant prior to any attempt on the part of plaintiffs to acquire the same by any purported conveyance subject thereto."

Plaintiffs offered the following evidence: (1) A deed, dated August 27, 1928, purporting to convey the lot in controversy to Effie Selby; (2) the quoted portions of defendant's answer; (3) a certified copy of a "Death Certificate" showing Effie Selby, a widow, residing at 24 Woodfin Place, died in Asheville in January 1930; (4) deeds, dated in September 1962, from Martha Selby Hammond, a widow, and Evans Selby and wife, purporting to convey the lands in controversy to plaintiffs; (5) parol evidence that Effie Selby died in January 1930;

she was a widow; her husband died in 1928; her surviving descendants were a son Evans, and a daughter Martha Hammond.

Plaintiffs' evidence was sufficient to show the parties claimed under a common source. If the evidence also showed plaintiffs had the better title from the common source, the court was in error in granting the defendant's motion. *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142.

Mrs. Selby's death having been shown, a presumption arose that she died intestate, *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726; *Barham v. Holland,* 178 N.C. 104, 100 S.E. 186; 26A C.J.S. 519; and her real estate passed to her descendants, G.S. 29-1, Rule 1, (Vol. 2A, p. 106).

If the evidence shows the invalidity of the action, instituted in September 1934 against Effie Selby and her husband, to foreclose Buncombe County's lien for taxes for 1930 and 1931, plaintiffs have shown a better title from the common source.

The procedure for the assessment and collection of taxes on real estate is fixed by statute. The procedural statutes dealing with taxes assessed for the years 1930 and 1931 are the Machinery Acts of 1929 and 1931, C. 344, P. L. 1929, and C. 428, P. L. 1931.

Sections 400 and 500 of those Acts required real estate to be listed for taxation to the person owning the property on April 1st, c/f G.S. 105-208. The owner was obligated to list: sec. 507(1), c/f G.S. 105-301(a). If the owner failed to list, public officials could list after notice to the owner, sec. 521(3), Machinery Acts of 1929 and 1931, c/f G.S. 105-331(b). "The Legislature provided these safeguards for the just protection of the taxpayer." *Rexford v. Phillips,* 159 N.C. 213 (217), 74 S.E. 337. "The provision in reference to the authoritative listing of property is a basic requirement of the law." *Phillips v. Kerr,* 198 N.C. 252, 151 S.E. 259. The law in force when the property should be listed is determinative of the rights of the parties. *Madison County v. Coxe,* 204 N.C. 58, 167 S.E. 486; *Phillips v. Kerr, supra.*

When Effie Selby died, her real estate passed immediately to her heirs at law, subject only to the rights of her creditors to subject it to the payment of her debts. *Baker v. Murphrey,* 250 N.C. 346, 108 S.E. 2d 644.

On plaintiffs' evidence, Mrs. Selby's property was not liable to Buncombe County for taxes. Mrs. Selby's children owned the land when tax liability for the years 1930 and 1931 accrued.

An attempted foreclosure of an asserted tax lien on property listed in the name of a dead person, and not by the true owner, when neither notice of the listing, nor foreclosure has been accorded the owner, is void. *Wake County v. Faison,* 204 N.C. 55, 167 S.E. 391. "[T]he law

as interpreted and applied in this State, has uniformly commanded a day in Court for parties in interest." *Brogden, J.*, in *Guy v. Harmon*, 204 N.C. 226, 167 S.E. 796; *Beaufort County v. Mayo*, 207 N.C. 211, 176 S.E. 753; *Wendell v. Scarboro*, 213 N.C. 540, 196 S.E. 818; *Johnston County v. Stewart*, 217 N.C. 334, 7 S.E. 2d 708; *Wilmington v. Merrick*, 231 N.C. 297, 56 S.E. 2d 643; *Eason v. Spence*, 232 N.C. 579, 61 S.E. 2d 717; *Comrs. of Roxboro v. Bumpass*, 233 N.C. 190, 63 S.E. 2d 144; *Boone v. Sparrow*, 235 N.C. 396, 70 S.E. 2d 204; *Rand v. Wilson County*, 243 N.C. 43, 89 S.E. 2d 779.

As said in *Page v. Hynds*, 252 N.C. 23 (28), 113 S.E. 2d 52: "A valid judgment may be rendered in favor of a party who is dead when the judgment is entered. A judgment against a party rendered after his death is, unless saved by the statute (G.S. 1-225) irregular and may be vacated by motion. *Wood v. Watson*, 107 N.C. 52. But a judgment against one dead when the original process issued is a mere nullity. It can bind no one."

Defendant, by its answer, based its claim of title on title vested in Effie Selby on April 1, 1930. Plaintiffs' evidence shows Effie Selby's title to the land in controversy terminated in January 1930.

Plaintiffs' evidence shows they have a superior title from a common source.

Reversed.

ELDA VETTORI v. S. S. FAY (WIDOWER), MARY BARNES AND HUSBAND, T. RUDOLPH BARNES; DOROTHY WALKER AND HUSBAND, DOUGLAS WALKER; GLORIA JUNK AND RAY JUNK; HORTENSE LOFTIN (WIDOW); AND ALL OF THE HEIRS-AT-LAW AND DEVISEES, IF ANY, OF JACK WILDEY, DECEASED; BLANCHE FALLS AND HUSBAND, JAMES H. FALLS, JR.; ALL UNKNOWN PARTIES HAVING OR CLAIMING ANY RIGHT, TITLE, INTEREST, OR ESTATE IN OR TO ALL OR ANY PART OF THE REAL PROPERTY DESCRIBED IN THE COMPLAINT IN THIS ACTION, INCLUDING BUT NOT LIMITED TO THE WIDOW, AND ALL OF THE HEIRS-AT-LAW AND DEVISEES, IF ANY, OF THOMAS LOFTIN, DECEASED; THE WIDOW AND ALL OF THE HEIRS-AT-LAW AND DEVISEES, IF ANY, OF JACK WILDEY, DECEASED.

(Filed 23 September, 1964.)

1. Deeds § 12—

The statute abolishing survivorship as an incident of joint tenancy, G.S. 41-2, does not prohibit written contracts making the future rights of the parties to depend upon survivorship, and a deed, accepted by the grantees,

conveying land to them and the heirs and assigns of the survivor creates the right of survivorship by contract.

2. Deeds § 16—

A duly executed and registered deed is an executed contract, and the grantee by acceptance of the deed becomes bound in its stipulations, recitals and limitations, even though he has not signed the instrument, and the subsequent execution of a mortgage by him is evidence of his acceptance of the deed according to its terms.

3. Deeds § 7—

The fact that a deed is registered raises a rebuttable presumption that it was duly executed and delivered.

4. Husband and Wife § 2—

Where a deed of bargain and sale conveys a joint tenancy in the grantees with right of survivorship, the subsequent marriage of one of the grantees does not sever the unity of title and possession. Constitution of North Carolina, Art. X, § 6.

APPEAL by defendants from *Martin, S. J.*, January 6, 1964, Special Session of BUNCOMBE.

Action to remove cloud from title to land.

Trial by jury was waived. The judge found, *inter alia,* the following facts: On 3 October 1940 T. C. Fogel and wife executed and delivered to plaintiff and Blanche Loftain a deed of bargain and sale, conveying a tract of land situate in Buncombe County. The deed was registered the same day in Book 528, at page 448, of the registry of Buncombe County. The granting clause contains the following: ". . . unto the parties of the second part their assigns as joint tenants and unto their heirs and assigns of their survivor forever." Habendum clause: ". . . unto the said parties of the second part their assigns, and the heirs and assigns of the survivor to the only use and behoof of them and their said heirs and assigns forever." Plaintiff and Blanche Loftain occupied the house located on the land. Thereafter, Blanche Loftain died intestate, leaving plaintiff surviving. The defendants are all of the heirs at law of Blanche Loftain.

The judge concluded that the deed created a joint tenancy and constituted a written contract between plaintiff and Blanche Loftain providing that the survivor of the two would own the land. Judgment was entered decreeing that plaintiff is the sole owner of the land. Defendants appeal.

Lee, Lee & Cogburn for plaintiff.
Wade Hall for defendants.

PER CURIAM. G.S. 41-2 abolished survivorship only where it follows as a legal incident to an existing joint tenancy. *Jones v. Waldroup,* 217 N.C. 178, 187, 7 S.E. 2d 366. It does not operate to prohibit persons from entering into written contracts as to lands so as to make future rights of the parties depend upon survivorship. *Bunting v. Cobb,* 234 N.C. 132, 135, 66 S.E. 2d 661. A deed, duly signed, sealed and delivered, is an executed contract. *Edwards v. Batts,* 245 N.C. 693, 698, 97 S.E. 2d 101. A grantee, by acceptance of a duly executed deed, becomes bound by the stipulations, recitals, conditions and limitations therein contained, even though he has not signed the deed. *Story v. Walcott,* 240 N.C. 622, 624, 83 S.E. 2d 498; *Raynor v. Raynor,* 212 N.C. 181, 193 S.E. 216. The public record of a registered and probated deed raises a rebuttable presumption that the original was duly executed and delivered. *Lance v. Cogdill,* 236 N.C. 134, 136, 71 S.E. 2d 918. In the case at bar, the court found as a fact that plaintiff and Blanche Loftain executed and delivered a deed of trust conveying the *locus in quo* as security for an indebtedness of $2000 payable to T. C. Fogel and wife, the grantors in the deed in question. The deed of trust is dated evenly with the deed and was registered 14 minutes after the deed was registered. This deed of trust furnishes evidence of the acceptance of the deed, according to its terms, by Blanche Loftain. The conclusion of the court that the deed was a written contract and that its provisions were binding upon and between the grantees is sustained.

The deed clearly provides for sole ownership in the survivor of the two grantees. The contention of defendants that the marriage of Blanche Loftain after the execution, delivery and acceptance of the deed severed the unity of title and possession is without merit. Constitution of North Carolina, Art. X, § 6; G.S. 52-1.

The judgment below is

Affirmed.

MARVIN EARL BOTTOMS, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT.

(Filed 23 September, 1964.)

Constitutional Law § 32—

A person charged with a felony is entitled to counsel unless he waives such right, and conviction in a trial in which he was denied his right to representation must be set aside.

ON petition for a Writ of *Certiorari* from *Burgwyn, E. J.*, December 1963 Criminal Session of JOHNSTON.

At the December 1961 Criminal Term of Johnston County superior court, petitioner Marvin Earl Bottoms, who was not represented by counsel, entered pleas of *nolo contendere* to three indictments: One indictment charging him on 15 April 1961 with obtaining $670 in U. S. currency from Cleo Stanley by false pretense, a felony, G.S. 14-100; another indictment charging him and one Nelms on 3 April 1961 with obtaining $400 in U. S. currency from Cleo Stanley by false pretense, a felony, G.S. 14-100; and a third indictment charging him and six other persons on 1 April 1961 with a criminal conspiracy to obtain money from Cleo Stanley by false pretenses and with obtaining from Cleo Stanley by such false pretenses $5,500 in U. S. currency, a felony, G.S. 14-100; *S. v. Dale*, 218 N.C. 625, 12 S.E. 2d 556. The presiding judge consolidated the three cases for judgment and sentenced Bottoms to serve a prison sentence of not less than seven nor more than ten years.

On 3 October 1963 Bottoms filed a petition in the superior court of Johnston County, pursuant to the provisions of G.S. 15-217 *et seq.*, Review of the Constitutionality of Criminal Trials, alleging that in his trial at the December 1961 Criminal Term of Johnston County superior court on three indictments charging him with the commission of felonies he was denied his constitutional right to have counsel to represent him. His petition came on to be heard at the December 1963 Criminal session, Burgwyn, E. J., presiding. Judge Burgwyn, finding that petitioner is an indigent, appointed William R. Britt of the Johnston County Bar to represent him. Judge Burgwyn heard the proceeding upon the petition of Bottoms, the records of the court, and upon argument of counsel for the State and for petitioner, and being of the opinion that the petitioner's criminal record prior to December 1961 and his prior service of one or two prison sentences showed he was experienced in court trials, he concluded that defendant's failure to have counsel appointed for him at the December 1961 Criminal Term did not militate against him. Judge Burgwyn's judgment further recites that the official records of the court do not show that petitioner requested appointment of counsel for him at the December 1961 Criminal Term. Judge Burgwyn's judgment gave petitioner no relief, and he excepted and applied to this Court for a Writ of *Certiorari* to review Judge Burgwyn's judgment. G.S. 15-222.

On 14 April 1964 this Court entered an order remanding the proceeding to the superior court of Johnston County for "additional and specific findings *re* whether petitioner waived counsel at Dec. 1961 Term."

Our order further recites that "upon receipt of these findings action will be taken on petition."

The proceeding came on again to be heard at the June 1964 Criminal Session of Johnston County superior court, Bickett, J., presiding. Judge Bickett's order recites that Bottoms testified that he requested the presiding judge at the December 1961 Term to appoint counsel to represent him, that he did not waive his right to have counsel, and that the presiding judge told him that he could provide counsel only in capital cases. Judge Bickett found as a fact "that Marvin Bottoms did not have counsel at the time of his trial in December 1961, and the Court finds further that the said Marvin Bottoms did not waive his right to counsel before or at the time he was tried in December 1961 in the Superior Court of Johnston County," and ordered that his findings of fact and orders be certified to this Court pursuant to its mandate. The testimony of Bottoms, which was forwarded with Judge Bickett's order, supports the judge's findings of fact.

Attorney General T. W. Bruton and Theodore C. Brown, Jr., Staff Attorney, for the State.

Britt & Ashley by William R. Britt for petitioner.

PER CURIAM. Upon authority of *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 93 A.L.R. 2d 733, the petition for a Writ of *Certiorari* is granted, and petitioner's pleas of *nolo contendere* entered at the December Term 1961 to the three felony indictments above set forth, and the judgment entered against him at that Term, are hereby vacated. When this opinion is certified down to the superior court of Johnston County, an order will be entered in accordance with this opinion. The solicitor for the State will proceed with reasonable promptness to try him again or otherwise dispose of the cases against petitioner.

Petition for Writ of *Certiorari* allowed.

ROY OTIS RESPESS v. MARVIN BRICKHOUSE AND GORDON HODGES DAVENPORT.

(Filed 23 September, 1964.)

Automobiles § 41f—

Evidence *held* sufficient to be submitted to the jury in this action to recover for injuries sustained when defendant driver drove his truck into the

rear of plaintiff's automobile, notwithstanding that the lights of the stationary vehicle were burning and a person was attempting to flag the truck down with a flashlight.

APPEAL by defendants from *Cowper, J.*, January Civil Session 1964 of PASQUOTANK.

This is a civil action to recover damages to the Cadillac automobile of plaintiff and for personal injuries sustained by him when a ten-wheeler GMC 61 model truck, owned by defendant Brickhouse and driven by defendant Davenport, carrying 28 or 30 head of cattle, ran into the rear of plaintiff's automobile on 23 October 1962 about 5:30 p.m.

The plaintiff was driving in a southerly direction on the Albemarle Sound bridge, which is 3.8 miles in length. The bridge is 22 feet wide and has a drawbridge 331 feet long, located approximately in the center thereof. Just before plaintiff reached the drawbridge he heard a swishing sound and realized as he was entering the drawbridge that he had a flat tire. He did not stop his car until he left the drawbridge and then stopped as near the right-hand side of the bridge as he could in order to leave sufficient room to remove the wheel from the rear right side of the car. The head and rear lights were on in regular driving position.

The bridge tender testified that when he saw the Respess car stopped he got his flashlight and went to see if he could help. The car had been stopped under the gate which would be lowered if the drawbridge had to be put into operation. At his request the car was moved south a few feet to clear the gate. This witness further testified that the red lights on the rear of plaintiff's car were burning; that he saw and heard the Brickhouse truck approaching from the north while he was walking back in a northerly direction from the plaintiff's car. When he was about 40 feet from plaintiff's car he took his flashlight, "with the red just like that and waved it back and forwards across the road." The truck was between 300 to 400 feet from the witness when he began to try to stop it. "I continued to wave the truck down until I had to jump out of the way to keep from getting run over myself."

From a verdict and judgment in favor of the plaintiff, the defendants appeal, assigning error.

McLendon, Brim, Holderness & Brooks, by L. P. McLendon, Jr. and Edgar B. Fisher, Jr.; and Frank B. Aycock, Jr., for plaintiff appellee.

LeRoy, Wells & Shaw for defendant appellants.

PER CURIAM. The defendants' only assignment of error is to the failure of the court below to sustain their motion for judgment as of nonsuit made at the close of plaintiff's evidence and renewed at the close of all the evidence.

In our opinion, plaintiff's evidence was sufficient to carry the case to the jury and we so hold.

Affirmed.

EUGENE M. JONES v. WAVERLY M. HESTER.

(Filed 23 September, 1964.)

1. Appeal and Error § 20—

Appellant may not complain of asserted errors committed in regard to issues answered in his own favor.

2. Trial § 52—

The amount of damages is to be decided by the jury and not the court, and the court does not commit error in refusing to set aside the verdict on the issues of compensatory and punitive damages because the jury has answered the issues in the sum of one dollar each.

APPEAL by plaintiff from *McLean, J.*, February, 1964 Term, POLK Superior Court.

The plaintiff instituted this civil action to recover actual and punitive damages alleged to have resulted from a libelous publication. The pleadings, issues, and much of the evidence are analyzed and discussed in this Court's opinion on a former appeal reported in 260 N.C. 264.

At the trial on the merits, the jury returned this verdict:

"1. Did the defendant write and publish Exhibit 19, as alleged in the complaint?

Answer: Yes.

"2. If so, was said publication actuated by actual malice or to accomplish some improper or ulterior motive?

Answer: Yes.

"3. What actual damages, if any, is the plaintiff entitled to recover?

Answer: $1.00.

"4. What punitive damages, if any, is the plaintiff entitled to recover?

Answer: $1.00."

The plaintiff moved to set aside the verdict on the third and fourth issues. The court refused to allow the motion but entered judgments in accordance with the verdict, from which the plaintiff appealed.

Robert N. Golding, W. Y. Wilkins, Jr., for plaintiff appellee.

McCown, Lavender & McFarland by Wm. A. McFarland, and Hamrick & Jones by Fred D. Hamrick, Jr., for defendant appellee.

PER CURIAM. The plaintiff insists the trial court committed errors relating to the first and second issues. If errors there be, they were not prejudicial for the reason that the answers to those issues were favorable to the plaintiff. The verdict on Issue No. 1 entitled the plaintiff to nominal damages. Any further compensatory damages (other than nominal) could be awarded only upon the basis of proof, by the greater weight of the evidence. The answer to Issue No. 2 permitted the jury to award punitive damages in its discretion, not as a matter of right, but as punishment for intentional wrongdoing. The damages to be awarded, therefore, were matters to be decided by the jury as issues of fact and not by the court as questions of law. The court did not commit error in refusing to set aside the issues as to damages.

In the verdict and judgment, we find

No error.

EDITH HILL v. AUSTIN LOGAN.

(Filed 23 September, 1964.)

1. Pleadings § 29—

Where defendant alleges in his answer and testifies at the trial that at the time of the collision he was operating one of the automobiles involved therein, he may not contend that his motion for nonsuit should have been allowed because plaintiff failed to identify him as the driver of the car.

2. Appeal and Error § 24—

Assignments of error to the charge which do not specifically set out the particular portions of the charge objected to and which do not present the errors relied upon without the necessity of going beyond the assignments themselves, are ineffectual.

HILL *v.* LOGAN.

APPEAL by defendant from *McLean, J.*, April 1964 Session of RUTHERFORD.

Hamrick & Hamrick for plaintiff.
Horace Kennedy for defendant.

PER CURIAM. This is an action for damages for personal injuries suffered by plaintiff when the automobile in which she was riding with her husband collided with an automobile owned and operated by defendant. The collision occurred about "dusky dark" on 11 December 1962 at or near the intersection of Coxe Road and Watson Road in Polk County. There was a sign on Watson Road, a "dirt road," requiring traffic to stop before entering Coxe Road, a paved road.

There is evidence in the record to the effect that the car in which plaintiff was riding was proceeding westwardly on Coxe Road and was approaching the intersection at a speed of 45 miles per hour, and that defendant was travelling northwardly on Watson Road and came to the intersection at a "pretty fast" speed, failed to stop, crossed into the lane in which the Hill car was travelling and thereby caused the collision.

Defendant contends that the evidence fails to identify him as the operator of his car, and that, for this reason, his motion for involuntary nonsuit should have been allowed. The contention is untenable. Defendant alleged in his answer and testified at the trial that he was operating the automobile which collided with the car in which plaintiff was riding. The motion for nonsuit was properly overruled.

Defendant's other assignments of error do not comply with the requirements of Rule 19(3) of the Rules of Practice in the Supreme Court, 254 N.C. 797. These assignments relate to the charge and are insufficient in that they do not present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are, and the particular portions of the charge objected to are not specifically set out. *Darden v. Bone,* 254 N.C. 599, 601, 119 S.E. 2d 634.

No error.

P. H. BELL v. LILLIAN E. PRICE AND HUSBAND JOHN A. PRICE.

(Filed 23 September, 1964.)

Appeal and Error § 24—

An exception to the charge on the ground that the court failed to charge the applicable law as required by statute is ineffectual as a broadside exception.

APPEAL by defendants from *Bundy, J.*, May 4, 1964 Session of BEAUFORT.

Plaintiff brought this action to recover compensation for services rendered defendants, at their request, in a condemnation proceeding instituted by the Highway Commission against defendants. He alleges defendants agreed to pay fair and reasonable compensation for the services rendered; as a result of the services rendered, defendants obtained a judgment against the Highway Commission for $1,000.00.

Defendants denied they employed plaintiff to represent them in the condemnation proceeding, or that he rendered any services in that litigation. They allege they employed plaintiff to represent them in other litigation and, for the services there rendered, he has been fully compensated.

Appropriate issues were submitted to the jury. It found defendants had employed plaintiff, as he alleged, and fixed the reasonable and fair value of his services at $333.33. Judgment was entered on the verdict. Defendants, having excepted, appealed.

Earl Whitted, Jr., for appellants.
Bailey & Bailey for plaintiff appellee.

PER CURIAM. The only exception assigned as error reads: "The defendants further except and object to the CHARGE OF THE COURT for the reason that the Court failed and neglected to Charge the Jury as to the LAW OF THE CASE as would be applied to the case at bar as the Court was required to do as specifically set out in G.S. 1-180."

The exception does not indicate what legal question was presented and not covered in the charge. The pleadings and testimony show no complicated legal questions were presented. The rights of the parties were dependent on the answers which the jury should give to simple factual questions. The exception is broadside and, for that reason, insufficient. *Clifton v. Turner*, 257 N.C. 92, 125 S.E. 2d 339; *Darden v. Bone*, 254 N.C. 599, 119 S.E. 2d 634.

No error.

STATE v. HORACE ANDERSON.

(Filed 23 September, 1964.)

1. Criminal Law § 26—

Where sentence is vacated on *habeas corpus* on the ground that defendant's constitutional rights were not protected in the trial, the State may try him for the second time for the same offense.

2. Criminal Law § 131—

Upon conviction for the same offense upon retrial after sentence in the original trial has been vacated, defendant is not entitled to credit on the last sentence for the time served on the first.

APPEAL by defendant from *Froneberger, J.*, February, 1964 Criminal Term, BUNCOMBE Superior Court.

The defendant was indicted in the Superior Court of Buncombe County upon a charge of rape. At the December Term, 1961, he entered a plea of guilty of assault with intent to commit rape. This plea the State accepted. The court imposed a prison sentence of not less than 12 nor more than 15 years.

The defendant by *habeas corpus*, applied to the United States District Court for the Western District of North Carolina for release upon the ground his constitutional rights had been denied him in his State court trial. The District Court vacated the sentence and ordered that the case be retried within a reasonable time or dismissed. The case is reported in Federal Supplement 221, page 930. The State elected to retry the defendant.

At the retrial on the original indictment, the defendant, represented by counsel when arraigned, again entered a plea of guilty of assault with intent to commit rape. The State accepted the plea. The court imposed a prison sentence of five years. The defendant appealed.

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

W. M. Styles for defendant appellant.

PER CURIAM. The defendant raises two questions on this appeal: (1) Having placed the defendant on trial and failed to protect his constitutional rights, may the State try him for the second time for the same offense? (2) In case of a conviction and sentence at the second trial, is the defendant entitled to credit on the last sentence for the time he served under the first sentence?

This Court, in *State v. White,* 262 N.C. 52, 136 S.E. 2d 205, answered both questions. The answer to the first question is, yes. The answer to the second question is, no.

In the trial below, we find

No error.

STATE v. RUTH BERNICE EVANS.

(Filed 23 September, 1964.)

Criminal Law § 19—

Where a prosecution in an inferior court is transferred to the Superior Court upon defendant's demand for a jury trial, defendant must be tried in the Superior Court upon an indictment, and trial on the original warrant is a nullity.

APPEAL by defendant from *McLean, J.,* June 1964 Mixed Session of McDOWELL.

The defendant was arrested on a warrant issued March 31, 1964 by a justice of the peace and made returnable to the McDowell County Criminal Court. She was charged with the wilful abandonment of her two minor children. On May 12, 1964, the State moved for a jury trial. Whereupon, the matter was transferred to the Superior Court as required by N. C. Sess. Laws 1959, ch. 530. When the case was called for trial at the June Term, the solicitor made the following statement to the court: "Your Honor, the defendant should be tried on the warrant. I do not have a proper bill of indictment." The defendant objected to being tried on the warrant and specifically declined to waive the bill of indictment. The court overruled the objection; defendant excepted and entered a plea of not guilty. The jury's verdict was "guilty as charged in the warrant." From the judgment imposed defendant appeals, assigning error.

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

Thomas E. White for defendant appellant.

PER CURIAM. A defendant may be tried in the Superior Court upon a warrant only when there has been a trial and appeal from a conviction by an inferior court having jurisdiction. G.S. 15-137, G.S. 15-140;

State v. Norman, 237 N.C. 205, 74 S.E. 2d 602. As this Court has repeatedly held, where there has been no such conviction, trial in the Superior Court upon the original warrant is a nullity. *State v. Peede,* 256 N.C. 460, 124 S.E. 2d 134; *State v. Johnson,* 251 N.C. 339, 111 S.E. 2d 297; *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283. The judgment of the Superior Court is vacated and the case remanded for further proceedings as allowed by law.

Judgment arrested.

J. HOWARD FORBES v. JAMES F. BRITTON AND WIFE, NORA A. BRITTON.

(Filed 23 September, 1964.)

Automobiles § 42d—

Evidence that plaintiff reduced his speed to some twenty miles per hour in entering an area of fog and smoke, and collided with defendant's vehicle which was standing without lights in his lane of travel some twenty-five feet in the fog, *held* not to show contributory negligence as a matter of law.

APPEAL by defendants from *Morris, J.,* December 1963 Session of CURRITUCK.

The plaintiff instituted this civil action to recover for personal injuries sustained in an automobile accident. His evidence tended to show these facts:

About 7:45 a.m. on December 4, 1961, while operating a pickup truck southerly on U. S. Highway No. 158 in Currituck County at a speed of from forty to fifty miles per hour, plaintiff observed a patch of fog three- or four-tenths of a mile away. He reduced his speed and drove into the fog at fifteen or twenty miles per hour. He then discovered that the fog was mixed with smoke. A pine thicket was burning near the highway. When he was ten or fifteen feet into the smoke and fog he observed in his lane of travel the defendants' automobile, ten or twelve feet away, stopped without lights. Defendants' car had entered the smoke and fog three or four minutes before. The shoulder on the west was sixteen feet wide, and three other vehicles which had entered the smoke and fog had driven onto it. The right front of plaintiff's truck collided with the left rear of defendants' automobile, and plaintiff sustained serious injuries.

Defendants' motions for nonsuit, timely made, were overruled. The jury, upon sharply conflicting evidence, answered the issues in favor of the plaintiff and awarded damages. From judgment entered on the verdict, defendants appealed.

John H. Hall for plaintiff.
LeRoy, Wells & Shaw for defendants.

PER CURIAM. The sole question here is whether plaintiff's evidence disclosed his contributory negligence as a matter of law. Although this is a borderline case, the issues, we think, were properly submitted to the jury. *Dawson v. Transportation Co.*, 230 N.C. 36, 51 S.E. 2d 921.

No error.

ANN THOMAS DAWSON v. ROBERT WAYNE DAWSON.

(Filed 23 September, 1964.)

Divorce and Alimony § 14—

Testimony of a witness by deposition that defendant had sexual intercourse with her forcibly and against her will, and was prosecuted therefor, is sufficient to be submitted to the jury in plaintiff's action for divorce on the ground of adultery.

APPEAL by plaintiff from *McLaughlin, J.*, April 27, 1964, Session of MOORE.

Action for absolute divorce on the ground of adultery and for custody of the child of the marriage. Defendant did not file answer. At the conclusion of plaintiff's evidence, the court, "on its own motion," being of the opinion the evidence "as to the charge of adultery was not sufficient to be submitted to the jury," entered judgment of nonsuit. Plaintiff excepted and appealed.

H. F. Seawell, Jr., for plaintiff appellant.
No counsel contra.

PER CURIAM. The evidence offered by plaintiff and admitted by the court was sufficient to require submission of the case to the jury. It includes the testimony of the woman with whom plaintiff alleged defendant had committed adultery. She testified, by deposition, that de-

fendant had sexual intercourse with her forcibly and against her will and was prosecuted therefor. This testimony was in accord with and supports plaintiff's allegations. Hence, the judgment of nonsuit is reversed.

Reversed.

STATE v. JAMES ABSON BROWN.

(Filed 23 September, 1964.)

APPEAL by defendant from *May, Special Judge,* March 9, 1964, Session of CRAVEN.

Defendant was tried in Craven Superior Court on a bill of indictment charging that defendant, on June 29, 1963, in said county, "unlawfully and willfully did drive a motor vehicle upon the public highways of North Carolina while under the influence of intoxicating liquor and narcotic drugs," etc. The jury returned a verdict of guilty as charged. Thereupon, the court pronounced judgment in which a prison sentence was imposed but suspended on specified conditions. Defendant appealed.

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

Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. The evidence, when considered in the light most favorable to the State, was sufficient to require submission to the jury and to support the verdict; and careful consideration of each of defendant's assignments of error fails to disclose any error of law for which a new trial should be awarded. The determinative issue was one of fact; and, after a trial free from prejudicial error, the jury, upon conflicting evidence, resolved the crucial issue against defendant.

No error.

ZENO H. PONDER v. WILLIAM JOSLIN, CHAIRMAN OF, WARREN R. WILLIAMS, JOSEPH E. ZAYTOUN, HIRAM WARD AND C. BRUCE HAWKINS, MEMBERS OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS.

(Filed 30 September, 1964.)

1. Elections § 3—

The State Board of Elections has been given broad supervisory powers over primaries and general elections by G.S. 163-10, to the end that, insofar as possible, the results of primaries and general elections will not be influenced or tainted with fraud, corruption or other illegal conduct on the part of election officials or others, and the authority thus given by statute to investigate alleged fraud and irregularities is not limited by G.S. 163-10(11) to the purpose of reporting them to the Attorney General or solicitor for further investigation.

2. Same; Elections § 6—

While returns certified to the State Board of Elections by a county board of elections, nothing else appearing, will be deemed *prima facie* correct, such certification is not conclusive and may be collaterally attacked.

3. Same—

A county board of elections is the proper agency to canvass the returns for county offices in primary as well as in general elections, G.S. 163-86, but the State Board of Elections is the proper agency to canvass and judicially declare the results of an election in a district composed of more than one county.

4. Mandamus § 1—

A mandatory injunction to compel a board or public official to perform an asserted duty and a *mandamus* to compel the performance of such duty are identical in function and purpose, and will not lie except to compel the performance of a clear and positive legal duty at the instance of a person having a clear legal right to demand performance; it will not lie to control the exercise of a discretionary function or the discharge of a judicial or *quasi*-judicial function unless there has been a clear abuse of discretion.

5. Elections § 6—After certification of primary returns by a county board, the State Board may go behind returns and declare the nominee.

Where, in a multiple county senatorial district, protest is filed with the State Board of Elections by a candidate in the primary election charging fraud and irregularities in the conduct of the election in one of the counties, the State Board of Elections has the power to go behind the certification of the county board, make findings of fact and conclusions of law and, upon such findings, to determine which candidate is entitled to be certified as the nominee, and while the findings and conclusions of the State Board may be reviewed in an action instituted in the Superior Court of Wake County, such review is upon the findings and conclusions of the State Board, without intervention of a jury, G.S. 143-307, and *mandamus* or a mandatory injunction will not lie to compel the State Board to declare a

particular nominee, nor has the Superior Court of a county other than Wake County jurisdiction to review such order. G.S. 143-307, G.S. 143-309.

APPEAL by plaintiff and defendants from *Huskins, J.*, in Chambers at Burnsville, North Carolina, 8 August 1964. From MADISON.

This is a civil action to restrain the defendants from certifying Clyde M. Norton as the Democratic nominee for the office of Senator for the 34th Senatorial District, as the result of the primary election held on 30 May 1964, and to require the defendants by writ of *mandamus* and mandatory injunction to declare the plaintiff the Democratic nominee for the said office as the result of said primary election, upon the basis of alleged lawful returns filed with the defendants.

The essential facts are these:

Clyde M. Norton and Zeno H. Ponder were opposing candidates for the Democratic nomination for the office of Senator for the 34th Senatorial District of North Carolina in the primary held on 30 May 1964. Upon the face of the original returns made to the State Board of Elections by the several county boards of election (four in number), the plaintiff, Zeno H. Ponder, received 7,508 votes, and his opponent, Clyde M. Norton, received 7,108 votes, giving the plaintiff a majority of 400 votes over his opponent. The vote in the four counties comprising the 34th Senatorial District was as follows: In Madison, Norton received 518 votes, Ponder 5,269; In Mitchell, Norton received 848 votes, Ponder 209; in McDowell, Norton received 4,197 votes, Ponder 1,178; in Yancey, Norton received 1,545 votes and Ponder 852.

On 4 June 1964 Clyde M. Norton, a resident of McDowell County and a candidate for the nomination in question, filed a protest with the State Board of Elections as to the conduct of the primary election in Madison County held on 30 May 1964, alleging illegal voting, fraud and other irregularities. Copies of this protest were mailed on 4 June 1964 to Zeno H. Ponder and to the Madison County Board of Elections.

The State Board of Elections, on 9 June 1964, canvassed the results of the State primary election and made the necessary tabulations and judicial determinations as to all the nominees and certified the same as nominees except it refused to certify the plaintiff, Zeno H. Ponder, as the nominee for the State Senate for the 34th Senatorial District because of the protest alleging misconduct, fraud, and the casting of illegal ballots in Madison County.

Thereafter, the State Board of Elections began on 11 June 1964 to conduct an extensive investigation and held numerous hearings in Mad-

ison County which involved the taking of evidence from numerous witnesses, the transcript of which evidence consists of approximately 2,000 pages.

On 2 July 1964 plaintiff Zeno H. Ponder instituted this action in the Superior Court of Madison County, North Carolina, and applied for a writ of *mandamus* to compel the State Board of Elections to certify plaintiff as the nominee for said office, contending that under G.S. 163-138 it was merely the duty of the State Board of Elections to compile and tabulate the returns as certified by the various county boards of election and that this was a ministerial duty which the plaintiff has a present, clear and legal right to require of the said State Board of Elections; that thereafter the plaintiff sought and obtained a temporary restraining order which restrained the defendants from requiring the Madison County Board of Elections from certifying any amended returns, from altering the number of ballots received from Madison County in behalf of Zeno H. Ponder, and from certifying any person other than Zeno H. Ponder as nominee for the office of Senator for the 34th Senatorial District.

The defendants filed answer to said motion and asked that the temporary restraining order be dissolved and that an order be entered authorizing the State Board of Elections to proceed to tabulate, canvass, and judicially determine the nominee of the Democratic Party for said senatorial office. Likewise, the defendants filed an answer to the application for writ of *mandamus*.

The matter came on for hearing before his Honor J. Frank Huskins, Resident Judge of the 24th Judicial District, in Chambers at Burnsville, North Carolina, on 8 August 1964.

The matter was heard upon an agreed statement of facts except the plaintiff introduced in evidence the abstract of the votes for the office of Senator for the 34th Senatorial District in Madison County as certified to the State Board of Elections.

The foregoing was all the evidence offered at the hearing.

His Honor entered the following order:

"That the Restraining Order heretofore issued by his Honor W. K. McLean, dated 6 July 1964, be dissolved to the end that the State Board of Elections may at the earliest possible date, convene in the City of Raleigh to canvass the returns from Madison County, Yancey County, Mitchell County and McDowell County of the votes cast in said counties for Zeno H. Ponder and Clyde M. Norton for Democratic Nominee for State Senator for the 34th Senatorial District; to consider the evidence taken by said State Board of Elections during its investigations conducted in Madison County since 11 June 1964; to thereupon

determine which candidate, in its opinion, is entitled to be declared the Democratic Nominee for State Senator of the 34th Senatorial District and notify plaintiff and his counsel and Clyde M. Norton and his counsel what determination of the matter has been made.

"IT IS FURTHER ORDERED that the State Board of Elections shall not certify a candidate based upon such determination of entitlement until this case has been heard by the Judge Presiding (or until further ORDERS by him) and a jury, if demanded by either party, at the next Session of the Superior Court of Madison County, Regular or Special, whichever may convene first.

"IT IS FURTHER ORDERED that this case be, and it is hereby set peremptorily as the first case for trial at the next Session of the Superior Court of Madison County, be it a Regular or Special Session. * * *"

On 18 August 1964 the defendants petitioned this Court for a writ of *supersedeas* and a writ of prohibition to stay any further proceedings in the Superior Court of Madison County in this case, until the appeal herein is heard and disposed of by this Court. We allowed the writs on 28 August 1964 and entered an order granting the relief sought, pending the disposition of this appeal.

The plaintiff and the defendants appeal from the order entered by Huskins, J. on 8 August 1964, and assign error.

Attorney General Bruton, Deputy Attorney General Ralph Moody and Staff Attorney Harold L. Waters for the State Board of Elections.

William J. Cocke and A. E. Leake for plaintiff.

DENNY, C.J. The plaintiff's first assignment of error challenges the correctness of the order entered by Huskins, J., on 8 August 1964, directing the defendants "to consider the evidence taken by said State Board of Elections during its investigations conducted in Madison County since 11 June 1964 * * *."

The plaintiff's second assignment of error challenges the order on the ground that, in effect, it presupposes the authority of the State Board of Elections to go behind the returns certified by the County Board of Elections in Madison County and to ascertain whether or not void, fraudulent or otherwise illegal votes were included in the certified returns to the State Board of Elections by the County Board of Elections in Madison County; and, in effect, recognizes the power of the State Board of Elections to require the Madison County Board of Elections to amend its returns and to declare which candidate, based on the

amended returns, is entitled to be certified as the nominee of the Democratic Party for State Senator for the 34th Senatorial District.

These assignments of error will be considered together.

The plaintiff's position is that the State Board of Elections cannot go behind the returns certified to it by a county board of elections; that in such a situation the only duty of the State Board of elections is to compile and tabulate the returns as certified by the various county boards of election and that this is merely a ministerial duty to be performed pursuant to the provisions of G.S. 163-138. We do not concur in this view when a protest has been filed challenging the legality of the returns certified by a county board of elections.

In the case of *Burgin v. Board of Elections,* 214 N.C. 140, 198 S.E. 592, this Court said: "The fact that after the returns are in, the State Board of Elections is to canvass the returns and 'determine whom they ascertain and declare by the count' (1933, ch. 165, sec. 9) to be nominated or elected is not to be construed as a denial or negation of its supervisory powers, which perforce are to be exercised prior to the final acceptance of the several returns. Nor will the courts undertake to control the State Board in the exercise of its duty of general supervision so long as such supervision conforms to the rudiments of fair play and the statutes on the subject."

By the enactment of Chapter 165 of the Public Laws of 1933 (now codified as Chapter 163, General Statutes of North Carolina) the General Assembly gave broad supervisory powers to the State Board of Elections.

It would seem that by the enactment of G.S. 163-10 and other sections of Chapter 163 of the General Statutes, the General Assembly gave the State Board of Elections power to supervise primaries and general elections to the end that, insofar as possible, the results in primary and general elections in North Carolina will not be influenced or tainted with fraud, corruption or other illegal conduct on the part of election officials or others, and we so hold. The people are entitled to have their elections conducted honestly and in accordance with the requirements of the law. To require less would result in a mockery of the democratic processes for nominating and electing public officials.

It is provided in G.S. 163-10, among other things, that "It shall be the duty of the State Board of Elections:

"(10) To compel the observance, by election officers in the counties, of the requirements of the election laws, and the State Board of Elections shall have the right to hear and act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws pertaining to their

duties thereunder. And the State Board of Elections shall have power to remove any member of a county board of elections for neglect or failure in his duties and to appoint a successor.

"(11) To investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county, and to report violations of the election laws to the Attorney General or solicitor of the district for further investigation and prosecution.

"(15) To have the general supervision over the primaries and elections in the State and it shall have the authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable: Provided same shall not conflict with any provisions of the law."

We do not construe G.S. 163-10 (11) to limit the authority of the State Board of Elections merely to an investigation of alleged "frauds and irregularities in elections in any county," for the sole purpose of making a report of such frauds and irregularities to the Attorney General or solicitor for further investigation and prosecution. The State Board of Elections is a *quasi*-judicial agency and may, in a primary or election in a multiple county district, investigate alleged frauds and irregularities in elections in any county upon appeal from a county board or upon a protest filed in apt time with the State Board of Elections, and may take such action as the findings of fact may justify, and may direct a county board of elections to amend its returns in accordance therewith. *Burgin v. Board of Elections, supra.*

Findings of fact and conclusions of law made by the State Board of Elections may be reviewed in an action instituted in the Superior Court of Wake County pursuant to the provisions of G.S. 143-307. In such action, however, the appellant is not entitled to a jury trial. In *Burgin v. Board of Elections,* 214 N.C. 324, 199 S.E. 72 this Court said: "* * * (T)he judge of the Superior Court will proceed to determine as a matter of law on the facts found, without the intervention of a jury, whether complete, legal and final returns from all the counties in the * * * District have been made, filed and accepted, or as a matter of law ought to have been accepted, by the State Board of Elections. If it be made to appear that such returns have been so made, the court shall thereupon dissolve the restraining order * * *, and determine whether upon such returns the plaintiff has shown a clear legal right to the writ of *mandamus,* and enter judgment accordingly. Unless so shown, the plaintiff's application therefor should be dismissed."

The case of *Ledwell v. Proctor,* 221 N.C. 161, 19 S.E. 2d 234, was a civil action in the nature of a *quo warranto* to try title to the office of

alderman of the town of Sanford. On appeal this Court said: "In canvassing the returns and judicially determining the result the board of canvassers must pass upon the legality of any disputed ballots. *Burgin v. Board of Elections,* 214 N.C. 140, 198 S.E. 592.

"It follows that the board of elections has authority, judicial in its nature, to examine the returns and decide upon their regularity, correctness and sufficiency, and to accept or reject them. *Gatling v. Boone,* 98 N.C. 573 (3 S.E. 392); *Barnett v. Midgett,* 151 N.C. 1, 65 S.E. 441. It constitutes an essential part of the machinery provided by statute for the ascertainment of the successful candidate in an election to which contesting candidates must first resort for the determination and declaration of the results of the election. The returns made by the registrars and judges of election merely constitute a preliminary step and such returns alone do not entitle the apparently successful candidate to the office."

While returns certified to the State Board of Elections by a county board of elections, nothing else appearing, will be deemed to be *prima facie* correct, such certification, however, is not conclusive. *Ledwell v. Proctor, supra.* Returns certified by a county board of elections may be collaterally attacked. *Barnett v. Midgett,* 151 N.C. 1, 65 S.E. 441.

There is a well defined distinction between a primary election and a regular election, as pointed out in the case of *Rider v. Lenoir County,* 236 N.C. 620, 73 S.E. 2d 913, in which case it is said: "A primary election is a means provided by law whereby members of a political party select by ballot candidates or nominees for office; whereas a regular election is a means whereby officers are elected and public offices are filled according to established rules of law. In short, a primary election is merely a mode of choosing candidates of political parties, whereas a regular election is the final choice of the entire electorate. G.S. 163-117 to 147; 29 C.J.S., Elections, Section 1(d) and (e); Words and Phrases, Permanent Edition, Vol. 36, p. 667, *et seq.*"

A county board of elections is the proper agency to canvass the returns in a primary for the selection of party nominees for county offices as well as in a general election to fill such offices. G.S. 163-86; *Strickland v. Hill,* 253 N.C. 198, 116 S.E. 2d 463. However, G.S. 163-93 provides: "The State Board of Elections shall constitute the legal canvassing board for the State of all national, State and district offices, including the office of State Senator in those districts consisting of more than one county. * * *"

Therefore, we hold that the State Board of Elections is the appropriate agency to canvass and judicially declare the results of a primary

for the nomination of a candidate in a senatorial district composed of more than one county.

Whenever a protest is filed before a county board of elections in a multiple county senatorial district, charging fraud and misconduct in connection with the conduct of a primary or election in such county, and there is an appeal from said board, or upon protest filed in apt time with the State Board of Elections, the State Board has the legal right and the duty to investigate such charges and determine the actual total of valid ballots cast in such county and to require the county board of elections to amend its returns accordingly; and, based upon its findings and the returns amended in accord therewith, to determine which candidate is entitled to be certified as the nominee in such multiple county senatorial district.

These assignments of error are overruled.

The plaintiff's third and last assignment of error challenges the correctness of the court below in dissolving the restraining order theretofore issued by McLean, J. on 6 July 1964, and in failing to continue said order during the pendency of the action and to the final determination of the cause.

The appellant is not entitled to have the State Board of Elections restrained in order to keep said Board from completing its investigation of the protest filed, finding the facts with respect thereto and making its conclusions of law based thereon. Furthermore, since there is no protest before the State Board of Elections involving the returns from any of the counties composing the 34th Senatorial District except from Madison County, when the amended returns from Madison County are certified in accord with the findings of fact and conclusions of law made by said Board, it will have the legal duty to declare the results of the primary election held on 30 May 1964 and to certify the nominee. This assignment of error is overruled.

The defendants challenge the right of the plaintiff to the relief sought in this action. The plaintiff has applied for a writ of *mandamus* to be entered against the defendants to compel them to declare and certify the plaintiff as the Democratic nominee for State Senator in the 34th Senatorial District. In this action the plaintiff also sought and obtained a temporary restraining order, restraining the defendants from entering any "order or direction altering the vote in Madison County as officially reported to them * * * and from certifying any person other than the plaintiff as Democratic nominee for Senator * * * in the 34th Senatorial District of North Carolina."

The law in this State with respect to the circumstances under which a writ of *mandamus* or mandatory injunction may be legally issued, is

succinctly stated in the opinion by *Parker, J.*, in *St. George v. Hanson*, 239 N.C. 259, 78 S.E. 2d 885, as follows: "* * * (A) party seeking a writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required. *Hancock v. Bulla*, 232 N.C. 620, 61 S.E. 2d 801; *Laughinghouse v. New Bern, Ibid*, p. 596, 61 S.E. 2d 802; *Steele v. Cotton Mills*, 231 N.C. 636, 58 S.E. 2d 620; *Ingle v. Board of Elections*, 226 N.C. 454, 38 S.E. 2d 566; *White v. Comrs. of Johnston*, 217 N.C. 329, 7 S.E. 2d 825; *Mears v. Board of Education*, 214 N.C. 89, 197 S.E. 752; *Person v. Doughton*, 186 N.C. 723, 120 S.E. 481. 'A mandatory injunction, when issued to compel a board or public official to perform a duty imposed by law, is identical in its function and purpose with that of a writ of *mandamus*. * * * Such writ *(mandamus)* will not be issued to enforce an alleged right which is in question.' *Hospital v. Wilmington*, 235 N.C. 597, 70 S.E. 2d 833; *Harris v. Board of Education*, 216 N.C. 147, 4 S.E. 2d 328.

"It is well settled law that *mandamus* cannot be invoked to control the exercise of discretion of a board, officer, or court when the act complained of is judicial or *quasi*-judicial, unless it clearly appears that there has been an abuse of discretion. The function of the writ is to compel the performance of a ministerial duty — not to establish a legal right, but to enforce one which has been established. *Hayes v. Benton*, 193 N.C. 379, 137 S.E. 169; *Wilkinson v. Board of Education*, 199 N.C. 669, 155 S.E. 562; *Harris v. Board of Education, supra.*" *Hinshaw v. McIver*, 244 N.C. 256, 93 S.E. 2d 90; *Watson v. Farms, Inc.*, 253 N.C. 238, 116 S.E. 2d 716.

A county board of elections in a multiple county senatorial district has no power to canvass the election returns and determine judicially the nominee in such district; that power is vested exclusively in the State Board of Elections. G.S. 163-93. When the State Board of Elections obtains jurisdiction of an election protest upon an appeal from a single county in a multiple county senatorial district, or by the filing in apt time of a protest directly with the State Board of Elections, its decision can only be reviewed in the manner prescribed by Article 33, Chapter 143 of the General Statutes of North Carolina. The Superior Court does not have original jurisdiction to hear and determine such controversies.

G.S. 163-118, in pertinent part, provides: "Unless otherwise provided in this article, such primary elections shall be conducted, as far as practicable, in all things and in all details in accordance with the general election laws of this State, and all the provisions of this chapter and of other laws governing elections not inconsistent with this article

shall apply as fully to such primary elections and the acts and things done thereunder as to general elections * * *." *Strickland v. Hill, supra.* See also G.S. 163-146.

In pertinent part, G.S. 143-309 provides: "In order to obtain judicial review of an administrative decision under this chapter the person seeking review must file a petition in the Superior Court of Wake County; except that where the original determination in the matter was made by a county agency or county board and appealed to the State Board, the petition may be filed in the superior court of the county where the petitioner resides. * * *"

The County Board of elections in Madison County did not originally determine the matters at issue in this proceeding. There was no appeal from the County Board of Elections in Madison County. This investigation was instituted by the State Board of Elections upon a protest filed with said State Board by Clyde M. Norton, who alleged fraud and irregularities in the conduct of the primary election held in Madison County on 30 May 1964.

The plaintiff has not shown a clear legal right to a writ of *mandamus* to require the defendants to declare and certify him as the Democratic nominee for State Senator for the 34th Senatorial District, and the application therefor is dismissed. Nor has the plaintiff shown any right to a restraining order, temporary or otherwise, restraining the State Board of Elections from discharging its statutory duty and certifying a candidate as the Democratic nominee for said senatorial district.

The order entered below on 8 August 1964 is set aside, and the temporary restraining order entered on 6 July 1964 is dissolved, to the end that the State Board of Elections may proceed to declare and certify the Democratic nominee for the 34th Senatorial District.

Likewise, in light of the facts disclosed by this record, we hold that the Superior Court of Madison County is without jurisdiction to review an order of the State Board of Elections; hence, this action is dismissed. G.S. 143-307 and G.S. 143-309; *In re Halifax Paper Co., Inc.,* 259 N.C. 589, 131 S.E. 2d 441; *In re Carter,* 262 N.C. 360, 137 S.E. 2d 150.

Action dismissed.

STATE OF NORTH CAROLINA v. JACKIE TYRONE COLSON.

(Filed 30 September, 1964.)

1. Criminal Law § 121; Indictment and Warrant § 4—

Motion in arrest of judgment lies only for defect of the record proper, and is inappropriate to present the contention of irregularity in proceedings before the grand jury.

2. Indictment and Warrant §§ 4, 15—

A plea in abatement or motion to quash the indictment is the proper procedure to present the contention that the solicitor was in the grand jury room and procured the finding of the indictment.

3. Indictment and Warrant § 14—

Plea in abatement and motion to quash the indictments for irregularity in the proceedings before the grand jury are addressed to the discretion of the court when not made until after conviction, and the exercise of such discretion by the court ordinarily is not reviewable on appeal.

4. Criminal Law § 167—

The findings of fact by the trial court upon the hearing of defendant's plea in abatement and motion to quash the indictments for alleged irregularities before the grand jury are conclusive on appeal when supported by competent evidence unless so grossly wrong as to amount to denial of due process.

5. Indictment and Warrant § 4—

While it is improper for the solicitor to be present in the grand jury room while the grand jury is deliberating and voting on indictments, the presence of the solicitor in the grand jury room at a time other than when the grand jury is deliberating and voting on indictments, for the purpose of advising them on questions of law will not warrant quashal in the absence of prejudice to the defendant.

6. Same; Indictment and Warrant § 15— Findings held to support conclusion that presence of solicitor in grand jury room was not prejudicial.

Evidence that in response to the grand jury's request the solicitor was present in the grand jury room for the purpose of advising them on questions of law, but that he was not present while they were examining witnesses or voting on the indictments in question, that he advised them in regard to their duty to determine the question of probable cause but not the question of guilt or innocence, that he correctly stated twelve affirmative votes were required for a finding of a true bill, that it was necessary to examine all witnesses named on an indictment before returning it not a true bill, and that their finding that the bill in question was not a true bill would not necessarily end the matter as he could, and probably would, send another bill, *is held*, under the facts and circumstances of this case, together with other findings by the court, to sustain the conclusion of the court that defendant was not prejudiced by the presence of the solicitor in the grand jury room.

7. Indictment and Warrant § 4—

The grand jurors' oath of secrecy does not preclude the court, when the ends of justice so require; from calling grand jurors to testify in respect to a charge that the solicitor influenced their proceedings, and the court properly interrogates them in regard to the matter and properly permits counsel to ask competent questions in regard thereto. G.S. 11-11.

8. Criminal Law § 98—

While discharging its duty to find the facts upon motion to quash indictments on the ground that the solicitor was in the grand jury room during the grand jury's deliberations, it is for the court to find the ultimate issues when different inferences can be drawn from the evidence.

9. Criminal Law § 99—

On motion to nonsuit, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and defendant's evidence is not to be considered except to the extent it is favorable to the State.

10. Negligence § 31—

Culpable negligence in the law of crimes implies something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.

11. Same—

If culpable negligence proximately causes death, the actor is guilty of manslaughter, and, under some circumstances, of murder.

12. Same—

The wilful, wanton or intentional violation of a safety statute or the unintentional or inadvertent violation of such statute which is accompanied by recklessness or a thoughtless disregard of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, constitutes culpable negligence.

13. Automobiles § 59— Evidence of culpable negligence in striking boys on highway held for jury.

The evidence tended to show that a bus stopped on the right side of the highway with its right wheels on the shoulder for passengers to alight, that the driver looked in his rear view mirror and saw no vehicle approaching from his rear, opened the door of the bus and permitted passengers to alight, that a nine year old and a six year old boy were among the passengers to alight, that the boys ran in front of the bus and started across the highway and were struck and fatally injured by the car driven by defendant, which approached from the rear of the bus. The evidence further tended to show that there was nothing to obstruct defendant's view of either side of the bus as he approached, that, according to his own testimony, he approached at a speed of 55 to 60 miles per hour and did not sound his horn, and that he was indifferent to the conditions and con-

tinued on at the same speed until he saw the boys come from in front of the bus and start across the highway, when he applied his brakes, etc. *Held:* The evidence is sufficient to show a wilful, wanton and intentional violation of G.S. 20-140 or, if such violation was unintentional, that defendant's failure to keep a proper lookout and failure to give any signal under the circumstances was accompanied by such recklessness of the probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, as to amount to culpable negligence, and defendant's motion to nonsuit the charge of manslaughter was properly denied.

14. Automobiles § 38—

Witnesses having a reasonable opportunity to observe and judge the speed of a car may testify as to their opinion of such speed.

15. Same; Appeal and Error § 41—

The admission of testimony of a witness that defendant's car was "moving pretty fast" is not prejudicial even though the witness had no reasonable opportunity to judge the speed of defendant's car when defendant himself testifies that he was traveling between 55 and 60 miles per hour.

16. Automobiles § 60—

In this manslaughter prosecution, the charge *is held* to have properly instructed the jury on the question of death by accident or misadventure.

17. Same —

"Reasonable prevision" and "reasonable foreseeability" have substantially the same significance when applied to the question of proximate cause in a manslaughter prosecution, and therefore the use of the phrase "reasonable prevision" instead of "reasonable foreseeability" in charging upon the element of proximate cause, is not prejudicial.

18. Automobiles § 61—

The acquittal of defendant on charges of speeding and the conviction of defendant of manslaughter are not incongrous when the State in regard to the manslaughter charge relies not only on excessive speed but also upon failure to maintain a reasonable lookout and reckless driving amounting to a heedless disregard of the probable consequences of a dangerous nature, when tested by the rule of reasonable prevision.

APPEAL by defendant from *Morris, J.,* September 1963 Session of CAMDEN.

Defendant was convicted on an indictment charging him with manslaughter in respect to the death of Custer Lee Roach, on another indictment charging him with manslaughter in respect to the death of Rufus Roach, Jr., was acquitted on the first count of a third indictment charging him with driving an automobile upon a public highway at a rate of speed in excess of 75 miles an hour in a 60-mile-an-hour speed zone, and on the third count of the same indictment charging him with operating an automobile on a public highway at a speed greater

than was reasonable and prudent and in excess of 60 miles an hour in a 60-mile-an-hour speed zone. At the close of the State's evidence, the court directed a verdict of not guilty on the charge in the second count of the same indictment charging him with operating an automobile upon a public highway with an improper registration card. The various indictments were consolidated for trial.

From a prison sentence imposed on each conviction for manslaughter to run concurrently, defendant appeals.

Attorney General T. W. Bruton, Assistant Attorney General Ray B. Brady, and Staff Attorney L. P. Hornthal, Jr., for the State.

LeRoy, Wells & Shaw by Dewey W. Wells and J. H. LeRoy for defendant appellant.

PARKER, J. The jury returned its verdict of guilty about midnight on 26 September 1963 on the manslaughter indictments, and the court that night imposed sentences of imprisonment. At 9:45 a.m. on the following morning, defendant filed with the trial judge what he terms a "plea in abatement, motion in arrest of judgment, and motion to quash the indictments, Indictments Nos. 245 and 246 — Manslaughter," based upon two grounds:

> "1. While the grand jury was discussing and deliberating upon the aforesaid bills of indictment the Solicitor of the First Judicial District visited the grand jury room and remained therein during said deliberations and discussions; that the Solicitor suggested and explained to the grand jury the testimony or probable testimony of witnesses, and the Solicitor advised and procured the action of the grand jury in finding a true bill, as supported by the affidavits furnished at the time of filing this motion.
>
> "2. That the facts connected with this motion have come to the attention of the defendant subsequent to the trial, conviction and entry of judgments herein. That judgment was pronounced in the above-entitled action between 11:00 and 12:00 P.M. on the night of September 26, 1963, and these motions are filed the following morning as soon as the Court's attention could be obtained."

The solicitor for the State answered defendant's plea and motions denying section 1 thereof, and on information and belief denying the first sentence of section 2 thereof, and admitting the second sentence of section 2 thereof, both of which sections are set forth above.

Judge Morris heard defendant's plea in abatement, motion in arrest of judgment, and motion to quash the manslaughter indictments on an

affidavit offered by defendant signed by seven of the grand jurors who were members of the grand jury that found and returned these indictments as true bills; upon an affidavit by the foreman of this grand jury and an affidavit by the solicitor for the State offered by the State; and upon oral testimony of the seven grand jurors who signed the affidavit offered by defendant. Judge Morris on his own motion had these seven grand jurors subpoenaed. He examined each one of them and permitted counsel for the State and defendant to examine each one of them, which they did.

After hearing and considering this evidence, Judge Morris made findings of fact, the crucial ones of which we summarize, except when quoted (the numbering of paragraphs is ours):

1. During a brief recess in the trial of a case on the afternoon of the first day of the September 1963 Session of the superior court of Camden County, the foreman of the grand jury at that session of court approached the solicitor and stated to him that the grand jury requested that he come to their room. Prior to this request by the grand jury, the grand jury had examined witnesses in indictments Nos. 245 and 246 charging the defendant with manslaughter, had discussed and deliberated on the evidence, and had taken a vote, and 14 members of the grand jury had voted for a true bill.

2. Upon entering the grand jury room, the solicitor was asked what evidence and how many votes were required in order to return a true bill of indictment. In reply to the question, the solicitor reminded them that the court had already instructed them that their duty was not to determine the guilt or innocence of any defendant named in an indictment, but that they were to be satisfied from evidence before them that there was probable cause to believe that the crime set forth in an indictment had been committed by the person or persons named as defendants in the bill, and that it required 12 affirmative votes of their body in order to return a true bill. That it was necessary to examine all the witnesses named on an indictment before returning it not a true bill. In response to a question as to how many votes for a true bill it would take to make a true bill, the solicitor answered, "twelve"; he never said, "majority." When he had opened the door and started to leave the room, a juror asked the solicitor this question: "If we should return not a true bill, would that end the matter?" The solicitor replied: "Not necessarily, as I could send another bill and probably would." Immediately thereafter the solicitor left the grand jury room and returned to the courtroom.

3. The solicitor was in the grand jury room less than five minutes. The solicitor did not influence the grand jury in the finding of a true bill of indictment. The solicitor was not in the grand jury room while the grand jurors were examining the witnesses and hearing testimony. He was not in the grand jury room when the grand jurors were deliberating and discussing the testimony of witnesses. He was not in the grand jury room when the grand jurors were voting on the bills of indictment. He did not suggest and explain to the grand jury the testimony or probable testimony of witnesses. He did not advise and procure the action of the grand jury in finding a true bill.

4. Before or during the trial, it was generally discussed among the crowds in and around the courthouse that the solicitor had been into the grand jury room. The court personally observed that defendant's father sat with defendant and his counsel throughout the trial. Within an hour after the verdict in this case was rendered and judgment imposed, defendant's father was at the home of some of the grand jurors, stated that he knew the solicitor had been to the grand jury room, and made inquiry concerning the same. He made a request of Paul DeBerry, one of the grand jurors, to meet him and defendant's attorney, and sign an affidavit. DeBerry, before or during the trial, received information that the solicitor was not supposed to go into the grand jury room.

5. One of the grand jurors who signed defendant's affidavit stated that the solicitor's affidavit is absolutely correct, and that the affidavit which he signed was misleading. Another grand juror who signed defendant's affidavit did not read it, had no knowledge of what it contained, and would not have signed it if he had known its contents. Several of the grand jurors had their names stricken from defendant's affidavit.

Based upon his findings of fact, Judge Morris made the following legal conclusions:

> "1. The defendant was not prejudiced in any respect by the presence of the Solicitor in the Grand Jury Room or by anything that occurred while he was in the Grand Jury Room.
>
> "2. There is no sufficient cause for abatement or for arrest of judgment or for quashal of the indictments."

Whereupon, Judge Morris entered an order denying defendant's plea in abatement, motion in arrest of judgment, and motion to quash the indictments.

A motion in arrest of judgment is not the proper procedure to endeavor to invalidate the indictments here on the alleged ground that the

solicitor was in the grand jury room and procured the finding of the indictments, for the reason that the motion is based on matters which do not appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311. The proper procedure in such case is by plea in abatement or motion to quash the indictments. *S. v. Ledford,* 203 N.C. 724, 166 S.E. 917; *S. v. Crowder,* 193 N.C. 130, 136 S.E. 337; *S. v. Branch,* 68 N.C. 186.

Defendant's plea in abatement and motion to quash the indictments were made after a plea of not guilty, and after a conviction and judgment on the conviction. Whether a plea in abatement shall be allowed, or a motion to quash entertained, after the plea of not guilty has been entered are matters addressed entirely to the discretion of the court. The exercise of such discretion is not reviewable on appeal. *S. v. Jones,* 88 N.C. 671; *S. v. Burnett,* 142 N.C. 577, 55 S.E. 72; *S. v. Pace,* 159 N.C. 462, 74 S.E. 1018; *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; *S. v. St. Clair,* 246 N.C. 183, 97 S.E. 2d 840. It is clear that the learned trial judge exercised his discretion in entertaining defendant's plea in abatement and motion to quash the indictments.

The findings of fact of Judge Morris are conclusive on appeal, if supported by competent evidence, unless so grossly wrong as to amount to a denial of due process. *S. v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *S. v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *S. v. Henderson,* 216 N.C. 99, 3 S.E. 2d 357.

Judge Morris's crucial findings of fact and the inferences reasonably to be drawn therefrom are amply supported by competent evidence in the record before us. A study of this evidence makes it manifest that there was no ill-consideration of it by him in making his findings of fact. Defendant's exceptions to his findings of fact are overruled.

Our decisions discountenance the solicitor for the State going into the grand jury room during the sessions of the grand jury, and hold that it is improper for him to influence, or to attempt to influence, the grand jury's action or decision. *S. v. Crowder, supra; Lewis v. Comrs.,* 74 N.C. 194. See concurring opinion of *Connor, J.,* in *S. v. Lewis,* 142 N.C. 626, 55 S.E. 600. However, it seems to be the generally prevailing rule in most jurisdictions that, except where there is a rule or statute otherwise, the prosecuting attorney may appear before the grand jury in his official capacity, and assist them in their investigation and advise them on questions of law; but he is not as a general rule permitted to be present during the deliberations and voting of the grand jury. Annotation entitled "Presence in grand jury room of person other than grand juror as affecting indictments," 4 A.L.R. 2d 392, 400; 4 Wharton's

Criminal Law and Procedure, Anderson, sec. 1716, p. 478; 38 C.J.S., Grand Juries, sec. 40(b), p. 1041.

In the *Crowder* case, the Court held that the indictments should have been quashed when it was made to appear that the solicitor was present in the grand jury room, explained the testimony to the grand jury, and advised and procured their action in finding true bills. However, in its opinion the Court used this significant language: "Nevertheless, we should be loath to hold that the mere presence of the solicitor in the grand jury room constitutes sufficient cause for abatement in the absence of some evidence of conduct or speech apparently prejudicial to the accused, or to suffer a bare unsubstantial technicality to defeat the administration of justice."

In the Annotation in 4 A.L.R. 2d 392, 395, it is said:

> "Although it appears well established that an indictment returned by a grand jury will be quashed or abated where the presence of an authorized person during the grand jury proceedings results in prejudice to the accused, there is a decided difference of opinion as to whether the mere presence of an unauthorized person, without a showing of prejudice, is a sufficient ground to set aside the indictment.
>
> "The prevailing view, apart from statutes expressly affecting the question, is that the presence of an unauthorized person during grand jury proceedings, is, at most, a mere irregularity, not sufficient to constitute a ground for setting aside the indictment returned by the grand jury, unless prejudice to the accused is shown."

This annotation cites *S. v. Crowder, supra,* in support of its statement as to the prevailing view. See also in this annotation secs. 6 through 16. See also 4 Wharton's Criminal Law and Procedure, Anderson, sec. 1715.

Although what is quoted above from the *Crowder* case is *obiter dictum,* it seems to be a strong expression of opinion by the members of the then Court that it would not hold that the presence of the solicitor in the grand jury room would necessarily result in an invalidation of an indictment returned by the grand jury. We think it is sound law, which we adopt in this jurisdiction, and which is consistent with the prevailing view in most other jurisdictions, apart from jurisdictions with statutes affecting the question, that the presence of the solicitor in the grand jury room at a time other than when the grand jury was deliberating and voting on an indictment is not sufficient to constitute

a ground for invalidating the indictment, "in the absence of some evidence of conduct or speech apparently prejudicial to the accused."

Judge Morris's findings of fact are to this effect: Prior to the solicitor's going into the grand jury room at the grand jury's request, the grand jury had examined witnesses in the manslaughter indictments here challenged, had discussed and deliberated on the evidence, had taken a vote, and 14 members of the grand jury had voted for a true bill. When he entered the grand jury room, he was asked what evidence and how many votes were required in order to return a true bill of indictment. In reply he reminded them the court had already instructed them that their duty was not to determine the guilt or innocence of any defendant named in an indictment, but that they were to be satisfied from evidence before them that there was probable cause to believe that the crime alleged in the indictment had been committed by the person or persons named as defendants in the indictment, and that it required 12 affirmative votes of their body in order to return a true bill. This statement by the solicitor is a correct statement of the law in this jurisdiction. *S. v. Stewart,* 189 N.C. 340, 127 S.E. 260; *S. v. Barker,* 107 N.C. 913, 12 S.E. 115; *S. v. Davis,* 24 N.C. 153; *Ex parte Bain,* 121 U.S. 1, 30 L. Ed. 849; 4 Blackstone's Com. 303, pp. 1695-6; Criminal Procedure from Arrest to Appeal (The Judicial Administration Series), p. 144; 37 N. C. Law Review, Grand Jury, 292. In 4 Blackstone's Com. 306, p. 1699, which is quoted partially with approval in *S. v. Stewart, supra,* it is said: "But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree; and the indictment, when so found, is publicly delivered into court." It seems to us manifest that there was no danger that this correct statement of the law to the grand jury by the solicitor under the circumstances found as facts by Judge Morris might have affected the action of the grand jury, and that such statement by the solicitor was not prejudicial to the accused.

Judge Morris also found as a fact that the solicitor also told the grand jury that it was necessary to examine all the witnesses named in the indictment before returning it not a true bill. Under the facts found by Judge Morris, it is clear this statement could not have prejudiced the accused.

Judge Morris further found these facts: When the solicitor started to leave the grand jury room, a grand juror asked him: "If we should return not a true bill, would that end the matter?" The solicitor replied. "Not necessarily, as I could send another bill and probably would." Judge Morris found as a fact that before the solicitor, at the grand jury's request, entered the grand jury room, the grand jury had

examined witnesses in the manslaughter indictments challenged here, had discussed and deliberated on the evidence, had taken a vote, and 14 members of the grand jury had voted for a true bill. Twelve members of the grand jury could find the manslaughter indictments here true bills, even though some of the rest of the grand jury disagreed. It seems plain that there was no danger under such circumstances that the reply of the solicitor to the question influenced the action of the grand jury, and that such reply by the solicitor was not prejudicial to the accused.

Judge Morris further found as facts that the solicitor was in the grand jury room less than five minutes; that he was not in the grand jury room while the grand jurors were examining the witnesses and hearing testimony, and while the grand jurors were deliberating and discussing the testimony and were voting on the bills of indictment; that he did not suggest and explain to the grand jury the testimony or probable testimony of witnesses; that he did not influence the grand jury in the finding of the manslaughter indictments; and that he did not advise and procure the action of the grand jury in finding a true bill.

In our opinion, and we so hold, the findings of fact by Judge Morris amply support his legal conclusions that the defendant was not prejudiced in any respect by the presence of the solicitor in the grand jury room, and that there is no sufficient cause for abatement or for arrest of judgment or for quashing the manslaughter indictments, and that his findings of fact and conclusions of law support his order denying defendant's plea in abatement and motions.

At the hearing of defendant's plea in abatement and of his motions in arrest of judgment and to quash the manslaughter indictments here, he offered an affidavit signed by seven members of the grand jury that found these indictments true bills. If the facts stated in defendant's plea in abatement and motions and the supporting affidavit were true, defendant was prejudiced, and the indictments of manslaughter here should be invalidated. At this hearing, Judge Morris had before him an affidavit by the foreman of the grand jury and an affidavit by the solicitor controverting the statements of fact in defendant's plea in abatement and motions and in the supporting affidavit. Under such circumstances, it is manifest that Judge Morris was of opinion that the ends of justice required that there should be an oral examination by himself, and by counsel for the State and counsel for the defendant, of the seven grand jurors who signed the affidavit offered by defendant. Judge Morris examined each one of these grand jurors and permitted counsel for the State and for the defendant to examine each one of

them, which they did. Defendant has numerous assignments of error to questions asked these witnesses by Judge Morris and to the admission in evidence of some of their testimony elicited by Judge Morris and also by counsel.

This Court as far back as 1846 held in *S. v. Broughton,* 29 N.C. 96, 45 Am. Dec. 507, a leading opinion that has since been cited with approval in many other jurisdictions, that a grand juror, on the trial of an indictment, may be compelled to disclose what was given in evidence by a witness before the grand jury. The tendency of modern decisions has been to hold that the grand jurors' oath of secrecy (G.S. 11-11) does not prohibit the disclosure in court of proceedings before the grand jury whenever the ends of justice require it. 4 Wharton's Criminal Law and Procedure, Anderson, p. 494; Stansbury's N. C. Evidence, sec. 64.

Under the circumstances, and the applicable law, the experienced and learned trial judge committed no error when on his own motion he called the seven grand jurors to the stand to testify in respect to what the solicitor said and did in the grand jury room, for the simple reason that he acted in furtherance of and according to the requirements of justice. We have carefully examined all the defendant's assignments of error in respect to the questions asked these grand jurors by Judge Morris and to the challenged evidence admitted, and all are overruled, for the reason no prejudicial error appears. As to the law applicable to a judge sitting without a jury and finding facts, and when different inferences can be drawn from the evidence, the ultimate issue is for the judge, see *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668; *Turnage Co. v. Morton,* 240 N.C. 94, 81 S.E. 2d 135; *Trust Co. v. Lumber Co.,* 221 N.C. 89, 19 S.E. 2d 138.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence offered by the State and by himself. G.S. 15-173; *S. v. Leggett,* 255 N.C. 358, 121 S.E. 2d 533. It is familiar learning that on a motion for judgment of compulsory nonsuit the State is entitled to have the evidence considered in its most favorable light, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and that defendant's evidence, unless favorable to the State, is not to be considered, except when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence. *S. v. Roop,* 255 N.C. 607, 122 S.E. 2d 363; Strong's N. C. Index, Vol. 1, Criminal Law, § 99. Applying such rule in considering defendant's motion for a judgment of compulsory nonsuit, the State's evidence tends to show the following facts:

About five o'clock on the afternoon of 2 July 1963, Charlie Rucker was operating a GMC passenger bus loaded with farm laborers on N. C. Highway 343 between Camden and South Mills, traveling in the direction of South Mills, in open country where the speed limit was 60 miles an hour. The hard-surfaced part of the highway was 20 to 22 feet wide, with dirt shoulders on each side. Among the passengers on the bus were Custer Lee Roach, age nine years, Rufus Roach, Jr., age six years, and two of their older sisters. The two boys were with their sisters merely to be away from home for the day.

When the bus approached the Roach home, Rucker looked in his rear-view mirror, saw no vehicle approaching from his rear, and stopped the bus on the opposite side of the highway from the Roach home, with his left wheels on the hard-surfaced part and his right wheels on the dirt shoulder. He opened the door of the bus, and the two Roach girls and the two Roach boys got out on the dirt shoulder. At this time Rucker looked again in his rear-view mirror, saw an automobile approaching him from the rear, and heard it skidding. The two boys went in front of the bus and started across the highway to their home. When they had reached the center of the highway or about three feet across the center in the direction of their home, they were struck and killed by an automobile driven by defendant, which approached the bus from its rear traveling in the direction of South Mills.

Defendant was traveling at a rate of speed of over 75 to 80 miles an hour, or 80 to 90 miles an hour, or between 85 and 90 miles an hour, according to the testimony of various eye witnesses. The boys were hit and picked up by the hood of defendant's automobile and carried along the highway until the automobile hit a ditch, where the bodies were thrown off or fell off. A highway patrolman arrived at the scene a few minutes after the boys were killed. He saw skid marks in the left lane of traffic for a person traveling towards South Mills that began 94 feet behind the front of the bus and continued to the front of the bus, and then continued 150 feet to the right side of the highway, and then there were tracks of tires and wheels to where the automobile went off the highway into a ditch embankment, across a ditch into a field 202 more feet, where defendant's automobile was stopped. At the scene defendant told the highway patrolman that he had been driving 80 to 90 miles an hour for three or four miles back up the highway, and that "he was driving at the time of the accident right at 60 m.p.h."

At the scene Barbara Roach, a sister of the dead Roach boys, asked defendant: "Didn't you see the children? Didn't you see the bus?" She testified: "He cussed me. He said he didn't see it, said he didn't see the

g.. damn bus, neither the children, and he asked me why we didn't keep our damn children in the yard." Alice Marie Trotman, an aunt of the dead Roach boys, at the scene went over to ask the defendant did he see the bus stop. She testified: "I was in the crowd where they all ask if he saw the bus stop or see the children and he said he didn't see the 'g.. d... bus,' and we 'ought to have kept our g.. d... children in the yard.' I was there when Barbara Roach was there in the group."

Defendant's testimony tends to show the following: He is 18 years old. When he first saw the bus, it was parked on the right shoulder, completely off the highway. He saw no one in the bus. The bus displayed no signals. He was traveling 55 to 60 miles an hour in a 60-mile speed zone. He did not sound his horn. He drove into the left lane to pass the bus. When he first saw the Roach boys, they came out from in front of the bus and started across the highway, one behind the other. When he first saw them, he "hit" his brakes. He tried to avoid hitting them by swerving to the right. After he hit the children, when they were about half way across the left lane, he eased off his brakes to keep control of his automobile. He never said he did not see the bus or the children, and he used no profanity at the scene.

Defendant on cross-examination testified in part: "I saw the bus on the highway about a quarter of a mile from the bus. I could not tell if it was stopped or not * * *. I decided that the bus was not moving when I got almost to it, by which I mean about five or six car-lengths behind it. There was nothing to prevent me from seeing that it wasn't moving before I got within five or six car-lengths of it. The bus was completely on the pavement. There was a shoulder some 8 to 10 feet wide on its right side. * * * There was nothing to obstruct my view on either side of the bus as I approached it some quarter of a mile away. I saw that it was a bus, and I was familiar with the fact that there were labor buses in the general area at that time or season, hauling laborers that were put off or either taken on, depending upon the time of day, at various places along the way." On cross-examination, defendant was asked these questions: "You were indifferent to the conditions there existing? It didn't make no difference to you about the bus being there; you just continued on with the same speed?" He replied: "Yes, sir."

Culpable negligence, from which death proximately ensues, makes the actor guilty of manslaughter, and under some circumstances guilty of murder. *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Roop, supra.*

Culpable negligence in the law of crimes necessarily implies something more than actionable negligence in the law of torts. *S. v. Stansell,*

203 N.C. 69, 164 S.E. 580; *S. v. Cope, supra; S. v. Becker,* 241 N.C. 321, 85 S.E. 2d 327.

The Court said in *S. v. Cope, supra:* "Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

This Court speaking by the present Chief Justice said in *S. v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491: "The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others."

In *S. v. Gash,* 177 N.C. 595, 99 S.E. 337, a chauffeur was convicted of the crime of manslaughter. The Court said: "Exception 6 is because the court charged the jury that if the defendant was operating the car lawfully and at the rate of speed permitted by law, yet if by reason of a failure to keep a proper lookout he failed to see the deceased in time to avoid injuring him, and 'by reason of his carelessness and negligence in failing to keep this lookout' he caused the death of the child, he was guilty. Upon the evidence for the State this failure to keep a lookout was due to the defendant turning his head and looking back to talk to a colored boy on the sidewalk. In this charge, there was no error."

The State's evidence and the reasonable inferences to be drawn therefrom, and defendant's evidence favorable to the State, would permit a jury to find that there was nothing to obstruct defendant's view on either side of the bus parked partially on the highway ahead of him as he approached it some quarter of a mile away, driving his automobile without keeping a proper lookout to see if persons were getting off the bus and, according to his testimony, without sounding his horn as he approached the bus driving at a speed of 55 to 60 miles an hour; that such operation of his automobile constituted a wilful, wanton or intentional violation of G.S. 20-140, a safety statute designed to prevent injury to persons or property and prohibiting the careless and reckless driving of automobiles on the public highways, and was culpable negligence; and that such culpable negligence proximately caused the death of the two Roach boys, and the defendant was guilty of manslaughter as charged in both indictments. Or, if defendant's violation of G.S. 20-

140 was inadvertent and unintentional, his operation of his automobile under the attendant circumstances at 55 to 60 miles an hour without keeping a proper lookout and without giving any signal of his approach was accompanied by such recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, as to amount altogether to a thoughtless disregard of consequences and a heedless indifference to the safety of others, and was culpable negligence which proximately caused the death of the two Roach boys, and defendant was guilty of manslaughter as charged in both indictments. That even if defendant, when he first saw the boys, applied his brakes and endeavored to avoid injuring them, his prior culpable negligence in the operation of his automobile under the attendant circumstances rendered it impossible for him to stop or control it, and prevent his striking and killing them as a proximate result of his culpable negligence. That defendant's reckless and careless driving of his automobile imported a thoughtless disregard of consequences and his heedless indifference to the safety and rights of others is shown by his answer "Yes, sir" on cross-examination to the questions: "You were indifferent to the conditions there existing? It didn't make no difference to you about the bus being there; you just continued on with the same speed?" The trial court properly overruled defendant's motion for judgment of compulsory nonsuit.

Defendant assigns as error the testimony of Cora Roach, Barbara Roach, Alice Marie Trotman, and Josette Spence, all State's witnesses, as to the speed of defendant's automobile. All these assignments of error are overruled, for a reading of the testimony of each one of them shows that each one of them had a reasonable opportunity to judge the speed of defendant's automobile, and therefore the testimony of each one of them as to its speed was competent. *S. v. Fentress,* 230 N.C. 248, 52 S.E. 2d 795; *S. v. Becker, supra; S. v. Hart,* 250 N.C. 93, 107 S.E. 2d 919. Defendant also assigns as error the testimony of Charlie Rucker that the defendant's automobile "was moving pretty fast." Even though it appears that Rucker did not have a reasonable opportunity to judge the speed of defendant's car, yet its admission was harmless, for the reason that defendant testified on cross-examination that at the time of the accident he was running between 55 and 60 miles an hour. All other assignments of error as to the admission of evidence have been examined and are overruled.

Defendant contends that the court failed to clearly instruct the jury that a finding of unavoidable accident would require a verdict of not guilty. This assignment of error is overruled. The court instructed the jury at length and correctly as to what constituted a death caused by

accident or misadventure, and later on in the charge he instructed the jury that if they found from the evidence that the killing of the Roach boys was accidental or that it was a killing by misadventure, then it would be their duty to return a verdict of not guilty of involuntary manslaughter.

Defendant contends that the charge is fatally defective, because foreseeability of injury is a requisite of proximate cause, and that nowhere in the charge do the words "foreseeable" or "foreseeability" appear. It is true that these two words do not appear in the charge. However, the judge did charge "if you find from the evidence and beyond a reasonable doubt that * * * the defendant was inadvertently driving his car in violation of the statutes in such case made and provided and that such acts and conduct of the defendant were accompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting to a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, then I charge you that the defendant would be guilty of culpable or criminal negligence," and then he went on to charge as to proximate cause. In this part of the charge Judge Morris used practically verbatim the language of this Court in *S. v. Cope, supra,* and in *S. v. Hancock, supra.* In both these cases the words "when tested by the rule of reasonable prevision" appear. The word "prevision" as a noun is defined in Webster's New International Dictionary, 2d edition: "Foresight; foreknowledge * * *." In the same dictionary, the word "prevision" as a transitive and intransitive verb is defined: "To foresee; to give or endow with prevision." The words "reasonable prevision" are substantially alike in meaning or significance with the words "reasonable foreseeability." *S. v. Mundy,* 243 N.C. 149, 90 S.E. 2d 312, relied upon by defendant, is clearly distinguishable, because in that case the charge did not state that the reckless driving must be the *proximate cause* of the wreck and resulting death. This contention and assignment of error of defendant is overruled.

All other assignments of error to the charge have been examined and are overruled. The charge is in substantial accord with the rules of law applicable to the facts as stated in the leading case of *S. v. Cope, supra; S. v. Phelps, supra; S. v. Hancock, supra;* in fact Judge Morris used almost verbatim many of the words used in the *Cope* case and the *Hancock* case. No error in the charge prejudicial to defendant's rights appears.

Defendant contends that the verdict of guilty of manslaughter on both indictments "is illogical and incongruous," because the jury acquitted defendant of speeding, that the "State's case was grounded on

unlawful speed," and therefore the verdict of guilty of manslaughter on both indictments should not be permitted to stand. The contention that the "State's case was grounded on unlawful speed" ignores a great part of the evidence in the record before us. The State's evidence, and defendant's evidence favorable to the State, tends to show defendant was guilty of culpable negligence in the operation of his automobile other than by speeding, which proximately caused the death of the Roach boys. This contention of defendant is untenable. *S. v. Mundy, supra; S. v. Midgett,* 214 N.C. 107, 198 S.E. 613.

All defendant's assignments of error have been examined and are overruled. In the trial below, we find no prejudicial error.

No error.

G. T. WESCOTT, PETITIONER v. STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 30 September, 1964.)

1. Eminent Domain § 7a—

By its express provisions G.S. 136-108 does not apply to a proceeding for compensation for the taking of property for a highway instituted prior to July 1, 1960, but such proceeding is governed by G.S. 136-19, making the statutes relating to eminent domain applicable as near as may be. G.S. 40-16.

2. Pleadings § 10—

New matter alleged in the answer is deemed controverted without the necessity of a reply, G.S. 1-159, and therefore where the State Highway Commission in a proceeding for compensation alleges that petitioner had conveyed to the Commission the right of way in question, petitioner is entitled to attack the conveyance of the right of way for fraud without filing a reply.

3. Cancellation and Rescission of Instruments § 2—

Where the Highway Commission introduces evidence of a conveyance of a right of way as shown by a map, testimony of petitioner that he did not understand maps, that he signed the instrument in reliance upon the representation that it affected certain of his lands but did not affect another parcel of land owned by him upon which he operated a parking lot, and that he would not have signed the right of way agreement if he had known the right of way adversely affected his parking lot, is sufficient to raise an issue of fraud for the determination of a jury.

4. Trial § 18—

Questions of law are for the determination of the court and only issues of fact must be submitted to a jury.

5. Same; Constitutional Law § 24; Jury § 5—

Where the evidence raises issues of fact in respect to the title to property, a party asserting ownership is entitled to a trial of the issues by a jury. Constitution of North Carolina, Art. I, § 19.

6. Eminent Domain § 7a—

Where in proceedings for compensation for the taking of land the respondent relies upon a conveyance by petitioner of the right of way in question, but petitioner offers evidence that the conveyance of the right of way was procured by fraudulent misrepresentation, the proceeding is, in effect, converted from a condemnation proceeding into an action in ejectment or trespass to try title, and petitioner is entitled to a jury trial upon the issue of title.

7. Pleadings § 10—

Petitioner's motion to be allowed to file a reply may be allowed on appeal to facilitate formulation of the issues to be submitted to a jury.

8. Eminent Domain § 7a—

Petition to recover damages to the remainder of petitioner's land resulting from large quantities of sand "negligently and carelessly" deposited or blown thereon as the result of the construction of the highway, is insufficient to present the question of petitioner's right to recover compensation, it not appearing whether respondent with its own force constructed the highway, whether the sand drifted on petitioner's property because of the negligent manner in which the work was done or as a result of the manner in which the work was necessarily done, or whether petitioner seeks damages for a tortious act or compensation for a taking.

APPEAL by plaintiff from *Cowper, J.*, January 1964 Session of DARE.

This is a proceeding for compensation for (1) the taking of a portion of petitioner's property known as the Casino; and (2) damage to the remainder of that property by large quantities of sand "negligently and carelessly" deposited or blown thereon as a result of the construction of State Highway No. 158, the Virginia Dare Trail. The area taken in constructing the road is alleged to measure 150 feet by 350 feet. Construction of the highway was completed about September 22, 1959. This action was begun March 1, 1960.

Respondent admitted the construction of a highway from a point "near Wright Memorial Bridge to Whalebone Intersection," Project 1223. It denied it had taken any of petitioner's property. As an additional defense, it asserted it owned, by agreement with petitioner dated November 2, 1956, the land on which the road was constructed. It attached to its answer a copy of the right of way agreement. The agree-

ment purported to convey to respondent "a right of way 150′ in width, as measured 75′ on each side of the center line of said survey and parallel thereto, over and across such properties as we may own on the above project and hereby release the Commission from all claims for damage by reason of the said right of way across the land of the undersigned, and of the past and future use thereof by the Commission * * * The above project to be constructed on [a line designated by letters] * * * as shown in red on map showing location survey between Wright Memorial Bridge and Whalebone Intersection, dated March 12, 1956. The construction to be in accordance with plans for said project to be prepared in the office of the State Highway and Public Works Commission, Raleigh, North Carolina."

Petitioner did not reply to the affirmative defense alleged in the answer. The clerk appointed commissioners. The commissioners fixed the amount of compensation due petitioner. Respondent excepted to the report of the commissioners. The clerk confirmed the report. Respondent excepted and appealed.

When the cause was called for trial in the Superior Court, respondent "moved the court to hear without a jury its motion to dismiss the action on its plea in bar." It cited in support of its motion G.S. 136-108, Cumulative Supplement 1963.

The court, in the absence of the jury and over the objection of petitioner, heard evidence from petitioner and respondent relating to the execution of the right of way agreement.

The court found petitioner executed the agreement on which respondent relied. It made no finding with respect to the asserted mistake or fraudulent representation, on which petitioner sought to avoid the agreement. Based on its findings, the court concluded the right of way agreement was a complete bar to petitioner's right to compensation, and dismissed the action.

Petitioner, having excepted to the court's refusal to submit appropriate issues to the jury and to the judgment, appealed.

Frank B. Aycock, Jr. and Worth & Horner for appellant.

Attorney General Bruton, Assistant Attorney General Lewis, Henry T. Rosser, Aydlett & White for appellee.

RODMAN, J. G.S. 136-108, on which respondent relies to defeat petitioner's asserted right of jury trial, has no application to the question presented for decision. That section is a part of Art. 9, c. 136 of the General Statutes. It was enacted in 1959, c. 1025, S. L. 1959. By express provision of the enacting statute, sections 3 and 4, it applies only

to proceedings begun subsequent to July 1, 1960. *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732.

This proceeding, begun March 1, 1960, is governed by the provisions of G.S. 136-19, as it read on the date summons issued. The controlling procedural statutes are, by G.S. 136-19, contained in the chapter on Eminent Domain. The statute here applicable is G.S. 40-16, which provides in part: "The Court shall hear the proofs and allegations of the parties and if no sufficient cause is shown against granting the prayer of the petitioner, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised * * *." The language of the statute necessitates an examination of the pleadings, including statutory pleas, to ascertain what issues of fact and what questions of fact are presented.

Petitioner alleged these facts: He owns a tract of land known as the Casino; respondent has taken a portion of this property for the construction of a highway; petitioner, because of the taking, is entitled to compensation. These allegations, if true, entitled petitioner to compensation for the property taken. N. C. Constitution, Art. I, sec. 17.

The answer admitted the construction of the highway over petitioner's Casino property. It denied petitioner was entitled to compensation because he had by writing, copy of which is annexed to the answer, granted respondent the right to construct and maintain the road.

The defense asserted, if established, was a complete bar to petitioner's claim for compensation. The right to build the highway across petitioner's land pursuant to the right of way agreement was new matter and, as such, was deemed controverted by the petitioner "as upon a direct denial or avoidance, as the case requires," G.S. 1-159.

There is lack of uniformity in the laws of the several states with respect to replies. Those states which have code provisions similar to ours hold that it is not necessary to plead, by reply, fraud or mistake to avoid a contract set up in the answer as a bar to plaintiff's claim. *Metropolitan Life Ins. Co. v. Hale,* 171 S.E. 306 (Ga.); *Harmon v. Givens,* 77 S.E. 2d 223 (Ga.); *Galphin v. Pioneer Life Ins. Co.,* 154 S.E. 855 (S.C.); *McDowell v. Southern Ry. Co.,* 102 S.E. 639 (S.C.); *Watson v. Poore,* 115 P. 2d 478 (Cal.); 71 C.J.S. 377-379.

Our statute was patterned on sec. 243 of the New York Civil Practice Act. The courts of New York have consistently held that fraud, to avoid a release set up in the answer to defeat a cause of action, need not be pleaded. *Babcock v. Clark,* 93 App. Div. 119, 86 N.Y.S. 976; *Keeler v. Keeler,* 102 N.Y. 30, 6 N.E. 678; *Lynch v. Figge,* 192 N.Y.S.

873; *Davis Confectionery Co. v. Rochester G. Ins. Co.*, 126 N.Y.S. 723; *Meyer v. Lathrop*, 73 N.Y. 315.

Petitioner, unless required by court order, G.S. 1-141, could, without written pleading, show facts which made the writing on which respondent relied a nullity. *Gamble v. Stutts*, 262 N.C. 276, 136 S.E. 2d 688; *Oldham v. Rieger*, 145 N.C. 254, 58 S.E. 1091; *Fishblate v. Fidelity Co.*, 140 N.C. 589, 53 S.E. 354; 1 McIntosh, N. C. Practice and Procedure, 705-6.

Petitioner, in the absence of the jury, testified: "I do not understand maps. I have never had any experience in surveying or engineering. At the time I signed this EXHIBIT 'B' I did not see any map showing any red location of survey between Wright Memorial Bridge and Whalebone intersection * * * I told him [the person who acted for the Highway Commission in getting the agreement signed] I had some land in front of the Carolinian I would be glad for him to come through but so far as the parking lot I could not get rid of any of that, so far the Casino property is concerned I told him I wouldn't want to get rid of any of that or give away any of that, that it would ruin my parking lot. I told him I wouldn't sign it if it was going over my Casino property. I was relying on what Mr. Swain told me. I made that statement to him that I would not sign it if it included any of my Casino property * * * I signed what he had down there and he said it wouldn't bother my Casino property but for me to sign it and it would help him to get others to sign it. I would not have signed this purported contract, EXHIBIT 'B', if I had known at the time that it was to cover any part of my Casino property." This evidence, if found by a jury to be true, would invalidate the agreement as it might relate to the Casino property. *Nixon v. Nixon*, 260 N.C. 251, 132 S.E. 2d 590; *Mills v. Lynch*, 259 N.C. 359, 130 S.E. 2d 541; *Davis v. Davis*, 256 N.C. 468, 124 S.E. 2d 130; *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5.

"In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." N. C. Constitution, Art. I, sec. 19. This is a constitutional guaranty of jury trial when the issue determinative of the rights of the litigants is: "Who owns the land, plaintiff or defendant?"

That issue does not arise when the state, or its agency, exercises the power of eminent domain. The phrase "eminent domain" by definition admits condemnor did not own, but took or appropriated the property of another for a public purpose. Webster, Third New International Dictionary; Cyclopedic Law Dictionary; 29 C.J.S. 776; 18 AM. JUR. 631;

G.S. 136-19; G.S. 136-103; *Power Co. v. King,* 259 N.C. 219, 130 S.E. 2d 318; *Redevelopment Comm. v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391; *Williams v. Highway Comm.,* 252 N.C. 141, 113 S.E. 2d 263; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129; *Jeffress v. Greenville,* 154 N.C. 490, 70 S.E. 919; *Railroad v. Davis,* 19 N.C. 451.

When respondent denied petitioner was entitled to compensation because it, not petitioner, was the owner of the property rights in controversy, respondent, in effect, converted what began as a condemnation proceeding into an action in ejectment or trespass to try title. On that issue petitioner was entitled to a jury trial. *Sparks v. Sparks,* 232 N.C. 492, 61 S.E. 2d 356; *Grantham v. Nunn,* 188 N.C. 239, 124 S.E. 309; *Comrs. v. George,* 182 N.C. 414, 109 S.E. 77; *Crews v. Crews,* 175 N.C. 168, 95 S.E. 149; *Wilson v. Featherstone,* 120 N.C. 446, 27 S.E. 124; *Worthy v. Shields,* 90 N.C. 192; *State v. Beasley,* 75 N.C. 211.

When the taking by the sovereign is conceded, questions preliminary to the determination of the amount to be paid are *questions* of fact to be determined by the court — not *issues* of fact which must be determined by a jury. This is the basis for the conclusion reached in *Kaperonis v. Highway Commission,* 260 N.C. 587, 133 S.E. 2d 464, holding G.S. 136-108 constitutional. The cases there cited and relied upon to uphold the constitutionality of the statute deal with questions incident to the right to take, or the manner of fixing compensation. An examination of those cases will show condemnor did not deny the taking because it was already the owner.

Only issues of fact must be submitted to a jury. The court determines questions of law. The parties in the *Kaperonis* case stipulated plaintiffs were the owners in fee of a described tract of land "subject to the legal effect of the following language appearing in Deed Book 1313, Page 1, in the Office of the Register of Deeds for Mecklenburg County, North Carolina, one of the deeds in Plaintiffs' chain of title * * * [course and distance description] and more particularly described and shown on blueprint of survey by T. J. Orr, Registered Surveyor, of the Property of T. Frank Estate dated March, 1948 which blueprint is made a part hereof * * * So much of said property as lies within the bounds of the right of way of Wilkinson Boulevard is subject thereto."

Plaintiffs asserted the right of way of Wilkinson Boulevard was 30 feet wide measured on each side from the center line. Defendant contended the width was 50 feet on each side of the center line. The parties did not controvert the location of Wilkinson Boulevard. What was its width? That was the only question. By stipulation of the parties, that width was fixed by the deeds under which plaintiffs asserted ownership. The deeds said look at the Orr map to find the width; that map said

50 feet. The stipulation eliminated any issue of fact, leaving only a question of law for the court. *Carney v. Edwards,* 256 N.C. 20, 122 S.E. 2d 786; *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311; *Moore v. Whitley,* 234 N.C. 150, 66 S.E. 2d 785; cases cited 1 Strong, N. C. Index, p. 413, note 66.

For the reasons given, plaintiff is entitled to have a jury determine the truth of the facts on which he relies to nullify his contract so far as it relates to the disputed area.

Petitioner, conceding a written statement of his contentions would facilitate the formulation of the issues to be submitted to a jury, moved in this Court for permission to file a reply. That motion is allowed. He will file, in the Superior Court of Dare County, his reply within 30 days of the certification of this opinion to the Superior Court.

Neither allegations nor proof are sufficient to justify the expression of an opinion on the question of liability for damage caused by sand drifting on the Casino property. Did respondent with its own force construct the highway, or was the work done by an independent contractor? Did the sand drift on to petitioner's property because of the negligent manner in which the work was done, or as a result of the manner in which the work was necessarily done? Does petitioner seek damages for a tortious act, or compensation for a taking? See *Light Company v. Creasman,* 262 N.C. 390, 137 S.E. 2d 497; *Midgett v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599; *Braswell v. Highway Commission,* 250 N.C. 508, 108 S.E. 2d 912.

Reversed and remanded for compliance with this opinion.

JOHNNIE F. EDWARDS AND DR. JOHN D. MESSICK AND THE AETNA INSURANCE COMPANY v. J. C. HAMILL AND COASTAL REFRIGERATION COMPANY, INC., DOING BUSINESS AS ALL-WEATHER COOLING & HEATING COMPANY, AND L. H. WHITEHURST.

(Filed 30 September, 1964.)

1. Negligence §§ 9, 20; Torts § 4—

Irrespective of G.S. 1-240, a defendant who is secondarily liable may have a defendant primarily liable joined upon alleging a cross action for indemnity.

2. Negligence § 9—

Primary and secondary liability between defendants exists only when they are jointly and severally liable to plaintiff and the one passively negligent is exposed to liability through the active negligence of the other or

the one is derivatively liable for the negligence of the other, and the doctrine cannot arise if one defendant is solely liable to plaintiff.

3. Same; Negligence § 20; Torts § 4—

The rights of contribution and indemnity are mutually inconsistent; the former assumes joint fault, the latter only derivative fault.

4. Same —

The original defendant was sued for damages resulting when fumes from the freshly varnished floors of a newly constructed house caught fire when defendant agent used an acetylene torch in the performance of work under the house. The original defendant had the subcontractor who varnished the floors joined, alleging that the subcontractor failed to give proper warning of the danger to defendant agent. *Held:* Demurrer of the additional defendant was properly sustained, since if he failed to give warning he was solely liable, while if he did give warning the original defendants are solely liable, and therefore the cross action fails to allege the right to contribution or to indemnity.

APPEAL by defendants J. C. Hamill and Coastal Refrigeration Company, Inc. from *Peel, J.*, January 1964 Session of PITT.

This case was heard below upon the demurrer of defendant L. H. Whitehurst to the answer of the original defendants J. C. Hamill and Coastal Refrigeration Company, Inc., upon whose application he had been made a party defendant.

On May 14, 1963 plaintiffs filed a complaint against the original defendants in which they allege: On June 14, 1962, plaintiff J. F. Edwards, a building contractor, was constructing a house for the other plaintiff, Dr. J. D. Messick. The house was nearly completed. That morning, Whitehurst, a subcontractor of Edwards, applied to the floors the last coat of a varnish which was 82% volatile and highly flammable. As he was leaving the premises, defendant Hamill, an employee of defendant Coastal Refrigeration Company, arrived to make connections to the air-conditioning and heating units, which were conjoined with ducts to the several rooms. Whitehurst informed Hamill that the floors had just been varnished and warned him not to go into the house for two hours. Hamill then went under the house and proceeded to remove caps from the air-conditioning unit with an acetylene torch. The torch ignited fumes from the floor lacquer and a "fire-explosion" occurred. The house was damaged in the sum of $5,764.79.

Defendants Hamill and Refrigeration Company, answering the complaint, allege that Whitehurst asked Hamill not to walk on the floors for 1½ hours but failed to inform him that the varnish would form a flammable gas which might be affected by work done under the house; that Hamill had no knowledge that such a hazardous condition existed;

that although Whitehurst knew Hamill proposed to work under the house with an acetylene torch, he failed in his duty to warn him of the danger. Defendants further aver (1) that the negligence of Whitehurst was the sole proximate cause of the plaintiffs' damage; (2) that Whitehurst should be made a party defendant to this action and be required to answer for any damages which plaintiffs suffered; (3) that "White hurst was the agent, servant, and subcontractor of the plaintiffs and was acting in the scope of such agency" and, if his negligence was not the sole proximate cause of plaintiffs' damage, it was a contributing cause barring plaintiffs' recovery; and (4) that plaintiffs owed defendants a nondelegable duty to warn them of the dangerous condition existing in the house and their failure to warn Hamill bars their recovery.

Defendants prayed that Whitehurst be made a party to this action but asked no specific relief against him. He was made a party and answered the pleadings of both the plaintiffs and the original defendants. He alleges, *inter alia,* that he specifically warned defendants that the house was filled with flammable fumes; that he cautioned Hamill not even to strike a match at the back door lest it cause an explosion; and that he had no knowledge Hamill intended to use an acetylene torch under the house. Thereafter Whitehurst demurred to the answer for that it failed to state a cause of action against him either for contribution or for indemnity and for that it asked no relief against him. From the order of Judge Peel sustaining the demurrer and dismissing the cross action as to Whitehurst, the original defendants appeal.

James and Speight and William C. Brewer, Jr., for defendant appellants.

M. E. Cavendish for defendant appellee.

SHARP, J. Appellants' defense, as set out in their answer, is that the negligence of Whitehurst was the sole proximate cause of plaintiffs' damage and he is *solely* liable to the plaintiffs. Appellants' position on appeal, as stated in their brief, is that the negligence of Whitehurst was the primary cause of the explosion and fire which damaged the Messick house and he is *primarily* liable to plaintiffs. Their goal is complete exoneration or indemnity, not contribution under G.S. 1-240, but the ruling on this demurrer depends entirely upon the facts alleged in the answer.

Independently of G.S. 1-240, the law permits an adjudication in one action of primary and secondary liability between joint tort-feasors who are not *in pari delicto.* A defendant secondarily liable, when sued

alone, may have the tort-feasor primarily liable brought into the action by alleging a cross action for indemnification against him. *Clothing Store v. Ellis Stone & Co.*, 233 N.C. 126, 63 S.E. 2d 118; *Bowman v. Greensboro*, 190 N.C. 611, 130 S.E. 502.

Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff, *Lewis v. Insurance Co.*, 243 N.C. 55, 89 S.E. 2d 788; *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768; *Bost v. Metcalfe*, 219 N.C. 607, 14 S.E. 2d 648; and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. *Steele v. Hauling Co.*, 260 N.C. 486, 133 S.E. 2d 197; *Newsome v. Surratt*, 237 N.C. 297,, 74 S.E. 2d 732; *Clothing Store v. Ellis Stone & Co., supra; Johnson v. Asheville*, 196 N.C. 550, 146 S.E. 229; *Bowman v. Greensboro, supra; Guthrie v. Durham*, 168 N.C. 573, 84 S.E. 859; *Gregg v. Wilmington*, 155 N.C. 18, 70 S.E. 1070; *Dillon v. Raleigh*, 124 N.C. 184, 32 S.E. 548; see also *McBryde v. Lumber Co.*, 246 N.C. 415, 98 S.E. 2d 663.

The doctrine of primary-secondary liability cannot arise where an original defendant alleges that the one whom he would implead as a third-party defendant is solely liable to plaintiff. *Greene v. Laboratories, Inc.*, 254 N.C. 680, 691, 120 S.E. 2d 82, 89; *Walker v. Loyall*, 210 N.C. 466, 187 S.E. 565; *Bargeon v. Transportation Co.*, 196 N.C. 776, 147 S.E. 299; *Ballinger v. Thomas*, 195 N.C. 517, 142 S.E. 761. Obviously, if a plaintiff sues defendant A when the negligence of B is the sole proximate cause of plaintiff's injuries and A has no derivative, or imputed, liability for the acts of B, A is not liable to the plaintiff and therefore not entitled to indemnity from B. If, on the other hand, A and B are *in pari delicto*, A's remedy is against B for contribution; he may not have indemnity. *Crowell v. Air Lines*, 240 N.C. 20, 81 S.E. 2d 178; *Newsome v. Surratt, supra; Taylor v. Construction Co.*, 195 N.C. 30, 114 S.E. 492; *Doles v. R. R.*, 160 N.C. 318, 75 S.E. 722.

The rights of contribution and indemnity are mutually inconsistent; the former assumes joint fault, the latter only derivative fault. Although a defendant may plead inconsistent defenses, *Woods v. Turner*, 261 N.C. 643, 135 S.E. 2d 664; *Freeman v. Thompson*, 216 N.C. 484, 5 S.E. 2d 434, appellants here have not done so, nor does it appear that they could. According to the facts alleged in their answer, admitted to be true for the purpose of this demurrer, negligence of Whitehurst was the sole proximate cause of plaintiffs' damage. Whitehurst had created a potentially dangerous situation of which he failed to give warning when he had a duty to warn Hamill. *Williams v. Stores Co., Inc.*, 209

N.C. 591, 184 S.E. 496. If Whitehurst failed to give the warning, Hamill was guilty of no actionable negligence and plaintiffs could not recover against appellants, the only defendants whom they have sued. If, however, Whitehurst warned Hamill, appellants are solely responsible to plaintiffs. Between appellants and Whitehurst there existed no contractual relation from which Whitehurst's negligence could be imputed to them; so they have no derivative liability for his acts.

One defendant may not substitute another party for himself by alleging the sole negligence of the other as the proximate cause of a plaintiff's injuries. Since an original defendant may implead a third-party defendant only for the purpose of contribution or indemnity, and appellants have stated no cause of action for either against appellee, the ruling of the court below sustaining the demurrer is

Affirmed.

STATE v. JAMES W. OATES.

(Filed 30 September, 1964.)

1. Constitutional Law § 32—

Where defendant does not request or desire counsel, it is not required that he be represented by counsel in a trial for a misdemeanor.

2. Criminal Law § 131—

Sentences upon conviction of separate misdemeanors of 12 months on each warrant, the sentences to run consecutively, are not excessive.

APPEAL by defendant from *Clarkson, J.*, January 27, 1964, Criminal Session of CLEVELAND.

Criminal prosecutions on eleven warrants. Each warrant charged defendant with the criminal offense (issuance of a worthless check) defined in G.S. 14-107.

On each of five warrants, defendant was tried originally in the Kings Mountain Recorder's Court, found guilty and appealed from the judgments pronounced in said court to the Superior Court of Cleveland County. These cases are identified on the superior court records as Nos. 5535, 5535-A, 5535-B, 5535-C and 5535-D.

The original hearing on each of the other six warrants was in the Cleveland County Recorder's Court. To each of these warrants, defendant pleaded guilty or *nolo contendere*. From the judgments pronounced in said court, defendant appealed to the Superior Court of

Cleveland County. These cases are identified on the superior court records as Nos. 5536, 5536-A, 5536-B, 5536-C, 5536-D and 5536-E.

In the superior court, "in his own proper person and without legal counsel, having heard the said warrants read, the said defendant James W. Oates entered a plea of Guilty in each case to uttering worthless checks in the sum of less than fifty dollars."

Upon said guilty pleas, the court entered judgments as follows:

"Cases Nos. 5535, 5535-*A*, 5535-*B*, 5535-*C*, 5535-*D*, *and* 5535-*E (sic) are consolidated for judgment:* It is the judgment of the Court that the defendant be confined in the common jail of Cleveland County for twelve (12) months, and assigned to work under the supervision of the State Prison Department.

"Cases Nos. 5536, 5536-*A*, 5536-*B*, 5536-*C*, *and* 5536-*D are consolidated for judgment:* It is the judgment of the Court that the defendant be confined in the common jail of Cleveland County for twelve (12) months, and assigned to work under the supervision of the State Prison Department, this sentence to run at the expiration of the sentence imposed in Nos. 5535, 5535-A, 5535-B, 5535-C, 5535-D and 5535-E *(sic);* to run consecutively and not concurrently."

Defendant, in open court, appealed to the Supreme Court of North Carolina. Defendant stated in writing he did not need or want the services of a lawyer in connection with his appeal. However, he applied for leave to appeal *in forma pauperis.* Judge Clarkson entered two orders: (1) That Cleveland County pay the necessary costs for a transcript of the proceedings in the superior court and for preparing records and briefs for filing in the Supreme Court; and (2) "that the law firm of Horn, West & Horn be appointed as attorneys for the Clerk of Superior Court for the purpose of taking care of all legal transactions required in the appeal of the above entitled case, to serve as attorneys for the said Clerk of Superior Court, and not as attorneys for the defendant, and that upon the rendering of said services the said law firm be paid for services rendered as ordered in a later order." Thereafter, a record on appeal was prepared, mimeographed and filed in this Court. It contains a stipulation signed by defendant to the effect that it constitutes the case and record on appeal.

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

No counsel contra.

PER CURIAM. The record, as prepared by the clerk of the superior court with the assistance of said court-appointed counsel, sets forth as assignments of error: "1. Failure of the Court to appoint an attorney to protect the defendant's interests in the trial court, as shown by EXCEPTION #1," and "2. The action of the Court in giving the defendant two consecutive twelve months' sentences, and signing a judgment to that effect, as shown by EXCEPTION #2."

With reference to Assignment of Error #1: Nothing in the record indicates defendant requested or desired that Judge Clarkson appoint counsel to represent him in the superior court. With reference to Assignment of Error #2: Under G.S. 14-107, as applicable in Cleveland County, each offense is a general misdemeanor. Upon the record before us, the assignments of error are without merit and the judgments must be and are affirmed.

Affirmed.

GLENN V. WALKER v. CONTINENTAL BAKING COMPANY.
AND
G. B. BASS v. CONTINENTAL BAKING COMPANY.
AND
HARVEY D. LEWIS v. GLENN V. WALKER AND G. B. BASS.

(Filed 30 September, 1964.)

Evidence § 55—

Where a party has testified as to his version of the accident, an officer, who arrived at the scene some 15 or 20 minutes after the accident occurred, should be permitted to testify in corroboration that the party at that time made statements of the same import in regard to how the accident occurred, and the exclusion of the corroborative evidence is error.

APPEALS by Glenn V. Walker and G. B. Bass from *Mintz, J.*, June 1964 Civil Term of NEW HANOVER.

On June 12, 1963, there was a collision between a truck owned by G. B. Bass and a truck owned by Continental Baking Company. The Bass truck was driven by Glenn V. Walker; Continental's truck was driven by Harvey Lewis. Walker sued Continental, alleging personal injuries sustained in the collision caused by the negligence of Continental's driver, engaged in his employer's business. Bass sued Continental to recover damages he sustained as a result of the collision.

Continental denied the negligence alleged by Walker. It pleaded contributory negligence and, for affirmative relief, asserted a counterclaim

for damages to its truck. Continental, in the action brought by Bass, did not assert a counterclaim. It merely denied the alleged negligence of Lewis and asserted Walker's contributory negligence.

Lewis brought an action for personal injuries sustained by him in the collision.

The cases were consolidated for trial. The jury, on appropriate issues submitted to it, found that Lewis, Continental's driver, was not negligent; that Walker was contributorily negligent; and in Lewis' case, that Walker was negligent, that Lewis was not contributorily negligent, and fixed the amount of damages sustained by Continental and Lewis. Judgments were entered on the verdicts. Walker and Bass appealed.

Hogue, Hill and Rowe, Addison Hewlett, Jr., for appellants.
James, James & Crossley for appellees.

PER CURIAM. Walker alleged and testified in support of his allegations: The collision occurred about 1:00 p.m. He was traveling north on Highway No. 17, and in the eastern, his proper lane. He saw Continental's truck approaching. It was also in the eastern, the wrong lane. He blew his horn to alert Continental's driver. To avoid a collision, he, Walker, pulled to his right and on to the shoulder. Continental's driver was slumped over with his head on the steering wheel. Seeing he could not avoid a collision by going further to the right, he turned to his left, but was unable to avoid a collision, which occurred in his lane of travel.

Walker's description of the manner in which the collision occurred was corroborated by a witness who testified he was traveling north and immediately behind Walker.

Lewis testified. He told how the collision occurred. His version contradicted the statements made by Walker and his witness. He said he was in his proper lane and that the collision occurred because Walker came into Lewis' lane. Lewis, to support his version, put on two witnesses who testified they saw the collision. Their testimony with respect to the manner in which the collision occurred supported Lewis' version.

Walker's character, and the character of his witness, were attacked on cross examination by questions directed to their commission of criminal offenses.

Walker and Bass assign as error the court's refusal to permit them to corroborate Walker's testimony by the testimony of the Highway Patrolman who investigated the collision. He arrived at the scene fifteen or twenty minutes after the collision occurred. His testimony, not per-

mitted to go to the jury, was that Walker, at the scene of the collision, told him how the collision occurred and related the manner in which it occurred. The statements he attributed to Walker as to the cause of the collision were the same as given by Walker as a witness.

The patrolman's testimony was not offered as substantive evidence, but for the sole purpose of corroborating Walker. It was competent for that purpose. Stansbury's North Carolina Evidence (2d Ed.), sec. 51, and cases assembled in note 63. We are of the opinion that the exclusion of the evidence was prejudicial. *State v. Brown,* 249 N.C. 271, 106 S.E. 2d 232; *Jackson v. Sanitarium,* 234 N.C. 222, 67 S.E. 2d 57; *Roberts v. Roberts,* 82 N.C. 29.

New trial.

STATE v. PERRY WHALEY.

(Filed 30 September, 1964.)

1. Robbery § 1; Indictment and Warrant § 9—

The violation of G.S. 14-89.1 is a felony, and an indictment therefor which does not contain the word "feloniously" is fatally defective.

2. Criminal Law § 121—

Arrest of judgment for fatal defect of the indictment does not entitle defendant to his discharge, since the State, if it so elects, may put defendant to trial on a proper bill.

3. Criminal Law § 161—

Where sentences on subsequent counts are made to begin at the expiration of the sentence on the count upon which judgment is arrested, the judgments on such counts must be set aside and the cause remanded for judgments thereon.

APPEAL by defendant from *Clarkson, J.,* April-May 1964 Session of CLEVELAND.

This is a criminal action in which defendant was tried and convicted of the following felonies:

(1) Case No. 5632 (first count) — Breaking into and entering the Edwards Clinic, 5 July 1963.

(2) Case No. 5632 (second count) — Larceny of $500 in money, the property of Dr. Joe Walker, 5 July 1963.

(3) Case No. 5632 (third count) — "Safecracking," G.S. 14-89.1 — safe of Dr. Joe Walker, 5 July 1963.

(4) Case No. 5632B (first count) — Breaking into and entering the house of Dr. Cecil Barrier, 21 July 1963.

(5) Case No. 5632B (second count) — Larceny of money and property of Dr. Cecil Barrier, of the value of $1200, 21 July 1963.

Judgment was entered imposing active prison sentences as follows: (1) Case No. 5632 (third count), "Safecracking," 10 years; (2) Case No. 5632, first and second counts (consolidated for judgment), 5 years, to begin at the expiration of the 10-year sentence for safecracking; (3) Case No. 5632B, first and second counts (consolidated for judgment), 5 years, to begin at the expiration of the 10-year sentence for safecracking and the 5-year sentence in Case No. 5632, first and second counts.

Attorney General Bruton, Assistant Attorney General Brady, and Staff Attorney Hornthal for the State.

Reuben L. Elam for defendant.

PER CURIAM. In this Court defendant moves in arrest of the judgment in case No. 5632, on the third count, for that the bill of indictment does not contain the word "feloniously." A violation of G.S. 14-89.1 is a felony. We have repeatedly held that bills of indictment charging felonies, 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. The motion must be sustained and the judgment arrested. This does not entitle defendant to be discharged on this count. The State, if it so elects, may put defendant to trial on a bill properly charging "Safecracking."

We find no error in the trial below on the other counts in the bills of indictment. However, since the sentences on those counts are to begin at the expiration of the sentence on the third count in the bill of indictment in case No. 5632 (safecracking), the judgments on such counts must be set aside and the cause remanded for judgment thereon. *State v. Sutton,* 244 N.C. 679, 94 S.E. 2d 797.

No. 5632 (third count) — Judgment arrested.

No. 5632 (first and second counts) and No. 5632B (first and second counts) — Sentences vacated and cause remanded for judgment.

B. W. CRAIG, PLAINTIFF v. SOUTHERN RAILWAY COMPANY AND ATLANTA & CHARLOTTE AIRLINE RAILWAY COMPANY, ORIGINAL DEFENDANTS; AND CITY OF GASTONIA, INTERVENING DEFENDANT.

(Filed 30 September, 1964.)

Deeds § 12; Railroads § 3—

A deed reciting that the grantors did "sell and convey" to the grantee a described tract of land, with habendum "to have and to hold the same for railroad purposes in fee simple forever" conveys the fee simple and not a mere easement for railroad purposes.

APPEAL by plaintiff from *Brock, J.*, June 1964 Civil Session of GASTON.

This action to construe a deed was heard upon stipulated facts, which we summarize:

On August 1, 1870, Oliver W. Davis owned 173 acres of land in Gaston County. On that day, in consideration of five dollars, he and his wife executed and delivered to Atlanta & Richmond Airline Railway Company a deed whereby they did "sell and convey to the said party of the second part: That tract or parcel of land lying in the County of Gaston and State of North Carolina one hundred feet in width on each side of said Railway Company's Roadway measuring from the center." This deed contained two habendum clauses as follows:

> "TO HAVE AND TO HOLD the same for railroad purposes in fee simple forever through any lands owned or claimed by said parties of the first. 'Provided that the said Railway shall not be located within less than ninety feet (90) of the dwelling house of the said parties of the first part if such location be in the rear of said dwelling and if in front thereof sufficiently distant therefrom to render said dwelling and outhouses safe from the sparks of the engines as they passed. It being also understood that said parties of the first part may be allowed the use of the timber on said lands and of all metals therein and of so much of said land as may not be required for the use of said Railway.'
>
> "TO HAVE AND TO HOLD the same with the appurtenances thereto belonging (including the right of dower of the said J. W. Davis femme covert) to said Atlanta & Richmond Air Line Railway Company in N. C., the party of the second part, their heirs and assigns, forever."

Pursuant to this deed the grantee went into possession of the two-hundred-foot strip of land described therein and later conveyed it to

defendant Atlanta & Charlotte Airline Railway Company, which leased it to Southern Railway Company, the present occupant. These two railway companies have now entered into an agreement with the intervening defendant, City of Gastonia, to lease it a part of the property for a parking lot, a use which is not for any railroad purpose.

Oliver W. Davis and his wife are both dead. Plaintiff is one of their numerous heirs, all of whom claim to own the fee in the land in question as tenants in common and who deny the right of defendants to enter into the proposed lease.

In his complaint the plaintiff alleges the facts stipulated above and prays the court to enter a judgment declaring that the Atlanta & Charlotte Railway Company owns only an easement for railway purposes in the land in question and that the heirs of Oliver W. Davis own the fee. The court, however, held that the 1870 deed from Davis conveyed the fee to his grantee. From a judgment decreeing that plaintiff had no interest in the land described therein, he appeals.

Hollowell & Stott by L. B. Hollowell, Jr., for plaintiff appellant.

Joyner & Howison by W. T. Joyner, Jr., for Southern Railway Company and Atlanta & Charlotte Airline Railway Company, defendants appellees.

Garland & Alala by James B. Garland for City of Gastonia, intervening defendant appellee.

PER CURIAM. This appeal, as the parties have stipulated, presents one question: Did the deed from Oliver W. Davis convey the fee to Atlanta & Richmond Airline Railway Company or merely an easement for railway purposes? The answer is found in the opinion in *McCotter v. Barnes*, 247 N.C. 480, 101 S.E. 2d 330, which fully discusses all the problems involved here. The Davis deed conveyed a fee simple to the grantee.

The judgment below is

Affirmed.

ALTON B. BELL v. MARY LOU SMITH.

(Filed 30 September, 1964.)

Insane Persons § 10; Process § 6—

Where service of process in a civil action is made upon defendant who is *non compos mentis*, the court correctly refuses to quash the summons and vacate the service, but the court should see to it that defendant is properly represented before any action is taken which is detrimental to his interests.

APPEAL by defendant from *Riddle, S. J.*, March 2, 1964 Non-Jury Civil Term, Gaston Superior Court.

The plaintiff instituted this civil action against the defendant for actual and punitive damages based on her alleged "false, slanderous, and malicious charges" which are detailed in the complaint. The Sheriff of Wake County served the summons and copy of the complaint on the defendant who at the time was confined in the State Hospital for the Insane, to which institution she had been committed by order of the Superior Court of Gaston County upon a jury finding that she did not have sufficient mental capacity to plead to a bill of indictment charging her with the crime of murder. Defendant's counsel undertook to enter a special appearance and moved to quash the summons and vacate the service because of her incompetency. From the order overruling the motion, the defendant appealed.

William N. Puett, Berlin H. Carpenter, Jr., for plaintiff appellee.

Hollowell & Stott, and Frank P. Cooke, by Grady B. Stott for defendant appellant.

PER CURIAM. If a defendant in a civil action is *non compos mentis*, he must defend by general or testamentary guardian if he has one within the State, otherwise by guardian *ad litem* to be appointed by the court. *Hood v. Holding*, 205 N.C. 451, 171 S.E. 633. The court may not quash the service on an incompetent, but should see to it that he is properly represented before any action is taken which is detrimental to his interests. Either party, or the court upon its own motion, may initiate proceedings for the appointment of a guardian *ad litem* before any hearing on the merits.

Affirmed.

ROYALS *v.* BAGGETT.

CAPTAIN WILLIAM C. ROYALS AND WIFE, DOLORES P. ROYALS; ASA J. ROYALS, JR. AND WIFE, LAURA ROYALS; HELEN JOSITA GIZARA AND HUSBAND, BERNARD J. GIZARA; QUINTON ROYALS (SINGLE); DR. THOMAS E. ROYALS AND WIFE, SARA M. ROYALS; ELIZABETH R. THURMOND (HUSBAND DECEASED); JANE ROYALS WHITE AND HUSBAND, ALBERT W. WHITE; JOSEPH P. ROYALS, JR. AND WIFE, MARY EDNA ROYALS; MARY R. CONNALLY AND HUSBAND, PAUL C. CONNALLY; JOHN ROYALS AND WIFE, BETTY L. ROYALS; JAMES MARCUS ROYALS AND WIFE, LILLIAN ROYALS; JOHN D. ROYALS AND WIFE, MALLIE G. ROYALS; BERNARD E. ROYALS (SINGLE); MARJORIE ROYALS BACON AND HUSBAND, EDWARD T. BACON, JR.; PHILIP A. ROYALS AND WIFE, LEONA D. ROYALS; VINCENT D. ROYALS (SINGLE) AN INCOMPETENT BNF AUSTIN STEVENS AND WIFE, NORMA JEAN ROYALS; MARY LUCY LANGSTON AND HUSBAND, MACK LANGSTON; AUGUSTA MANNING (HUSBAND DEAD); THENIE McLAMB AND HUSBAND, HERMAN McLAMB; L. M. TART (WIFE DECEASED); MOSES A TART AND WIFE, HENRIETTA TART; WINNIE RAYNOR AND HUSBAND; LISCHER RAYNOR; JAMES MARION ROYALS AND WIFE, ETHEL ROYALS; MAGELENE BAREFOOT (HUSBAND DECEASED); LEOLA TART GREGORY AND HUSBAND, THOMAS C. GREGORY; RUPERT C. TART AND WIFE, ADA PEARL TART; UPTON TART AND WIFE, MARY LUE TART; JOHN K. TART AND WIFE, IVA J. TART; FRAUD A. TART AND WIFE, EDNA G. TART; JOSIAH TART AND WIFE, CAROLINE TART; J. M. TART AND MARTHA LEE TART BY THEIR NEXT FRIEND, HARRY CANADAY; MICHAEL A. WILLIAMS AND WIFE, LEOLA B. WILLIAMS, ET ALS V. WILLIAM ELI BAGGETT (INDIVIDUALLY) AND WIFE, JEAN BAGGETT, AND WILLIAM ELI BAGGETT, ADMINISTRATOR OF JOHN C. WILLIAMS, DECEASED.

(Filed 30 September, 1964.)

APPEAL by plaintiffs from *Bundy, J.*, June Session 1964 of SAMPSON.

Plaintiffs instituted this action to set aside on grounds of mental incapacity and undue influence a deed executed and delivered by John C. Williams to William Eli Baggett on or about May 3, 1960. Plaintiffs sue as heirs of John C. Williams who died intestate on or about December 3, 1961.

The issues raised by the pleadings and submitted to the jury were answered as follows:

"1. Did John C. Williams, on May 3, 1960, have sufficient mental capacity to execute and deliver the deed in question to William Eli Baggett? ANSWER: 'YES.'

"2. Was the execution and delivery of said deed procured by undue influence, as alleged in the complaint? ANSWER: 'NO.'

"3. Is the paper writing purporting to be the deed of John C. Williams to William Eli Baggett the act and deed of John C. Williams? ANSWER: 'YES.'"

The court entered judgment, in accordance with said verdict, as follows:

"NOW, therefore, it is, CONSIDERED, ORDERED AND ADJUDGED that the deed from John C. Williams to William Eli Baggett, dated May 2, 1960, acknowledged May 3, 1960, and recorded in Book 706 page 203 in the office of Register of Deeds of Sampson County, was and is the valid act and deed of John C. Williams, and constitutes a valid conveyance of the lands therein described.

"IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that the Plaintiffs pay the costs of this action, to be taxed by the Clerk."

Plaintiffs excepted and appealed.

J. R. Barefoot for plaintiff appellants.
Stewart B. Warren and Max E. McLeod for defendant appellees.

PER CURIAM. On September 8, 1964, appellees filed in this Court a motion to dismiss the appeal for failure to comply with our Rule 19. Rules of Practice in the Supreme Court, 254 N.C. 783, 795. Prior thereto, a record and a brief for appellants had been prepared and filed in this Court by E. R. Temple, Esquire, who had served as counsel for appellants from the commencement of this action.

On September 21, 1964, Mr. Temple filed a motion in this Court for an order "confirming the termination of employment of E. R. Temple in this cause," in which he set forth an agreement with appellants that his employment terminate and that he withdraw as counsel. Simultaneously, J. R. Barefoot, Esquire, filed in this Court, as attorney for appellants, a statement to the effect Mr. Temple's employment by appellants had been terminated by mutual consent; that Mr. Temple had withdrawn as counsel for appellants, subject to the approval of this Court; and that he (Mr. Barefoot) had been offered and accepted employment by appellants. In this statement, and also in an answer filed by Mr. Barefoot as attorney for appellants, it was asserted that appellees' motion to dismiss the appeal should be denied and that the Court in its discretion should allow appellants an opportunity to correct deficiencies, if any, in the record.

On September 23, 1963, pending decisions on said motions, Mr. Barefoot was permitted to present and did present an oral argument to this Court relating to the asserted merits of appellants' appeal.

Under the circumstances, Mr. Temple's motion for leave to withdraw as counsel for appellants is allowed.

With reference to appellees' motion to dismiss: While appellants have failed to comply with the requirements of our Rule 19 in certain respects, we have deemed it appropriate under existing circumstances to consider the questions presented by the assignments of error and appeal.

After a protracted trial, the jury resolved all issues of fact against plaintiffs-appellants; and appellants have failed to show error of such nature as to justify the award of a new trial. "Technical error is not sufficient to disturb the verdict and judgment. The burden is on the appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right; or to phrase it differently, to show that if the error had not occurred, there is a reasonable probability the trial might have been materially more favorable to him." *In re Will of Thompson*, 248 N.C. 588, 598, 104 S.E. 2d 280, and cases cited.

Having elected to treat the appeal as properly before us, the judgment entered by Judge Bundy is affirmed.

Affirmed.

ROGER FULLER, BY HIS NEXT FRIEND, LAIL FULLER v. SHELBY E. BRIGHT.

(Filed 30 September, 1964.)

APPEAL by plaintiff from *Froneberger, J.*, April Regular Civil Session 1964 of BUNCOMBE.

This is a civil action to recover for personal injuries sustained by plaintiff under the circumstances hereinafter set out.

On 14 June 1962 the plaintiff, Roger Fuller, who was then just over seven years of age, had come out of a church located on Church Road in Buncombe County, where he had been attending Bible School. A converted school bus, still painted the same color, was parked in front of the church on the shoulder of the road. This bus was being used to transport children to and from their homes to the Bible School. The driver of the bus, who was sitting in the driver's seat in the bus at the time of the accident complained of, testified that there were children on both sides of the road; that the plaintiff ran in front of his bus and continued to run into the road until the impact with defendant's car. The defendant's car approached the church bus from its rear.

Immediately before the accident the defendant was operating her car at a speed of approximately 30 miles an hour in a speed zone of 35 miles an hour. The defendant testified that when she saw the children in the church yard she slowed down to about 20 miles an hour; that she pulled her car to the left side of the road to pass the bus; that she did not see the little boy until he was right in front of her car. "I guess I hit him at about the time I saw him * * *."

The jury answered the negligence issue in the negative. Plaintiff appeals, assigning error.

John C. Cheesborough for plaintiff appellant.

Van Winkle, Walton, Buck & Wall by O. E. Starnes, Jr., for defendant appellee.

PER CURIAM. All the plaintiff's assignments of error are to the charge of the court or to the failure of the court to charge the jury in certain respects.

A careful review of the charge, however, when read contextually, leads us to the conclusion that sufficient prejudicial error has not been shown to justify a new trial.

No error.

MARTIN SHERWOOD RANDALL v. BILLY VINSON ROGERS.

(Filed 14 October, 1964.)

1. Automobiles § 52—

Ordinarily, the owner-occupant of a car has the right to direct its operation by the driver and therefore is responsible for the driver's negligence irrespective of agency, as such, and the provisions of G.S. 20-71.1.

2. Same—

Allegations in the complaint that the automobile was owned by defendant and registered in his name and was being negligently operated at the time by defendant or by some person with his permission, and that the negligence in the respects specified was the proximate cause of plaintiff's injury, when aided by allegations in the answer that defendant was an occupant of the car at the time of the accident, *is held* sufficient to allege defendant's liability for the driver's negligence.

3. Pleadings § 20—

The omission of a material allegation from the complaint may be supplied by a positive allegation of the crucial fact in the answer.

4. Negligence § 24a—

It is not necessary that negligence be proved by direct and positive evidence, but it may be established by circumstantial evidence, either alone or in combination with direct evidence.

5. Automobiles § 39—

The physical facts at the scene of an accident may be more convincing than oral testimony, and their import is ordinarily a matter for the determination of the jury.

6. Automobiles § 41a— Circumstantial evidence held sufficient to permit the inference that accident was the result of negligence.

Evidence permitting the jury to find that defendant was an occupant of the automobile owned by him, that he had the right to control the driver in the operation of the car, that he knew the driver to be intoxicated and that the driver in approaching and rounding a sharp curve ran off the road and into a tree resulting in injury to plaintiff, who was asleep in the car, that the car was in good mechanical condition and that there was no other traffic on the road at the time, together with the physical facts at the scene of the accident, *is held* sufficient to take the issue of negligence to the jury, since it permits the inference that the accident was the result of the intoxication of the driver and his reckless operation of the vehicle, or his failure to maintain a proper lookout so that he did not see the curve, or that he negligently failed to keep the vehicle under control.

APPEAL by plaintiff from a judgment of compulsory nonsuit entered by *Riddle, S. J.*, 23 March 1964 Civil Session of GASTON.

William N. Puett and Berlin H. Carpenter, Jr., for plaintiff appellant.
Hollowell & Stott by L. B. Hollowell, Jr., for defendant appellee.

PARKER, J. Plaintiff in his complaint alleges in substance: About 1:30 a.m. on 28 April 1963, he was injured while riding in an automobile owned by defendant and registered in his name. He is informed, believes, and so alleges, that at the time he was injured defendant's automobile was being operated by defendant, or by some person with his permission or under his direction, in a southerly direction on the road leading to Kings Mountain Moose Lodge in Cleveland County, at a high rate of speed, and that the driver lost control of the automobile which left the road on a curve at the right and crashed into a tree, resulting in injuries to him. He is informed, believes, and so avers, that defendant, or the unknown person driving the automobile under defendant's direction, was negligent in that the automobile was being operated at a speed greater than was reasonable and proper under the circumstances, at a reckless and dangerous speed, in a careless and reckless manner, and without keeping it under proper control. That said

acts of negligence were the sole proximate cause of the collision of the automobile with the tree and of his injuries.

Defendant in his answer denies all the allegations in the complaint, except that he admits both parties are residents of Gaston County, and that at about 1:30 a.m. on 28 April 1963 plaintiff was injured while riding in an automobile owned by him and registered in his name. As a bar to any recovery by plaintiff, he conditionally pleads plaintiff's contributory negligence in substance as follows: From 9 p.m. until about 1:15 a.m. on 28 April 1963, he and plaintiff were at the Moose Lodge drinking alcoholic beverages continuously. As a result of such drinking both became intoxicated, and plaintiff knew he (defendant) was intoxicated. He was not driving his automobile at the time plaintiff was injured. That if he was negligent as alleged in the complaint, plaintiff was guilty of contributory negligence in that he, while in an intoxicated condition, voluntarily continued to ride in his automobile, and failed to register any protest against its excessive speed, if any, or to take any measures for his own safety when he had ample opportunity to get out of the automobile, and that he continued to ride in his automobile when he knew, or should have known, that the driver was intoxicated. As an alternative and separate defense and bar to any recovery by plaintiff, defendant alleges that at the time of the accident he and plaintiff "were at the same time engaged in a joint enterprise in which they were occupying the motor vehicle owned by the defendant, but in the management and control of which all had equal authority and rights, and the plaintiff assumed responsibility for the negligent operation of said vehicle, if any, * * * that being engaged in a joint enterprise with the defendant, the negligence of the defendant, if any, is imputed to and becomes the negligence of the plaintiff * * *."

Plaintiff's evidence shows the following: About 8:30 or 9 p.m. on 28 April 1963 he went with defendant in his automobile to the Moose Lodge in Kings Mountain. There each had four mixed drinks containing vodka. He had worked the night before, and about 11:30 p.m. he became drowsy. He was not drunk. At that time he went out of the Moose Lodge, got in defendant's automobile, and went to sleep. The next thing he remembers is waking up the next day in a hospital in Gastonia hurting all over, particularly in his chest and head.

About 1 a.m. on 28 April 1963 William Valentine, a State highway patrolman, investigated an accident on the Moose Club Road in Cleveland County. At the scene of the accident, Moose Club Road is a hard-surfaced, black-top road about 20 feet wide. There is no posted speed limit on this road. This road has a sharp-sweeping curve that curves to the left. The road becomes a dirt road 200 or 300 feet from where the automobile

was against the tree. Valentine saw a 1963 Ford automobile "setting against a tree" about 30 feet off the paved portion of the road. The automobile was on the right side of the road not far from the curve. There were tire marks leading from the automobile to the road. The right side of the automobile was caved in to a depth of a foot or so, and its top was bowed. Valentine saw defendant at the scene, and in his opinion he was under the influence of alcohol. Defendant told Valentine he was in the back seat, someone else was driving, he owned the automobile, and he did not know at what speed the automobile went around the curve.

Plaintiff called defendant as an adverse witness. He testified in substance: He was in his automobile with plaintiff at the time of the collision, but he was not driving. The automobile left the road not far from the curve. The paved portion of the Moose Club Road terminates in a dead end, and the dirt road turned at about a 90 degree angle. He does not know if plaintiff was sleeping at the time of the collision: he was not talking. He was awake prior to the collision, but he does not know how fast his automobile was going. His automobile was four or five months old, and there was no mechanical failure in his automobile. He testified: "I ran into the driver at the Moose Club. I had driven the car to Kings Mountain past this curve while he was riding with me, but he drove the car back. I let him drive the car because he wanted to. He had been drinking but I don't know how many drinks he had had. * * * When he came to the end of this road (indicating the paved portion of Moose Club Road which dead-ended) he got off on the dirt road. I don't know if he ever put his brakes on nor at what point he started sliding. I did not hear the tires skid. I was wide awake, but I don't know whether he ever eased up on the gas. * * * I did not know the boy who was driving and I have made no efforts to locate him. * * * I would not say that speed was the only thing that caused the car to leave the road; the road ran out on the man. Nothing was happening in the car as it left the road."

Defendant offered no evidence.

Defendant contends that the judgment of compulsory nonsuit should be sustained on two grounds: One, the complaint does not allege agency sufficient to bind defendant; and two, plaintiff's evidence does not show negligence on defendant's part.

Plaintiff alleges in his complaint, and defendant in his answer admits the truth of plaintiff's allegation, that about 1:30 a.m. on 28 April 1963 he was injured while riding in an automobile owned by defendant and registered in his name. Plaintiff further alleges, on information and belief, that defendant's automobile was being negligently operated at the time by defendant, or by some person with his permission or under

his direction — plaintiff alleges in detail the acts of negligence — and that such acts of negligence were the sole proximate cause of the collision of the automobile with the tree and of his injuries. It is true plaintiff does not allege that defendant was in his automobile at the time, but defendant in his answer aids this defect or omission in the complaint by alleging as follows: he "denies that he was driving said automobile on said occasion" and avers "that at the time of the accident the plaintiff and the defendant were at the same time engaged in a joint enterprise in which they were occupying the motor vehicle owned by the defendant, but in the management and control of which all had equal authority and rights." McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. I, § 1193, "Aider by Answer"; 71 C.J.S. Pleading, § 590, a, b; 41 Am. Jur., Pleading, § 402. Defendant's answer is to the effect that he was the owner of and a passenger in the automobile at and before its collision with the tree, that he was not driving it, and that he had the right to exercise control over and direct the driver in its operation during this time.

"The mere fact that the owner refrains from directing the operation of his motor vehicle does not change his liability in such a case [when the owner is a passenger therein], since it is the right of control rather than the actual exercise of it which is material on the question of the owner's liability." 8 Am. Jur. 2d, Automobiles and Highway Traffic, p. 124. In accord *Matheny v. Motor Lines,* 233 N.C. 681, 65 S.E. 2d 368.

In *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185, the Court said: "The owner of an automobile has the right to control and direct its operation. So then when the owner is an occupant of an automobile being operated by another with his permission or at his request, nothing else appearing, the negligence of the driver is imputable to the owner." See also *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543.

"The liability of an owner-occupant does not depend upon whether the driver was his agent in the ordinary sense, that is, then engaged as authorized in furtherance of the owner's business. Rather, the liability of such owner-occupant arises from the fact that he knowingly permits or directs the negligent operation of his car by another." *Litaker v. Bost,* 247 N.C. 298, 101 S.E. 2d 31.

Osborne v. Gilreath, 241 N.C. 685, 86 S.E. 2d 462, relied on by defendant, is distinguishable. *Inter alia,* in the *Osborne* case there is no aider by answer as here; in the *Osborne* case plaintiff alleged no actionable negligence against anyone except the defendant, and in the instant case there is an allegation of actionable negligence against defendant or the unknown person driving the automobile; and in the *Osborne*

case a part of the decision relied on by defendant was concerned with whether plaintiff could invoke the aid of G.S. 20-71.1.

Without regard to the provisions of G.S. 20-71.1, the allegations in the complaint, aided by the allegations in the answer, state such a relationship between the person operating the automobile with the permission of the owner-occupant at the time plaintiff was injured and the owner-occupant that the law of agency is applicable. *Harper v. Harper, supra; Litaker v. Bost, supra.*

"Evidence of actionable negligence need not be direct and positive. Circumstantial evidence is sufficient, either alone or in combination with direct evidence." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. "Physical facts are sometimes more convincing than oral testimony." *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554. "* * * what the physical facts say when they speak is ordinarily a matter for the determination of the jury." *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912.

Plaintiff's evidence would permit, but not compel, a jury to find that defendant permitted a man to drive his automobile who he knew had been drinking; that defendant was a passenger in his automobile and also plaintiff, who was asleep; that defendant had the legal right to control the driver in his operation of his car; that the automobile was four or five months old and there was no mechanical failure in it; that there was no other traffic on the road at the time; that the driver was operating defendant's automobile carelessly and recklessly in violation of G.S. 20-140, in that in approaching and rounding the sharp-sweeping curve he failed, by reason of his drinking or otherwise, to exercise due care to maintain a proper lookout so that he did not see the curve, and in that he failed to keep the automobile under control; and that because of this negligence on his part, he did not stay on the highway but ran off of it and into a tree, thereby proximately causing plaintiff's injuries. The evidence was sufficient to carry the case to the jury on the issue of defendant's actionable negligence. This decision is in line with our decisions in *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33, and *Tatem v. Tatem,* 245 N.C. 587, 96 S.E. 2d 725.

The judgment of involuntary nonsuit was improvidently entered and is

Reversed.

JAMES LOUIS COWAN v. MURROWS TRANSFER, INC. AND ROGER DALE BUCHANAN.

AND

ROBERT LEE CARR v. MURROWS TRANSFER, INC. AND ROGER DALE BUCHANAN.

(Filed 14 October, 1964.)

1. Automobiles § 41d—

Evidence tending to show that defendant had followed plaintiff's vehicle on the highway for about two miles at a speed of approximately 45 miles per hour, that as plaintiff's vehicle slowed down and was turning left into a private driveway defendant's vehicle, which was attempting to pass, struck plaintiff's vehicle, that defendant gave no warning of his intention to pass, with evidence favorable to plaintiff that plaintiff gave timely signal for a left turn, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Negligence § 26—

Nonsuit on the ground of contributory negligence is proper only when plaintiff's own evidence establishes this defense as the sole reasonable conclusion.

3. Automobiles § 8—

G.S. 20-154(a) requires that a motorist before turning from a direct line should first ascertain that such movement can be made in safety, and a violation of this provision is negligence *per se*, but a motorist is not required to ascertain that a turning motion is absolutely free from danger.

4. Automobiles § 42h—

Evidence tending to show that plaintiff looked in his rear view mirror some 400 feet before making a left turn and looked again when 40 feet away from his turn, and saw defendant's following vehicle in his right hand lane, that plaintiff did not look again to the rear, and was struck by defendant's vehicle which was attempting to pass him as he was making his turn, *is held* not to disclose a violation of G.S. 20-154(a) as a matter of law, since under the circumstances of the case whether plaintiff could reasonably assume that he could make the movement in safety is a question for the jury.

5. Automobiles § 6—

Ordinarily, the violation of a statute or ordinance enacted for the safety of motorists on the highway is negligence *per se* and proof of breach of the statute or ordinance establishes negligence, since in such cirmumstance the common law rule does not obtain but the statute itself imposes the duty, and the question of proximate cause is to be determined by the other facts and circumstances.

6. Same—

Where a statute or ordinance provides that its violation should not be negligence *per se*, the common law obtains and the duty is to exercise due care under the circumstances, so that whether such violation constitutes

negligence and whether such negligence constitutes a proximate cause of injury is to be determined from facts and circumstances of the case.

7. Automobiles § 46—

An instruction that G.S. 20-149(b) places the duty on a motorist to blow his horn as a reasonably prudent person would do in the act of passing and to give such warning in reasonable time to avoid an injury which would likely result from a left turn by the preceding motorist, all in the discharge of the duty to use reasonable care under the circumstances, *is held* without prejudicial error, and objection that the court did not sufficiently explain that the violation of the statute should not constitute negligence *per se* is untenable.

8. Trial § 33—

In charging the law contained in an applicable statute it is preferable for the court to give a plain and simple application of the principles of law rather than to read to the jury the technical language of the statute.

APPEAL by defendants from *Peel, J.*, March 1964 Civil Session of PITT.

Actions to recover for injury and damages resulting from a collision of motor vehicles.

The collision occurred about 1:00 P.M., 14 August 1963, on U. S. Highway 264 about 6 miles east of Farmville, N. C. The paved portion of the highway is 20 feet wide and is level and straight for a distance of ½ mile in each direction from the point of collision. The highway runs generally east and west. Plaintiff Carr was proceeding eastwardly, operating a refrigerated milk truck belonging to his employer, plaintiff Cowan. Defendant Buchanan was following the milk truck, operating a tractor-trailer of his employer, the corporate defendant. As the milk truck was turning left to enter a private driveway on the north side of the highway, it was struck by the tractor-trailer which was attempting to pass. The tractor-trailer had been following the milk truck about two miles; each vehicle had been travelling at a speed of approximately 45 miles per hour. The weather was clear and the highway dry.

Plaintiffs' version of the accident: Carr put on the electric turn signal, indicating a left turn, 500 feet before reaching the driveway, and kept the signal on continuously until the moment of impact. When 400 feet from the driveway he observed in his rear-view mirror that the tractor-trailer was 400 feet behind him. He looked in the mirror again when he was about to begin the turn, 40 feet from the driveway, and saw that the tractor-trailer was then about 300 to 400 feet to the rear, in the south lane, with no indication that it would attempt to pass the milk truck. Carr did not look again. He made a turn slightly to the

right, without getting off the hardsurface, to give him a longer approach to the narrow driveway. He then made a sharp turn to the left and was struck at the north edge of the hardsurface as he was about to enter the driveway. There was no audible warning from the tractor-trailer. Carr had gradually decreased speed after putting on the turn signal and in making the turn was travelling 5 to 10 miles per hour.

Defendants' version: There was no turn signal from the milk truck, and nothing to indicate an intention to turn from the highway. When the tractor-trailer was about 160 feet to the rear of the milk truck, Buchanan gave a left turn signal and pulled to the north lane preparing to pass. The milk truck was decreasing speed and Buchanan reduced speed to 40 miles per hour. The milk truck pulled to the right as if to yield. When about 87 feet from the driveway and 40 feet from the milk truck, Buchanan reached for his horn. The milk truck swerved sharply to the left directly in the path of the tractor-trailer. Because of the emergency thus created, Buchanan took his hand from the horn and put it back on the wheel. He did not sound the horn. He was unable to avoid the collision. The milk truck made the turn at a speed of 10 to 15 miles per hour.

Plaintiff Carr seeks recovery for his personal injuries, plaintiff Cowan for damage to the milk truck. Corporate defendant counterclaims for damage to the tractor-trailer.

The jury found that defendants were negligent and plaintiffs were not contributorily negligent, and awarded plaintiffs damages.

James & Speight for defendant appellants.
Lewis & Rouse and Gaylord & Singleton for plaintiff appellees.

MOORE, J. Defendants assign as error the denial of their motions for nonsuit.

From the evidence favorable to plaintiffs the jury could infer that defendant Buchanan was inattentive to Carr's left turn signal given continuously for 500 feet, was inattentive to the turning movements of the milk truck which were begun when the tractor-trailer was at least 300 feet away, continued forward at a speed of at least 40 miles per hour when the milk truck had greatly reduced speed in turning, and attempted to pass without giving audible warning of his intention to do so when he should have observed that the milk truck was in the act of making a left turn, and such negligence (with respect to lookout, speed, control and lack of warning, as alleged by plaintiffs) was a proximate cause of the collision.

Defendants contend however that the plaintiffs were contributorily negligent as a matter of law. This contention is based on plaintiff Carr's testimony that he looked in his rear-view mirror when 40 feet from the driveway and "never looked back again." It is insisted that Carr's failure to continue his lookout violates G.S. 20-154(a) which provides that "the driver of any vehicle upon a public highway before . . . turning from a direct line shall first see that such movement can be made in safety . . ." A violation of this provision is negligence *per se*. *Mitchell v. White,* 256 N.C. 437, 124 S.E. 2d 137; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538. We held in *Tallent v. Talbert,* 249 N.C. 149, 105 S.E. 2d 426, that failure to look during the last 90 feet before turning constituted contributory negligence as a matter of law. See also *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357; *Gasperson v. Rice,* 240 N.C. 660, 83 S.E. 2d 665.

Nonsuit may not be granted on the ground of contributory negligence unless plaintiff's own evidence establishes this defense as the sole reasonable conclusion. In our opinion it is debatable whether Carr's failure to look again constitutes a violation of G.S. 20-154(a) as a matter of law on this record. He testified in effect that he looked when he was ready to begin his turning movement and observed that the tractor-trailer was then at least 300 feet to the rear. Whether, under such circumstances, he could reasonably assume that he could make the movement in safety is a question for the jury. A motorist is not required to ascertain that a turning motion is absolutely free from danger. *Lemons v. Vaughn,* 255 N.C. 186, 120 S.E. 2d 527; *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1. The motion for nonsuit was properly overruled.

Defendants also contend that the trial judge committed prejudicial error in failing to give the jury adequate instructions with respect to G.S. 20-149(b). As originally written this statute provided that "The driver of an overtaking motor vehicle not within a business or residence district . . . shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction." A violation of this provision was formerly regarded as negligence *per se*. *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730. In 1959 the Legislature placed a comma at the end of the foregoing provision and added the following: "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 other facts in the case in determining whether the driver of the overtaking vehicle was guilty of negligence or contributory negligence." See *Boykin v. Bissette,* 260 N.C. 295, 132 S.E. 2d 616. Defendants say that the charge does not give them the benefit of the 1959 amendment and does not ex-

plain the meaning of the clause, "shall not constitute negligence . . . *per se.*"

It is the generally accepted view that the violation of a statute enacted for the safety and protection of the public constitutes negligence *per se, i. e.,* negligence as a matter of law. The statute prescribes the standard, and the standard fixed by the statute is absolute. The common law rule of ordinary care does not apply — proof of the breach of the statute is proof of negligence. The violator is liable if injury or damage results, irrespective of how careful or prudent he has been in other respects. No person is at liberty to adopt other methods and precautions which in his opinion are equally or more efficacious to avoid injury. But causal connection between the violation and the injury or damage sustained must be shown; that is to say, proximate cause must be established. In short, where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose protection or benefit it was imposed for any injuries or damage of the character which the statute or ordinance was designed to prevent, and which was proximately produced by such neglect, provided the injured party is free from contributory negligence. *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 311; 38 Am. Jur., Negligence, § 158, pp. 827-829; 65 C.J.S., Negligence, § 19, pp. 418-420.

Where, as in G.S. 20-149(b), a violation is declared not to be negligence *per se,* the common law rule of ordinary care applies, and a violation is only evidence to be considered with other facts and circumstances in determining whether the violator used due care.

The distinction, between a violation of a statute or ordinance which is negligence *per se* and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances. In both instances other facts and circumstances are to be considered on the question of proximate cause; in the latter, other facts and circumstances are to be considered also on the question of negligence. In practical effect the real distinction is not so great as seems apparent from the definitions.

Defendants specifically call in question the following portions of the charge:

> "Now, the duty that this particular statute [G.S. 20-149(b)] places on a motorist is not merely to blow his horn in the act of passing, but it is to blow a horn as a reasonable person would do in the act of passing. The duty imposed by the statute upon the driver of the overtaking vehicle to sound his horn before attempt-

ing to pass must be regarded as requiring that warning be given to the driver of the vehicle being overtaken in reasonable time to avoid the injury which would likely result from a left turn. So you can see that, as you will be seeing throughout here, that the, that it boils down to a duty to use reasonable care.

"The horn must be blown in reasonable time to serve the purpose for which a horn is normally blown in a passing situation."

These instructions with reference to *timely* giving of an audible warning are in accord with our decisions. *Boykin v. Bissette, supra; Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396.

The 1959 amendment of G.S. 20-149(b) does not mean that an overtaking and passing motorist is relieved of all duty to give audible warning; it simply means that a failure to give such warning may or may not constitute a want of due care, depending upon the circumstances of the particular case.

The judge did not instruct the jury that defendant's failure to give audible warning was negligence *per se*. On the other hand, he did not read the statute to the jury, nor state *in totidem verbis* that failure to give audible warning is *not* negligence *per se*. To have done so would have had little, if any, meaning for the jury. The judge is not required to read to the jury the technical language of statutes; a plain and simple application of the principles involved is preferable. *Pittman v. Swanson,* 255 N.C. 681, 122 S.E. 2d 814; *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212.

It is clear from a consideration of the charge as a whole that the jury was told that defendant's duty was reasonable care under the circumstances. Moreover, it appears that defendants were not contending that no audible warning was required under the circumstances, but that because of an emergency created by plaintiff's negligence defendant Buchanan was suddenly required to make a choice between blowing his horn and attempting to control his vehicle. The charge with respect to G.S. 20-149(b) dealt mainly with this theory of the matter. It is our opinion that the errors, if any, in the court's instructions are not sufficiently prejudicial to require a new trial.

No error.

MARY LEE ADAMS v. JAMES ERNEST ADAMS.

(Filed 14 October, 1964.)

1. Appeal and Error § 24—

A broadside assignment of error to the charge may be aided by a subsequent assignment of error which particularizes the objection to the charge, and the two assignments of error in this case are held sufficient to present the question of error in the failure of the court to charge the law applicable to specified aspects presented by the evidence.

2. Divorce and Alimony § 8—

Where the evidence tends to show that plaintiff and defendant lived together for a period of four days after a reconciliation, and defendant testifies to the effect that at the end of the four-day period he packed his belongings and left, without any contention that he left because plaintiff ordered him to get out, the court is not required to charge the jury on the law that would have been applicable if defendant had left because of plaintiff's order for him to do so, even though the testimony of another witness might be susceptible to the interpretation that plaintiff did order defendant to leave the home.

3. Divorce and Alimony § 8—

Where plaintiff's action for subsistence and counsel fees is predicated upon defendant's leaving plaintiff after a four-day period of reconciliation, and defendant seeks to justify his leaving plaintiff at the end of the four-day period only on the basis of what occurred during that period and does not plead condonation, the court properly excludes evidence tending to show that defendant left plaintiff prior to the period of reconciliation because of abusive language.

APPEAL by defendant from *Farthing, J.*, January 27, 1964, Schedule "A" Civil Session of MECKLENBURG.

Plaintiff instituted this action May 27, 1963, under G.S. 50-16 to recover reasonable subsistence and counsel fees. She alleged, based on G.S. 50-7(1), that defendant abandoned her on April 26, 1963, without just cause, justification or excuse. Defendant's answer was a general denial of plaintiff's said allegations.

Plaintiff and defendant were married May 28, 1937. They lived together as husband and wife, "with periods of separation," until April 26, 1963. Their two children (sons) are now of age. In April, 1963, the older, 26, lived in the home at 504 East Tremont Avenue, Charlotte, N. C. The younger lived in Montana.

In April, 1963, plaintiff, 49, was, and had been for approximately twenty years, an employee of Nebel Knitting Company; and defendant, 52, was, and had been for approximately twelve years, employed by Akers Motor Lines as "a long line driver." Defendant's route was between Charlotte and Boston, Massachusetts. His work was such that

he lived on the road "about 80 per cent of the time." In April, 1963, plaintiff was sole owner of the Tremont Avenue residence. Some years back, defendant had conveyed to her his interest in this property.

On Monday, April 22, 1963, there was pending in Mecklenburg Superior Court a prior action plaintiff had instituted against defendant under G.S. 50-16. In connection therewith, plaintiff and defendant were in the Mecklenburg Courthouse on the afternoon of Monday, April 22, 1963. There was "a reconciliation" between plaintiff and defendant and a consent judgment dismissing the pending action was signed. Plaintiff was to get his clothes from his sister's home in Statesville and thereafter return to the Tremont Avenue residence.

Defendant returned to the Tremont Avenue residence the evening of Monday, April 22nd. From then until Friday, April 26th, defendant lived there and resumed marital relations with plaintiff. During this period, plaintiff and the son continued work in their respective employments. Defendant had been unable to go out on his run to Boston and therefore was not at work in his regular employment. During this period, at the Tremont Avenue residence, defendant performed certain chores, for example, he tore down the dog house, mended the fence, spaded a garden plot and set out tomato plants. On Friday, April 26th, after plaintiff and the son had gone to work, defendant left and did not return. In defendant's words: "The next morning between 8 and 9 I packed my belongings and put them in my automobile and I drove off." Thereafter, when not "on the road," he lived in a rented room in Concord. Since Friday, April 26th, and for a period prior thereto, defendant has made no contribution for the support of plaintiff.

Plaintiff's evidence tends to show the relationship between plaintiff and defendant in the home during defendant's four-day stay was friendly; that there was no disturbance or quarrel; that nothing in her conduct constituted a provocation for defendant to leave; and that she "had no idea he was going to leave" and was surprised and upset when she discovered he had left.

Defendant's evidence tends to show that plaintiff, on the night defendant returned home, screamed and hollered at him for approximately forty minutes, demanding money, cursing the courts, demanding that he sell his 1961 Falcon Ford; that on Thursday night, April 25th, she again demanded money, threatened to have defendant put in jail, repeatedly cursed defendant's aged mother and defendant's sister, referring to them as "whores"; and that, while he said nothing that night, he drove off the next morning "because that was all (he) could stand" and has "never been back."

The fact and the date of marriage were stipulated.

The court submitted and the jury answered one issue, to wit: "Did the defendant abandon the plaintiff as alleged in the complaint? Answer: Yes."

After verdict, the court heard further evidence bearing upon the health, respective incomes, etc., of plaintiff and defendant. After such hearing, and based on said verdict, judgment was entered "that the defendant pay each and every week to the plaintiff the sum of Ten ($10) Dollars per week . . . for the partial support of the plaintiff . . . until further order of the Court; that the defendant be taxed with the costs of this action."

Defendant excepted and appealed.

Plumides & Plumides for plaintiff appellee.
Richard M. Welling for defendant appellant.

BOBBITT, J. Defendant's Assignment of Error #4 asserts in general terms that the court's charge did not comply with G.S. 1-180. Defendant's Assignment of Error #5 asserts "the Court erred in failing to give a complete definition of 'abandonment' as applied to the facts in this case, and wholly ignored the defendant's evidence which tended to prove that the plaintiff ordered the defendant to leave the home, and the Court failed to state such evidence, and failed to explain to the jury the law pertaining to this evidence as it bore on the issue in the case of abandonment." While Assignment of Error #4, considered alone, is broadside, Assignment of Error #5 may be and will be treated as a particularization of Assignment of Error #4.

Defendant's contention (AE 5) is based solely on the testimony of Mrs. Ruth Cook. Mrs. Cook testified: There was "just a drive" between her home (502 East Tremont Avenue) and the Adams home, the houses being 20-25 feet apart; that her kitchen was next to the Adams kitchen, "just a little angling"; and that, although next door neighbors for fourteen and a half years, she had "never said anything or spoken to that lady," the plaintiff. In her original testimony, Mrs. Cook stated that, sometime during defendant's said four-day stay, she was in her kitchen and overheard a conversation between plaintiff and defendant in their kitchen; and that during the course of their conversation she heard plaintiff tell defendant she "had to have money," that he "had to give her money," and "what the Judge would do and what her lawyer would do to him." She testified she did not hear any curse words or profanity and that "(t)he demands for money, about courts, and the lawyers" was "just about all" she could remember. Later, Mrs. Cook was recalled and testified: "Since I was on the witness stand yesterday

I recollect some statements I heard made the week of the 22nd of April. They were discussing money. She wanted money and he didn't have any. It was during this time she made the statement, 'Well, hell, get out.' "

We do not understand Mrs. Cook's supplemental testimony to mean that she overheard any *full conversation* between plaintiff and defendant but that, at sometime during *a conversation* in which plaintiff said she wanted money and defendant said he did not have any, she heard plaintiff say, "Well, hell, get out." Presumably, plaintiff and defendant were in the kitchen when the statement attributed to her by Mrs. Cook was made. Possibly, plaintiff was telling defendant to get out of the kitchen. Be that as it may, defendant did not testify he left because plaintiff ordered him to do so or that plaintiff told him, "Well, hell, get out," but that he left solely for the reasons indicated in our preliminary statement. It was neither required nor appropriate for the judge to instruct the jury as to the law *that would be applicable* if plaintiff had ordered defendant to leave and defendant had left for that reason when defendant did not so testify or contend.

The issue was clear and simple. Did the defendant leave without just cause, justification or excuse, or did he leave because of provocative and abusive conduct of plaintiff of the nature indicated in our preliminary statement?

No error is assigned to the court's instructions as given. Moreover, a careful examination of the charge leaves the impression that defendant was not prejudiced by deficiencies, if any, in the court's instructions.

Defendant's Assignment of Error #3 asserts that the court erred in excluding testimony of Mrs. Cook as to what occurred prior to April 22, 1963. The excluded testimony of Mrs. Cook, summarized, was as follows: During the fourteen and one-half years prior to April 22, 1963, she (Mrs. Cook) had heard "rows" between plaintiff and defendant in which plaintiff was demanding money and in which defendant was insisting plaintiff had taken all he had; that on some unidentified occasion she heard plaintiff say to defendant, "to hell, get out then"; that the statements by plaintiff to defendant were made "in a scream"; and that plaintiff had "the shrillest, screechingest voice" Mrs. Cook had ever heard.

Whether the exclusion of said portion of Mrs. Cook's testimony was prejudicial to defendant need not be determined. Certainly, its vagueness as to time and circumstances renders it of doubtful probative value. Be that as it may, the exclusion thereof was proper.

In urging the competency of the excluded portion of Mrs. Cook's testimony, defendant cites decisions of this Court relating to condonation. "Condonation in law is the conditional forgiveness by a husband or wife of a breach of marital duty by the other, whereby the forgiving party is precluded, so long as the condition is observed, from claiming redress for the breach so condoned." *S. v. Manon,* 204 N.C. 52, 167 S.E. 493. Condonation is a specific affirmative *defense* to be alleged and proved by one who is charged with a breach of marital duty. *Phillips v. Phillips,* 223 N.C. 276, 25 S.E. 2d 848. For full discussion, see Lee, North Carolina Family Law, Volume 1, § 87.

Legal principles applicable to condonation are not relevant. Here, the complaint is the only pleading that alleges a breach of marital duty, to wit, defendant's alleged abandonment of plaintiff without just cause, justification or excuse. Defendant's answer consists solely of a general denial. It contains no allegations to the effect the separation prior to April 22nd was caused by wrongful conduct on the part of plaintiff. Moreover, defendant in his testimony seeks to justify his leaving plaintiff on Friday, April 26th, on the basis of what occurred during the four-day period.

Defendant's remaining assignments of error are formal and do not require discussion.

No error.

MATTIE BYRD PARKER v. QUINN-McGOWEN COMPANY, INC.

(Filed 14 October, 1964.)

1. Dead Bodies § 1—

Upon the death of husband or wife, the surviving spouse has the primary right to the custody of the body for burial and to direct and control its preparation therefor.

2. Dead Bodies § 3—

The person entitled to possession of a dead body for the purpose of burial may maintain an action for mental suffering against a person mutilating the dead body, either intentionally, or negligently, or by unlawful autopsy, and if such conduct is wilful or wanton, actually malicious or grossly negligent, punitive damages may also be recovered.

3. Same—

An autopsy and embalming are different in purpose and effect, and the mere fact of an unauthorized embalming, without more, does not constitute

such a mishandling or mutilation of the body as will support a cause of action.

PARKER, J., dissents.

APPEAL by plaintiff from *Bundy, J.*, May 1964 Civil Term of DUPLIN.

Action by a widow to recover compensatory damages for mental anguish allegedly caused by the unauthorized embalming of the body of her husband.

Plaintiff alleges: On April 25, 1963, her husband died under unusual circumstances. On that date his body was delivered to defendant's funeral home in Warsaw, where it was immediately embalmed and prepared for burial by the employees of defendant, all without the knowledge or permission of plaintiff or other relatives of the deceased. Notwithstanding that it is the general custom and duty of a funeral home to notify relatives of a deceased immediately upon receiving the body and to obtain their permission before embalming it, defendant's employees failed to notify the relatives of deceased or to obtain their permission to embalm his body, although they knew his identity and their address. Immediately upon learning that defendant had possession of her husband's body, plaintiff notified another funeral home to take possession of it "for preservation and burial" and the body was removed to that funeral home. In consequence of defendant's acts, plaintiff's feelings have been cruelly wounded and she has been made to suffer, both in body and in mind, to the extent of $50,000.

Defendant demurred to the complaint on the ground that it fails to state a cause of action. Judge Bundy entered an order sustaining the demurrer and plaintiff appealed.

James F. Chestnutt and Miles B. Fowler for plaintiff.

Beasley & Stevens and Nance, Barrington, Collier & Singleton for defendant.

SHARP, J. Upon the death of a husband or a wife, the surviving spouse has the primary right to the custody of the body for burial as well as the preparation therefor. *Lamm v. Shingleton,* 231 N.C. 10, 55 S.E. 2d 810; *Kyles v. R. R.,* 147 N.C. 394, 61 S.E. 278; 15 AM. JUR., *Dead Bodies* § 9 (1938). Our law recognizes that the next of kin has a quasi-property right in the body — not property in the commercial sense but a right of possession for the purpose of burial — and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently. The rights of one legally entitled to its custody are violated if another unlawfully withholds the dead body from him. *Bonaparte v. Funeral Home,* 206 N.C. 652, 175 S.E. 137.

Furthermore, the survivor has the legal right to bury the body as it was when life became extinct. *Kyles v. R. R., supra.* For any mutilation of a dead body the one entitled to its custody may recover compensatory damages for his mental suffering caused thereby if the mutilation was either intentionally or negligently committed, *Morrow v. R. R.*, 213 N.C. 127, 195 S.E. 383, or was done by an unlawful autopsy. If defendant's conduct was wilful or wanton, actually malicious, or grossly negligent, punitive damages may also be recovered. *Kyles v. R. R., supra.*

Hitherto, this Court has considered three types of tortious conduct involving the mistreatment of dead bodies: (1) the negligent mangling and dismemberment of bodies on railroad tracks by trains, *Morrow v. R. R., supra; Floyd v. R. R.*, 167 N.C. 55, 83 S.E. 12; *Kyles v. R. R., supra;* (2) unauthorized autopsies, *Gurganious v. Simpson,* 213 N.C. 613, 197 S.E. 163; *Stephenson v. Duke University,* 202 N.C. 624, 163 S.E. 698; and (3) the wrongful withholding of a body as security for unauthorized embalming, *Bonaparte v. Funeral Home, supra.*

In the instant case, the complaint discloses these sparse facts: The dead body of plaintiff's husband was delivered to the defendant funeral home. Without securing plaintiff's permission, defendant proceeded to embalm the body and prepare it for burial.

Does the complaint state a cause of action for the mishandling or mutilation of the body of plaintiff's husband?

Although a wife is entitled to the body of her husband in the condition it was in at death, and to bury it without embalming if she so desires, embalming is now considered a routine incident in the preparation of a body for burial and "a very proper service." *Konecny v. Hohenschuh,* 188 Iowa 1075, 173 N.W. 901; *accord, Sworski v. Simons,* 208 Minn. 201, 208, 293 N.W. 309, 312 (dissenting opinion of Holt, J.). Although it has been said that an undertaker's unauthorized embalming of a body received for burial constitutes mutilation similar to that involved in an autopsy, 17 A.L.R. 2d 770, 775, there is a distinct difference in the two operations. An autopsy is a violation of the body not intended to preserve it intact — quite the contrary — and is totally unrelated to its proper burial. True, except in the case of an inquest, the avowed purpose of an autopsy is to advance medical knowledge and thus alleviate suffering in the living. Nevertheless, because many persons regard an autopsy with extreme aversion, it may not legally be performed without the consent of the person having the duty to bury the body unless authorized by statute. G.S. 90-217. Embalming, on the other hand, creates no such repulsion. Although technically it may be included in the generic term *mutilation,* embalming involves no dis-

memberment or disfigurement and it is not popularly thought to be a mutilation. In our contemporary society it is regarded as the proper method of preparing a corpse for burial. Indeed, it is but one of the successfully standardized burial practices which have generated the high cost of dying.

No case has been called to our attention in which recovery has been sanctioned *solely* for an unauthorized embalming. The annotation *Undertaker — Civil Liability,* § 5, *Negligent or Unauthorized Embalming,* 17 A.L.R. 2d 770, 775, supplied the cases cited in the briefs. In those which would permit a recovery for unauthorized embalming there appears to be some additional major factor such as an unauthorized autopsy, mutilation other than the technical mutilation of embalming, a wrongful withholding of the body, or negligence. In *Bonaparte v. Funeral Home, supra,* defendant unlawfully withheld the body as security for the fee for the unauthorized embalming. *Kirksey v. Jernigan,* Fla., 45 So. 2d 188, 17 A.L.R. 766, dealt with facts similar to those in *Bonaparte, supra.* In *Sworski v. Simons, supra,* plaintiffs' son had committed suicide in jail. Without plaintiffs' knowledge, defendant coroner turned the body over to defendant undertaker, who embalmed it. When plaintiffs arrived to claim the body, the undertaker attempted to collect $37.50 for his services. Before plaintiffs were permitted to see their son's body, "the father had to sign some papers."

The companion cases of *Lott v. State* and *Tumminelli v. State,* 32 Misc. 2d 296, 225 N.Y.S. 2d 434, cited by plaintiff, incidentally involved an unauthorized embalming. These cases, however, were not brought against undertakers. Mrs. Lott, Orthodox Jewish, and Mrs. Tumminelli, Roman Catholic, died at about the same hour in the Brooklyn State Hospital. The hospital negligently confused and mistagged the bodies. As a result, the "Tumminelli funeral director" embalmed the body of Mrs. Lott, made it up with cosmetics, and placed it in a coffin with a crucifix and rosary in accordance with Roman Catholic rites. The "Lott undertaker" prepared the body of Mrs. Tumminelli for an Orthodox Jewish burial. The next of kin of each decedent felt that the body had been mishandled and sued the State, which was held liable for the mental suffering resulting to the plaintiffs from the hospital's mistaken and negligent identification of the bodies. Each body had been handled in direct violation of the religious beliefs of the deceased and her family, and the Court held that her next of kin was entitled to damages for the resulting mental suffering.

In *Hale v. Brown,* 84 Ariz. 61, 323 P. 2d 955, the plaintiff's only grievance was that the body of her husband had been embalmed without her express permission *prior* to the autopsy. It appeared from the

evidence that embalming the body had not affected the autopsy findings, and the trial court allowed defendant's motion for summary judgment. The Supreme Court in sustaining the ruling said that "the time of the embalming and not the wrongfulness thereof was the gist of the complaint." Two justices dissented on the theory that "the mere act of embalming without authority" imported at least nominal damages. With this theory we do not agree.

In the case under consideration, plaintiff seeks to recover damages for mental anguish she alleges she suffered when defendant embalmed the body of her husband without first securing her permission. She does not allege that defendant used faulty technique, that the body was negligently embalmed, or that it was subjected to any indignity whatever in preparing it for burial. Indeed, plaintiff does not *ipsissimis verbis* allege *mutilation* of the body. There was no attempt to assert a lien or to collect for the services rendered. Upon demand, defendant relinquished it immediately. If the embalming was done with an ulterior motive, the complaint does not charge it; nor did plaintiff see fit to allege by whom or under what circumstances the body was delivered to defendant. Ordinarily, a body is delivered to a funeral home only for the purpose of embalming and otherwise preparing it for burial in the customary manner. Reasonable promptness in performing this service is essential. Plaintiff makes no allegation that defendant wilfully or maliciously prepared the body for burial in the knowledge that defendant was *persona non grata* to plaintiff and that its performance of this operation, rather than another's performance, would cause her mental anguish. There is no allegation that its employees were aware that plaintiff did not know defendant had the body. In short, the complaint fails to allege any intentional wrong or negligent act on the part of the defendant, nor does it state wherein defendant's preparation of her husband's body for burial caused her such suffering. Defendant simply did what plaintiff would have preferred to have another do and, so far as we are told, it acted in good faith.

We hold that the bare fact of an unauthorized embalming, without more, does not constitute such a mishandling or mutilation of a body as will support a cause of action by the next of kin for mental anguish. If there is more in this case, plaintiff has not alleged it. If, as suggested on the argument, the body was delivered to defendant funeral home because its agent had engaged in unprofessional conduct proscribed by G.S. 90-210.4, that same statute empowers the State Board of Embalmers and Funeral Directors to take appropriate action.

The judgment sustaining the demurrer is
Affirmed.
PARKER, J. dissents.

CARL E. DEATON v. GRADY JUNIOR THOMAS.

(Filed 14 October, 1964.)

1. Process § 2—

A summons which is not delivered to the sheriff or to someone for him expressly or by implication, but is delivered by the clerk to the attorney for plaintiff, and retained in the possession of the attorney, is not issued.

2. Process § 3—

In order for plaintiff to be entitled to an extension of time for service of summons under G.S. 1-95, it is necessary that the clerk endorse the extension of time upon a live summons, G.S. 1-89, and where, after the return of the original summons "not to be found" the summons is not again issued by the clerk to an officer for service but is delivered to the attorney for plaintiff, who keeps the summons in his possession for over 90 days, such summons may not thereafter be used as a basis for the issuance of an alias process or an extension of time for service.

APPEAL by defendant from *Brock, S.J.*, 3 February 1964 Schedule "D" nonjury Session of MECKLENBURG.

This is a civil action for personal injuries in which the defendant in his answer pleaded the pendency of a prior action between the parties in the Superior Court of Gaston County, North Carolina, in abatement of plaintiff's action.

This cause of action arose out of an automobile collision which occurred in Gaston County on 17 February 1963, between an automobile owned by Carl E. Deaton and driven by Sadie L. Ledbetter, a resident of Mecklenburg County, and an automobile owned and driven by the defendant Grady Junior Thomas (Grady Thomas, Jr.), a resident of Gaston County.

On 3 April 1963, summons was issued by a Deputy Clerk of the Superior Court of Gaston County entitled *Grady Thomas, Jr. v. Carl Edward Deaton and Sadie L. Ledbetter,* directing the Sheriff of Mecklenburg County to serve the summons on the defendants. The summons was received by the Sheriff of Mecklenburg County on 4 April 1963, and on 17 April 1963 the Sheriff of Mecklenburg County made the following return thereon: "I hereby return the within Summons without

service for the following reasons: After due and diligent search the defendants, Carl Edward Deaton and Sadie Ledbetter, not to be found in Mecklenburg County," and the summons was returned forthwith to the Clerk of the Superior Court of Gaston County.

A complaint was filed in the Gaston County action by Grady Thomas, Jr. on 23 April 1963 and an additional ten days allowed for its service.

The following order was entered on the original summons and signed by an Assistant Clerk of the Superior Court of Gaston County: "The time of service of this Summons is hereby extended until May 13, 1963. Witness my hand this 23rd day of April, 1963."

The foregoing order and summons were not sent to the Sheriff of Mecklenburg County, nor to the Sheriff of any county. No attempt was made to serve the summons; instead, counsel for Grady Thomas, Jr. took the summons from the Clerk's office and kept it in his possession until 20 May 1963, at which time said counsel presented the original summons and order to the Clerk of the Superior Court of Gaston County and procured the entry of the following order on the original summons and signed by the Clerk of the Superior Court of Gaston County: "Upon application of the plaintiff through counsel, it is hereby ordered that the time for serving the within Summons be, and the same is hereby extended for a period of twenty days from this date. This May 20, 1963." The summons as extended was redelivered to counsel for Grady Thomas, Jr., and was kept by him in his briefcase and never delivered to the Sheriff of Mecklenburg County, or to anyone, for service, but, on the contrary, remained in the possession of counsel for Grady Thomas, Jr.

The plaintiff herein commenced this action against the defendant herein, Grady Junior Thomas (Grady Thomas, Jr.), in the Superior Court of Mecklenburg County on 5 July 1963. The summons was sent to and received by the Sheriff of Gaston County on 9 July 1963 and duly served on the defendant herein on 9 July 1963. A duly verified complaint was filed in this cause by the plaintiff herein on 19 July 1963, with an order for service of the complaint being signed on said date, and said complaint and order for service of the complaint were served on the defendant herein by the Sheriff of Gaston County on 22 July 1963.

The time for serving summons and complaint in the Gaston County action was purportedly extended by the Clerk of the Superior Court of Gaston County on 1 August 1963 for twenty days, and the summons and complaint were sent to the Sheriff of Mecklenburg County and were received on 2 August 1963 and served on the defendant, Carl E.

Deaton, on 3 August 1963 by a Deputy Sheriff of Mecklenburg County. After the officer made his return of service, the original summons and orders attached thereto were forthwith returned to the Clerk of the Superior Court of Gaston County.

The defendant herein filed a duly verified answer in this action and pleaded the pendency of his action instituted in the Superior Court of Gaston County, on 3 April 1963, in bar of the right of the plaintiff herein to maintain this action.

The plea in bar was heard before Brock, S.J., Judge Presiding at the above session of the Superior Court of Mecklenburg County. The court held that the summons in the Gaston County action, signed on 1 August 1963, was served after a break in the chain of summonses, and that the action in Gaston County was a new action effective from and after 1 August 1963, and overruled the plea in abatement.

The defendant appeals, assigning error.

Hollowell & Stott; Kenneth R. Downs for plaintiff appellee.

Carpenter, Webb & Golding; Childers & Fowler for defendant appellant.

DENNY, C.J. G.S. 1-95 in pertinent part provides: "When the defendant in a civil action or a special proceeding is not served with summons within the time allowed for its service, it shall not be necessary to have new process issued. At any time within ninety days after issue of the summons, or after the date of the last prior endorsement, the clerk, upon request of the plaintiff shall endorse upon the original summons an extension of time within which to serve it. The extension shall be for the same number of days, from the date of such endorsement, as were originally allowed for service. * * *"

After the original summons was issued in the Gaston County action instituted by Grady Thomas, Jr. against Carl E. Deaton and Sadie L. Ledbetter, which summons was returned unserved, the plaintiff had the statutory right to apply to the Clerk of the Superior Court of Gaston County at any time within ninety days from the date the original summons was issued, for an extension of time in which to serve said summons. However, when the order was entered on the original summons on 23 April, 1963, extending the time in which to serve the summons until 13 May 1963, the original summons became *functus officio* at the expiration of the extended time since it was never delivered to the Sheriff of Mecklenburg County for service but was kept in the possession of counsel for Grady Thomas, Jr., who made no effort to have it served. Consequently, when the order was entered on 1 August 1963

extending the time for service for twenty days, more than ninety days had elapsed since the original summons was issued on 3 April 1963. Likewise, more than ninety days had elapsed since the return of the unserved summons by the Sheriff of Mecklenburg County on 17 April 1963; in the meantime, the original summons had not been kept alive.

In order for a plaintiff to be entitled to the procurement of an extension of time to serve summons, it is contemplated by our statutes and decisions that the summons as originally issued or extended by order of the clerk, must be served by the sheriff to whom it is addressed for service within the time provided therein, and if not served within that time, such summons must be returned by the officer holding the same for service to the clerk of the county issuing the summons, with notation thereon of its nonservice and the reasons therefor as to any defendant not served. G.S. 1-89; *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215.

In *United States v. American Lumber Co.* (C.C.A. 9th Cir.), 85 F. 827, it is said: "In order that the writ be deemed to be sued out, it must have left the possession of the officer who issued it, and must either have reached the possession of the officer who is to serve it, or the possession of some one who is the medium of transmission to such officer. But this is not sufficient to toll the statute of limitations. The delivery of the writ must be followed either by a service of the same or by a bona fide effort to serve it. If nothing be done with the writ after its issuance, if it be returned unserved, or without the bona fide effort to serve it, and a new writ be taken out, the date of the commencement of the suit will be postponed to the date of the second writ."

In the case of *McClure v. Fellows,* 131 N.C. 509, 42 S.E. 951, this Court said: "The summons was not *issued.* It did not pass from the hands of the clerk. It was never delivered to the sheriff nor to any one for him, expressly or impliedly. Therefore, it was never issued. *Webster v. Sharpe,* 116 N.C. 466 (at page 471). It was in process of issuance, and had it been delivered to the sheriff, or to some one for him, its issuance would have become complete and been in force and of effect from the time of the filling out and dating by the clerk."

We hold that where a summons is issued by a clerk of the superior court and such summons is never delivered to the officer to whom it is directed for service, after the time for service has been extended, such summons may not be used as a basis for the issuance of an alias process or the extension of time for service. *Atwood v. Atwood,* 233 N.C. 208, 63 S.E. 2d 103. Consequently, we hold that the order entered by the Clerk of the Superior Court of Gaston County on 1 August 1963, more

than ninety days after the issuance of the original summons, in light of the facts revealed by the record, served only to commence the Gaston County action as of 1 August 1963. *Ryan v. Batdorf,* 225 N.C. 228, 34 S.E. 2d 81.

The judgment of the court below is

Affirmed.

SADIE L. LEDBETTER v. GRADY JUNIOR THOMAS.

(Filed 14 October, 1964.)

APPEAL by defendant from *Brock, S. J.,* 3 February 1964 Schedule "D" nonjury Session of MECKLENBURG.

Hollowell & Stott; Bailey & Booe for plaintiff appellee.

Carpenter, Webb & Golding; Childers & Fowler for defendant appellant.

PER CURIAM. The factual situation and the legal question involved in this appeal are identical to those in the case of *Deaton v. Thomas,* decided this day, *ante,* 565.

On authority of the foregoing case, the judgment of the court below is

Affirmed.

CLYDE JIM HOWARD v. WILEY ROGER MELVIN.

(Filed 14 October, 1964.)

1. Negligence § 11—

Negligence on the part of the plaintiff bars recovery if such contributory negligence is a proximate cause of the injury.

2. Automobiles § 17—

A motorist traveling along a servient highway is not required to stop at the place where the stop sign is located on the highway, but is required to bring his car to a full stop at a place where his precaution may be effective and not to enter upon the intersection with the dominant highway until he exercises due care to see that he may do so in safety, yielding the right of way to vehicles upon the dominant highway.

3. Automobiles § 42g—

Evidence to the effect that the motorist traveling east along the servient highway stopped before entering an intersection with a dominant highway at the place where the stop sign was erected, saw no vehicle approaching along the dominant highway, and then without again stopping drove into the intersection and collided in the southeast quadrant of the intersection with a vehicle approaching from the south along the dominant highway, and that a vehicle could be seen approaching from the south for one-quarter to one-half mile, *is held* to disclose contributory negligence constituting a proximate cause of the collision as a matter of law.

APPEAL by plaintiff from *Bundy, J.,* February Civil Session 1964 of SAMPSON.

Action to recover damages for personal injuries sustained by plaintiff as a result of the collision of motor vehicles on January 11, 1961, about 11:45 a.m., in Sampson County, North Carolina, at the intersection of North Carolina Highway No. 242 (N.C. #242) and Rural Paved Road No. 1414 (R.P.R. #1414). The intersection is about one mile north (along N.C. #242) of Salemburg. N.C. #242, the dominant highway, runs generally north and south. R.P.R. #1414, the servient road, runs generally east and west.

In approaching the intersection, defendant was operating his 1955 two-door Ford north on N.C. #242 and plaintiff was operating a 1953 GMC one half ton pickup truck east on R.P.R. #1414. A stop sign faced eastbound traffic approaching the intersection on R.P.R. #1414. The eastbound truck operated by plaintiff had crossed the center line of N.C. #242 ("about ⅔ of the way across the road") when the right front side thereof was struck by the left front of defendant's northbound Ford.

Plaintiff alleged the collision and his injuries were proximately caused by the negligence of defendant. Defendant (1) denied negligence, and (2) conditionally pleaded contributory negligence.

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

James F. Chestnutt and Miles B. Fowler for plaintiff appellant.
Nance, Barrington, Collier & Singleton for defendant appellee.

BOBBITT, J. In approaching the intersection and at the moment of collision, defendant was proceeding north in his right (the east) traffic lane of N.C. #242. N.C. #242, the dominant highway, "was 21 feet 9 inches wide and marked with a center line." The collision occurred when

the front wheels of the truck "were about center way of the north lane." No part of the truck had actually gone through the intersection.

Plaintiff's allegations, summarized, are that defendant was negligent in that he (1) failed to keep a proper lookout; (2) failed to yield the right of way; (3) operated his car at unlawful and excessive speed; and (4) failed to decrease speed when approaching the intersection.

The only witness who testified he saw defendant's car prior to and at the moment of collision was General Lee Willis. He was standing in front of his blacksmith shop located (approximately 75 feet east of N.C. #242) in the area at the southeast corner of the intersection. Willis testified: "Clyde Jim Howard came to the stop sign and stopped. . . . I was looking at the sign when he came to it, and I saw him stop. Then all at once I heard a car roaring, coming north, and heard a big fuss; a big noise. That car was running at high speed. . . . I saw it about 300 yards, I believe. After Clyde Jim Howard stopped, he pulled on out into the highway. I do not have an opinion as to how far away from the intersection Mr. Melvin's car was at the time Clyde Jim Howard entered the intersection. I saw the collision happen." Willis also testified: "After the car struck the truck, the truck back door was thrown open and Mr. Howard was thrown out. The truck then went into a side ditch. Mr. Melvin's car went north up the road for quite a ways and then stopped. His car went about as far as from here to the back of the courtroom before stopping, that is about 80 feet." With reference to the damage to the vehicles: Willis testified "the right-hand front wheel (of the truck) was knocked out from under it" and the left front of defendant's car "was torn up, all the way back."

The evidence is silent as to skid marks.

According to all the evidence, plaintiff stopped the truck *at the stop sign;* and defendant, when approaching the intersection, had a clear view of the stop sign and of eastbound traffic approaching the stop sign and the intersection.

W. C. Pate, whose testimony relates primarily to conditions at the intersection, testified: "There is a stop sign on the west side of 242 at the southwest corner of the intersection which I measured to be 38 feet from the edge of the pavement on the west side." Plaintiff testified there was a ditch and a wide shoulder between the stop sign and the road; and, although he had not measured it, the stop sign, in his opinion, was not "38 feet from the pavement." Plaintiff testified he believed the distance between the stop sign and the main road to be 19 feet.

The reciprocal rights and duties of motorists when approaching an intersection from dominant and servient highways, particularly in rela-

tion to G.S. 20-158(a), have been often stated. *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373.

The evidence discloses plaintiff stopped the truck at the stop sign, started again and proceeded slowly to and across the traffic lanes of N.C. #242. This evidence affords a basis for the contention that defendant had reasonable ground to assume that plaintiff knew he was approaching an intersecting dominant highway and would keep his truck under control and stop again before entering upon the traffic lanes of N.C. #242. However, we need not determine whether the evidence was sufficient to support a finding that negligence on the part of defendant was a proximate cause of the collision and plaintiff's injuries.

Irrespective of defendant's negligence, if any, unquestionably plaintiff's negligence was a proximate cause of the collision and plaintiff's injuries. This suffices to bar recovery herein.

G.S. 20-158(a) did not require that plaintiff stop *where* the stop sign was located. It required that plaintiff, in obedience to the notice provided by the stop sign, bring his car to a full stop before entering N.C. #242 and to yield the right of way to vehicles approaching the intersection on N.C. #242. *Clifton v. Turner,* 257 N.C. 92, 96, 125 S.E. 2d 339; *Edwards v. Vaughn,* 238 N.C. 89, 93, 76 S.E. 2d 359. "This . . . statute not only requires the driver on the servient highway or street to stop, but such driver is further required, after stopping, to exercise due care to see that he may enter or cross the dominant highway or street in safety before entering thereon." *Jordan v. Blackwelder,* 250 N.C. 189, 193, 108 S.E. 2d 429, and cases cited.

According to plaintiff's testimony: When he stopped, his seat in the truck was even with the stop sign post and his eyes were about five feet above the ground. Nothing obstructed his view and nothing was in sight on N.C. #242 (south) to his right. He "could see to (his) right 75 or 80 yards, perhaps 100 yards." Plaintiff testified: "There wasn't anything to keep me from seeing automobiles coming from towards Salemburg for a distance of at least one-half a mile at that time." Other evidence was in substantial accord. Pate testified: "There is nothing to obstruct the visibility of cars using 242 proceeding north as to vehicles entering 242 from 1414 for a good ¼ of a mile." Again: "Looking across that intersection from 1414 to 242, south, the drivers have equal opportunity to see." Plaintiff testified: "I never looked after I stopped at the stop sign. I did not look back to the right or left again." Plaintiff did not *at any time* see defendant's car.

The only conclusion that may be reasonably drawn from the evidence is that plaintiff entered upon and attempted to cross N.C. #242

when defendant's approaching car was in close proximity to the intersection; that plaintiff, by the exercise of due care, could have but did not see defendant's approaching car; that plaintiff, failing to see what he should have seen, negligently drove the truck directly across the path of defendant's approaching car; and that such negligence on the part of plaintiff was a proximate cause of the collision and plaintiff's injuries.

Decision that plaintiff's evidence discloses contributory negligence as a matter of law is in accord with the following: *Edwards v. Vaughn, supra,* and cases cited; *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357; *Edens v. Freight Carriers,* 247 N.C. 391, 100 S.E. 2d 878; *Clayton v. Rimer,* 262 N.C. 302, 136 S.E. 2d 562.

Affirmed.

NELL STROUPE, PRESIDENT AND FRANCES K. McLAREN, SECRETARY, OF THE ASHEVILLE AND BUNCOMBE COUNTY BRANCH OF THE PURE WATER ASSOCIATION v. EARL ELLER, FRANK MULVANEY, CLARENCE MORGAN, THEODORE B. SUMNER, WILLIAM ALGARY, WALTER McRARY, AND RALPH MORRIS, INDIVIDUALLY AND AS MEMBERS OF THE ASHEVILLE CITY COUNCIL; AND J. WELDON WEIR, INDIVIDUALLY AND AS CITY MANAGER OF ASHEVILLE, NORTH CAROLINA; AND THE CITY OF ASHEVILLE, NORTH CAROLINA, A MUNICIPAL CORPORATION.

(Filed 14 October, 1964.)

1. Municipal Corporations § 24; Injunctions § 5—

A municipal ordinance for the fluoridation of the city water supply is enacted in the exercise of public policy and the courts will not interfere therewith in the absence of a showing that the ordinance is so unreasonable, oppressive and subversive as to amount to an abuse rather than a legitimate exercise of the legislative power.

2. Same—

A court, in the exercise of its equity jurisdiction, may refuse to dismiss an action to restrain a municipality from enforcing its ordinance for the fluoridation of the city water supply, even though no ground for injunctive relief is established, until its voters have an opportunity to petition for a referendum to recall the ordinance, it appearing that the changeover to fluoridation would involve expense, that the city charter provides that a recall petition might be filed after the passage of an ordinance and before it goes into effect, and that on an occasion some seven years prior the voters had disapproved fluoridation.

3. Municipal Corporations § 24—

Only residents of a municipality may vote in a referendum to recall a fluoridation ordinance, notwithstanding the city also sells drinking water to persons living outside its boundaries.

APPEAL by defendants from *Froneberger, J.*, March, 1964 Civil Term, BUNCOMBE Superior Court.

The plaintiffs instituted this civil action on November 22, 1963, for temporary and permanent orders restraining the defendants from enforcing an ordinance passed by the Asheville City Council directing the city manager to place fluorides in the water supply of the corporate defendant. The verified complaint upon which the plaintiffs base their demand for the orders alleges as the reasons therefor both the excessive costs and the harmful effects of fluoridation.

The defendants filed a demurrer upon the ground the complaint fails to state a cause of action. The parties stipulated that in February, 1956, the Buncombe County Board of Health passed a resolution requesting the City Council to institute such orders as "may be required to fluoridate our public water supply" and in order for the Council to have the benefit of an advisory vote, the Board of Commissioners of the County was requested to and did call a county-wide election on the question whether the City should introduce fluorides into the public drinking water supply. The vote was 2,479 for and 8,465 against fluoridation. "No further action was taken by the council and the public water supply was not fluoridated."

The parties stipulated:

"7. That the question of the feasibility of placing fluorides in a public water supply is highly controversial, many communities having allowed it, many communities having disallowed it, and many communities having taken same out of their water supply after having installed it, and representatives of the proponents and opponents having appeared formally before the City Council at various times over the last several years, both before and after the vote of 1956.

"8. That the sole purpose of fluoridation of the city water supply is to reduce the dental caries (dental decay) in teeth of individuals from birth to the age of approximately fifteen years, together with any residual benefit to those persons throughout their life by consumption of fluoridated water. Dental caries, or tooth decay, is a prevalent and common disease or condition of residents generally in Asheville and Buncombe County.

"9. It is contemplated that the fluoridation measures undertaken by the Asheville City Council, if carried out, would be under the control and governed by the procedure determined by the North Carolina State Board of Health as in such matters provided."

In August, 1963, the County Health Officer, the Buncombe County Dental and Medical Associations recommended the immediate fluoridation of the city's water supply. The Council, on September 12, 1963, by a 4 to 3 vote, adopted a resolution directing the city manager to fluoridate the water supply. The plaintiffs instituted this action and obtained a temporary order from Judge McLean restraining the defendants pending a hearing. At the hearing on March 4, 1964, Judge Froneberger overruled the demurrer and continued the restraining order to the final hearing. The defendants appealed.

Horton & Horton, by Shelby E. Horton, Jr., for plaintiff appellees.
O. E. Starnes, Jr., for defendant appellants.

HIGGINS, J. According to the stipulations of the parties and the findings of the court, the advantages and disadvantages of fluoridating the city water supply are controversial. The question, therefore, becomes one of policy for the decision of the City Council rather than one of law for the courts. *DeAryan v. Butler,* 260 P. 2d 98 (Cal.); *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703; G.S. 160-229 and 255; *State ex rel Whittington v. Strahm,* 374 S.W. 2d 127 (Mo.). "It is only where the ordinance is so unreasonable, oppressive and subversive of individual and property rights that it carries the inference of an attempted abuse rather than a legitimate exercise of power that the courts will interfere." 6 McQuillan, Municipal Corporations, § 20.04, p. 9 (3rd Ed. 1949).

The plaintiffs contend the adverse vote in the county-wide election of 1956, although advisory, nevertheless should prevent the council from passing the resolution until the electors are given another opportunity to vote on the question. While the city charter was not introduced in evidence, yet the parties in their briefs and in the oral argument concede that it provides for a referendum election upon proper petition before any ordinance becomes effective; and in the event a majority vote for the repeal, the ordinance shall be recalled.

The broad allegations in the complaint are narrowed by the stipulations of the parties. In the absence of any charge of bad faith on the part of the city council or on the part of the health officer and the dental and medical associations at whose instance the council ordered flu-

oridation, we hold the complaint fails to allege a cause of action. At the same time we realize that difficulty and expense are involved in the changeover to fluoridation, and that upon petition for a referendum the resolution to fluoridate may be recalled. This being an equity proceeding, we remand the cause to the Superior Court of Buncombe County to be dismissed — but only after the opponents have had time to call for and obtain a referendum as provided in the City Charter.

The recall election must be determined by the voters of the city. Those outside, notwithstanding their dependence on the city for their water supply, may not participate in any election to recall an ordinance of the City Council. After the opponents of fluoridation have had a reasonable time to petition for a referendum the Superior Court will dismiss this cause at the cost of the plaintiffs. This delay seems proper inasmuch as the Charter provides the petition may be filed "*after* the passage of any ordinance . . . and *before* it goes into effect." (Emphasis added.)

Reversed and remanded with instructions to dismiss within a reasonable time after the mandate of this Court.

A. A. SHORT AND WIFE, MARY A. SHORT v. NANCE-TROTTER REALTY, INC., A CORPORATION, AND HOWARD T. NANCE AND WILLIAM H. TROTTER, INDIVIDUALS.

(Filed 14 October, 1964.)

1. Pleadings § 18—

Where the court sustains demurrer for misjoinder of parties and causes of action, the court should dismiss the action.

2. Trespass § 1; Trespass to Try Title § 1—

A party may allege ownership of realty and that defendants had trespassed thereon to his damage in a stated amount, or he may allege that he is in lawful possession of land and that defendant had committed trespass against his possession to his damage in a stated amount, in which case plaintiff is not required to prove title but only lawful possession and damages.

3. Trespass § 5; Trespass to Try Title § 2; Pleadings § 18—

Allegations to the effect that plaintiffs were the owners of certain land by record title and the owners of contiguous lands by adverse possession, and that defendants had committed several acts of trespass against both tracts constitute but a single cause of action, so there can be neither misjoinder of parties nor causes.

4. Parties § 9; Pleadings § 18—

If an unnecessary party be joined, the remedy is by motion to dismiss as to such party.

5. Parties § 1; Pleadings § 18—

If necessary parties are absent, they may be brought in by motion, order, and the service of process.

6. Appeal and Error § 40—

Where the court erroneously sustains demurrer for misjoinder of parties and causes, but does not dismiss the action but grants leave to amend, plaintiff is not prejudiced by the error when the complaint is such as to require amendment.

APPEAL by plaintiffs from *Riddle, S. J.*, June 22, 1964 "D" Civil Session, MECKLENBURG Superior Court.

The plaintiffs instituted this civil action against the defendant corporation and its president and vice president-treasurer as individuals. The defendants demurred. The court sustained the demurrer upon the ground of misjoinder both of parties and causes, but entered an order allowing plaintiffs 20 days in which to file an amended complaint. The plaintiffs appealed.

Ray Rankin, Lloyd F. Baucom, for plaintiff appellants.
Louis A. Bledsoe, Jr., Joseph A. Moretz for defendant appellees.

HIGGINS, J. The complaint contains more than 19 pages of single-spaced type. It attempts to allege three separate causes of action. In the first cause the plaintiffs allege they are the owners and in possession of five described lots in the City of Charlotte by virtue of duly recorded deeds; that the defendants have wrongfully trespassed on said lots, grading and building a street, removing shrubbery and undergrowth to their damage in the sum of $15,000.00. As a second cause they allege they are the owners by adverse possession for more than 20 years of a portion of Chester Street at or near the five lots described in the first cause of action, and that the defendants have wrongfully trespassed on the street by grading and building a roadway, to their damage in the sum of $15,000.00. As a third cause of action the plaintiffs allege that the defendants, by construction of "a roadbed . . . which generally follows Chester Street, and partially . . . on lots 1 and 5 described in the first cause . . . removed several trees and bushes . . . and caused to be hauled on to plaintiffs' land . . . a large volume of dirt . . . that the defendants caused to be installed under said raised roadbed a culvert . . . 18 inches in diameter" which impounded and diverted sur-

face water across plaintiffs' land to their damage in the sum of $15,000.00. The plaintiffs allege generally that the defendants' several acts of trespass were unlawfully, wilfully and intentionally committed, for which they are entitled to recover altogether $45,000.00 actual, and $50,000.00 punitive, damages.

The court committed error in sustaining the demurrer for misjoinder of parties and causes and thereafter allowing the plaintiffs to amend. A misjoinder of parties and causes requires dismissal of the action. *Southern Mills v. Yarn Co.*, 223 N.C. 479, 27 S.E. 2d 289. Actually, the plaintiffs seem to have one cause of action for trespass. A plaintiff may bring an action in trespass, alleging he is the owner of described lands; that the defendant has committed acts of trespass thereon to his damage, and the amount thereof. *Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786; *Norman v. Williams*, 241 N.C. 732, 86 S.E. 2d 593. Or, the plaintiff may allege he is in the lawful possession of described lands; that the defendant has committed acts of trespass against his possession to his damage, and the amount thereof. *Matthews v. Forrest*, 235 N.C. 281, 69 S.E. 2d 553. In the latter case the plaintiff is not required to prove title, but only lawful possession and damages for interfering therewith.

In the light of the authoritative cases, it seems the plaintiffs should have alleged a single cause of action for trespass and the resulting damages. Hence there is neither misjoinder of parties nor causes. In the event of unnecessary parties, the remedy is by motion to dismiss as to them. If necessary parties are absent, they may be brought in by a motion, order, and the service of process. We suggest the plaintiffs may not have enough parties present to permit them to establish either ownership or lawful possession of Chester Street by adverse possession.

The plaintiffs appealed. The court order permits them to amend. The condition of their pleadings makes amendment necessary in order to avoid confusion at the trial. There is error in the court's holding that the pleadings show a misjoinder of parties and causes. Of this, plaintiff appellants may not complain because of the permission and the necessity to amend. Otherwise, the order is

Affirmed

DIAMOND BRAND CANVAS PRODUCTS COMPANY, INC. v. LOLA POTTER CHRISTY.

(Filed 14 October, 1964.)

1. Pleadings § 3—

A cause of action by the driver of one vehicle to recover for personal injuries, and a cause of action by the owner of such vehicle to recover for damages to the vehicle are separate and distinct and may not be joined, even though both are against the driver-owner of the other vehicle involved in the collision and both allege the same acts of negligence.

2. Abatement and Revival § 3—

The test for determining a plea in abatement for pendency of a prior action is whether the two actions are substantially identical as to parties, subject matter, issues involved and relief demanded.

3. Same—

An action solely between the drivers of the two vehicles involved in the collision will not support a plea in abatement to a counterclaim asserted by the owner-driver in a separate action instituted by the owner of the other vehicle involved in the collision.

4. Same; Torts § 4—

The owner of a vehicle may not object to the joinder of his driver for the purpose of a counterclaim by defendant-driver, notwithstanding the pendency of another action between the two drivers based upon the same collision, the right to object in such instances being solely in the driver so joined.

APPEAL by plaintiff from *Nettles, E. J.*, Special April 1964 Civil Session of HENDERSON.

Plaintiff, referred to hereafter as Products Company, is a New York corporation, having one of its principal places of business in Henderson County, North Carolina; and defendant, referred to hereafter as Christy, is a resident of Spartanburg, South Carolina.

This action grows out of a collision in Henderson County on April 13, 1963, between a 1963 Buick, owned by Products Company and operated by David Kemp, its president, and a 1959 Chevrolet, owned and operated by Christy.

On May 22, 1963, Products Company and Kemp instituted separate actions against Christy in the General County Court of Henderson County. Products Company (in this action) sued to recover for damage ($1,500.00) to its 1963 Buick. Kemp sued to recover ($25,000.00) for personal injuries. Each action was based on identical allegations with reference to the actionable negligence of Christy.

Christy, a nonresident, removed Kemp's action to the United States District Court for the Western District of North Carolina. On July 22,

1963, she filed in the United States District Court an answer in which she alleged, *inter alia,* a counterclaim against Kemp. She alleged that negligence of Kemp, while acting as agent for Products Company, was the sole cause of the collision and that she was entitled to recover for her personal injuries ($15,000.00) and for the damage to her 1959 Chevrolet ($1,200.00). Too, she alleged that Products Company was a proper party to said action and moved that it be joined as an additional party (defendant) in respect of her counterclaim. (Note: It was stated on oral argument that Christy's said motion in the United States District Court had been denied.)

Christy filed *in this action* on July 29, 1963, an answer in which she alleged, *inter alia,* a counterclaim against Products Company. Her allegations in respect of the negligence of Kemp, agency and her damages are the same as in the counterclaim she filed in Kemp's action. Too, she alleged that Kemp was a proper party to this action and moved that he be joined as an additional party (defendant) in respect of her counterclaim.

Products Company filed a reply in which, *inter alia,* it moved that the counterclaim asserted by Christy against Products Company herein abate (and be stricken from the answer) on account of the pendency of said action (*Kemp v. Christy*) in the United States District Court. The judgment entered by Judge Nettles affirmed orders of the general county court which (1) denied Products Company's plea in abatement and (2) allowed Christy's motion that Kemp be joined as an additional party (defendant) in respect of her counterclaim. Plaintiff excepted and appealed.

William J. Cocke and Prince, Jackson, Youngblood & Massagee for plaintiff appellant.

Van Winkle, Walton, Buck & Wall and Roy W. Davis, Jr., for defendant appellee.

BOBBITT, J. The record shows both actions were instituted in the general county court on May 22, 1963. Whether they were instituted simultaneously does not appear. It does appear that the counterclaim of Christy against Kemp was filed (July 22, 1963) prior to the filing herein (July 29, 1963) of the counterclaim of Christy against Products Company.

The alleged causes of action of Products Company and of Kemp are separate and distinct. *Thigpen v. Cotton Mills,* 151 N.C. 97, 65 S.E. 750; *Teague v. Oil Co.,* 232 N.C. 65, 59 S.E. 2d 2; *S. c.,* 232 N.C. 469, 61 S.E. 2d 345. Under our decisions, if Products Company and Kemp had

asserted their respective claims against Christy in a single action, their complaint and action would have been subject to demurrer *and* dismissal on the ground of misjoinder of parties and causes of action. "It has been uniformly held by this Court that separate and distinct causes of action set up by different plaintiffs or against different defendants may not be incorporated in the same pleading, and that such a misjoinder would require dismissal of the action." *Snotherly v. Jenrette,* 232 N.C. 605, 607, 61 S.E. 2d 708; Strong, N. C. Index, Vol. III, Pleadings § 18, p. 634.

The plea in abatement asserted by Products Company in its reply is directed to the counterclaim asserted by Christy against Products Company. In the action now pending in the United States District Court, where Kemp is the sole plaintiff and Christy is the sole defendant, Christy has asserted a counterclaim against Kemp.

The rules applicable when considering a plea in abatement on the ground "(t)here is another action pending between the same parties for the same cause" (G.S. 1-127(3)) are stated, with full citation of authority, by Ervin, J., in *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860, and by Winborne, J. (later C.J.), in *Dwiggins v. Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892. Later decisions are cited in *Perry v. Owens,* 257 N.C. 98, 125 S.E. 2d 287.

"The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796; *Pittman v. Pittman,* 248 N.C. 738, 104 S.E. 2d 880; *Wirth v. Bracey,* 258 N.C. 505, 128 S.E. 2d 810.

We perceive no basis for Products Company's plea in abatement. Products Company is not a party to the action pending in the United States District Court. Kemp and Products Company are not identical parties or in privity but are separate and distinct. *Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132. A judgment in the action pending in the United States District Court barring Kemp's right to recover would not bar recovery by Products Company in this action. *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688, and cases cited. Nor would a recovery by Christy on her counterclaim against Kemp entitle Christy to a judgment against Products Company. *Bullock v. Crouch,* 243 N.C. 40, 89 S.E. 2d 749, and cases cited. Christy's sole remedy in respect of the cause of action she asserts against Products Company is by way of counterclaim in this action. *Hill v. Spinning Co.,* 244 N.C. 554, 94 S.E. 2d 677; *Bullard v. Oil Co.,* 254 N.C. 756, 119 S.E. 2d 910.

There remains for consideration the order allowing Christy to join Kemp as an additional party to the end that Christy may assert herein a cause of action against Kemp as well as a counterclaim against Products Company.

Christy, prior to the institution of the Kemp and Products Company actions, could have sued Kemp, the alleged agent, or Products Company, the alleged principal, or both, on the cause of action she now asserts. *Bullock v. Crouch, supra.* Moreover, for reasons stated in *Adler v. Curle,* 254 N.C. 502, 119 S.E. 2d 393, and in *Bullard v. Oil Co., supra,* we perceive no sound basis for Products Company's objection and exception to the order joining Kemp as a party. It is noted that Kemp is not now a party. If and when Kemp is made a party, such pleas, if any, as he may see fit to interpose will be for consideration and decision.

For the reasons indicated, the rulings of the court below were correct and the judgment entered in accordance therewith is affirmed.

Affirmed.

NOMMIE J. GOODWIN v. ANNA B. WHITENER AND HUSBAND, CLAUDE R. WHITENER, JR.

(Filed 14 October, 1964.)

1. Appeal and Error § 2—

The Supreme Court must take cognizance *ex mero motu* of a fatal defect appearing on the face of the complaint, constituting a part of the record proper.

2. Corporations § 12—

Mismanagement of corporation affairs by directors, causing the corporation to become insolvent, gives rise to a cause of action in favor of the corporation, and a creditor may not sue the directors on such cause of action in the absence of an allegation of demand on and refusal of the corporation or its receiver to institute such action, and even in that instance the corporation must be made a party.

APPEAL by plaintiff from *Bundy, J.,* February 20, 1964 Session, WAKE Superior Court.

The plaintiff instituted this civil action against Anna B. Whitener and her husband, Claude R. Whitener, Jr., alleging in substance (1) they were the incorporators and directors of Southern Protective and Patrol Service, Inc.; (2) the corporation is indebted to the plaintiff in

the sum of $6,073.60 due by judgment of the Federal Court for services, attorney's fees, and costs; (3) execution on the judgment has been issued and returned unsatisfied for lack of assets; (4) the defendant Anna B. Whitener was the manager and in control of the affairs of the corporation; (5) her "reckless, extravagant, and fraudulent schemes and devices caused the insolvency of the corporation"; (6) thereby causing loss and damage to the plaintiff. The plaintiff prayed for judgment against the defendants "jointly and severally" for the amount of his judgment.

Before time to answer, the defendants filed a motion to strike certain parts of the complaint. On November 15, 1963, Judge Bickett entered an order allowing in part and denying in part the motion to strike. On January 2, 1964, the clerk of the superior court entered a judgment by default and inquiry for failure to file an answer. On January 30, 1964, the defendant moved to set aside the default judgment, alleging excusable neglect and a meritorious defense without specifying facts in support of either averment. On February 20, 1964, Judge Bundy, finding excusable neglect and "that there is a possibility that the defendants have a good and meritorious defense," entered an order setting aside the default judgment. The plaintiff appealed.

Davis & Brown by Lemuel H. Davis for plaintiff appellant.
No counsel contra.

HIGGINS, J. The complaint is the foundation document in this civil action. Hence, it is before the Court as a part of the record proper, of which we take notice. *Skinner v. Transformadora,* 252 N.C. 320, 113 S.E. 2d 717, citing many cases. The complaint alleges that two directors of the corporation were guilty of such mismanagement of the corporate affairs as caused the company to become insolvent and unable to pay the plaintiff's judgment. A claim of mismanagement exists in favor of the corporation. The duties which have been breached by this mismanagement are duties primarily to the corporation. Before a creditor or stockholder may sue those guilty of mismanagement, he must allege a demand on the corporation, or its receiver if insolvent, to bring the suit and a refusal to do so. Even then the corporation must be made a party defendant; and any recovery must be held for the benefit of the corporation. *Coble v. Beall,* 130 N.C. 533, 41 S.E. 794; *McIver v. Hardware Co.,* 144 N.C. 478, 57 S.E. 169; *Douglass v. Dawson,* 190 N.C. 458, 130 S.E. 195; *Corporation Commission v. Bank,* 193 N.C. 113, 136 S.E. 362. "Where, however, an officer of a corporation so utilizes his authority as to benefit himself to the detriment of the corporation, a right of

action accrues to the corporation." *Fulton v. Talbert,* 255 N.C. 183, 120 S.E. 2d 410.

Under the authority of the cases cited, we hold the plaintiff's complaint fails to state a cause of action. For the reasons assigned in *Transformadora, supra,* and the many cases therein cited, we remand the case to the Superior Court for the entry of judgment dismissing the action. This disposition makes unnecessary any discussion of the questions discussed in the appellant's brief.

Remanded.

WALTER ROBERTSON, JR. v. WILLIE BEE GHEE, WALTER WILLIAMS AND CALBERT JOHNSON.

(Filed 14 October, 1964.)

1. Negligence § 11—

Contributory negligence *ex vi termini* implies negligence on the part of defendant.

2. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's own evidence, considered in the light most favorable to him, establishes this defense as the sole reasonable conclusion.

3. Automobiles § 13—

It is not negligence *per se* to drive a vehicle on a highway covered with snow or ice.

4. Automobiles §§ 14, 42e—

Evidence tending to show that the preceding vehicle had collided with a stationary vehicle, throwing an occupant thereof into the middle of the highway, that another occupant jumped out and had stood over the person lying in the highway for a couple of minutes before the following vehicle reached the scene, *held* not to show that the following vehicle was following more closely than 300 feet.

5. Automobiles § 19—

A person confronted with a sudden emergency is not held to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence, similarly situated, would have made.

6. Automobiles § 42c—

Evidence tending to show that plaintiff was driving a tractor-trailer at a speed of some 15 miles per hour on a highway upon which there was snow and ice, that as he was driving over the crest of a hill he could not see a person lying prone on the highway until such person was picked up by the

lights of his vehicle when some 50 to 75 yards away, that, apprehending he could not stop his vehicle on the ice and snow before hitting such person, he drove to his left off the side of the highway, resulting in damage to the vehicle, *is held* not to show contributory negligence as a matter of law.

APPEAL by defendant Willie B. Ghee from *Mintz, J.*, April 1964 Session of NORTHAMPTON.

Civil action to recover damages for personal injuries and property damage allegedly caused by the joint and concurrent actionable negligence of the defendants.

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

"1. Was the plaintiff injured and his property damaged by the negligence of the defendant Willie Bee Ghee, as alleged in the Complaint?

"ANSWER: Yes.

"2. If so, did the plaintiff by his own negligence contribute to his injury and the damage to his property as alleged in the Answers of Willie Bee Ghee and Walter Williams?

"ANSWER: No.

"3. Was the defendant Willie Bee Ghee driving the pickup truck at the time of the accident as the agent of the defendant Walter Williams?

"ANSWER: No.

"4. What amount, if any, is the plaintiff entitled to recover on account of the injury to his person?

"ANSWER: $3,000.00.

"5. What amount, if any, is the plaintiff entitled to recover on account of the damage to his property?

"ANSWER: $5,000.00."

From a judgment on the verdict defendant Willie Bee Ghee appeals.

Gay, Midyette & Turner by Felton Turner for defendant appellant.
Rudolph Bryant and William L. Thorp, Jr., for plaintiff appellee.

PER CURIAM. In the record there is no answer by defendant Calbert Johnson. No issue was submitted as to him. He and his wife testified as witnesses for plaintiff.

Defendant Ghee assigns as error the denial of his motion for judgment of involuntary nonsuit made at the close of all the evidence. In

his brief his contention is that plaintiff is guilty of contributory negligence as a matter of law. The term "contributory negligence" *ex vi termini* implies or presupposes negligence on the part of defendant in an action for damages. *Darden v. Leemaster,* 238 N.C. 573, 78 S.E. 2d 448.

Defendant Ghee may successfully avail himself of his plea of contributory negligence of plaintiff as a matter of law by a motion for a compulsory judgment of nonsuit if, and only if, the facts necessary to show contributory negligence of plaintiff are established so clearly by his own evidence that no other conclusion can be reasonably drawn therefrom. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40. Defendant Ghee's contention necessitates an appraisal of plaintiff's evidence in the light most favorable to him. *Short v. Chapman, supra; Beasley v. Williams,* 260 N.C. 561, 133 S.E. 2d 227; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

Plaintiff's evidence, considered in such light, shows:

About 8 p.m. on 14 December 1958 plaintiff, en route from Florida north with a load of oranges, drove his tractor and attached trailer across the bridge over the Roanoke River on U. S. Highway 301 between Weldon and Garysburg. The gross weight of his units and load was about 58,000 pounds. The brakes on his tractor and trailer were good. For a mile or two before he reached the river bridge, he had been following on the highway a Chevrolet driven by Calbert Johnson. There had been a snowstorm, it was cold and hazy, and the highway was slippery and covered with ice. George Sledge, a witness for defendant, was working at a filling station near where the Johnson Chevrolet struck the pickup truck. He testified: "On this night it was cold but there was not too much ice on the road."

Where U. S. Highway 301 crosses the river bridge going north, there is a steep hill or grade, and then it levels off and runs straight to where the collision occurred. A pickup truck owned by defendant Williams and operated by defendant Ghee was parked or stopped on U. S. Highway 301 north of the river bridge, headed north, with no lights on it. In the pickup truck as passengers were Peggy Ann Bell sitting in the middle and J. C. Walden to her right. Johnson, driving the Chevrolet about 30 miles an hour, did not see this pickup truck parked or stopped on the highway ahead of him until he was almost at it. He ran into its rear end, knocking it over into a ditch on the left side of the highway. By the impact J. C. Walden was thrown out of the pickup truck into the middle of the highway. Johnson's Chevrolet came to rest on the

right shoulder of the highway going north, just across the highway from the pickup truck.

The last time plaintiff saw the Johnson Chevrolet, until after the collision, was when he approached the steep hill or grade north of the river bridge. He was traveling 15 or 20 miles an hour. When he reached the crest of this hill or grade, his headlights picked up, 50 to 75 yards ahead of him, a man lying on the highway with two persons bending over him. He testified: "I had a split second to make a decision, and knew brakes are no good on ice, and my only choice was to go off the road and start out in the field. I got on the left-hand shoulder and got down in the ditch, rolled up another 25 feet and I hit a culvert and turned over, and that is it." He testified on cross-examination: "I did not attempt to use my brakes because at that distance I knew that my brakes were not good on the ice. My main concern was not to kill anybody. * * * If I had had a little more room I would have taken a chance to use my brakes. Probably would have jack-knifed or something, but the way it stood there, there was a human life and I did not take a chance." Traveling 15 or 20 miles an hour, it would take 300 feet to bring his tractor and loaded trailer to a normal stop.

J. C. Walden, a witness for defendant, heard a car coming, and the next thing he remembered was Ghee and Peggy Ann Bell helping him up from the highway. He testified on cross-examination: "I knew the truck barely missed hitting me. Yes, sir, he probably did save my life by turning as he did."

One is not negligent *per se* in driving an automobile on a highway covered with snow or ice. *Wise v. Lodge,* 247 N.C. 250, 100 S.E. 2d 677; *Linden v. Miller,* 172 Wis. 20, 177 N.W. 909, 12 A.L.R. 665. See *Culver v. LaRoach,* 260 N.C. 579, 133 S.E. 2d 167.

Considering plaintiff's evidence in the light most favorable to him, he was traveling 15 miles an hour, *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406, and was keeping a reasonably careful and proper lookout, because when he reached the crest of the steep hill or grade, he saw Walden lying on the middle of the highway with two persons bending over him 50 to 75 yards ahead. Plaintiff's evidence does not show how closely he was following the Johnson Chevrolet. Before he reached the crest of the steep hill or grade, he could not see the level road ahead of him. Certainly, his evidence does not compel a conclusion that he was following the Johnson Chevrolet at a distance of 300 feet or less behind. Peggy Ann Bell, a witness for defendants, testified: "The car hit us and knocked J. C. Walden out, and the truck went on the left side of the road in the ditch. I jumped out and was standing over J. C. *a couple of*

minutes. I was trying to help him get up. We got J. C. out of the road and the truck passed and went in the ditch." (Emphasis ours.)

Plaintiff was confronted with a sudden emergency. He was free from any negligence in bringing it about or contributing to it in whole or in part. He was required to act suddenly and in the face of real, impending, and imminent danger to the life of J. C. Walden, who was lying on the middle of the highway 50 to 75 yards ahead, which danger to the life of J. C. Walden had been proximately caused in part or in whole by defendant Ghee's negligence in stopping or parking a pickup truck without lights on the highway at night.

"One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made." *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562.

Plaintiff's evidence, considered in the light most favorable to him, permits the reasonable inferences and conclusions that when he turned off the highway to avoid running over J. C. Walden he acted with such care as a reasonably prudent and careful person would use in such an emergency and under similar environments, that he was not driving at an improper speed, that he was keeping a reasonably careful lookout, that he had his tractor-trailer under control, and that he was not guilty of contributory negligence. An examination of the plaintiff's complaint and the evidence does not show a fatal variance, as contended by defendant. There is ample evidence of defendant Ghee's actionable negligence. The trial court correctly denied defendant's motion for a compulsory nonsuit.

The jury, under application of settled principles of law, resolved the issues of fact against appellant. While appellant's well-prepared brief presents contentions in respect to the charge involving fine distinctions and close differentiations, a careful examination of the charge and the assignments of error thereto discloses no prejudicial error sufficient to justify disturbing the verdict and judgment, and no new question or feature requiring extended discussion.

Neither reversible nor prejudicial error has been made to appear. All appellant's assignments of error are overruled. The verdict and judgment will be upheld.

No error.

WILLIAM H. ROSS v. ROBERT C. DELLINGER AND TRY-WILK REALTY COMPANY, INC., T/A AND D/B/A CAPRI MOTEL.

(Filed 14 October, 1964.)

Corporations § 26—

Evidence tending to show that the general manager of a motel in complete charge of its operations had a car towed from its premises under the mistaken belief that the owner of the car was not a guest, and that when the guest refused to pay his bill without deducting the unwarranted towing charges, instituted a prosecution of the guest under G.S. 14-110, *is held* sufficient to be submitted to the jury on the issue of *respondeat superior* in an action against the motel, the acts of the manager having been performed in furtherance of the motel's business.

APPEAL by defendant Try-Wilk Realty Company, Inc., t/a Capri Motel, from *Lathan, S. J.*, 18 May 1964 Schedule C Session, from MECKLENBURG.

This is a civil action instituted by the plaintiff against defendant to recover actual and punitive damages resulting from the malicious prosecution of the plaintiff by defendant Robert C. Dellinger, who was manager of the corporate defendant's motel, acting within the course and scope of his employment.

On 9 July 1963 the plaintiff registered as a guest at the Capri Motel, owned and operated by the corporate defendant. The plaintiff was registered by defendant Dellinger, the manager of the motel, who gave plaintiff a weekly rate based on a daily rental of $4.41. At the time, the plaintiff had a fractured kneecap and was unable to drive. His cousin drove plaintiff's 1963 Chevrolet car to the motel. There was a parking space adjacent to the room assigned to the plaintiff, but because the plaintiff knew he would be unable to drive during his stay, he had his car parked in the parking lot 25 or 30 feet away from his room rather than in the space adjacent to his room because the latter space was in an area which was used by those coming into the motel, and plaintiff was fearful his car might be damaged by a passing vehicle.

The plaintiff's automobile remained in the parking lot until the early morning of 12 July 1963, at which time the plaintiff discovered that his car was missing. He inquired of Dellinger, the motel's manager, about his car. Dellinger informed him that he had had the car towed away because he did not know to whom it belonged. Dellinger refused to pay the towing charges. At that point the plaintiff advised Dellinger that he was going to check out of the motel immediately and offered to pay the motel bill less the towing charges. Dellinger refused the offer and advised the plaintiff that he (Dellinger) knew the law and that they had

"places to put people * * * that wouldn't pay their motel bill." The plaintiff then did check out of the motel and registered at another motel.

The next morning plaintiff went to get his car from the White Star Wrecking Service which had towed the automobile away from the Capri Motel upon the written instructions of Dellinger, which instructions authorized the White Star Wrecking Service to pull away the plaintiff's automobile, describing it by make and license number, and further stating that the automobile was not owned by a registered guest of the motel.

The plaintiff paid White Star Wrecking Service $10.00 towing charge, recovered possession of his automobile and returned to the Capri Motel. The manager was not present. The plaintiff offered to pay his motel bill to the room clerk less the towing charges, and the room clerk stated that he was acting upon the instructions of the manager and refused to accept the payment.

Later, the plaintiff called the manager of the motel on the telephone and again offered to pay the motel bill less the towing charges. Dellinger again refused. Dellinger told the plaintiff that he would have him put in jail if he didn't pay the whole motel bill.

On 24 July 1963 Dellinger swore out a warrant for the plaintiff, charging him with failure to pay his motel bill in violation of Section 14-110 of the General Statutes of North Carolina. The plaintiff was tried on the charge in the Charlotte City Recorder's Court on 25 July 1963 and was found "Not Guilty."

The jury awarded the plaintiff actual and punitive damages against both defendants.

Defendant Try-Wilk Realty Company, Inc., appeals, assigning error.

W. Faison Barnes, Leon Olive for plaintiff appellee.

Weinstein, Waggoner & Sturges by T. LaFontine Odom for defendant Try-Wilk Realty Company, Inc.

PER CURIAM. The corporate defendant assigns as error the failure of the court below to sustain its motion for judgment as of nonsuit, made at the close of plaintiff's evidence and renewed at the close of all the evidence.

Defendant contends that the evidence of the plaintiff was insufficient to show that defendant Dellinger had the authority to have the plaintiff arrested or to prosecute any criminal action on behalf of the corporate defendant.

The general rule of law relative to the application of the doctrine of *respondeat superior* in a situation like that presented on this appeal, is stated in 54 C.J.S., Malicious Prosecution, section 64(a), page 1032, as follows: "It is a settled rule that a corporation may be liable for the malicious prosecution of an action or proceeding instituted by its authorized agents, officers, or servants acting within the scope of their employment or authority in the carrying out of its policy, or in the furtherance of its business, although it may not have expressly authorized the particular act, or ordered it, or subsequently ratified it. The malice of the agent or servant will be imputed to the corporation; and, where the agent or servant acted within the general scope of his authority in instituting a prosecution, the corporation is liable for his acts, although in doing the particular act he may have disobeyed instructions. * * *"

The evidence in this case supports the view that the defendant Dellinger was the manager of the Capri Motel and had complete charge of its operation. He testified that an agent of the corporate defendant turned the motel over to him and that he (Dellinger) did the hiring and firing of the employees, set the hours of the employees, and was in charge of the maintenance of the motel.

In *Kelly v. Shoe Co.*, 190 N.C. 406, 130 S.E. 32, it is said: "The designation 'manager' implies general power, and permits a reasonable inference that he was invested with the general conduct and control of the defendants' business centered in and about their Wilmington store, and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." See also *Gillis v. Tea Co.*, 223 N.C. 470, 27 S.E. 2d 283, 150 A.L.R. 1330, and *Long v. Eagle Store Co.*, 214 N.C. 146, 198 S.E. 573.

The plaintiff's evidence, in our opinion, was sufficient to carry the case to the jury; therefore, this assignment of error is overruled.

Other assignments present no sufficiently prejudicial error to justify a new trial.

In the trial below, we find

No error.

STATE OF NORTH CAROLINA v. CHARLES E. MORROW.

(Filed 14 October, 1964.)

1. Criminal Law § 87—

An indictment charging defendants with rape and an indictment charging defendants with armed robbery may be consolidated for trial when it appears that defendants stopped the car in which husband and wife were riding, forced them into the woods where each raped the wife while the other held a pistol on the husband, and that one of them committed robbery from the person of the husband while he was being held at the point of the pistol, since the crimes are so connected in time and place that the evidence on the trial of the one is competent and admissible on the trial of the other. G.S. 15-152.

2. Criminal Law § 125—

A motion for a new trial for newly discovered evidence may be made only at the trial term and, in the event of an appeal, at the term next succeeding affirmance of the judgment on appeal.

3. Same—

The Superior Court is without jurisdiction to hear a motion for a new trial for newly discovered evidence during the pendency of an appeal, and its denial of motion so made is a nullity and an appeal from such denial must be dismissed.

APPEAL by defendant from *Braswell, J.,* 13 April 1964 Special Criminal Session of MECKLENBURG, and appeal by defendant from an order of *Walker, S. J.,* 15 June 1964 Criminal Session of MECKLENBURG denying defendant's motion for a new trial upon the ground of newly discovered evidence.

Criminal prosecution on two indictments: One charging Charles E. Morrow, alias Charles E. Franklin, and Warren Hill Summers in Mecklenburg County on 21 December 1963 with feloniously ravishing and carnally knowing Sara Lee Guion, a female person, by force and against her will, and another charging both defendants at the same time and place with the robbery of fifty-two cents in money from the person of Benny Guion by the use of firearms, to wit, a pistol, and other dangerous weapons, a violation of G.S. 14-87.

Plea by Morrow not guilty to both indictments. Previously Summers had entered pleas of guilty to both indictments, seemingly, according to the record before us, pursuant to the provisions of G.S. 15-162.1. At the close of the State's evidence the trial court allowed defendant Morrow's motion for judgment of compulsory nonsuit on the indictment charging armed robbery. Verdict on the indictment charging the felony of rape: "Guilty as charged of the crime of rape with a recommendation of life imprisonment."

From a judgment of imprisonment for life defendant Morrow appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

George J. Miller for defendant appellant.

PER CURIAM. Defendant Morrow assigns as error the order of the trial judge, entered upon motion of the solicitor, consolidating the armed robbery case and the rape case for trial. This assignment of error is overruled.

The State's evidence presents these facts: About 10 p.m. on 21 December 1963 Charles E. Morrow was driving an automobile, with Warren Hill Summers riding in it as a passenger, on Highway 51 near Pineville. They came up behind an automobile driven by Sara Lee Guion, in which her husband Benny Guion was a passenger. Morrow said to Summers, "Let's rape her"; Summers agreed. Whereupon, Morrow drove past the Guion automobile about half a mile, and stopped his automobile across the highway blocking traffic. Sara Lee Guion drove up and stopped. Morrow and Summers got out of their automobile and walked to the Guion automobile. Morrow pointed a pistol at them and told them "to stick them up." Sara Lee Guion jumped out of her automobile and ran down the highway screaming. Summers testified Morrow ran down the highway, caught her, and brought her back; Sara Lee Guion testified Summers was the person who ran her down, caught her, and brought her back. The Guions were then placed in the Morrow automobile on the back seat. Summers sat on the back seat with them, holding a pistol on them. Morrow then drove the automobile down the highway, and off the highway about two miles on a dirt road, and parked in the woods. Summers got out of the automobile, held the pistol on Benny Guion and forced him to get out of the automobile and go down into the woods with him. Then Morrow got into the back seat where Sara Lee Guion was, and by force and against her will ravished her. When he had finished, he told her to stay in the automobile. He then went in the woods, took the pistol from Summers, and held it on Benny Guion. Summers went to the automobile, got in, and by force and against her will ravished Sara Lee Guion. When Summers had Benny Guion in the woods holding a pistol on him and Morrow was ravishing Sara Lee Guion, Summers robbed Benny Guion of fifty-two cents in money. Sara Lee Guion testified: "From where my automobile was stopped, down to the wooded area, the two men in the

car asked us on the way down if we were married, and we told them yes, and they said they needed $25.00 to go to Ennisville."

The two indictments here charge Morrow with crimes which are so connected in time and place as that evidence at the trial of one of the indictments is competent and admissible at the trial of the other, and under such circumstances the trial judge was authorized by the provisions of G.S. 15-152 in his sound discretion to order their consolidation for trial. *S. v. White,* 256 N.C. 244, 123 S.E. 2d 483; *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460; *S. v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250; *S. v. Combs,* 200 N.C. 671, 158 S.E. 252; Strong's N. C. Index, Vol. I, Criminal Law, § 87.

We have examined defendant's assignments of error to the admission of evidence over his objections and exceptions, and to the refusal of the court to strike it out, and no prejudicial error appears. A discussion of them *seriatim* would serve no useful purpose, and they are all overruled.

Defendant has no assignments of error to the charge of the court to the jury. In the trial before Judge Braswell we find

No error.

MOTION FOR A NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE

From the judgment of life imprisonment, defendant appealed in apt time to the Supreme Court. On 4 May 1964, Campbell, J., entered an order requiring the county commissioners of Mecklenburg County to pay all necessary costs for obtaining from the court reporter a transcript of the evidence and charge of the court for the use of defendant, an indigent, and to pay all necessary costs for filing in the Supreme Court the statement of the case on appeal and defendant's brief, to the end that defendant's appeal might be properly perfected.

While defendant's appeal was pending in the Supreme Court for argument at the Fall Term 1964, defendant by his counsel made a motion before Judge Walker presiding over the 15 June 1964 Criminal Session of Mecklenburg County for a new trial, and in support of his motion he attached thereto an unsworn letter from Warren H. Summers addressed to his lawyer. Summers wrote this letter from the State prison where he is serving a sentence of life imprisonment based on his plea of guilty of raping Sara Lee Guion. In this letter he states in effect he is not guilty of raping Sara Lee Guion, and that he lied on Morrow and himself when he testified against Morrow as a State's witness. The

testimony of Sara Lee Guion is to the effect that she was first raped by Morrow, and then by Summers.

Defendant's motion for a new trial on the ground of newly discovered evidence was not made at the term of court at which he was tried and convicted, but at a subsequent term presided over by Walker, S. J., and at a time when his case was on appeal to the Supreme Court. A motion for a new trial in a criminal case on the ground of newly discovered evidence can be entertained by the superior court at only two terms — "the trial term and the next succeeding term following affirmance of judgment on appeal." *S. v. Edwards,* 205 N.C. 661, 172 S.E. 399; *S. v. Smith,* 245 N.C. 230, 95 S.E. 2d 576. In *S. v. Casey,* 201 N.C. 620, 161 S.E. 81, it is said, "unless the case is kept alive by appeal, such motion can be entertained only at the trial term."

During the pendency of the appeal here in the Supreme Court, Judge Walker was without power to entertain the motion. *S. v. Casey, supra; Bledsoe v. Nixon,* 69 N.C. 81; *S. v. Lea,* 203 N.C. 316, 166 S.E. 292; *S. v. Smith, supra.* Judge Walker should not have entertained the motion. However, he heard evidence, found facts, and denied the motion. For lack of power by Judge Walker to entertain the motion, his order is a nullity.

A new trial will not be awarded in a criminal case in the Supreme Court for newly discovered evidence. *S. v. Williams,* 244 N.C. 459, 94 S.E. 2d 374; *S. v. King,* 225 N.C. 236, 34 S.E. 2d 3.

Defendant, if he so desires, may make a motion for a new trial for newly discovered evidence in the trial court at the next succeeding criminal session after this case is certified down. *S. v. Dunheen,* 224 N.C. 738, 32 S.E. 2d 322.

Appeal from Judge Walker's order denying a new trial for newly discovered evidence dismissed.

The result is this:

In the trial before Judge Braswell
No error.

Appeal from Judge Walker's order
Dismissed.

JOHN V. BARGER AND CLYDE R. BRAWLEY T/A JOHN V. BARGER AND COMPANY v. JAMES C. KRIMMINGER, HARRY WILLIAMSON AND ROBERT T. MEDLOCK, TRUSTEES OF KILGO METHODIST CHURCH.

(Filed 14 October, 1964.)

1. Evidence § 27—

Evidence of a prior oral agreement is incompetent to contradict or vary the terms of a subsequently written contract.

2. Principal and Agent § 5—

Where a contractor knows that the building committee of a church is limited to a specified sum in contracting for a building, the contractor cannot assert a claim for building the church in a sum in excess of the known limitation of authority.

3. Compromise and Settlement—

A creditor accepting a check in full settlement of the amount due under contract is precluded from thereafter asserting a claim for an additional amount.

4. Trial § 15—

G.S. 1-206 is applicable when the evidence is admitted over objection and does not obviate the necessity for an exception when evidence is excluded upon objection of the adverse party.

APPEAL by plaintiffs from *Latham, J.*, May 25, 1964 Schedule "C" Term of MECKLENBURG.

Action on contract. Plaintiffs allege: Defendants are the trustees of the Kilgo Methodist Church (Church). On or about July 18, 1959, plaintiffs "entered into an oral agreement with a group of individuals, who represented themselves to be the building committee of the Kilgo Methodist Church, to construct a church sanctuary at 2102 Belvedere Avenue, Charlotte." Plaintiffs were to be paid the total cost of construction, which amounted to $218,662.31. Of this amount defendants have paid only $195,259.66. Plaintiffs are entitled to recover judgment for $23,402.65, the balance due.

Answering, defendants deny the contract alleged by plaintiffs. They aver, *inter alia:* On July 13, 1959, the parties entered into a *written* contract in which it was stipulated that plaintiffs would build the church for $199,000.00. The sanctuary was completed on October 5, 1960, and plaintiffs accepted $195,259.66, the contract price less certain credits due defendants, in full payment.

Plaintiffs' evidence, most of which was excluded upon defendants' objection and taken in the absence of the jury, disclosed the following state of affairs: Sometime prior to July 9, 1959, plaintiffs submitted to defendants a bid of $199,000.00 for the construction of a sanctuary for

Church in accordance with certain plans and specifications. Thereafter plaintiffs discovered an error in their calculations. On July 11, 1959, plaintiff John V. Barger met with Church's architect, its minister, and one of the members of its Board of Trustees, a group represented to Barger as Church's building committee. He reported to this group that it would cost approximately $215,000.00 to build the Church. The Board of Trustees was not involved in this meeting. The architect informed Barger that the building committee had no authority to go beyond $200,000.00. With reference to this meeting Barger testified in the absence of the jury:

> "I told the Committee I understood this $200,000.00 that had been set was as high as they could go and that they would not have the money to go beyond that point, and felt I had some obligation to the Committee because I had made this error. I stated that I could withdraw but didn't want to because of my reputation. I told them that we would build the church and keep our costs and that when it was over with if the costs exceeded this $199,000.00 that I would take a note for it and throw it in the back of my safe. I stated that I would sign this $199,000.00 contract and we would proceed on that basis and when the job was completed I would have my auditor submit to their Architect an itemized costs *(sic)* of the job and they would pay me the costs . . . The agreement was that I was to be paid my cost for building the building."

Thereafter, on July 13, 1959, plaintiff Barger and defendants signed the American Institute of Architects' standard form of agreement between contractor and owner for the construction of buildings, in which he agreed to erect the building for $199,000.00. The work was not finally completed until November 20, 1960, but on October 27, 1960, plaintiffs submitted to the architect an itemized statement of costs totaling $223,729.11. The construction of the church was financed by a loan from a building-and-loan association. On September 30, 1960, Barger sent to the lending institution his last payment request under the signed agreement. This payment request showed a contract price of $199,000.00, listed a number of credits, which reduced the price to $195,259.66, and a balance due of $35,096.92. On November 4, 1960, Barger went to the office of the building-and-loan association, signed a lien waiver, and accepted the final check, marked "paid in full."

The court ruled that evidence of the oral contract between plaintiffs and Church's building committee was incompetent and dismissed the case as of nonsuit at the close of plaintiffs' evidence. Plaintiffs excepted and appealed.

Collier, Harris & Collier by T. C. Homesley, Jr., for plaintiffs.
Winfred R. Ervin for defendants.

PER CURIAM. The judgment of nonsuit must be affirmed. The oral contract upon which plaintiffs sue was allegedly made on July 11, 1959. It was therefore superseded by the written agreement executed by the parties on July 13, 1959, and was incompetent to contradict or vary the terms of the written contract. *Gas Company v. Day,* 249 N.C. 482, 106 S.E. 2d 678; *Williams v. McLean,* 220 N.C. 504, 17 S.E. 2d 644. Furthermore, if we were to assume the agency of the building committee — which we may not, *Sledge v. Wagoner,* 250 N.C. 559, 562, 109 S.E. 2d 180, 183; *Commercial Solvents v. Johnson,* 235 N.C. 237, 240, 69 S.E. 2d 716, 719 —, the testimony of plaintiff Barger discloses that he dealt with a committee whose authority to contract, he knew, was limited to $200,000.00. It could not bind Church to pay more. "One dealing with an agent or representative with known limited authority can acquire no rights against the principal when the agent or representative acts beyond his authority or exceeds the apparent scope thereof." *Texas Co. v. Stone,* 232 N.C. 489, 61 S.E. 2d 348. Finally, plaintiffs' evidence discloses that at the time the construction loan was closed, Barger signed a lien waiver and accepted and cashed a check which stated on its face that it was in full payment of his contract. *Moore v. Greene,* 237 N.C. 614, 75 S.E. 2d 649. It clearly appears that appellants, under any aspect of their evidence, are not entitled to recover.

It is noted that during the trial plaintiffs took no exception to the *exclusion* of much of their proffered evidence. In the case on appeal, however, "appellants assert 'exception' by reason of G.S. 1-206." This section protects a litigant whose objection to the *admission* of evidence is overruled. "It makes no provision for the protection of the adversary party who sits by and fails to except when an objection to evidence is sustained." *Cathey v. Shope,* 238 N.C. 345, 78 S.E. 2d 135.

Judgment affirmed.

STATE OF NORTH CAROLINA v. NOLEN HEARD.

(Filed 14 October, 1964.)

Criminal Law § 165½—

Upon defendant's denial on cross-examination that he had been convicted of shoplifting, defendant's counsel moved for mistrial on the ground that the solicitor had no basis for the question. The next day the court stated that it appeared that defendant had been charged with shoplifting but had been acquitted by a jury, and the court found as a fact that the question regarding his guilt had been made in good faith by the solicitor. *Held:* Any prejudice resulting to defendant from the remarks of the court was invited by defendant's counsel, and defendant is not entitled to a new trial therefor.

APPEAL by defendant from *Clarkson, J.*, February 1964 Criminal Session of GASTON.

Criminal prosecution on an indictment charging defendant with assaulting Edna Reid with a deadly weapon, to wit, a shotgun, with intent to kill, and with inflicting upon her serious injury not resulting in death. G.S. 14-32.

Plea: Not Guilty. Verdict: Guilty of Assault with a deadly weapon.

From a judgment of imprisonment defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Frank P. Cooke for the defendant appellant.

PER CURIAM. On Christmas morning 1963 defendant shot Edna Reid in her home with a shotgun inflicting a wound which caused the amputation of her right arm.

Defendant has brought forward and discussed in his brief two assignments of error. He first assigns as error that the prosecutrix Edna Reid was permitted by the court, over his objections, to testify to this effect: Defendant said nothing to her at the time he shot her, but that two weeks before he shot her he told her he was going to kill her. This evidence of threats was competent and properly admitted in evidence. *S. v. Church,* 231 N.C. 39, 55 S.E. 2d 792; *S. v. Shook,* 224 N.C. 728, 32 S.E. 2d 329; Stansbury, N. C. Evidence, § 162a.

The solicitor for the State asked the defendant, who had voluntarily become a witness for himself, if he had been convicted of shoplifting on 19 March 1963 in Charlotte. Defendant did not object to the question. He replied: "No sir, I wasn't." It was proper for the solicitor to ask him this question for the purpose of impeaching him, provided the question was based on information and asked in good faith. *S. v. Sheffield,* 251

N.C. 309, 111 S.E. 2d 195; Strong's N. C. Index, Vol. I, Criminal Law, § 80, pp. 746-7. Defendant's answer was conclusive, and if there had been a record of conviction, the State could not introduce it in evidence to contradict him. *S. v. King*, 224 N.C. 329, 30 S.E. 2d 230; Stansbury, N. C. Evidence, 2d Ed. § 112. After defendant had answered the question, defendant's counsel moved for a mistrial, stating to the court that the solicitor "had no foundation" for the question asked. The solicitor replied: "I certainly have." At this point in the trial the court excused the jury until the next day.

In the absence of the jury the court asked the solicitor what was the basis of his question. He replied: "The record from Mecklenburg County." Whereupon, the court asked him if he had a certified copy of it, and the solicitor replied he had not: "We have it from the rural police of Charlotte, records they keep, and also from the city." Counsel for defendant insisted that he wanted the court record, and said: "I'll get a subpoena, Judge."

The next morning in the presence of the jury, the court made this statement to the jury: "It appearing to the Court that the defendant was charged with shoplifting in Mecklenburg County and was acquitted by a Jury of the Superior Court of Mecklenburg County. The Court finds as a fact that the question regarding this conviction was based on information and asked in good faith by the Solicitor. The Court further instructs the Jury that they will disregard the question and erase the matter from their minds, based on the information that the defendant was acquitted in Mecklenburg County. And the Court DENIES THE MOTION FOR A MISTRIAL."

Defendant assigns as error the denial of his motion for a mistrial. Defendant makes this contention: "The statements made later to the Jury by his Honor underscored the fact in the minds of the jury that the defendant had been charged, and had been tried for shoplifting, which is a reflection involving moral turpitude, and that even though a jury acquitted him, the fact remains that he may have been guilty, but by the grace of the jury was acquitted. It is the position of the defendant that this was highly prejudicial to him and inflamed the jury against him."

The record is crystal clear that defendant's counsel, not satisfied with defendant's reply that he had not been convicted of shoplifting, which was binding on the State, was solely responsible for the production in court of the record of defendant's trial and acquittal in the superior court of Mecklenburg County on the charge of shoplifting. If the court's remarks "underscored the fact" that defendant had been tried and acquitted on the charge of shoplifting, defendant's counsel caused

it. If there was technical error, which under the circumstances we do not concede, defendant's counsel alone precipitated it and invited it. No prejudicial error is made to appear, because the court record and the judge's remarks merely confirmed the truth of defendant's reply that he had not been convicted of shoplifting. The court properly denied defendant's motion for a new trial.

No sufficient reason appears to warrant disturbing the verdict and judgment below. All defendant's assignments of error are overruled.

No error.

PRISCILLA C. EVANS v. LLOYD A. BATTEN.

(Filed 14 October, 1964.)

1. Negligence § 34—

Slight depressions, unevenness and irregularities in outdoor walkways are so common that their presence is to be anticipated by prudent persons, and therefore a complaint alleging that plaintiff fell when her heel caught in a depression slightly more than a half-inch in depth in the pavement of an outdoor walk to the parking area of a restaurant, fails to state a cause of action.

2. Pleadings § 19—

Where the facts alleged in the complaint, taken as true, disclose that plaintiff has no cause of action, the court properly dismisses the action.

APPEAL by plaintiff from *Parker, J.*, April 1964 Civil Session of WILSON.

Action to recover for personal injury suffered in a fall on a walkway.

Plaintiff's original complaint is summarized as follows:

Defendant operates a "Howard Johnson" restaurant at Wilson, N. C., and in connection therewith maintains paved areas for the parking of automobiles by customers and concrete walkways leading from the restaurant to and along the parking areas. On 27 February 1963 plaintiff, age 32, was a customer at the restaurant. After eating she left the restaurant with two companions and proceeded along the walkway toward the parking area to the south of the restaurant. It was about 1:30 P.M.; "the sun was shining, the day was clear, and the sun was shining almost directly into the eyes of the plaintiff." As plaintiff stepped down to a lower level of the walkway at the parking area, "or on her first step after so stepping down, and while the plaintiff was step-

ping with the weight on her right foot," the heel of her shoe entered an indenture in the walkway causing her ankle to twist, she fell and was seriously injured. The indenture was "in the form and shape of a shoe print" in the concrete and was 9/16 of an inch deep and 29½ inches from the step-down. At the time of her fall there was snow and ice in the parking area, but none on the walkway. The walkway was wet and a small amount of water was flowing from the parking area across the walkway.

Defendant demurred to the complaint on the ground that the facts alleged do not, as a matter of law, constitute actionable negligence on the part of defendant. The demurrer was sustained and plaintiff was given leave to amend.

The amended complaint alleges additionally that the indenture was made in the walkway at the time of its construction and has existed for ten years to the knowledge of defendant, at the time plaintiff stepped into the indenture it was wet "and some water was running across said walkway at the location of the indenture and also across the indenture, and the indenture was thereby obscured."

Defendant again demurred, asserting *inter alia* that the facts alleged are insufficient to state a cause of action against defendant. The demurrer was sustained and the action dismissed.

Brewer & Gilliam for plaintiff.
Gardner, Connor & Lee for defendant.

PER CURIAM. Plaintiff appellant contends that the facts alleged are sufficient to show that the indenture was a dangerous condition to defendant's knowledge, defendant should have foreseen that rain, melting snow and ice would flow across and tend to obscure it, and defendant neglected to give warning. We do not agree. Slight depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets are so common that their presence is to be anticipated by prudent persons. We are unable to distinguish this case from those in a long line of decisions by this Court. For examples, see: *Falatovitch v. Clinton*, 259 N.C. 58, 129 S.E. 2d 598; *Bagwell v. Brevard*, 256 N.C. 465, 124 S.E. 2d 129; *Little v. Oil Co.*, 249 N.C. 773, 107 S.E. 2d 729; *Welling v. Charlotte*, 241 N.C. 312, 85 S.E. 2d 379. The demurrer was properly sustained.

Assuming that the factual allegations of the complaint are true, as we must in considering demurrer, we conclude that plaintiff has no

cause of action against defendant. Therefore, it was proper to dismiss the action. *Perrell v. Service Co.*, 248 N.C. 153, 102 S.E. 2d 785.

Affirmed.

STATE v. STACEY CLYDE JOLLEY, ALIAS STACEY CLYDE TOWNSEND.

(Filed 14 October, 1964.)

Larceny § 7—

Evidence that within less than three days after clothing of a value of some $600 was stolen many of the articles of clothing were found concealed in the trunk of the automobile which defendant was driving is sufficient to take the case to the jury under the presumption arising from the recent possession of stolen property, and defendant's explanation that he had bought the clothing somewhere for the sum of $80.00 is not such an explanation as is calculated to weaken the presumption.

APPEAL by defendant from *Martin, S. J.*, April 6, 1964 "A" Criminal Session, MECKLENBURG Superior Court.

This criminal prosecution originated by indictment in which the defendant was charged with the larceny of various designated articles of men's clothing valued at $1,162.05, the property of Bill King.

The evidence disclosed that just before midnight on March 1, 1964, Bill King, a clothing salesman, registered and parked his automobile at a motel in Charlotte with the many articles of sample clothing suspended on hangers inside his vehicle. The windows were closed and the doors were locked. About seven o'clock next morning he discovered the windows of his vehicle had been lowered during the night and all clothing stolen.

Three days later city police officers, while checking the driver and two passengers in a Cadillac automobile, discovered many articles of men's clothing suspended in the vehicle. However, these articles were second-hand. After obtaining written permission to search the trunk of the Cadillac in which two companions were riding with the defendant, the officers found many articles of clothing identified by Mr. King as having been stolen from his vehicle. The value of the articles recovered amounted to $610.35. Also found in the Cadillac was a bent coat hanger which the State contended was suitable for use in lowering the windows of an automobile without breaking the lock. On being questioned, the defendant told the officers that he and one of his com-

panions bought the clothes for $80.00 from a colored man somewhere in Atlanta, Georgia.

At the close of the State's evidence the defendant was unsuccessful in his motion to dismiss. From a jury verdict of guilty and judgment of imprisonment, he appealed.

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

Haynes, Graham & Bernstein by William E. Graham, Jr., for defendant appellant.

PER CURIAM. The evidence that the defendant was in the possession of many articles of sample clothing found concealed in the trunk of the automobile which he was driving within less than three days after the articles were stolen was sufficient to take the case to the jury and to sustain the verdict. The defendant's explanation that he and one of his companions bought $600.00 worth of new clothing from a colored man somewhere in Atlanta for the sum of $80.00 was not calculated to weaken the presumption that the recent and unexplained possession of stolen property gives rise to an inference of fact that the possessor was the thief. Evidence was ample to sustain the conviction. In the verdict and judgment, we find

No error.

MANER B. JONES v. KINSTON HOUSING AUTHORITY.

(Filed 14 October, 1964.)

Negligence § 37a—

Where the owner of land maintains adequate paved driveways and entrances to its buildings sufficient to accommodate its tenants and their visitors, a visitor electing to approach the premises over the private property of an adjacent landowner and to walk over an unlighted area with which she was unfamiliar, may not recover for a fall over a reinforcing rod embedded in a broken piece of concrete.

APPEAL by plaintiff from *Bundy, J.*, January Session 1964 of JONES.

This is a civil action for damages for personal injuries allegedly sustained as the result of the negligence of the defendant.

On 29 April 1961, about 7:00 p.m., the plaintiff went upon the premises of the defendant for the purpose of visiting her daughter, who was

a tenant of the defendant and had been for ten years. The daughter was an invalid and, according to the plaintiff, she (plaintiff) had visited her daughter in defendant's housing project "I imagine * * * 500 times," before the occasion involved herein. The car in which the plaintiff rode to or near the premises of the defendant was driven by one of her sons-in-law who was unfamiliar with the property of the defendant and who had never driven plaintiff there before. Instead of letting plaintiff out of the car on the street or in one of the paved parking areas designated and maintained as such, and with which plaintiff was familiar, her son-in-law entered a private driveway on adjacent property, the Best Funeral Home, and drove across this property and put the plaintiff out of his car on an unlighted dirt path behind defendant's apartment house in which plaintiff's daughter lived. Plaintiff then proceeded to walk across a dirt area belonging to the defendant in the rear of the apartment house, which area was used for parking by certain persons but which had not been designated or maintained as a parking area by the defendant.

As plaintiff walked from the point where she got out of the automobile, across the defendant's property, she tripped over a broken piece of reinforced concrete which had a reinforcing rod, in a hooked shape, protruding from the concrete. Plaintiff struck the above-mentioned rod, which stuck in her leg, causing the injury of which she complains.

The plaintiff had never walked across this area before at any time, day or night, but she had observed cars parked in the area.

At the close of plaintiff's evidence the court sustained the defendant's motion for judgment as of nonsuit.

Plaintiff appeals, assigning error.

Brock & Hood for plaintiff appellant.
LaRoque, Allen & Cheek for defendant appellee.

PER CURIAM. The evidence introduced by the plaintiff in the trial below tends to show that the defendant maintains adequate paved driveways, parking areas, sidewalks and paved entrances to its apartment buildings, sufficient to accommodate its tenants and their visitors. The plaintiff, however, on the occasion complained of, chose to approach the premises of the defendant over the private property of an adjacent landowner, and to walk over an unlighted area with which she was unfamiliar and which she had never used before.

In the case of *Wilson v. Dowtin,* 215 N.C. 547, 2 S.E. 2d 576, this Court said: "In entering or leaving premises, the visitor is bound to use the ordinary and customary place of ingress and egress, and if he

adopts some other way he becomes a mere licensee, and cannot recover for defects outside and not substantially adjacent to the regular way." See also *Cupita v. Carmel Country Club*, 252 N.C. 346, 113 S.E. 2d 712.

The judgment below is

Affirmed.

STATE v. DAVID CANUP.

(Filed 14 October, 1964.)

Criminal Law §§ 139, 173—

Even though a post-conviction hearing is denied because petition therefor was not filed until more than five years after the trial, the Supreme Court will grant *certiorari* when it appears on the face of the record proper that defendant had been sentenced to imprisonment in excess of the maximum allowed by law for the offense charged, and the Court will vacate the judgment and remand the cause for proper judgment, with credit under such circumstances for time served, including any allowance for good behavior.

ON September 23, 1964, the defendant David Canup applied to this Court for writ of *certiorari* to review an order entered by *Judge Bundy* at the August, 1964 criminal session, NEW HANOVER Superior Court, denying a post-conviction review of the defendant's trial held at the May, 1958 Term, New Hanover Superior Court. At the Post-Conviction Hearing the solicitor moved to dismiss the application for review upon the ground the trial was held at the May Term, 1958 and the application was not filed until August, 1964, more than five years after the trial. Judge Bundy allowed the motion to dismiss for the reason assigned.

The defendant's petition for *certiorari* and the Attorney General's answer disclose that the defendant, at the May Term, 1958, entered a plea of *nolo contendere* to a charge of possessing burglary tools. The court imposed a sentence of not less than 15 nor more than 20 years in the State's prison. The ground assigned for the review here is that the original sentence of 15 to 20 years is in excess of the authorized punishment for the offense charged. We grant the writ.

T. W. Bruton, Attorney General; Theodore C. Brown, Jr., Staff Attorney for the State.

No counsel for the petitioner.

PER CURIAM. The determinative facts alleged in the petition are admitted in the Attorney General's answer. They appear upon the face of the record proper. The judgment of imprisonment for 15 to 20 years was in excess of the maximum permitted by law for the offense charged. *State v. Blackmon,* 260 N.C. 352, 132 S.E. 2d 880. The judgment of imprisonment entered against the defendant at the May Term, 1958 of the Superior Court of New Hanover County is vacated and set aside. The Superior Court will cause the defendant forthwith to be brought before the court for the imposition of a sentence not to exceed a maximum of ten years. The defendant is entitled to credit for the time served, including any allowance for his good behavior.

Certiorari allowed.

Sentence vacated.

Case remanded for proper judgment.

STATE v. SYLVESTER DAWSON.

(Filed 14 October, 1964.)

Criminal Law § 70; Searches and Seizures § 1—

Defendant, who had paid the person having the lawful possession of a car a sum of money to drive defendant on a trip to get whiskey, may not complain that whiskey belonging to defendant was found in the trunk of the car, without a search warrant, after the person having possession of the car had given the officer permission to search the car, since under the facts defendant is not a lessee of the car and has no right to object to a search.

APPEAL by defendant from *Parker, J.,* March 1964 Session of WILSON.

Criminal prosecution on a warrant charging that defendant on February 1, 1964, did unlawfully transport twelve gallons of nontaxpaid whiskey in violation of G.S. 18-2, tried *de novo* in the superior court after appeal by defendant from conviction and judgment in the Recorder's Court of the City of Wilson.

The only evidence was that offered by the State. The only witnesses were William Earl Best, 24, and ABC Officer Glenn E. Stutts.

The evidence, summarized, tended to show: On February 1, 1964, in the City of Wilson, Best was in possession and control of and was driving his mother's 1957 Chevrolet. Best, accepting defendant's pro-

posal, agreed, for the consideration of $5.00, to drive to Nash County to get and bring back (to Wilson) for defendant "two cases of liquor." Accompanied by defendant, Best drove his mother's car to Nash County. When he stopped at an unidentified place as directed by defendant, Best got out and opened the trunk. Defendant obtained and placed in the trunk of the Best car two cases of liquor. On the return trip, the Best car was stopped by Stutts about 3:10 a.m. on Highway No. 301 within or near the corporate limits of Wilson. Best, the driver, got out of the car and talked with the officer. Defendant was on the back seat. The officer had no conversation with defendant. In response to the officer's questions, Best first stated he did not have any nontaxpaid liquor and did not have a key to the trunk. Thereafter, Best told the officer he had two cases of nontaxpaid whiskey, which belonged to defendant, "on the car," and gave the officer the key to the trunk. Thereupon, the officer opened the trunk and there found two cases of nontaxpaid whiskey, "six gallons to a case."

The jury returned a verdict of guilty. Judgment imposing a prison sentence was pronounced. Defendant excepted and appealed.

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

Vernon F. Daughtridge and J. Russell Kirby for defendant appellant.

PER CURIAM. Defendant moved to suppress the testimony of Best and of Stutts as to the contents of the trunk of the Best car on the ground that Stutts had no search warrant and therefore his search of the trunk of the car and his seizure of the twelve gallons of nontaxpaid whiskey were in violation of defendant's constitutional rights. Defendant stresses his assignment of error based on his exceptions to the denial of said motion and to the admission of said testimony.

While the evidence shows the twelve gallons of nontaxpaid whiskey belonged to defendant, the evidence also shows the car was driven by and in the possession and under the control of Best. There was ample evidence that Best voluntarily gave Stutts the key to the trunk. Moreover, there was no search of defendant's person and the car was not in defendant's possession or under his control. The evidence does not support defendant's contention that he was a lessee of the Best car. It shows simply that defendant paid Best $5.00 to use his mother's car in performing an errand for defendant. The applicable legal principles relating to search and seizure are stated in *S. v. McPeak*, 243 N.C. 243, 90 S.E. 2d 501.

While defendant's other assignments have been considered, the alleged errors are not deemed of such prejudicial nature as to justify the award of a new trial.

No error.

STATE v. JOHN EARL COX.

(Filed 14 October, 1964.)

APPEAL by defendant from *Clarkson, J.*, January Session 1964 of CLEVELAND.

This is a criminal action in which the defendant was tried upon a bill of indictment charging him with forcing open a safe of the Snowflake Laundry, located at 403 E. Graham Street in the City of Shelby, North Carolina, on 23 December 1963, which safe was used for storing chattels, money, and other valuables, in violation of Section 14-89.1 of the General Statutes of North Carolina, and upon a bill of indictment containing two counts: (1) charging that defendant on 23 December 1963 unlawfully, wilfully and feloniously did break and enter a building occupied by the Snowflake Laundry, with intent to steal, take and carry away the merchandise, chattels, money, *et cetera*, of the Snowflake Laundry, and (2) charging that on 23 December 1963 the defendant did steal and carry away $400.00 in United States currency which belonged to the Snowflake Laundry.

According to the testimony of Howard Hines, Jr., he and the defendant Cox and Jimmy Eaves broke into the Snowflake Laundry on the night in question; that Eaves and the defendant Cox carried the safe into the boiler room of the building and proceeded to break it open; that in the meantime Hines saw John Wray outside the window. They all left the building and talked with Wray. They told Wray that if he would watch out for them they would give him part of the money. Thereafter, they returned to the building and defendant Cox removed two money boxes from the safe. They took the boxes to the home of one Bernice Sutton, where defendant Cox lived, and divided the money. According to the testimony of Hines, John Wray was given $45.00, he (Hines) was given $50.00, and defendant Cox and Eaves kept most of the money. There was no objection to the admission of Hines' testimony.

The defendant offered no evidence.

The jury returned a verdict of guilty on all counts.

The court imposed a sentence of ten years in State's Prison beginning at the expiration of certain sentences theretofore imposed on defendant in other cases which were set out in the judgment.

The defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Charles D. Barham, Jr., for the State.

C. B. Cash, Jr., for defendant appellant.

PER CURIAM. The defendant brings forward and argues in his brief only those exceptions and assignments of error set out in the record which relate to the testimony of the State's witness W. Knox Hardin, Chief of Police of the City of Shelby. Under the rules of this Court all other exceptions and assignments of error are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783; *S. v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334.

The State's witness Hardin was permitted to testify without objection as to the statements made to him by Jimmy Eaves and John Wray. The statement made by Eaves to this witness, made in the presence of the defendant, detailed the manner in which the alleged crimes were committed, and corroborated the testimony of Hines who had testified without objection.

The exceptions and assignments of error relied upon by the defendants are set out below.

The witness testified that "Jimmy Eaves made a statement to me in the presence of the defendant, John Earl Cox, about the breaking and entering of Snowflake Laundry. I have a copy of the statement he made." The solicitor then propounded this question to the witness: "Q. Will you - - - (objection — overruled — exception) say to the jury after Eaves made that statement what statement, if any, did Cox make. A. He didn't make any." Exception No. 1.

Later in the examination, the solicitor asked the following questions of the witness: "Q. Was John 'Dad' Wray present when that statement was made to Cox and in Cox's presence? A. Yes. Q. And you say Cox said nothing? A. He didn't say anything."

Defendant's counsel on cross examination asked the following questions: "Was Cox obligated to say anything in that particular?" Objection — sustained. Exception No. 2. "Q. How many of these people that you questioned admitted they had a part in this breaking and entering?" Objection — sustained. Exception No. 3 The witness further testified: "I tried to question Cox during this period. Q. And

he denied any knowledge of any of the charges, didn't he?" Objection — sustained. Exception No. 4.

Later, in the cross examination, defendant's counsel asked the witness what else he knew about the case except what Wray, Eaves and Hines had told him. Objection. The court then told defendant's counsel he could ask the witness about what "each one individually — what they told him, if anything." Defendant's counsel propounded no further questions.

Since the defendant did not object or except to the admission in evidence of the statement made by Evans to this witness in the presence of defendant Cox, or any part thereof, we hold that no sufficiently prejudicial error has been shown to justify a new trial.

In the trial below, we find

No error.

VEELLA MASSEY v. CALVIN GASTON SMITH.

(Filed 14 October, 1964.)

APPEAL by plaintiff from *Patton, J.*, May 1964 Civil Session of MECKLENBURG.

Plaintiff was injured when struck by an automobile operated by defendant. The collision occurred at night as plaintiff was crossing Hawkins Place, a street in Derita. Plaintiff, to support her claim for damages, alleged the collision was caused by defendant's negligent failure: (1) to keep a proper lookout, (2) to maintain control over his vehicle, (3) to give warning of his approach, and (4) driving on the wrong side of the street.

Defendant denied plaintiff's allegation of negligence. As an additional defense, he pleaded plaintiff's negligence as a contributing cause of the collision.

The jury, on appropriate issues, found the collision was caused by the negligence of both parties. Judgment was entered that plaintiff recover nothing. Plaintiff excepted and appealed.

Charles V. Bell for appellant.
Haynes, Graham & Bernstein for appellee.

PER CURIAM. Plaintiff has only one exception, that is to the charge covering eleven pages of the record. The exception is broadside. It is

not sufficient to raise the question: Did the court comply with G.S. 1-180? *Rigsbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926. Hence there is no exception on which to base an assignment of error. Error is not shown by an assignment not supported by appropriate exception. *Clifton v. Turner,* 257 N.C. 92, 125 S.E. 2d 339; *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118.

No error.

JOHN McNAMARA v. W. J. OUTLAW.

(Filed 21 October, 1964.)

1. Automobiles § 8—

G.S. 20-154(a) requires that before making a left turn upon a highway a motorist must exercise reasonable care to see that such movement can be made in safety and whenever the operation of any other motor vehicle may be affected by such move must give the appropriate signal visible to the driver of such other vehicle affected for a sufficient length of time and distance to enable him to observe it and determine therefrom what movement is intended, but the statute does not require infallibility of a motorist and does not preclude a left turn until the circumstances are absolutely free from danger.

2. Negligence § 26—

Nonsuit for contributory negligence is proper only when, considering plaintiff's evidence in the light most favorable to him, the facts necessary to establish this defense appear from plaintiff's own evidence so clearly that no other conclusion can be reasonably drawn therefrom.

3. Automobiles § 42h— Evidence held not to show contributory negligence as a matter of law in making left turn.

Plaintiff's evidence tending to show that he saw the headlights of defendant's vehicle following some 300 or 400 yards behind him, that, intending to make a left turn into an intersecting road, he slowed his automobile to 15 miles an hour, turned on his left turn signal light about 100 feet from the intersection, and did not look behind him again after he turned on the signal light because he was looking for traffic on the road he was turning into and for traffic that might be meeting him, that there was a yellow line in the middle of the highway marking the intersection, and that the driver of the automobile behind him, without giving any warning of his intention to pass, crossed the yellow line and struck the left front of plaintiff's vehicle as it was about a foot over the yellow line, *held* not to disclose contributory negligence as a matter of law, and the issue should have been submitted to the jury upon the conflicting inferences.

4. Negligence § 26—

Conflicting inferences of causation carry the issue to the jury.

MCNAMARA *v.* OUTLAW.

APPEAL by plaintiff from *Fountain, J.*, June 1964 Civil Session of WAYNE.

Civil action to recover $400 for damages to an automobile. From a judgment of compulsory nonsuit entered at the close of plaintiff's case, he appeals.

Robert H. Futrelle for plaintiff appellant.
Dees, Dees & Smith by William W. Smith for defendant appellee.

PARKER, J. Plaintiff's evidence tends to show the following facts: The collision occurred about 8:30 p.m. on 6 June 1963 in Wayne County at a point where North Carolina Highway 55 is intersected by a paved road running north and south. His automobile driven by himself and defendant's automobile driven by him were proceeding in an easterly direction on N. C. Highway 55. His automobile was traveling in front. In the direction both automobiles were traveling there was a yellow line in the middle of the highway marking this road intersection. He intended to make a left turn at the intersection and to proceed north. Before he began a left turn, he saw in his rear-view mirror the headlights of defendant's automobile about 300 or 400 yards behind him. He slowed down to about 15 miles an hour, and turned on his left signal light when he was about 100 yards or about 100 feet from the intersection — plaintiff testified as to both distances. He did not look behind him again after he turned on his left signal light. He was watching for traffic on the road he was turning into, and for traffic that might be approaching, to see if he "had a clear view turn." The driver of the automobile behind gave no "indication" he was going to pass. He began making a turn to the left, and when his automobile was about a foot over the yellow line, the right-hand front part of defendant's automobile, which was in the act of passing his automobile, struck the left door of his automobile and went on down the road 15 or 20 feet. He was not aware that the automobile behind was attempting to pass him until it hit him. After the collision, defendant told him "he would have it fixed."

Defendant in his answer denies that he was negligent, and conditionally pleads contributory negligence of plaintiff as a bar to any recovery by him.

It is manifest that plaintiff's evidence shows actionable negligence, as alleged in his complaint, on defendant's part. Defendant's contention, as stated in his brief, is that plaintiff according to his own testi-

mony is guilty of contributory negligence in that he violated the provisions of G.S. 20-154(a).

The provisions of G.S. 20-154(a) do not require infallibility of a motorist, and do not mean that he cannot make a left turn upon a highway "unless the circumstances be absolutely free from danger." *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754. Further, the provisions of this statute do not give the signaler an absolute right to make a turn immediately regardless of circumstances. *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885. The provisions of this statute relevant here, where no pedestrian was affected by such movement, impose two duties upon a motorist intending to turn from a direct line upon a highway: (1) to exercise reasonable care to see that such movement can be made in safety, and (2) to give the required signal whenever the operation of any other vehicle may be affected by such movement, plainly visible to the driver of such other vehicle, of the intention to make such movement. *Tart v. Register, supra; Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849; *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115. It is the purview of this statute that the prescribed signal should be given and maintained for a sufficient length of time and distance to enable the driver of the following vehicle to observe it and to understand therefrom what movement is intended. *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431.

In *Cooley v. Baker, supra,* the Court said:

> "In considering whether he can turn with safety and whether he should give a statutory signal of his purpose, the driver of a motor vehicle, who undertakes to make a left turn in front of an approaching motorist, has the right to take it for granted in the absence of notice to the contrary that the oncoming motorist will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care to avoid collision with the turning vehicle."

A defendant may avail himself of his plea of contributory negligence of plaintiff by a motion for judgment of compulsory nonsuit under G.S. 1-183, 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.

Defendant's contention that plaintiff's own evidence shows that he was guilty of contributory negligence as a matter of law necessitates a consideration of plaintiff's evidence in the light most favorable to him. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40. Plaintiff's evidence, considered in such light, would permit, but not compel, a jury to find

the following facts and draw the following reasonable inferences therefrom: Plaintiff, seeing at night in his rear-view mirror the headlights of defendant's automobile 300 or 400 yards behind him, and intending to make a left turn at the intersecting road and to proceed north on it, slowed his automobile down to about 15 miles an hour, and turned on his left signal light about 100 feet from the intersection. That he did not look behind him again after he turned on his left signal light, because he was looking for traffic on the road he was turning into, and for traffic that might be meeting him. That there was a yellow line in the middle of the highway marking this road intersection ahead. That the driver of the automobile behind him having given no "indication" that he would attempt to overtake and pass him, he had a right to assume the driver of the automobile behind him would maintain a proper lookout, would not cross a yellow line in the middle of the highway marking a road intersection ahead, and would not under such circumstances attempt to overtake and pass him. That under all the attendant circumstances he exercised reasonable care to see that his left-turn movement to enter the road at the intersection and to proceed north could be made in safety, and that he turned on his left signal light for a sufficient length of time and distance to enable the driver behind him to observe it and to understand therefrom what movement he intended to make, and therefore he was not guilty of negligence proximately contributing to the damage to his automobile. The inference is also permissible from plaintiff's evidence that he failed to exercise reasonable care to see that his left-turn movement could be made in safety, and that this constituted negligence proximately contributing to the damage to his automobile. Conflicting inferences of causation carry the case to the jury. *Pruett v. Inman, supra.*

Gasperson v. Rice, 240 N.C. 660, 83 S.E. 2d 665, relied on by defendant, is distinguishable, in that a jury trial was waived, and the Court held that there was competent evidence to support the trial court's finding and conclusion that plaintiff was guilty of legal contributory negligence.

The judgment of compulsory nonsuit was improvidently entered, and is

Reversed.

ESTELLE C. DAVIS, ADMINISTRATRIX OF THE ESTATE OF DEBORAH DENISE DAVIS, DECEASED v. JOEL DEE PARNELL.

(Filed 21 October, 1964.)

1. Appeal and Error § 42—

In order to be entitled to a new trial for error in the charge appellant must show not only error but that the error adversely affected her chance of success on the issue in question.

2. Trial § 32—

The fact that the charge of the court is not in the usual form is not ground for objection if the charge fairly applies the law to the ultimate facts which each party, respectively, contends is established by the evidence, and gives proper balance to the opposing contentions.

APPEAL by plaintiff from *Hubbard, J.*, January, 1964 Session, NEW HANOVER Superior Court.

This civil action was here on a former appeal, reported in 260 N.C. 522. The pleadings and the plaintiff's evidence are sufficiently stated in the prior opinion.

At the new trial the defendant testified and offered corroborating evidence that he did not run through a red light at the intersection approximately 128 feet west of the point of accident; that he was driving approximately 30 miles per hour; that the deceased child darted out from behind another vehicle into his traffic lane; that he had insufficient opportunity and time to avoid striking her.

The jury found the issue of negligence in favor of the defendant. From the judgment dismissing the action, the plaintiff appealed, assigning errors.

Aaron Goldberg, Rountree & Clark by Geo. Rountree, Jr., for plaintiff appellant.

W. G. Smith, for defendant appellee.

HIGGINS, J. On the former appeal this Court reversed the nonsuit, holding the plaintiff's evidence was sufficient to require submission to the jury. Now the plaintiff has appealed from a judgment based upon the jury's finding that the death of her intestate was not proximately caused by the defendant's negligence. Although the plaintiff noted exceptions to the admission and exclusion of evidence, nevertheless she does not base any assignment of error thereon, but relies altogether for a new trial upon alleged errors in the instructions to the jury. Consequently, she must carry the burden of showing error in the charge adversely affecting her chance of success on the issue of the de-

fendant's negligence. *Bullin v. Moore,* 256 N.C. 82, 122 S.E. 2d 765; *Fleming v. Drye,* 253 N.C. 545, 117 S.E. 2d 416.

The plaintiff alleged the defendant was negligent in driving too fast; in failing to keep his vehicle under proper control; and in failing to keep a proper lookout under existing conditions. The evidence as to defendant's speed was conflicting. Plaintiff's witnesses estimated his miles per hour speed at 40 to 45; the defendant's witnesses, not exceeding 30. The parties stipulated the maximum lawful speed at the time and place was 35. The investigating officer found the defendant's vehicle left skid marks of 40 feet prior to contact. The vehicle moved two feet thereafter.

The court charged at great length as to the law governing defendant's duties under the conditions existing at the time and place of the accident. However, the court summarized its instructions in these words:

> "It is the duty of every motorist who sees, or by the exercise of due care should see, a child on or near the traveled portion of a street to use proper care with respect to speed and control of his vehicle, and to maintain a proper lookout to give timely warning and avoid injury, and to recognize the likelihood of a child running into the street in obedience to a childish impulse. * * *
>
> "If you find Mr. Parnell was not maintaining a proper lookout, or did not have his car under proper control at the time and place in question, as those terms have already been explained to you, or was operating his car in violation of the speed statute, as I have explained the law to you, and you find he did not see Deborah Denise Davis although she suddenly darted in front of his car, or from behind any other object, and further find that although she darted suddenly into his view that if he had been maintaining a proper lookout, or had been observing the speed law, he could have avoided striking and injuring her by the exercise of due care, he would be guilty of negligence, and if such negligence was a proximate cause of her death he would be guilty of actionable negligence in this respect. * * *
>
> "In other words, if you find Mr. Parnell operated his car on Dawson Street at the time and place in question in excess of 35 miles an hour, or did operate it at a lower speed than 35 miles an hour, but such lower speed was greater than was reasonable and prudent under the circumstances and conditions then and there existing . . . he would have been guilty of negligence in violating the speed statute, and if you further find by the greater weight of the evidence such speed was one of the proximate causes of the death

of Deborah Denise Davis, he would be guilty of actionable negligence in this aspect. * * *

"We have taken up and considered the various acts of negligence charged against Mr. Parnell. If you find from the evidence and by its greater weight that he was negligent in one or more of the aspects charged, and that such negligence was one of the proximate causes of Deborah Denise Davis' death, then Mr. Parnell would have been guilty of actionable negligence, and you should answer the first issue 'Yes.'"

The plaintiff strenuously contends the court failed to state the evidence "to the extent necessary to explain the application of the law thereto," as contemplated by G.S. 1-180 and by the opinion of this Court in many cases, including *Bulluck v. Long*, 256 N.C. 577, 124 S.E. 2d 716. The charge as given is somewhat out of the ordinary in that, instead of reciting the evidence and applying the law thereto, the court interlaced and combined into one fabric the ultimate facts which according to the contention of each party the evidence established, and then applied the law thereto. The charge gave proper balance to the contentions of the parties.

The plaintiff has been represented by able counsel who obtained a reversal of the original nonsuit. In this trial she was unable to clear the first hurdle before the jury. The record before us does not disclose any valid reason why the judgment should be disturbed or any likelihood that another trial would produce a different result.

No error.

ROBERT HALL, JR., PLAINTIFF v. J. C. LITTLE AND JAMES LEON McLEAN, DEFENDANTS.

AND

ABE WARREN, PLAINTIFF v. J. C. LITTLE AND JAMES LEON McLEAN, DEFENDANTS.

(Filed 21 October, 1964.)

Automobiles § 41f—

The bridge in question was some 400 feet long, cresting in the middle, so that motorists approaching from the south could not see vehicles at the north end. Evidence tending to show that both lanes were blocked at the north end because of the congregation of cars there sequent to several collisions, and that plaintiff driver could not avoid skidding and hitting the

side of the bridge before stopping, and was then successively hit by the cars of defendants, which were following him, without more, *held* insufficient to be submitted to the jury on the issue of defendants' negligence.

APPEALS by plaintiffs from *Campbell, J.*, March 9, 1964, Regular Schedule B Session of MECKLENBURG.

On December 25, 1962, plaintiff Hall was riding as a passenger in a Pontiac automobile owned and operated by plaintiff Warren. They were traveling northwardly on U. S. Highway 29. When crossing the bridge over Haw River, they saw several cars stopped at, or near, the north end of the bridge. There had been several collisions. As a result, both lanes on the bridge and highway were blocked and traffic was stopped. When Warren saw the vehicles ahead of him, he attempted to stop, but, because of ice on the bridge, was unable to do so without coming into contact with the sides of the bridge.

Shortly after Warren's car came to a stop, defendant Little, driving northward in a Ford, struck the Pontiac; "momentarily thereafter," defendant McLean, driving a Chevrolet northwardly, struck Little's Ford. Plaintiff Hall sustained personal injuries in the collision between the Pontiac and Ford, and the Chevrolet and Ford. His action is to recover damages for these injuries. Warren's Pontiac was damaged by the collision. His action is to recover the damage done to his car.

The causes were consolidated for trial. At the conclusion of plaintiffs' evidence, the court sustained motions of defendants for nonsuit. Plaintiffs appealed.

McDougle, Ervin, Horack & Snepp by C. Eugene McCartha for plaintiff appellants.

Sanders & Walker, James E. Walker and J. Howard Bunn, Jr., for Defendant J. C. Little, appellee.

Boyle, Alexander and Wade for Defendant James Leon McLean, appellee.

PER CURIAM. Plaintiffs allege each defendant was negligent in that he: (1) violated G.S. 20-140 making criminal the reckless driving of a motor vehicle, as that phrase is there defined; (2) violated G.S. 20-152(a) requiring the driver of a motor vehicle following another to stay a reasonable distance behind; (3) violated G.S. 20-141(a) prohibiting the operation of a motor vehicle at a speed greater than reasonable under existing conditions; (4) drove at a speed which prevented his stopping "within the assured clear distance" ahead; and (5)

failed to maintain a proper lookout, and to keep his vehicle under control.

The collision occurred about 6:30 p.m. Plaintiffs left Charlotte about 3:30 that day. There had been snow and sleet; but "it had stopped; the sun had come out, it was a little foggy; slight drizzle," there were spots of ice on the bridge.

The bridge over Haw River is approximately 400 feet long and 26 feet wide. There is a curve in the road about 1,000 feet south of the bridge. The maximum permissible speed before a northbound traveler reaches the bridge is 60 miles per hour. The speed at the curve and to the bridge is 45 miles per hour. One traveling north is on an incline approaching the southern portion of the bridge. The road peaks at the center of the bridge and then takes a sharp decline. Occupants of cars at the south end of the bridge cannot see cars stopped at the north end of the bridge. Warren testified he did not see the cars of defendants when he entered the bridge. Was it because they were then south of the curve and 1,000 feet or more behind the Pontiac? No one fixes the distance between the cars as they approached the bridge. The record is devoid of any evidence with respect to the speed at which defendants were driving. There is no evidence to show defendants were familiar with the bridge, nor was there anything to put them on notice of a dangerous condition ahead until they reached the peak in the bridge and started on the decline.

Our examination of the record fails to disclose any evidence to support plaintiffs' allegations of negligence.

Affirmed.

BURLINGTON INDUSTRIES, INC. v. STATE HIGHWAY COMMISSION AND TRAVELERS INSURANCE COMPANY.

AND

WILLIAM R. STUCKEY v. STATE HIGHWAY COMMISSION AND TRAVELERS INSURANCE COMPANY.

(Filed 21 October, 1964.)

State § 5d—

In these proceedings by the driver and owner of the truck which was struck in its lane of travel by a road roller of the Highway Commission, the evidence *is held* to support the findings of the Industrial Commission that claimants were injured by the negligence of the Highway Commission

and its employees and not to show that claimants were contributorily negligent.

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

APPEAL by defendants from *Huskins, J.*, April 1964 Session of CATAWBA.

Proceedings under the Tort Claims Act (G.S., Ch. 143, Art. 31) for compensation by William R. Stuckey, for personal injury, and by Burlington Industries, Inc. (Burlington), for property damage, arising out of a collision occurring 27 July 1960 on Highway 64 east of Claremont, N. C., between a road roller of the State Highway Commission, operated by its employee Carl W. Keener, and a truck of Burlington, operated by its employee Stuckey. As a result of the collision the truck was forced off the highway and damaged, and Stuckey was injured.

The proceedings came on for hearing before Deputy Industrial Commissioner Smith, whose findings of fact are summarized as follows: The road roller is equipped with a steel roller on one end and wheels with rubber tires on the other; it is steered by a tiller bar which controls the "rubber-tired-end" of the vehicle. It is equipped with a single set of mechanical brakes. The braking procedures are sufficient to stop it when in use in its regular work of rolling out asphalt or other road materials; the usual method of braking the machine when it is doing road work is by use of the transmission, shifting from forward to reverse gear. When the roller is transported from one job to another it is towed behind a truck with the roller end elevated off the road surface — it is attached for towing by means of a metal tongue which is a part of its equipment. The roller had been inspected and repaired and was in operable condition. It operates at 1 to 2 miles per hour when in low gear, at 2 to 4 in high gear. On the day of the collision it was towed to the job site. It rolled out asphalt patches and when the work was completed Keener was directed by his foreman to drive it on the highway to Claremont, a distance of about 2 miles, and park it. Keener was a regular truck driver; he had not operated a roller within two years prior to the date of the collision; he had never driven one a long distance on a highway. He was proceeding westwardly uphill with the "rubber-tired-end" forward; he was looking at the tires in order to properly steer it and keep it on the road. The transmission suddenly jumped out of gear and the roller started, "roller-end" forward, back down the hill. Keener applied the mechanical brakes but they did not stop or slow the roller, he was not able to control it. In the meantime the truck, proceeding eastwardly, came over the hill about 400 feet

away. It was drizzling rain and the road was wet. Stuckey, the truck driver, saw the roller and touched his brakes; he couldn't tell then whether the roller was in motion but observed that his (south) lane of the highway was open. He proceeded downhill at a speed of 40 to 45 and when about 150 feet away he saw the roller swerve toward his line of travel; he applied brakes, sounded his horn and left tire marks 140 feet in length. The truck was struck by the roller in the truck's lane of travel.

The Deputy Commissioner concluded that claimants were damaged by the active negligence of the Highway Commission in that its employee, Keener, was negligent in operating the roller on the highway with brakes which were not sufficient to stop or control it, in operating it on the highway without two separate means of applying brakes, G.S. 20-124(a), in operating the roller with limited experience in ordinary working operation and no experience in long distance operation on the highway. It was also concluded that the Highway Commission was not excused by reason of the emergency created by the transmission jumping out of gear — the brakes being inadequate to control it. It was further concluded that claimants were not contributorily negligent. Stuckey was awarded $10,000 damages and Burlington $4,487.

Upon review the Full Commission adopted as its own the findings, conclusions and awards of the Deputy Commissioner. On appeal to Superior Court all of respondents' exceptions were overruled and the awards of the Industrial Commission were affirmed.

Helms, Mulliss, McMillan & Johnston and Larry J. Dagenhart for plaintiffs.

Patrick, Harper & Dixon for defendants.

PER CURIAM. The evidence supports the Industrial Commission's findings of fact, and these findings support its conclusions. The court below did not err in affirming the awards.

Affirmed.

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

ERVIN E. WHALEY v. HENRY JACKSON MARSHBURN.
AND
REGINALD R. QUINN v. HENRY JACKSON MARSHBURN.

(Filed 21 October, 1964.)

1. Automobiles § 41a —

In these actions by a passenger to recover for injuries sustained when the driver failed to follow a curve, hit the shoulder, and lost control of the vehicle, the evidence *is held* sufficient to be submitted to the jury on authority of *Randall v. Rogers, ante,* 544.

2. Appeal and Error § 42—

Mere technical error does not warrant a new trial, but appellant must show not only error but that it was of such prejudicial nature as to amount to a denial of a substantial right.

APPEAL by defendant from *May, J.,* August 1964 Session of LENOIR.

In these actions, consolidated for trial, plaintiffs' allegations and evidence are to the effect they were passengers in an automobile owned and operated by defendant on December 24, 1961, about 1:00 a.m.; that defendant, driving westwardly on a rural paved road from Potter's Hill, N. C., to Pink Hill, N. C., reached a curve to the left as the road approaches a bridge over Beaver Dam Creek; that defendant failed to follow this curve, hit the shoulder, lost control, jumped the creek to the right of the bridge and stopped when his car crashed into a tree on the west bank of the creek; and that, as a result, plaintiffs sustained personal injuries. In each action, the issues raised by the pleadings, namely, negligence and damages, were answered in favor of plaintiff, and judgments in accordance with the verdicts were entered. Defendant appealed.

Jones, Reed & Griffin for plaintiff appellees.
White & Aycock for defendant appellant.

PER CURIAM. The only evidence was that offered by plaintiffs. It was sufficient to require submission for jury determination of issues as to the alleged actionable negligence of defendant. In accordance with legal principles stated in *Randall v. Rogers, ante,* 544, 138 S.E. 2d 248, and cases cited, defendant's motions for judgment of nonsuit were properly overruled.

Assignments of error relating to the charge have been carefully considered. Conceding technical error, when the charge is construed contextually, the assignments, in our view, do not show error of such prejudicial nature as to amount of a denial of a substantial right and jus-

tify the award of a new trial. Strong, N. C. Index, Appeal and Error § 42. Hence, the verdicts and judgments will not be disturbed.

No error.

FIDELITY FEDERAL SAVINGS & LOAN ASSOCIATION OF HICKORY v. CECIL H. JARRETT COMPANY, INCORPORATED.

(Filed 21 October, 1964.)

Negligence §§ 1, 24a—

Evidence that a rug which defendant had cleaned with permission of plaintiff for the purpose of demonstrating a rug cleaning compound, shrunk and developed numerous brownish spots and became sticky to the touch, with testimony of an expert in the field that the damage resulted from an excessive amount of detergent in the cleaning compound, together with evidence as to the amount of the damage, *held* sufficient to take the case to the jury.

APPEAL by defendant from *Huskins, J.*, January 1964 Regular Term of CATAWBA.

Action for damages. Plaintiff alleges that defendant negligently spoiled the carpeting in its place of business by applying excessive quantities of an improperly diluted soap solution to the carpet and then pouring large amounts of water on it in an effort to remove the solution.

Plaintiff's evidence tended to show the following facts: On March 10, 1962, defendant requested and received permission to demonstrate a rug-cleaning compound, known as Knap-Back, on plaintiff's carpet. On March 12, 1962, the carpet was still damp from the cleaning; it had shrunk and pulled away from the walls. Numerous brownish spots, some as large as five feet in diameter, had appeared on it throughout, and the carpet was sticky to the touch. Defendant attempted to remove the detergent left in the carpet on March 10th by applying water to it, using a floor-scrubbing machine with a revolving brush "to activate the suds and a wet vacuum pick-up machine to remove the suds." The treatment was ineffectual and two years later the carpet was still sticky. Any application of water still raises lather from the soap left in the carpet. Dry compounds will no longer remove dirt and the carpet has a very dingy appearance. To apply more water to the carpet now would cause it to shrink again. Prior to defendant's attempt to clean the carpet it was worth $2,600.00; immediately afterwards, only

$250.00. Ted Walker, whom defendant admitted to be an expert in "the installation and knowledge of carpets," testified, without objection, that he had an opinion as to what caused the brown spots on the carpet. He said: "It appears to me that there was an excessive amount of detergent and not the proper amount of water mixed with it and the browning out is what we call detergent burn caused by improper mixture. Detergent burn would have a tendency to weaken the carpet fibers and take some of the oil out of the wool and the long range result would be a break-down of the fibers."

The defendant offered no evidence. The jury awarded plaintiff damages in the amount of $1,400.00. From judgment on the verdict, defendant appealed.

Keener & Butner for plaintiff.
Corne & Warlick for defendant.

PER CURIAM. Defendant's one assignment of error is the failure of the court to grant its motions of nonsuit timely made. The evidence was clearly sufficient to sustain plaintiff's allegations and withstand defendant's motions.

The judgment of the court below is
Affirmed.

STATE v. GERALD CLIFTON FORREST.

(Filed 21 October, 1964.)

Criminal Law § 107—

The charge must be complete within itself, and the defendant and his counsel are entitled to hear the instructions and to have them for review upon appeal, and therefore it is prejudicial error for the court to instruct the jury to take into consideration definitions and instructions which the court had given them in other cases or instructions that they had heard in other cases.

APPEAL by defendant from *Parker, J.*, August 24, 1964 Regular Session, LENOIR Superior Court.

This criminal prosecution originated by warrant from the Recorder's Court, Kinston, North Carolina, which charged that Gerald Clifton Forrest did on April 29, 1964, unlawfully and wilfully operate a motor vehicle upon the public highway while under the influence of intoxicating liquor. From a conviction and judgment in the Recorder's Court,

he appealed to the Superior Court. Upon his plea of not guilty, a jury was impaneled which returned a verdict of guilty. From judgment on the verdict, the defendant appealed.

T. W. Bruton, Attorney General; James F. Bullock. Assistant Attorney General for the State.

C. E. Gerrans, for defendant appellant.

PER CURIAM. The police officer testified he went to the intersection of Grainger Avenue and McLewean Street in Kinston at 11:25 at night. "Mr. Forrest's car was parked in the intersection. . . . The motor was running and there was steam coming from the engine . . . Mr. Forrest was leaning over the steering wheel, . . . his foot was on the gas pedal, his other foot was on the brake and the car was in gear, what kept it from moving, I don't know. He was leaning over the steering wheel and was asleep. . . . In my opinion he was highly intoxicated."

The defendant's assignment of error based on the refusal of the court to sustain his motion to dismiss at the close of the evidence is not sustained. The defendant assigns as error the following from the court's charge:

> "This defendant is not charged here with operating a motor vehicle upon the public highways while drunk or intoxicated, but he is being charged with having operated a motor vehicle upon the public highways of the State while under the influence of intoxicating beverages. The Court has been over those definitions before, and I think most of you gentlemen have been on the jury, and I think the others have heard the distinction between the two, and the Court instructs you to take that into consideration when you come to make up your verdict."

Every defendant is entitled to have a jury pass on the question of his guilt or innocence. Likewise, he is entitled to have this Court review the trial upon appeal. The trial court must charge the jury as to all material aspects of the offense. The charge must be complete within itself. Hence, it was error for the court to charge the jury to take into consideration the definitions and instructions he had given them in other cases, or instructions they had heard in other cases. Each jury must act and be instructed while functioning as a body, and the defendant and his counsel are entitled to hear the instructions and to have them reviewed here. Patently, this cannot be done if the judge lets the jury consider other instructions in other cases. For this error, the defendant is awarded a

New trial.

IN RE KENAN.

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

(Filed 4 November, 1964.)

1. Appeal and Error § 60—

The decision on appeal becomes the law of the case in subsequent proceedings in the trial court and upon subsequent appeal.

2. Insane Persons § 4; Trusts § 5—Court has authority to authorize trustee to make gifts from incompetent's estate upon findings that incompetent would probably make such gifts if he were competent.

In this proceeding to authorize the trustees to make certain specific gifts from the income and principal of the estate of their incompetent and to make a revocable *inter vivos* trust irrevocable and to give the income from such trust to certain designated charities, the evidence *is held* to support the findings of the trial court to the effect that the proposed gifts could not possibly prejudice the incompetent (the incompetent being incurably insane and there being income from her estate greatly in excess of any possible need for her support, care, and comfort), that the gifts would increase the value of her residuary estate at her death, and that the incompetent if of sound mind would probably have made the gifts in the manner proposed, and judgment modifying the trust and authorizing the trustees to make the specified gifts is affirmed. Chapters 111, 112 and 113, Session Laws of 1963.

3. Trusts § 5; Constitutional Law § 25—

The trust in question was revocable and provided that the trustor should receive for life the income from the trust estate. The trustor later became mentally incompetent, and the jury found that there was no prospect for her recovery. *Held:* Modification of the trust by making it irrevocable and donating the income for the life of the trustor to certain designated charities does not rewrite the contract so as to affect the rights of the ultimate beneficiaries, but merely authorizes the trustees to do those things which the trustor, if competent, would probably have done.

4. Same; Wills § 1; Parties § 1—

The beneficiaries of a will have no interest in the estate so long as the testatrix is alive, and therefore are not necessary parties in a proceeding to authorize the trustees of an incompetent's estate to make certain gifts from the income and corpus of her estate in accordance with what the incompetent would probably have done if she were competent, and the incompetent and her guardian are the only necessary parties to such proceeding, notice of the filing of the petition by the trustees for the incom-

petent having been given the nonresident beneficiaries as prescribed by G.S. 1-104.

MOORE, J., dissenting.

BOBBITT, J., joins in dissent.

APPEALS by Wallace C. Murchison and Louis A. Burney, as guardians *ad litem,* and by William R. Kenan, Jr. and A. R. MacMannis, as trustees, from *Mintz, J.,* June 22, 1964 Civil Session of NEW HANOVER.

Wallace C. Murchison, Guardian Ad Litem for Sarah Graham Kenan, Incompetent.

Louis A. Burney, Guardian Ad Litem for named minors.

Hogue, Hill & Rowe for appellants MacMannis and Kenan, as Trustees.

John T. Manning, Marshall & Williams and Joyner & Howison for appellee.

RODMAN, J. Sarah Graham Kenan was adjudged incompetent by the Superior Court of New Hanover County in May 1962. Her nephew, Frank H. Kenan, was appointed as trustee of her estate and person. Shortly after his appointment, he filed, in the Superior Court of New Hanover County, three verified petitions. These petitions sought judicial sanction for: (1) A proposed gift from the income to accrue to Mrs. Kenan's estate during 1963; (2) a gift from the principal of her estate; and (3) a gift of Mrs. Kenan's right for her life to the income derived from a trust created by her and the surrender of her right to revoke that trust. The trustee, in seeking court authorization, relied on Chapters 111, 112 and 113, S.L. 1963, now codified as Articles 5A, 5B and 5C, chapter 35 of the General Statutes.

The trustee was, by judgments entered in June 1963, authorized to make the gifts, and to make the trust irrevocable. Present appellants appealed from the judgments then rendered. Each judgment was reversed. The opinion disposing of those appeals, reported 261 N.C. 1, 134 S.E. 2d 85, is referred to for a statement of the facts deemed decisive on those appeals. It was then said: "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." The opinion concluded with this language: "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."

Petitioner, when the causes were returned to the Superior Court, sought and was granted permission to amend each petition. Notices of the proposed amendments were given to all interested parties. The amendments proposed to each petition may be summarized as follows:

Petition, designated in the record as C. 111, seeking authority to make gifts from income: The gifts are to come from income accruing in 1964, instead of 1963 as originally contemplated. The aggregate of these gifts is reduced from $731,600, to $606,600. The reduction results from the elimination of the proposed gift of $125,000 to the North Carolina Episcopal Church School for Boys, Inc. Mrs. Kenan's income for 1964 is expected to exceed $4,025,000. This is more than was originally estimated or actually received in 1963. "Sarah Graham Kenan, if competent, would make the gifts herein sought to be made and approved, as provided for under Chapter 111 of the Session Laws of North Carolina, 1963, and as set out in Exhibit 1-A, attached hereto and made a part hereof; and she would make the gifts and take the action herein sought to be approved by the petitioner; and those things which the petitioner seeks authority to do, as herein set forth, are things which Sarah Graham Kenan would do, if of sound mind; and the authority which he seeks is something which she would do, if competent; and the authority herein sought is wise and consistent with the desires of Sarah Graham Kenan, if she were competent; and that if she were competent, and heeding sound advice, and possessed of the facts known to the Judge of this Court on the effective date of any Order signed by him upon this Petition, she would make, or probably would make, such gifts herein sought to be approved; and the said Sarah Graham Kenan, if competent, would, or probably would, do the things which her said trustee seeks authority to do, as herein set forth."

Petition seeking permission to make a gift from the principal of incompetent's estate, Proceeding 112. Originally, the trustee sought authorization to make a gift of $100,000 to the "State of North Carolina for the North Carolina Museum of Art Building Fund, and possibly to other donees qualified under Chapter 112 of the Public (Session) Laws of North Carolina, 1963." It is now proposed to give designated and preferred stocks to "Sarah Graham Kenan Foundation, Inc." "It is the intent of the Trustees of the Sarah Graham Kenan Foundation, Inc. that, if the gifts of principal herein proposed are approved, there will be made out of the first available income of the foundation a gift of One Hundred Thousand ($100,000.00) Dollars to the State of North Carolina for the North Carolina Museum of Art Building Fund."

It is also alleged, in substantially the language alleged in the petition for authority to make gifts from the income, that Mrs. Kenan, if competent, would act as the trustee seeks authority to act.

Petition seeking permission to make the inter vivos trust irrevocable and give the income for the life of Mrs. Kenan to designated charities, Proceeding 113: The provisions for payment from the income to the North Carolina Episcopal Church School for Boys, Inc. was deleted, otherwise the donees are the same. Allegations with respect to what Mrs. Kenan would do, if competent, are made in substantially the language quoted from the petition seeking authority to make gifts from the 1964 income. Additionally, petitioner alleges: "That the Petitioner respectfully petitions the Court by this duly verified Amended Petition to ratify and confirm the action taken by Petitioner on June 28, 1963, on which date Petitioner, by executing an Instrument of Amendment of Trust and Release of Further Right to Revoke or Amend, dated June 28, 1963, declared the aforesaid revocable *inter vivos Trust* dated December 26, 1956, to be irrevocable and made the incompetent's life interest therein the subject of public, religious, charitable, literary, scientific, historical, medical, and educational gifts as provided in Chapter 113 of the Public (Session) Laws of North Carolina, 1963, Petitioner having been authorized to execute said Instrument of Amendment of Trust and Release of Further Right to Revoke or Amend, by an Order of this Court made and entered in this Proceeding on June 28, 1963, a copy of said Instrument having been attached to said Order, and designated therein as Exhibit AT-113; and which Order and Exhibit AT-113 are filed in the office of the Clerk of Superior Court of New Hanover County, North Carolina, and said Order, and said Exhibit AT-113 (as executed as aforesaid) are hereby specifically referred to and by reference the said Instrument, as executed (Exhibit AT-113) is made a part hereof and incorporated herein; and the public record thereof on file in the office of the Clerk of Superior Court of New Hanover County is hereby specifically made; and said Petitioner respectfully petitions the Court to ratify and approve the execution and delivery by Petitioner of said Instrument dated June 28, 1963, and the making of the gifts set out in said Instrument and also set out in the said Order of this Court dated June 28, 1963, as aforesaid; and as set out in Exhibit T-A attached hereto and made a part hereof."

The several actions were consolidated for the purpose of taking testimony. A single issue was submitted to the jury. It found that it was improbable that Mrs. Kenan would recover competency during her lifetime.

The parties waived jury trial on all questions or issues raised by the pleadings, other than the single question submitted to the jury.

The court made findings of fact and conclusions of law in each case, and on these findings and conclusions rendered judgment in each proceeding.

Basic to all the proceedings, the court found these facts: Frank Kenan had duly qualified as trustee and had possession and control, either actual, or constructive, of all of Mrs. Kenan's estate. Mrs. Kenan had, before she became incompetent, executed wills disposing of her properties. The beneficiaries named in the wills, as well as those who would take if Mrs. Kenan should die intestate, had been given due notice of the proceeding and were properly before the court. Mrs. Kenan had, before becoming incompetent, created a revocable trust under the laws of this State with respect to 120,000 shares of Standard Oil Company of New Jersey. The trustees under that trust had been duly notified of the filing of the original and amended petition, and were, because of their general appearance, properly before the court. Mrs. Kenan, now 88 years of age, is a widow. She has no children or other descendants. There is no person who has a legal right to look to her for support. The beneficiaries of the trust, subject to Mrs. Kenan's right to receive the income for her life, are her nephews, James G. Kenan and Frank H. Kenan, if they survive her, and, if not, their children take. The proposed donees are charitable or educational institutions. The value of her estate, excluding her rights under the *inter vivos trust,* is $118,000,000. Her income for 1963, exclusive of income from the trust was $3,442,491.00, and is expected to exceed $3,670,000 for 1964. $45,000 per annum will provide adequately for her needs. Prior to his appointment as trustee, Frank H. Kenan was not familiar with the extent of his ward's estate. Promptly on his appointment, he made a careful study and came to these conclusions:

"(1) That it is wise and provident and proper that the gifts be made and the action be taken as prayed for in the original Petitions and the Amended Petitions; and

"(2) That it is consistent with his powers and duties existing under the North Carolina law, and as recognized and limited by Chapters 111, 112 and 113 of the Session Laws of 1963, that the gifts be made and the action taken as sought by him in the said original Petitions and Amended Petitions; and

"(3) That the natural objects of Sarah Graham Kenan's bounty would recommend that the action sought to be approved in the original Petitions and the Amended Petitions be taken; that it was his

duty, as her Trustee, to seek approval of such action, and that the taking of such action was in the best interest of his ward and her estate; and that if competent, Sarah Graham Kenan would take such action.

"Frank H. Kenan has testified and the Court believes his testimony and finds as facts:

"(a) that he has continued to hold to those conclusions as sound and valid at all times subsequent to the filing of the original Petitions and the Amended Petitions, including the time of the testimony given by him in this proceeding; and

"(b) that if Sarah Graham Kenan were competent now, he would go to her and explain the facts as disclosed by this record and by the testimony of the witnesses in this proceeding and would recommend to her that she make the gifts and take the action for which he seeks authority in said Amended Petitions; and

"(c) that he would request his brother, James G. Kenan; his cousins, William Rand Kenan, Jr. and Lawrence Lewis, Jr.; Dr. Ewald W. Busse, who is an expert in geriatrics and gerontology; Leon L. Rice, Jr., Richard E. Thigpen and John L. Gray, Jr., estate planning experts; and John W. Scott, an expert in the field of taxation, to give to a competent Sarah Graham Kenan in person or in writing the advice, opinions and recommendations which they have given to this Court as disclosed by the record of this proceeding."

The persons named in the preceding paragraph, other than William Rand Kenan, Jr., were witnesses. Each expressed the opinion that the proposed gifts would be advantageous to Mrs. Kenan's estate and to those who, by virtue of her wills and the trust agreement, would receive the bulk of her estate upon her death. Each went into detailed explanation of reasons for the opinion expressed. Each testified that if Mrs. Kenan were competent and sought his advice he would, for the reasons given, recommend that she pursue the course proposed by the trustee.

W. R. Kenan is a resident of New York; he is 92 years of age. He was not a witness but, as an individual, he filed answers to each proceeding. He said in his answer to the proceeding to make a gift from income: "I am familiar with her [Mrs. Kenan's] present physical and mental condition and the manner in which she is being supported and cared for and I am also familiar with the amount of her property and her income and income taxes; over the past many years my sister, Sarah Graham Kenan, always took my advice in connection with busi-

ness matters and under the circumstances existing I would advise her to make the gifts as requested in the Amended Petition and if she were competent I believe she would follow my advice and make such gifts." He makes similar statements in his answer to the amended petition in each of the other proceedings. Mrs. Kenan's nephews, Frank and James, and other relatives testified to the love and affection which Mrs. Kenan had for her brother William, and the reliance she placed on suggestions or recommendations he made with respect to the handling of her properties.

As a trustee of the trust created in 1956, Mr. Kenan, with his co-trustee, MacMannis, filed an answer in which they said: "That as Trustees under the revocable *inter vivos* trust dated December 26, 1956, they are stakeholders and hold the corpus of the trust estate under the terms and conditions of said Trust Agreement, which have been set forth in the previous trial of this cause. That as stakeholders they take no position with respect to whether or not the relief asked for in this Petition should be granted, this being for the determination of the court upon hearing all of the facts and making the necessary findings as set forth and required in Chapter 113 of the North Carolina Session Laws of 1963. That to grant the relief requested would result in rewriting the Trust Agreement which these Respondents are informed and believe the court has no authority to do under the law of North Carolina as decided by the Supreme Court of North Carolina in this cause as reported in 261 N.C. 1, 134 S.E. 2d 85."

The Court specifically found: "[O]n all of the evidence in this proceeding (of which proceeding all interested parties were given proper notice) and on the preponderance of the evidence, that Sarah Graham Kenan, if of sound mind, would make the gifts and property dispositions and take the action approved and authorized in this Order, and would make the gifts and take the action approved and authorized in the Orders entered in the other two proceedings referred to elsewhere herein.

"(b) In further support of the Finding of Fact immediately set forth above, the Court makes the following special and detailed Findings of Fact, that is, the Court finds as facts that if Sarah Graham Kenan were competent

"(1) Frank H. Kenan would go to a competent Sarah Graham Kenan and would make known to her the facts disclosed by the record in this proceeding.

"(2) Frank H. Kenan would recommend to a competent Sarah Graham Kenan that she make such gifts and take such action for the

benefit of herself and for the objects of her bounty and for the good which she would thereby accomplish.

"(3) Frank H. Kenan would request the persons named in subparagraph (c) of paragraph 30 next hereinabove to relate to a competent Sarah Graham Kenan, in person or in writing, the facts and opinions expressed by them to this Court, and to make to her the recommendations made by them in the course of this proceeding, and the Court finds as facts that upon such requests made by Frank Kenan to those persons, each of them would repeat to a competent Sarah Graham Kenan the facts and recommendations which they have expressed in this Court.

"(4) Sarah Graham Kenan would know and would consider (among other things) the facts:

"(i) that she is eighty-eight years of age, has had two paralytic attacks, that her life might end suddenly at any time, and

"(ii) that she could not possibly need or intelligently spend any substantial part of her great annual income or any part of her enormous principal and that the making of the gifts and taking the action recomemnded to her (which is the action sought to be authorized and approved under the Amended Petitions) would not endanger or jeopardize the provisions for her care and upkeep and would not endanger or jeopardize the carrying out of all bequests set forth in her Wills, and

"(iii) that taking the action recommended to her (which is the action authorized and approved in these proceedings) would increase the value of her residuary estate at her death and would materially benefit the objects of her bounty and would contribute to the benefit of many worthy causes and agencies beloved by her, or of the class or kind beloved by her, and that she had received expert, sincere and intelligent advice that the making of said gifts and taking such action would give to her a satisfaction and healthful feeling of self esteem, and

"(iv) that one of her only means of being useful in the world or of performing a creditable function as an individual at her age and in her condition was through the employment by her of her money in the making of gifts to help people and promote worthy causes; and that such worthy employment of some of the surplus portion of her otherwise sterile wealth would give her an interest and satisfaction in life, and would perpetuate the good name of the Kenan family, which has always been one of her principal interests, and

"(v) that her brother, William Rand Kenan, Jr., upon whom she had almost always relied for advice and whose advice she had almost uniformly followed, had recommended this action be taken, and

"(vi) that her only sister, Mrs. Jessie Kenan Wise, had followed sound estate planning advice and had taken similar action, and that her great nephew, Lawrence Lewis, Jr., had recommended to her that these gifts be made and that this action be taken, and

"(vii) that her nephew, James Graham Kenan, and her nephew, Frank H. Kenan, the natural objects of her bounty over a period of many, many years, and the testamentary residuary takers of her estate, and the primary beneficiaries under the 1956 trust, had recommended that these gifts be made, and that this action be taken, and

"(viii) that the other legatees named in her Wills would not be adversely affected by the recommended action.

"(5) Sarah Graham Kenan would believe what was said to her by the persons advising her and would accept their opinions and recommendations as sincere, wise and proper and would rely upon the soundness of the advice so given to her, and would make the gifts and take the action recommended to her (which is the action herein authorized and approved by this Court and in the other two proceedings).

"(6) Sarah Graham Kenan would heed such advice and make the gifts and take the action so recommended (such action being the same as that authorized and approved by this Court as herein provided and in the other two proceedings)."

Based on its findings, the court entered judgments granting the prayers of the petitions. MacMannis and Kenan, as trustees, appealed only from the judgment relating to the trust agreement. Murchison and Burney, as guardians, appealed from each judgment.

The conclusion reached on the prior appeal that the Superior Court, on proper findings, supported by competent evidence, could authorize Frank H. Kenan, as trustee, to do for his ward what she would do, if competent, is the law of this case. The conclusion then reached is, we think, logical and supported by well reasoned cases from the highest courts of the states of this Nation and England. No reasonable argument has been advanced which would warrant a different conclusion.

We do not understand appellants to challenge the conclusion reached on prior appeal that the court could authorize the trustee of Mrs. Kenan's estate to do for her what she would do herself, if competent. Their position is that no one can know what Mrs. Kenan would do in

any particular situation, if she were competent. They maintain that any answer given to that query must be speculative, and not sufficient to warrant a court decree. To so hold would distort and destroy the theory on which the prior opinion was based.

Of course, no court should authorize a guardian, or trustee, of an estate of an incompetent to act in a manner which will prove detrimental to the estate of his ward; but it does not follow that the proposed action must be one which benefits or enhances the estate of the ward. We deal now with a situation of that kind. It is not contended that the authorization which the trustee seeks can possibly benefit Mrs. Kenan. What the evidence suffices to show is that if the trustee is permitted to act as requested, those who will take the bulk of Mrs. Kenan's properties at her death will be advantaged financially. Charities and educational institutions will also receive funds enabling them to further the laudable purposes for which they were created. Execution of the desired authority would not, when considered in relation to the size of Mrs. Kenan's estate, be prejudicial to her.

The statement that the court could authorize a fiduciary to act as the incompetent *would* act, if competent, was an answer to the contention then made that the court *could* authorize the gifts even though the incompetent *would not,* if competent.

What it is necessary to establish is that the act proposed is "that which it is probable the Lunatic would himself have done," *Ex Parte Whitbread;* or "as it is probable he would have acted for himself, if he were of sound mind," *In Re Flagler.* These quotations are taken from the earlier opinion.

We are of the opinion, and hold, that the evidence, while it did not require, was adequate to support the court's factual conclusions. These conclusions were sufficient to support the legal conclusions and the judgments based thereon.

On December 26, 1956, Mrs. Kenan, by agreement in writing, transferred to William R. Kenan, Jr., James G. Kenan, Frank H. Kenan and A. R. MacMannis, as trustees, 120,000 shares of Standard Oil Company of New Jersey. The agreement provides: "The net income shall be paid to or applied for the benefit of the Donor [Mrs. Kenan] so long as she shall live."

Upon her death, the trust assets are to be divided into two parts, one to be held in trust for James G. Kenan and his children, the other for Frank H. Kenan and his children.

Section D of Article II provides: "No disposition, charge or encumbrance on the income of any trust by any beneficiary by way of anticipation shall be valid or in any way binding upon the Trustees,

and no beneficiary shall have the right to assign, transfer, encumber or otherwise dispose of such income, or any part thereof, until the same shall be paid or distributed to such beneficiary by the Trustees, and no income, or any part thereof, shall in any wise be liable to any claim of any creditor of any such beneficiary."

Article V reads: "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 Trustees at the time in office."

Do the quoted provisions prevent the court from authorizing the trustee to donate the life income reserved by Mrs. Kenan to charities and surrender her right to revoke the trust agreement? Appellants argue that to so authorize would be to rewrite the contract which Mrs. Kenan had made when competent. Appellants misapprehend what authority the trustee seeks to exercise. He merely seeks court authority to do those things which Mrs. Kenan, if competent, could, and probably would, do. If she, when competent, could donate to charities the income reserved for her life, then the court, acting for her and in her behalf, could do what she would do, and, of course, if the court, acting for her and in her behalf, could give the income because she would give it, it could authorize the surrender of the right to revoke because she would have authorized it. The court's decree in no way impairs any contractual right which Mrs. Kenan has. It merely acts for and in her behalf.

Chapters 111, 112 and 113, S.L. 1963, limit the power of a guardian or a trustee to make gifts of the character enumerated in those statutes. He may do so only with the approval of the Resident Judge of the Superior Court of the county in which the guardian or trustee was appointed. To secure approval, the guardian or trustee must file a verified petition setting out what authority he wishes and the reasons justifying his request. Section 2 of each act enumerates facts which must be shown to the "satisfaction" of the judge in order to obtain the requested authorization. Chapters 112 and 113 make a condition precedent to approval "at least ten (10) days written notice that approval for such gifts will be sought and that objection may be filed with the Clerk of the Superior Court, of the county in which the guardian or trustee was appointed," to those named as legatees or devisees, if incompetent has executed a will, or to those who would be heirs and distributees if the incompetent died intestate contemporaneously with the filing of the petition.

Appellants challenge the power of the court to authorize the trustee to act in the 112 and 113 proceedings, because some of those named as

beneficiaries in Mrs. Kenan's wills are not residents of the State of North Carolina. Notice of the filing of the petitions was given to these nonresidents by service as prescribed by G.S. 1-104. Appellants assert: These nonresidents are necessary parties; the court could not acquire jurisdiction over a nonresident by personal service of process outside of the state; hence service as provided by G.S. 1-104 would not give the court jurisdiction over these nonresidents. They further contend the court did not have jurisdiction over the *res*, the stocks and bonds placed in New York for safekeeping and, because the court did not have personal jurisdiction over the nonresidents, or jurisdiction over the *res*, it lacked authority to authorize the trustee to act.

The answer to the contention is apparent. Those named as beneficiaries in Mrs. Kenan's will have no interest in her properties so long as she lives. They take at her death only such properties as she then owns. They are not parties, and the statute does not purport to make them parties, to a proceeding initiated by the trustee. The statutes do recognize the contingent or potential interest of those who would probably benefit financially by the death of an incompetent; and, because of their interest, notice must be given to them. Those who must have notice are given an opportunity to present to the court facts which will assist the court in determining whether the action proposed by the trustee is detrimental to the estate of the incompetent, or whether the incompetent, if then competent, would probably not act as the trustee proposes to act. The proceeding is *in personam*. Mrs. Kenan and her guardian are the only necessary parties. Any judgment rendered by the court binding on Mrs. Kenan would be entitled to full faith and credit.

We would be remiss if we concluded this opinion without expressing our appreciation for the diligence of counsel and the able manner in which they have presented their contentions.

The judgment in each proceeding is

Affirmed.

MOORE, J., dissenting:

The conclusion reached by the majority opinion compels me to disagree. I take the liberty of reviewing the facts and procedures and discussing features of the case which to me are significant and controlling.

In 1955 Sarah Graham Kenan was 79 years old, a widow with no descendants or dependants. The value of her property was then approximately $52,000,000. That year she executed testamentary writings providing for the disposition of her property at her death. She

made bequests totaling approximately $800,000 to the following religious, charitable and educational institutions: Memorial Presbyterian Church of St. Augustine, Fla., St. James Episcopal Church of Wilmington, Thompson Orphanage of Charlotte, First Presbyterian Church of Wilmington, St. Mary's Junior College of Raleigh, University of North Carolina for the University Library and the Graham Kenan Fellowship in Philosophy, University of Georgia Library, and the Children's Home Society of Jacksonville, Fla. After providing relatively small legacies for certain of her relatives and for her employees and servants, she left the residue of her estate to her nephews by marriage, Frank H. Kenan and James G. Kenan. These wills, interrelated and for probate in North Carolina and New York, are extant and unchanged except for a relatively insignificant codicil.

In 1956 Mrs. Kenan created an *inter vivos* trust, naming William R. Kenan, Jr., A. R. MacMannis, Frank H. Kenan and James G. Kenan, trustees, and placing therein 120,000 shares of capital stock of the Standard Oil Company of New Jersey. She reserved to herself the income for life, retained the power to revoke the trust at will, and provided that if it were not revoked the trust property should belong to Frank H. Kenan and James G. Kenan at her death. The trust remains unmodified and unrevoked.

In May 1962 Mrs. Kenan was declared by a jury to be incompetent to manage her affairs and Frank H. Kenan was duly appointed trustee. He "knew nothing of the nature of her estate or its holdings until after . . . appointment as Trustee." He made a study of the estate, conferred with experts, and developed a plan under which it is now proposed to do the following things:

(1) Out of the estate's 1964 income, which is estimated to be $4,000,000 before taxes, to donate $606,600 to the following religious, charitable, cultural, medical and educational institutions: The Law Foundation of the Law Alumni Association of the University of North Carolina, the Graham Kenan Fund, the Medical Foundation of North Carolina, Wilmington College, the Catherine Kennedy Home of Wilmington, Wilmington Y. M. C. A. Building Fund, St. Stephen's Episcopal Church of Durham, Episcopal Diocese of Eastern Carolina, Boys Home of Lake Waccamaw, Episcopal High School of Alexandria, Va., Lees-MacRae College, Henry Morrison Flagler Museum of Palm Beach, Fla., United Fund of New Hanover County, N. C., Home Economics Foundation of the University of North Carolina at Greensboro, Episcopal Diocese of North Carolina for Vade Mecum, Home for the Aging of the Episcopal Diocese of North Carolina, Episcopal Diocese

of Western North Carolina for the Patterson School, Colonial Dames of America of Wilmington, Watts Hospital of Durham, Woodberry Forest School of Woodberry Forest, Va.

From 1955 to 1962 Mrs. Kenan had made charitable gifts each year in the amount of $8,160. The principal donees were St. James Episcopal Church of Wilmington, the Board of Education of Duplin County, the Memorial Presbyterian Church of St. Augustine, Fla., and the United Fund of New Hanover County. With court approval these annual gifts have been continued each year since 1962.

(2) It is proposed to give most of Mrs. Kenan's stocks in four corporations, generally referred to as the Flagler System Companies, to the Sarah Graham Kenan Foundation (formed or to be formed) for charitable, religious, scientific, medical, educational, cultural and governmental purposes. All of the stock in those corporations is owned equally by Mrs. Kenan, her sister Jessie Kenan Wise, and her brother William R. Kenan, Jr. There is a quantity of preferred stock. Of the common stock 10% is voting and 90% is non-voting stock. To facilitate the gift of stock to the Foundation it is proposed to merge the four corporations and to issue stock in the merger in the same classes and proportions as before. The preferred stock and the non-voting common stock is to be given to the Foundation, the voting common stock is to be retained. The value of the gift is $13,000,000. The stock to be donated earns about $83,500 annually. The first $100,000 of income is to be given by the Foundation to the North Carolina Museum of Art Building Fund. Thereafter the donees will be chosen by the Foundation.

Mrs. Kenan's assets, other than the Flagler System stocks, are liquid and consist of listed stocks readily saleable at determined market value. The Flagler System stocks are not liquid; Mrs. Kenan owns only one-third and cannot sell a controlling interest in the businesses; if it becomes necessary or advisable to sell these stocks for the payment of estate taxes or for other purposes, they would have to be sold at a sacrifice. The purpose of this gift of stocks is to remove from the estate non-liquid assets which would require heavy estate taxes, and at the same time to retain the voting common stock and thereby prevent control of the Flagler businesses from passing outside the family. As explained by several witnesses, the control of the Flagler businesses has been a way of life for the Kenan family. However, if the bulk of the stock is given to the Foundation, it will not be necessary to dispose of the more liquid and more producive assets of the estate to pay estate taxes on the Flagler stocks.

(3) It is proposed to make the 1956 *inter vivos* trust irrevocable, and during the life of Mrs. Kenan donate the trust income in fixed amounts or percentages to the following institutions: National Cultural Center, Memorial Presbyterian Church of St. Augustine, St. James Episcopal Church of Wilmington, St. Mary's Junior College, Graham Kenan Fellowship in Philosophy, University of North Carolina Library, Children's Home Society of Florida, Board of Education of Duplin County, and Sarah Graham Kenan Foundation. The value of the corpus of the trust is $10,000,000. The annual income is $365,000. The interests of Frank H. Kenan and James G. Kenan will become fixed and for tax purposes will be classed as gifts. Gift taxes are at a lower rate than estate taxes.

It is estimated that this three-fold plan will result in an increase, after payment of estate taxes, in excess of $4,000,000 in the amount the residuary legatees, Frank H. Kenan and James G. Kenan, will receive upon the death of Mrs. Kenan, if she lives three years or more after inception of the plan. If she dies earlier and the gift of the trust corpus to the beneficiaries is held to be in contemplation of death, there will still be an increment to the residuary legatees by reason of the plan of $1,600,000. The plan will, of course, greatly benefit the charitable and educational donees. Mrs. Kenan's gross and net annual incomes will be reduced. The gross income will be $449,000 less, the net income $96,000 less. However, her income will still be far in excess of her needs. She has had personal expenses of $33,000 per year for several years. It is estimated that she will not need in any year more than $45,000. She will still have a substantial surplus of income.

The General Assembly undertook to give an "assist" to the plan by the passage of certain enabling acts. S.L. 1963, chs. 111, 112 and 113 (codified as G.S. 35-29.1 to G.S. 35-29.16). Proceedings were instituted in 1963 by Frank H. Kenan, trustee, pursuant to these acts, to obtain approval of the plan. In that proceeding the plan was in some respects different from that outlined above. The superior court approved the plan presented. We heard an appeal at the Fall Term 1963, and reversed the superior court judgment. *In re Trusteeship of Kenan,* 261 N.C. 1, 134 S.E. 2d 85.

I agree that the principles stated in the majority opinion on the former appeal are correct. My chief concern has been and still is the constitutional questions involved, relating to the incidents of private ownership of property. These are discussed in the former opinion, and I agree that the principles are correctly stated. I refrain from a further general discussion here. The former opinion concluded that "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.*" (Emphasis added). This is the law in North Carolina and any features of S.L. 1963, Chs. 111, 112 and 113, which are in conflict therewith are violative of due process and void.

The plan is well conceived, will serve the intended purposes, and while it will not benefit the incompetent, it will not be detrimental to her personally nor deny her adequate funds for her maintenance. The gifts to the many excellent charitable, medical, and educational institutions appeal to the sympathies of all. If the question were whether the plan is good, there would be no problem in reaching a decision. But the question is: Does it appear from a preponderance of the evidence that this is what Mrs. Kenan would do if she were competent?

The court below found as a fact and concluded as a matter of law "that Sarah Graham Kenan, if of sound mind, would make the gifts and property dispositions and take the action" now proposed by petitioner. Appellants except to this finding and conclusion on the ground that it is not supported by or in accord with the evidence, and is contrary to law. In my opinion the exception is well taken.

In determining what Mrs. Kenan would do if competent, we must look to the evidence and determine what she did do with respect to such matters when she was competent and what change of circumstances since she has become incompetent might have influenced her wishes with respect to the plan.

Mrs. Kenan usually donated each year $8,000 to religious and charitable causes. The largest extra donation she ever made was $24,000 or $25,000 to the St. James Church Building Improvement program. On other occasions she gave $20,000 to Thompson Orphanage and $5,000 to St. John's Episcopal Church. A person of her wealth undoubtedly was often solicited for charitable donations. While she gave sympathetic consideration to such solicitations, she was not an easy mark and was not inclined to make lavish gifts. It was suggested to her that her donation to the St. James Church building and improvement fund should be $50,000. She considered the matter and sent a check for $24,000 or $25,000. She later explained: "I thought that ($50,000) was too much for one person to give to the fund they were trying to raise, so I didn't give them that much." There is no evidence that she wished to donate or ever considered donating any sums to any of the following institutions to which petitioner would now have her contribute in large sums: The Law Foundation of the Law Alumni Association of the University of North Carolina, Medical Foundation of North Carolina, Wil-

mington College, St. Stephen's Episcopal Church of Durham, Boys Home of Lake Waccamaw, Watts Hospital of Durham, Woodberry Forest School, Lees-McRae College, Colonial Dames of America, National Cultural Center, and others. The evidence is that she did not wish to contribute to these — see her will which we will discuss later. It is proposed to give large sums to certain Episcopal schools and causes. In 1955, the year she made her will, Bishop Wright and another suggested to Mrs. Kenan that she donate $1,000,000 to the Episcopal Diocese of Eastern Carolina. She agreed to consider it. The request was repeated and William R. Kenan, Jr. was contacted. No gift was made, and nothing was included in her will for this purpose. During the depression the President of the University of North Carolina visited her and solicited a large sum to be used for a student loan fund. She made a nominal contribution, but established no loan fund. It is in evidence that she was charitably disposed but was "not one to initiate contributions." It is perfectly clear that when contributions were suggested or solicited, she reacted kindly but conservatively.

It is perfectly clear that she had in mind the causes to which she wished to contribute and the amounts to be contributed. She executed her will in 1955. It was prepared by Mr. Gray, a New York attorney who was an expert in estate planning. He had represented her and other members of the Kenan family for many years. She set out the charitable gifts she wished to make from her estate, the legatees are named above. Several were given as much as $100,000 each. The conclusion is inescapable that she considered this settled the matter of gifts as far as she was concerned. In this connection, we find a note of finality in the following provision in the will: ". . . it is my will that if any person named in this instrument as a beneficiary or legatee or devisee, or anyone interested therein shall at any time or in any manner institute or cause to be instituted, or shall aid, abet, connive or directly or indirectly promote the institution of any contest or proceeding or litigation, contesting or intending to contest, defeat or obstruct this instrument or any provision thereof, or the enforcement of such provision, then any and every such offending person or persons . . . shall, whether such contest, proceeding or litigation be successful or not, thereby forfeit all interest under this instrument." Mr. Gray, though an expert in the field of estate planning and Mrs. Kenan's long-time attorney, stated that he was not consulted by Mrs. Kenan with reference to an estate plan and he "did not offer or purport to offer her estate planning advice." The impression is left that Mrs. Kenan knew what she wanted and did not appreciate gratuitous suggestions and advice.

In 1954 James G. Kenan suggested to Mrs. Kenan the idea of creating a trust in certain of her stocks for his and Frank H. Kenan's benefit. Mrs. Wise had created an *inter vivos* trust. Mrs. Kenan said she would consider it. From time to time he pressed the matter. On one occasion he discussed it with William R. Kenan, Jr. Time passed. He decided not to press the matter further. Finally in 1956 Mrs. Kenan created the trust described above. James G. Kenan was not pleased with the terms, and, though he was closer to her than any other member of the family, he thought it better to leave the matter as it was. It can hardly be said that Mrs. Kenan, after deliberating two years, did not wish and intend to retain the income and the right to revoke.

As stated in the former opinion, Mrs. Kenan was fully aware of the impact of taxes, and that gifts to charity from income would mean an outlay on her part of only about 12% of the gifts. Mr. MacMannis, financial expert and long-time friend and business associate, prepared her tax returns and handled tax matters for her. He did not advise her to make gifts. She was unimpressed by manipulations for tax purposes. With respect to any change of circumstances, Mr. Gray stated: ". . . you could truthfully say that the same reasons existed five years ago for this reorganization as exists today . . . there was no change in the tax law that would make the reorganizations more compelling or more desirable at the present time than some years ago." The only perceptible change in circumstances is the increase in the value of her holdings. Her estate is now valued at $128,000,000. But the petitioner instituted this proceeding within a year after she was declared incompetent. There was very little time for circumstances to change. The naked truth is that her legatees expectant do not like the manner in which she organized and proposed to handle and dispose of her property. The changes in the Flagler Companies are merely a part of the plan, not something which has arisen because of emergency. It is true that the present voting trust will terminate soon, but there is no reason in law or otherwise why the trustee may not vote her stock, and in fact it is his duty to do so.

It is unthinkable that under the facts and circumstances disclosed by the record a person, who had never given for charity from income in any one year in excess of $50,000, would wish to give in one year for such purposes $1,000,000 from income and $13,000,000 from principal. Nor is there any evidence to support the proposition that she would desire to make a gift of $10,000,000 to relatives when she had already provided for them by will.

We now consider the evidence upon which petitioner relies for approval of the plan. First, there is the testimony of a psychiatrist who

never knew and never saw or examined Mrs. Kenan. This was purely a boot-strap operation. Frank H. Kenan testified that if Mrs. Kenan was competent he would go to her and explain all of the facts, would recommend that she take all of the actions proposed, would ask her brother William R. Kenan, Jr., and other relatives and all of the expert witnesses to give her the same advice, and that they would do so. He testified further: "Mrs. Kenan left all of her business matters, other than the running of her household, to her brother William Kenan." When her house was burned many years ago just before she was to depart for a European tour, she left to him the matter of reconstructing the house, and he attended to it. There was testimony that Mrs. Kenan and Mrs. Wise "relied 100% on William R. Kenan's judgment." Mr. William R. Kenan, Jr., filed an answer in the proceedings. The answer was prepared and taken to him for signature. It states that Mrs. Kenan always took his advice, and if she was competent he would advise her to take the proposed actions. The answer states: "I believe she would follow my advice and make such gifts." Mr. William R. Kenan, Jr., did not testify.

The good faith of these statements and allegations is not questioned. One wonders, however, whether William R. Kenan, Jr., advised her with respect to the will and the trust. She has had no more important business. If he did so advise her, things came out much differently than the actions now proposed. The best that can be said for the testimony upon which petitioner relies is that it consists of conclusions supported by very little or no factual evidence. It comes to this: If Mrs. Kenan were now competent everyone to whom she might listen would go to her and try to prevail upon her to take the actions proposed, and they believe she would yield and take such actions. I am unwilling to place the property rights of incompetents on such tenuous basis. Furthermore, it does not meet the test of proof by preponderance of the evidence of what the incompetent would do if competent. There is no case in the books which countenances such a wide departure. The majority opinion ignores the court's duty with regard to the property of incompetents. However good and appealing the plan may be in this case, the decision of today will be the law tomorrow. It is an invitation to replan and give away portions of every incompetent's estate in this jurisdiction in accordance with the wishes of expectant heirs, devisees, legatees, settlees, and organized charities. For equity to decree such gifts from an incompetent's estate, there should be a showing that the gifts are consistent with donor's wishes as evidenced by donor's words and conduct when competent. It is not what others desire and would urge; it is what donor would normally do if competent.

With respect to the trust, the majority opinion overrules what has heretofore been established law in this jurisdiction. The trust instrument is a contract and we are varying its terms without legal justification. In *Cocke v. Duke University,* 260 N.C. 1, 131 S.E. 2d 909, *Rodman, J.,* speaking for the Court said:

> "'. . . the power of the court should not be used to direct the trustee to depart from the express terms of the trust, except in cases of emergency or to preserve the trust estate.' *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253. 'It must be made to appear that some exigency, contingency or emergency has arisen which makes the action of the court indispensible to the preservation of the trust and protection of the infants.' *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203. 'To invoke the jurisdiction of a court of equity the condition or emergency asserted must be one not contemplated by the testator, and which, had it been anticipated, would undoubtedly have been provided for; and in affording relief against such exigency or emergency, the court must, as far as possible, place itself in the position of the testator and do with the trust estate what the testator would have done had he anticipated the emergency.' *Cutter v. Trust Co.,* 213 N.C. 686, 197 S.E. 542. '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.' *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713."

See also *Reynolds v. Reynolds,* 208 N.C. 578, 623, 182 S.E. 341. There is no emergency in the instant case which threatens the trust, nor does anyone contend that there is.

The appellants raise the question of denial of trial by jury. It does not arise here for jury trial was waived except on the issue of the permanent incompetency of Mrs. Kenan.

With reference to the jurisdiction of the court with respect to some of the parties not properly served with summons, suffice it to say that if there are parties who are not properly before the court by reason of failure of service, and if such parties have a vested or contingent interest which has been impaired, they may hereafter assert their rights and have their day in court.

I vote to reverse.

BOBBITT, J., joins in dissenting opinion.

IN THE MATTER OF THE ESTATE OF WILSON MERIWETHER MILES, DECEASED.

(Filed 4 November, 1964.)

1. Death § 3—

The right of action for wrongful death is exclusively statutory in this State. G.S. 28-173, G.S. 28-174.

2. Same; Abatement and Revival § 10—

An action for wrongful death survives the death of the tort-feasor and may be maintained against the executor or administrator of the tort-feasor. G.S. 28-173.

3. Death § 4—

An action for wrongful death must be brought within two years. G.S. 1-53(4).

4. Executors and Administrators § 33—

An order approving the final account of an administratrix and discharging her may be set aside by motion in the cause without a showing of fraud or mistake or the necessity of surcharging the final account, it being sufficient if movant show a valid claim against the estate not barred by any statute of limitations, and assets of the estate available for the payment of such claim.

5. Same—

An administrator who institutes action for the wrongful death of his intestate within the statutory time, G.S. 1-53(4), against the estate of the deceased tort-feasor is entitled to have the order of the clerk discharging the administratrix of the deceased tort-feasor set aside by motion in the cause upon showing a policy of liability insurance in the hands of the administratrix of the deceased tort-feasor available for the payment of the claim.

6. Actions § 10—

An action is begun from the time of issuance of summons and not its service.

7. Courts § 6—

Even if it be conceded that the judge of the Superior Court is bound by the findings of the clerk on appeal from the clerk's refusal to set aside his order approving the final account and discharging an administratrix, the court may review the clerk's conclusions of law and may properly set aside conclusions not supported by the facts, and the court's findings of certain additional facts which are irrelevant to the rights of the parties and therefore not prejudicial, will not be disturbed.

8. Equity § 2—

Findings which disclose that an action was brought within the statutory limitation and that delay in bringing the action did not prejudice or dis-

advantage the defendant, do not support the conclusion that plaintiff was guilty of laches.

9. Executors and Administrators § 18—

Even if it be conceded that G.S. 28-113 is applicable to a claim for unliquidated damages, the statute would bar a claim only as to assets paid out by the personal representative and would not bar a claim for damages for wrongful death, instituted within the statutory limitation, as against undistributed assets of the estate.

10. Executors and Administrators § 33—

Where the Superior Court sets aside the order of the clerk discharging an administratrix and approving her final account so as to permit the assertion of a claim for wrongful death against the undistributed assets of the estate, the court should not direct that the clerk appoint a public administrator or some other suitable person, since such appointment would be necessary only in the event the administratrix resigned.

APPEAL by Eugenia Payne Miles, discharged administratrix c. t. a. of the estate of Wilson Meriwether Miles, deceased, from *Riddle, S. J.*, 1 June 1964, Schedule "D" nonjury Session of MECKLENBURG.

Petitioner Robert L. Grubb, administrator of the estate of Ronald Allen Sybrant, deceased, who has a claim against the estate of Wilson Meriwether Miles, deceased, for an alleged death by wrongful act sustained in an automobile accident (G.S. 28-173 and 28-174), filed a petition on 6 March 1964 before the clerk of the superior court of Mecklenburg County to reopen the account of Eugenia Payne Miles, the discharged administratrix c. t. a., and the estate of Wilson Meriwether Miles, deceased.

On 10 March 1964 Eugenia Payne Miles, who called herself formerly administratrix c. t. a. of the estate of Wilson Meriwether Miles, deceased, filed an answer to the petition of Grubb, administrator of the estate of Sybrant, deceased, in the office of the clerk of the superior court of Mecklenburg County.

On 10 January 1962 Ronald Allen Sybrant, a nonresident of the State of North Carolina, was riding as a guest in an automobile driven by Wilson Meriwether Miles, a resident of Mecklenburg County, North Carolina. On that date the automobile in which they were riding was involved in an accident, apparently in Davidson County, North Carolina, and both died the same day from injuries sustained in the accident.

On 27 March 1964 the petition and answer thereto were heard by the clerk of the superior court of Mecklenburg County upon the argument

of counsel, and he made what he terms findings of fact, though some are conclusions of law. These we summarize:

On 2 February 1962 (the record shows letters of administration were issued on 5 February 1962), Eugenia Payne Miles was appointed administratrix c. t. a. of the estate of Wilson Meriwether Miles, deceased, by the clerk of the superior court of Mecklenburg County. On 11 February 1963, she, as administratrix, filed her final account in said estate and was that date discharged as administratrix by an order entered by an assistant clerk of the superior court of Mecklenburg County.

The record does not reveal that the petitioner Grubb, administrator of the estate of Sybrant, deceased, filed any claim with the administratrix of the estate of Wilson Meriwether Miles, deceased, prior to the time she was discharged.

At the present time there are no assets remaining in the estate of Wilson Meriwether Miles, except the possible liability coverage of an automobile liability policy which insured Wilson Meriwether Miles, deceased.

Sybrant died 10 January 1962, and petitioner Grubb was appointed administrator of his estate on or about 8 January 1964 by the clerk of the superior court of Davidson County, North Carolina.

Petitioner Grubb instituted an action for wrongful death in the superior court of Davidson County on 9 January 1964 against Eugenia Payne Miles, administratrix c. t. a. of the estate of Wilson Meriwether Miles, deceased.

The court does not find any evidence of fraud, mismanagement, misrepresentation, or mistake on the part of the administratrix of the estate of Wilson Meriwether Miles, deceased, nor any inequities that would warrant the opening of the administration of his estate.

Petitioner Grubb is guilty of laches in presenting his claim with the administratrix of the estate of Wilson Meriwether Miles, deceased.

The court concluded, in its discretion, that as a matter of law, the petitioner is not entitled to reopen the administration of the estate of Wilson Meriwether Miles, deceased.

Whereupon, the clerk entered an order decreeing that petitioner's prayer set forth in his complaint is denied.

Petitioner made a broadside exception to the clerk's findings of fact and conclusions of law, and further excepted to the entry of the order and appealed to the judge of the superior court. The appeal was heard by Judge Riddle on 11 June 1964. Based upon the petition of Robert L. Grubb, administrator of the estate of Sybrant, deceased, and evidence offered, the judge made the following findings of fact, which we summarize: On 10 January 1962 Ronald Allen Sybrant, a nonresident

of this State, died intestate in Davidson County, North Carolina, as the result of injuries sustained while riding as a guest passenger in an automobile operated by Wilson Meriwether Miles. On 8 January 1964 Robert L. Grubb was appointed administrator of the estate of Sybrant, deceased, by the clerk of the superior court of Davidson County, North Carolina, and is presently acting and serving in such representative capacity.

Wilson Meriwether Miles died on 10 January 1962. On 2 February 1962 Eugenia Payne Miles was appointed administratrix c. t. a. of his estate by the clerk of the superior court of Mecklenburg County, North Carolina. On 11 February 1963 an order was entered by the assistant clerk of the superior court of Mecklenburg County, North Carolina, approving the final account of Eugenia Payne Miles, administratrix c. t. a. of the estate of Wilson Meriwether Miles, directing her discharge as administratrix c. t. a. of his estate.

Robert L. Grubb, administrator of the estate of Sybrant, deceased, has a meritorious claim against the estate of Wilson Meriwether Miles, deceased, to wit, a cause of action for the wrongful death of his intestate which is presently pending in the superior court of Davidson County, North Carolina, a complaint having been filed and summons issued from said court on 9 January 1964, which was within the statutory period allowed by law, and said action is still pending.

A policy of liability insurance issued by the Lumberman's Mutual Casualty Company, Policy No. 24-A-16039-X, is an asset of the estate of Wilson Meriwether Miles, which may be available for the payment of the claim for wrongful death of the said Sybrant. That representatives of the said Casualty Company negotiated with attorneys representing the beneficiaries of the estate of the said Sybrant during the period from April 1962 to December 1962. That no notice as provided by G.S. 28-49 has ever been served on Robert L. Grubb, administrator of the estate of said Sybrant, or anyone representing said estate.

Based upon his findings of fact, the judge entered an order decreeing that the order of the clerk of the superior court of Mecklenburg County dated 27 March 1964 denying the reopening of the estate of Wilson Meriwether Miles, deceased, and the appointment of a personal representative thereof, be and the same is hereby vacated, and ordering this matter remanded to the clerk of the superior court of Mecklenburg County, North Carolina, for an appropriate order and appointment of the public administrator of Mecklenburg County, North Carolina, or some other suitable person as personal representative of the estate of Wilson Meriwether Miles, deceased, for the reason that the

administratrix of the Miles estate had been discharged prior to the appointment of an administrator of the Sybrant estate.

From this order, Eugenia Payne Miles, discharged administratrix of Wilson Meriwether Miles, deceased, appeals.

Dockery, Ruff, Perry, Bond & Cobb by Lyn Bond, Jr., for respondent appellant.

A. L. Meyland and Henry H. Isaacson for petitioner appellee.

PARKER, J. In North Carolina a right of action to recover damages for wrongful death is given by G.S. 28-173 and 28-174, and in this jurisdiction the action for wrongful death exists only by virtue of these statutes. *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807. By the specific language of G.S. 28-173, when the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, and the person that would have been so liable dies, or is killed at the same time as here, then the action for damages for wrongful death survives the death of the tort-feasor against his executor or administrator. See *McIntyre v. Josey,* 239 N.C. 109, 79 S.E. 2d 202. Such an action must be brought within two years. G.S. 1-53, subsection 4.

In *Neill v. Wilson,* 146 N.C. 242, 59 S.E. 674, the Court, after quoting our wrongful death statute, now G.S. 28-173, said: "* * * we are of opinion that the statute quoted gives clear indication of the purpose of the Legislature to impress upon the right of action the character of property as a part of the intestate's estate * * *."

Grubb, administrator of the estate of Sybrant, deceased, has an unliquidated claim against the estate of Wilson Meriwether Miles, deceased, and on 9 January 1964 commenced an action to recover damages for the alleged wrongful death of his intestate against Eugenia Payne Miles, administratrix c. t. a. of the estate of Wilson Meriwether Miles. The case of *Mitchell v. Downs,* 252 N.C. 430, 113 S.E. 2d 892, is helpful in the present situation. This was a civil action to recover of defendant's decedent damages as a result of fraud and misrepresentation of defendant's decedent Harry E. Poulos. After one Mitchell, who had qualified as executor of the estate of Poulos, resigned, Kenneth R. Downs was appointed administrator c. t. a., d. b. n., of the estate of Poulos, and entered upon his duties. Afterwards, on 7 November 1958 he filed in the clerk's office a final account, which was audited and approved, and an order discharging him as such administrator c. t. a., d. b. n., was signed by the clerk of the court and filed in his office. On 5 June 1959 the present action was filed naming Downs, administrator

c. t. a., d. b. n., of the estate of Poulos, as defendant, and summons was issued and served. It appeared that funds were in the hands of the clerk which would indicate that Poulos' estate had not been settled. The Court held that under the circumstances the order of the clerk is subject to be set aside on motion in the cause, and "then the way would be open to plaintiffs to assert claim against the administrator of the estate." See also *King v. Richardson,* 136 F. 2d 849.

The Court, speaking by *Ervin, J.,* said in *Doub v. Harper,* 234 N.C. 14, 65 S.E. 2d 309: "Moreover, neither the final account of an executor nor an order of the probate court approving it is operative as to matters not included or necessarily involved in the account. [Citing authority.] Furthermore, an order of discharge made by the probate court on a final accounting by an executor cannot do more in any event than discharge the executor from liability for the past. It does not destroy the executorship * * *." In accord, 21 Am. Jur., Executors and Administrators, § 170.

Petitioner had a right to present his claim for the alleged wrongful death of his intestate in a court of law against a representative of the Miles estate according to the provisions of G.S. 28-173 and G.S. 1-53, subsection 4. In seeking to have the clerk set aside his order discharging the administratrix c. t. a. of the estate of Miles and approving his account, in order that the way would be open for him to assert his action for wrongful death against the administratrix c. t. a. of the estate of Miles, it was not necessary for petitioner to surcharge the final account of the administratrix c. t. a. of the estate of Miles, or to show evidence of fraud, mismanagement or mistake on the part of such administratrix (in his petition he alleges no such grounds for relief), because petitioner's claim was not included or necessarily involved in her final accounting, and further, because until petitioner's unliquidated claim had been disposed of, it cannot be held that the Miles estate has been completely settled. *Doub v. Harper, supra; Powell v. Buchanan, Admrx.,* 245 Miss. 4, 147 So. 2d 110; *In re Palmer's Estate,* 41 Ill. App. 2d 234, 190 N.E. 2d 500. We do not believe the right of petitioner can be defeated merely because the administratrix c. t. a. of the estate of Miles has filed her so-called final account and been discharged, when the clerk found as a fact, and also Judge Riddle, that petitioner Grubb, administrator of the estate of Sybrant, commenced the action to recover damages for wrongful death within the statutory period. G.S. 1-53, subsection 4; *Powell v. Buchanan, Admrx., supra; In re Palmer's Estate, supra.*

Petitioner's exception to the order rendered by the clerk presented to Judge Riddle the question as to whether the facts found by the clerk

support his conclusions and order, and whether there is error of law on the face of the record proper. *Webb v. Gaskins,* 255 N.C. 281, 121 S.E. 2d 564, and cases there cited.

The clerk's conclusion that he found no evidence of fraud, mismanagement or mistake on the part of the administratrix c. t. a. of the Miles estate, nor any inequities that would warrant the opening of the Miles estate, is irrelevant and immaterial, because on the facts found by the clerk petitioner was not required to show such facts to reopen the administration of the Miles estate.

The clerk found that Sybrant died on 10 January 1962; that petitioner was appointed administrator of his estate on 8 January 1964, and "instituted an action for wrongful death in the superior court of Davidson county on January 9, 1964 against Eugenia Payne Miles, administratrix c. t. a. of the estate of Wilson Meriwether Miles, deceased." Appellant did not except to this finding. Judge Riddle made a similar finding, and further found that a complaint was filed with the superior court of Davidson County and a summons in said action issued from that court on 9 January 1964. The Court said in *Atkinson v. Greene,* 197 N.C. 118, 147 S.E. 811: "A civil action is commenced when the summons is issued and, as the statute fixes the inception of the action, suit is pending from that time and not exclusively from the time when the summons is served." The clerk's conclusion in his order that petitioner is guilty of laches in presenting his claim is not supported by the facts found by him, because mere delay of petitioner in commencing his action for damages for wrongful death, which does not amount to a bar of the statute of limitations, does not of itself constitute laches, where the delay has not worked an injury or prejudice or disadvantage to the administratrix c. t. a. of the Miles estate, and the clerk has found no facts that petitioner's delay would work prejudice or injury to the estate of Miles, deceased. *East Side Builders v. Brown,* 234 N.C. 517, 67 S.E. 2d 489; *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83; *Hutchinson v. Kenney,* 27 F. 2d 254.

The facts found by the clerk do not support his order denying petitioner's motion to set aside his order discharging the administratrix c. t. a. of the Miles estate, and failing to reopen the administration of the Miles estate to the end that petitioner may assert in a court of law his claim against the administratrix c. t. a. of the Miles estate.

Appellant strenuously contends in her brief that Judge Riddle erred in not finding facts found by the clerk and in finding new facts: that Judge Riddle on appeal from the clerk's order could only review the clerk's order to determine if the clerk's findings of fact support his order. It is not necessary in passing on this appeal to decide this ques-

tion, for the simple reason that Judge Riddle found the same crucial facts that the clerk did, and in doing so and in finding additional facts Judge Riddle did not prejudice appellant. Judge Riddle correctly did not make any conclusion of law about fraud, etc., of the administratrix c. t. a. of the Miles estate as the clerk did, because under the circumstances here it was irrelevant, and did not incorporate in his order the clerk's erroneous conclusion of law on the facts found by him that petitioner was guilty of laches in presenting his claim; both of which conclusions of law the clerk's order terms findings of fact. The clerk found there was an automobile policy insuring Wilson Meriwether Miles, deceased. Surely, Judge Riddle's finding as a fact the name of the company issuing the policy and the policy number, and that this is an asset of the Miles estate which may be available for the payment of the claim for wrongful death of petitioner's intestate, did not prejudice appellant. Judge Riddle's finding of unsuccessful negotiations by the insurance company to settle the death claim of the Sybrant estate is only competent on the question of laches, and does not prejudice any rights of the appellant, because on the facts found by the clerk petitioner was not guilty of laches. Judge Riddle found that no notice has ever been served on a representative of the Sybrant estate as provided for by G.S. 28-49. Appellant in her answer to the petition does not allege she caused notice to be served on a representative of the Sybrant estate, and there is nothing in the record to indicate that any notice was served. Consequently, this finding by Judge Riddle is immaterial and irrelevant, and does not seem prejudicial to appellant. The clerk found that petitioner instituted an action for wrongful death on 9 January 1964. It would seem that Judge Riddle's finding to the same effect and his further finding that summons was issued on that date did not prejudice appellant.

Although appellant contends Judge Riddle could find no facts, she contends he erred in not finding as a fact that petitioner never filed any claim against the Miles estate prior to her discharge. By the provisions of G.S. 28-113, if a claim is not presented in six months, the representative is discharged as to assets paid. Even if this statute applies to a claim for unliquidated damages, which we do not concede, it would only bar petitioner's claim for damages for wrongful death as to assets paid out by appellant, and he could still assert his demand against undistributed assets of the estate and without cost against the administratrix c. t. a. of the Miles estate. *In re Estate of Bost*, 211 N.C. 440, 190 S.E. 756. In our opinion, failure of petitioner to file a claim for unliquidated damages with appellant does not bar his action, where he is seeking to recover damages for an alleged

wrongful death of his intestate, and to collect it out of the automobile liability insurance policy issued to Miles, deceased. The failure of Judge Riddle to find the facts requested by appellant was not prejudicial to appellant.

On the crucial facts found by the clerk, and on the same crucial facts found again by Judge Riddle in his order, he correctly decided in effect that the clerk's findings of fact do not support his order that as a matter of law petitioner is not entitled to reopen the administration of the Miles estate, and he correctly vacated the clerk's order. Upon the crucial facts found by the clerk, and upon the same crucial facts found again by Judge Riddle, he correctly remanded the matter to the clerk for an order in effect to reopen the administration of the estate of Miles, but he erred in ordering the appointment of the public administrator of Mecklenburg County or some other suitable person as personal representative of the Miles estate. *Edwards v. McLawhorn*, 218 N.C. 543, 11 S.E. 2d 562; *Doub v. Harper, supra.* Upon the remand of this case to the clerk of the superior court of Mecklenburg County, he, the clerk, will enter an order reopening the administration of the Miles estate, setting aside his former order discharging Eugenia Payne Miles, administratrix of the Miles estate, and approving her final account, so that the way will be open to petitioner to assert his death claim against the administratrix c. t. a. of the Miles estate in a court of law, and if the administratrix c. t. a. of the Miles estate then resigns, he shall, after her resignation, appoint some other suitable person as administratrix or administrator of the Miles estate.

In a case with substantially similar facts as here, the Supreme Court of Mississippi in *Powell v. Buchanan, Admrx., supra,* reached a substantially similar conclusion as we have here. Our decision is also supported by the decision of the Illinois Court of Appeals in *In re Palmer's Estate, supra.*

The crucial findings of fact made by the clerk, and found again by Judge Riddle, are supported by competent evidence. All of appellant's assignments of error have been examined and are overruled.

Judge Riddle's order as modified is affirmed.

Modified and affirmed.

EDGAR OTTO SHAW, JR. v. WELLMON EAVES, MABLE WHITTENBURG, LOUIS CARSON AND WILLIE CARSON.

(Filed 4 November, 1964.)

1. Torts § 4—

Where the original defendant has another joined for contribution, the additional defendant and plaintiff are not legal adversaries and have no opportunity to litigate their rights *inter se*, and therefore plaintiff if successful, is not entitled to a joint and several judgment against both defendants, but is entitled to judgment only against the original defendant, and the original defendant, if successful in his cross action, is entitled to judgment for contribution against the additional defendant.

2. Pleadings § 30—

Judgment in favor of a pedestrian against one driver and in favor of such driver against a second driver joined for contribution cannot entitle the pedestrian to judgment on the pleadings on his counterclaim in a subsequent action instituted by the second driver against the first driver, the pedestrian and the pedestrian's superior. *A fortiori*, the superior, who was not a party to the other action, is not entitled to judgment on the pleadings on his counterclaim.

3. Same—

Judgment on the pleadings is proper only when as a matter of law the allegations of the opposing party, taken as true, are insufficient to constitute a cause of action or a defense, and such motion must be determined on the pleadings alone without extrinsic evidence and may not be entered when the pleadings raise an issue of fact on any single material proposition.

4. Judgments § 28—

In order for a judgment to bar a subsequent action under the doctrine of *res judicata*, it is required that there be identity of parties, subject matter, and relief demanded.

5. Same—

Estoppel by judgment must be mutual, and the estoppel is mutual only if the party taking advantage of the earlier adjudication would have been bound by it had it gone against him.

6. Same—

An unsatisfied judgment against one joint tort-feasor is no bar to the prosecution of actions against the other tort-feasor.

7. Same— Judgment for contribution is not res judicata as between plaintiff and additional defendant.

Judgment was entered in favor of a pedestrian and against one motorist, the original defendant, and in favor of such motorist against another motorist joined for contribution. Thereafter the second motorist instituted an action against the first motorist and the pedestrian, and both filed a counterclaim against the second motorist. *Held:* The judgment is *res*

judicata as to the second motorist's cause of action against the first motorist and the first motorist's counterclaim, but it is not *res judicata* as to the rights of the pedestrian and the second motorist *inter se*, either in the action or the counterclaim, since the rights of the pedestrian and the second motorist were not adjudicated in the prior action. Nevertheless, the first motorist should not be dismissed from the action, since if the pedestrian is successful on his counterclaim against the second motorist, the first motorist would be liable for contribution to the second motorist.

APPEAL by plaintiff, Edgar Otto Shaw, Jr., from *Martin, S. J.*, January 1964 "A" Session of BUNCOMBE.

This action arose out of a three-car collision which occurred about 10 P.M., 22 September 1962, on Black Street in the City of Asheville.

Willie Carson was standing behind a Mercury automobile belonging to Louis Carson; the Mercury was not in motion and was on, or protruding into, Black Street. Plaintiff Shaw, driving a Chevrolet automobile belonging to Elna Torrence Castion, ran into Willie Carson and the Mercury. Almost immediately thereafter Wellmon Eaves, driving an Oldsmobile belonging to Mable Whittenburg, ran into the Chevrolet.

We refer herein only to such of the pleadings as are essential to an understanding of the questions involved on this appeal.

On 1 November 1962 Shaw instituted an action in the superior court of Buncombe County against Eaves, Whittenburg, Willie Carson and Louis Carson, alleging that he received personal injuries in the collision, his injuries were caused by the concurrent negligence of Eaves and Willie Carson, that Whittenburg and Louis Carson are liable to him under the doctrine of *respondeat superior,* and he is entitled to recover $10,000. Eaves, Whittenburg, Willie Carson and Louis Carson in separate answers deny negligence and plead the contributory negligence of Shaw. Willie Carson and Louis Carson counterclaim against Shaw for damages — Willie Carson for $35,000 for personal injuries, and Louis Carson for $550 property damage. Southern General Insurance Company, liability insurer for Louis Carson, was permitted, for reasons which do not concern us on this appeal, to intervene and answer.

On 29 November 1962 Willie Carson instituted an action in the general county court of Buncombe County against Eaves and Whittenburg to recover $35,000 for personal injuries suffered by him in the collision. Eaves and Whittenburg, answering, denied negligence, pleaded contributory negligence, and alleged a cross-action against Shaw and Castion for contribution (G.S. 1-240). On motion of Eaves and Whittenburg, Shaw and Castion were made additional defendants. They answered,

denied negligence and counterclaimed against Eaves and Whittenburg — Shaw for $10,000 for personal injuries, and Whittenburg for $1250 property damage (Shaw and Castion took voluntary nonsuits as to these counterclaims before trial in general county court).

The action instituted by Willie Carson came on for trial in the general county court in October 1963. Issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendant, WELLMON EAVES, as alleged in the complaint?

Answer: Yes.

"2. Was WELLMON EAVES at said time agent, servant and employee of his co-defendant, MABEL BRATTEN WHITTENBURG, as alleged in the complaint?

Answer: Yes.

"3. Was the plaintiff injured by the negligence of the defendant EDGAR OTTO SHAW, JR., as alleged in the defendant EAVES' Answer and Cross-action?

Answer: Yes.

"4. Was EDGAR OTTO SHAW, JR., at said time acting as agent, servant and employee of ELNA TORRENCE CASTION, as alleged in the defendant EAVES' Answer and Cross-action?

Answer: Yes.

"5. Did the plaintiff by his own negligence contribute to his injury, as alleged in the Answers?

Answer: No.

"6. Notwithstanding the plaintiff's own contributory negligence, if you so find, could the defendants, through the exercise of due care, have avoided the injury to the plaintiff, as alleged in the plaintiff's Reply?

Answer: .....

"7. What damages, if any, is the plaintiff entitled to recover?

Answer: $35,000.00."

On motion of Whittenburg the court, in its discretion, set aside the answer to the second issue. Judgment was entered on the verdict. It decreed that Willie Carson recover of Eaves $35,000, and that Eaves recover of Shaw and Castion contribution as provided in G.S. 1-240. We are advised by counsel that no appeals from this judgment were

perfected and it is a final judgment. It has not been paid and satisfied by Eaves.

After the entry of the above judgment in general county court, Willie Carson, Louis Carson, the Insurance Company, Eaves and Whittenburg, with leave of court, amended their answers in superior court in Shaw's action and pleaded the judgment of the general county court as a bar to the maintenance of the action in superior court by Shaw. Willie Carson also moved for judgment in the amount of $35,000 against Shaw, on the pleadings in the superior court action. In reply Shaw alleged that, if the judgment of the general county court is *res judicata* as to his action, it also bars Willie Carson's counterclaim.

In January 1964 Shaw's action came on for trial in superior court. After reviewing the pleadings and hearing arguments by counsel, the court entered judgment decreeing that "the judgment of the General County Court is a bar to plaintiff's (Shaw's) cause of action . . . against any of said defendants, and the said action as against Wellmon Eaves and Mable Whittenburg . . . is hereby dismissed, and the action against Louis Carson and his agent, Willie Carson, is dismissed with prejudice; the motion for judgment on the pleadings of Willie Carson against plaintiff, Edgar Otto Shaw, Jr., is allowed and . . . that Willie Carson have and recover of plaintiff, Edgar Otto Shaw, Jr., the sum of $35,000 . . . (and) that Louis Carson, on his counterclaim, have and recover of the plaintiff, Edgar Otto Shaw, Jr., for damages to Mercury automobile . . . such sums as a jury may hereafter determine on a proper issue . . . ."

Plaintiff Shaw appeals.

Lawrence C. Stoker, Landon Roberts, Meekins, Packer & Roberts for plaintiff appellant.

Williams, Williams and Morris for defendants Louis Carson and Southern General Insurance Company, appellees.

George H. Ward; Loftin & Loftin for defendant Willie Carson, appellee.

MOORE, J. All parties agree that the judgment of the general county court in the action instituted by Willie Carson is a valid, binding, final judgment. We are concerned here with its effect on the rights of the parties in the action instituted by Shaw in the superior court.

(1) The superior court judge granted Willie Carson's motion for judgment on the pleadings and entered judgment in the superior court case that Willie Carson recover of plaintiff Shaw $35,000 on his coun-

terclaim, and that Louis Carson recover of plaintiff Shaw such sums, on his counterclaim, for damage to his automobile, "as a jury may hereafter determine." In effect, the superior court judge entered judgment in Shaw's superior court case in favor of the Carsons upon the verdict of the jury in general county court in the Willie Carson action.

The general county court could not have entered judgment in favor of Willie Carson against Shaw upon the verdict in that court. In general county court Willie Carson sued Eaves and Eaves joined Shaw for contribution (G.S. 1-240); the verdict was such as to permit judgment in favor of Willie Carson against Eaves, and in favor of Eaves against Shaw for contribution. Willie Carson sought no affirmative relief against Shaw in that action. We held in *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534, that where plaintiff seeks no affirmative relief against an additional defendant joined by the original defendant for the purpose of enforcing contribution against the additional defendant as a joint tort-feasor, it is error for the court to enter joint and several judgments in favor of plaintiff against both defendants upon the jury's finding that both the original defendant and the additional defendant were guilty of actionable negligence, since the liability of the additional defendant is solely to the original defendant on the latter's claim for contribution.

Since the general county court could not enter an affirmative judgment in favor of Willie Carson against Shaw upon the verdict in that court, neither can the superior court in an entirely different action on motion for judgment on the pleadings. *A fortiori,* the superior court could not enter judgment against Shaw in favor of Louis Carson, who was not a party to the action in the general county court.

A motion for judgment on the pleadings is similar to a demurrer. In determining such motion the court's decision must be based upon the facts alleged on the one hand and admitted on the other. The court should not hear extrinsic evidence or make findings of fact. The motion raises a question of law, whether the matters set up in the pleadings of an opposing party are sufficient in law to constitute a cause of action or a defense. When a party moves for judgment on the pleadings, he admits for the purposes of the motion (1) the truth of all well pleaded facts in the pleadings of his adversary, together with all fair inferences to be drawn from such facts, and (2) the untruth of his own allegations insofar as they are controverted by the pleadings of his adversary. The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384; 41 Am. Jur., Pleading, §§ 335-339; pp. 520-523.

Shaw's complaint and the answers of defendants, including the counterclaims of defendants Carson, raise issues as to negligence, contributory negligence and damages. The defendants Carson amended their answers and set up the judgment roll in the general county court case and pleaded the same in bar of Shaw's action in superior court. In reply Shaw admitted the correctness of the judgment roll in general county court, denied that it bars his action, and asserted that if it does bar his action the estoppel is mutual and it also bars Carsons' counterclaims. Certainly the judgment of the general county court cannot be the basis for an affirmative judgment on the pleadings, including an award of damages, in favor of the Carsons, unless it is a complete bar to plaintiff Shaw's action and also estops him to deny the truth of the counterclaims.

(2) We now come to a consideration of the pleas of *res judicata* as between plaintiff Shaw and defendants Carson in the superior court case.

"The doctrine of *res judicata* as stated in many cases is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." 30A Am. Jur., Judgments, § 324, p. 371. In order for a judgment to constitute *res judicata* in a subsequent action there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual. *Light Co. v. Insurance Co.*, 238 N.C. 679, 79 S.E. 2d 167; *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E. 2d 345; *Cameron v. Cameron*, 235 N.C. 82, 68 S.E. 2d 796; *Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570. In order for a party to be barred by the doctrine of *res judicata*, it is necessary not only that he should have had an opportunity for a hearing but also that the identical question must have been considered and determined adversely to him. *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E. 2d 655. Recent cases involving the doctrine of *res judicata* seem to indicate that a prior judgment will work an estoppel only if the rights and liabilities of the parties were put in issue so that they were actually adverse parties in the prior case. See *Hill v. Edwards*, 255 N.C. 615, 122 S.E. 2d 383.

The judgment of the general county court is *res judicata* as to Willie Carson's cause of action against Eaves and Whittenburg, and as to the defenses and counterclaims which were or could have been asserted by Eaves and Whittenburg against Willie Carson. But it does not necessarily follow that that judgment is *res judicata* as to the

rights and liabilities of Willie Carson and Shaw *inter se*. A tort-feasor who is not sued by the injured party is not privy to one who is sued. *Bigelow v. Old Dominion Copper Mining and Smelting Co.*, 225 U.S. 111. Willie Carson did not sue Shaw in the general county court action.

An estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it had it gone against him. *Bernhard v. Band of America Nat. Trust & Sav. Ass'n.*, 122 P. 2d 892. In *Powell v. Ingram*, 231 N.C. 427, 57 S.E. 2d 315, plaintiffs sued original defendants and the original defendants joined the additional defendant for contribution; the jury found that plaintiffs were not injured by the actionable negligence of the original defendants and judgment was entered against plaintiffs. The opinion states that "The question of the liability of Sanders (additional defendant) to plaintiffs was not at issue on the trial, and in consequence the judgment does not preclude the plaintiffs from suing Sanders in case they desire to do so." It is clear that even if Willie Carson had not prevailed in his action against Eaves in general county court and judgment had been entered against him, he could still prosecute his cause of action (counterclaim) against Shaw, the additional defendant in the superior court action. Since he was successful against Eaves, he is in even better position to prosecute his action (counterclaim) against Shaw. An unsatisfied judgment against one tort-feasor is no bar to the prosecution of actions against other tort-feasors. 52 Am. Jur., Torts, § 127, p. 464.

It is clear that the general county court judgment is not a bar to the prosecution of Willie Carson's counterclaim against Shaw in the superior court action. It follows that it is not a bar to Shaw's cause of action against Willie Carson and Louis Carson. Estoppel by judgment must be mutual. The rights and liabilities of Willie Carson and Shaw *inter se* were not at issue in the general county court. Shaw had no opportunity to prosecute his claim against Willie Carson in that court. When an additional defendant is joined by an original defendant for contribution in an action *ex delicto*, the latter is plaintiff as to the former, the question for determination is the liability, if any, of the additional defendant to the original defendant, and the plaintiff and additional defendant are not in law adversaries. *Jenkins v. Fowler*, 247 N.C. 111, 100 S.E. 2d 234; *Norris v. Johnson*, 246 N.C. 179, 97 S.E. 2d 773; *Powell v. Ingram, supra; Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911. It is elementary and fundamental that every person is entitled to his day in court to assert his own rights or to defend against their infringement. *Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E. 2d 688. It is true that the jury in general county court found that Willie Carson was injured by the negligence of Shaw, "as alleged in defendant

Eaves' answer and cross-action." But this related to the liability of Shaw to Eaves, not of Shaw to Willie Carson. Shaw and Willie Carson have not had their day in court as adversaries.

The judgment of the superior court will be vacated and set aside insofar as it adjudges that the judgment of the general county court is a bar to plaintiff Shaw's cause of action against Willie Carson and Louis Carson, that the action against Willie Carson and Louis Carson is dismissed, and that Willie Carson and Louis Carson have judgment on the pleadings as specified. This cause will stand for trial upon the issues raised by plaintiff Shaw's and Willie Carson's and Louis Carson's pleadings (exclusive of the pleas of *res judicata*).

(3) The judgment of the general county court is a bar to plaintiff Shaw's action against Eaves and Whittenburg, and any counterclaim which Eaves and Whittenburg might attempt to assert against Shaw. *Pittman v. Snedeker,* 261 N.C. 365, 134 S.E. 2d 622; *Hill v. Edwards, supra; Jenkins v. Fowler, supra.* But Eaves will not be dismissed from the action. Should Willie Carson obtain a judgment on his counterclaim against plaintiff Shaw, Shaw will be entitled to contribution from Eaves. *Stansel v. McIntyre, supra.* The judgment in general county court established that Eaves and Shaw are, as between themselves, joint tort-feasors as to Willie Carson.

Error and remanded.

CLIFFORD J. LOCKWOOD v. EARL McCASKILL; AND CHARLES ALBERT MACON, D/B/A C. A. M. MACHINE COMPANY.

(Filed 4 November, 1964.)

1. Evidence § 44—

It is proper for a medical expert to testify from his own knowledge or from facts assumed in a proper hypothetical question, or in part upon such hypothetical facts and in part on statements made by the patient in the course of a professional examination, that a particular cause could or might have produced the result in question when the testimony indicates a reasonable probability in that particular scientific field, but an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.

2. Same— Testimony of an expert to the effect that amnesia was probably the result of injury held competent.

Non-expert evidence tended to show that plaintiff suffered pain, had severe headaches, and was incapacitated to work in a supervisory capacity

for more than two months as a result of the injury. Plaintiff's expert witness testified on direct examination that the accident may have induced plaintiff's subsequent amnesia, but on cross-examination the expert testified that the amnesia was induced by a deep sense of insecurity, that plaintiff was unusually sensitive to conditions which threatened his security, and that the injuries suffered in the accident and the financial burdens caused by his physical incapacity produced mental stress resulting in the amnesia attack. *Held:* The expert testimony, taken in connection with the non-expert testimony, is competent as tending to show that the amnesia attack was a probable result of the injury.

3. Damages § 3—

Ordinarily, if defendant's act would not have resulted in any injury to an ordinary person, defendant may not be held liable for the harmful consequences of his act to a plaintiff of peculiar susceptibility except insofar as defendant was on notice of the existence of plaintiff's susceptibility; if defendant's act amounted to a breach of duty to a person of ordinary susceptibility, defendant is liable for damages suffered by plaintiff, notwithstanding that these damages were unusually extensive because of plaintiff's peculiar susceptibility.

4. Same—

Where defendant's negligence causes physical injury and suffering to the plaintiff, defendant is liable for all the consequences which are the natural and direct result of his conduct, even though a part of such result occurs because of plaintiff's peculiar susceptibility of which defendant had no knowledge.

APPEAL by defendant Charles Albert Macon from *Campbell, J.*, June 15, 1964, "B" Session of MECKLENBURG.

Action to recover for personal injury and property damage resulting from a collision of motor vehicles, allegedly caused by the negligence of defendants.

About 10:30 P.M., 11 February 1963, a truck owned by defendant Macon, and being operated by his agent, defendant McCaskill, ran into the rear of plaintiff's automobile while plaintiff was stopped and waiting for a traffic light to change at the intersection of Independence Boulevard and Pecan Avenue in the City of Charlotte. Plaintiff was injured and his automobile damaged.

Summons was duly served on defendant Macon 14 May 1963, but no service was had on McCaskill. Macon failed to answer or otherwise plead, and judgment by default and inquiry was entered against him on 24 June 1963. The case came on for trial solely on the issue of damages; Macon was represented at the trial and contested the amount of the damages. The jury awarded plaintiff $5000, and judgment was entered accordingly. Defendant Macon appeals.

H. Parks Helms for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman and Charles V. Tompkins, Jr., for defendant Charles Albert Macon, appellant.

MOORE, J. Appellant assigns as error the admission of the testimony of plaintiff that he suffered an attack of amnesia on 20 May 1963, the overruling of appellant's objection to a hypothetical question and Dr. Thomas H. Wright's response thereto relating to plaintiff's amnesia, the denial of the motion to strike all evidence of amnesia, and the refusal to instruct the jury not to consider such evidence in arriving at a verdict.

Plaintiff testified in substance: Immediately following the collision he was momentarily unconscious; he had pain in his back and left hip, loss of feeling in his left leg, a headache with pain not only in his head but down in his neck, and a "wobbly" feeling. For about 2½ months he was treated by two orthopedic specialists; he suffered much pain in his back, hip and leg and periodically had unusually severe headaches — he had never had headaches to any extent before, none of this kind. He operated a service station in Charlotte, and his injuries and condition kept him away from his business until 1 May 1963 except for occasional short visits to supervise operations. While he was away one of his employees wrecked a car belonging to a customer and he was forced to pay the damages in the amount of $1200. He worked full-time at the station from May 1 to May 20, 1963, but his activities were limited. He worried about his financial difficulties in meeting payrolls and other expenses; these worries, together with his pain and headaches, caused him trouble in sleeping at night. On the morning of May 20 he had a very severe headache at the base of his skull and took two aspirin tablets; he remembered nothing from about 10 o'clock that morning until he regained consciousness in Albemarle, N. C., on the following day. He had never had an attack of amnesia before. He was placed in Charlotte Memorial Hospital under the care of a psychiatrist, Dr. Thomas H. Wright, Jr. For some time he was depressed and confused. On June 15 he was discharged. While in the hospital he had an inflammation of his urinary bladder, causing him to remain there for two or three days longer than would otherwise have been required. Dr. Wright continued treatment until December. At the time of the trial he was fully recovered.

A hypothetical question was put to Dr. Wright in which he was asked if he had an opinion, based on the hypothesis, whether or not the accident was a "contributing factor to his (plaintiff's) attack of amnesia and depression on May 20, 1963, and his inability to carry on his work

and business." In response Dr. Wright stated that he had an opinion and his opinion was that "It may have had an influence on his condition." He explained further: "I feel like there were other contributing factors. . . . basically this man is an insecure person. He is a perfectionist. They worry more — a worrisome individual. The accident was a threat to his security, as well as the precipitating one is the loss of the automobile some several days before at which time his security was threatened and this is a factor. These are precipitating factors in an insecure individual." On cross-examination Dr. Wright stated: "This employee's . . . wrecking a car, . . . that financial burden, yes, seems to be one of the factors. I thought that was the precipitating factor. He . . . had an insecure feeling which, of course, existed long before this accident. . . . If he had been a normal person, this collision which resulted in some back pain . . . and some leg pain, would not have brought on amnesia."

The hypothetical question covers approximately three pages of the record. It is not free of technical fault. Indeed, perfect hypothetical questions are a rarity in the trial of cases. The one in this case is not sufficiently objectionable to render it prejudicial.

Appellant's main contention is that the non-expert testimony is insufficient to support the inference that the attack of amnesia, which occurred three months after the accident, was a result of the accident and the injuries suffered therein, and that the testimony of Dr. Wright with respect to such cause and effect is speculative, declares it a mere possibility, is not a sufficient predicate for any recovery of damages by reason of the attack of amnesia and concomitant depression, and defendant was therefore prejudiced by the admission of the evidence relating to amnesia and depression.

Appellant cites 135 A.L.R., Anno. — Expert Evidence as to Cause — Sufficiency, pp. 516-546. From this annotation the following principles appear. (1) It appears to be well settled that expert medical testimony that a given accident or injury *possibly* caused a subsequent impaired physical or mental condition — indicating mere possibility or chance of the existence of the causal relation — is not sufficient to establish such relation. *Ibid.*, p. 517. (2) There is a division of opinion as to whether expert medical testimony of the *probability* of such causal relation is sufficient. *Ibid.*, p. 529. (3) There are a number of cases, however, which have held that expert medical testimony of the *possibility* of such causal relation, in conjunction with non-expert testimony indicating that such relation exists (although not sufficient by itself to establish the relation), is sufficient to establish the causal relation. *Ibid.*, p. 532. We note that no North Carolina cases are cited or

discussed in this Annotation or in the volumes of "Supplemental Decisions."

The matter is also discussed in 20 Am. Jur., Evidence, as follows:

> "An expert witness' view as to *probabilities* is often helpful in the determination of questions involving matters of science or technical or skilled knowledge. Expert testimony may be given in terms of an opinion that something might, could or would produce a certain result. It is necessary, however, that the facts upon which the expert bases his opinion or conclusion permit reasonably accurate conclusions as distinguished from mere guess or conjecture. Expert opinion testimony should not be allowed to extend to the field of baseless conjecture concerning matters not susceptible of reasonably accurate conclusions. An expert's opinion must be in the terms of the certain or *probable*, and not of the *possible*. Such witness is entitled to give his best judgment or opinion on the matter under inquiry, but not give answers which are mere guesses. . . . The allowance of opinion testimony of experts is, however, addressed to the discretion of the trial court, and under particular circumstances more or less conjectural opinions have been admitted, especially in cases calling for expert medical testimony," *Ibid.*, § 795, pp. 667, 668.
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> "A very liberal practice is indulged in permitting opinion testimony of experts on matters in the field of medical practice. A duly qualified physician may state, upon the basis of facts set forth in proper hypothetical questions, . . . his opinion as to the nature of the disease or disability from which a person is or was suffering, as to the facts and causes which probably produced, or might have produced such condition, as to how injuries or wounds were inflicted . . ." *Ibid.*, § 862, pp. 722, 723.
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> "Expert medical opinion should not be allowed to extend to the field of baseless conjecture concerning matters not susceptible of reasonably accurate conclusions, such as what would have been the result of an injury to a sick child if it had been strong and well at the time of such injury." *Ibid.*, § 863, p. 725.

We now turn to pertinent rules and principles adopted and declared in this jurisdiction.

We said in *Williamson v. Bennett*, 251 N.C. 498, 503, 112 S.E. 2d 48, that "It is almost the universal opinion that recovery may be had for mental or emotional disturbance in ordinary negligence cases where, coincident in time and place with the occurrence producing the mental

stress, some actual physical impact or genuine physical injury also resulted directly from defendant's negligence. . . . But the emotional disturbance and nervous disorder must be the *natural and proximate result of the injury as it affects plaintiff himself.*" (Emphasis added.)

Ford v. Blythe Brothers Co., 242 N.C. 347, 87 S.E. 2d 879, was an action for damages by a 3-year old child who was burned by live coals when she walked into a bed of apparently harmless ashes. Before the accident she slept and ate well and was not nervous; after the injury she was excitable, afraid of noises, and neither ate nor slept well. Two medical experts testified that the injuries sustained by the child could cause traumatic neurosis or personality shock. The opinion states: "We think the testimony of these experts . . . was admissible, particularly in view of the other testimony offered by the plaintiff . . . The fact that these experts further testified that the experience encountered by the plaintiff in connection with her injuries might or might not result in traumatic neurosis or personality shock to her, goes to the weight of their testimony rather than to its admissibility."

With respect to hypothetical questions propounded to expert witnesses, the rule in North Carolina is that "If the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition *could* or *might* have produced the result in question, not whether it did produce such result." Stansbury: North Carolina Evidence (2d Ed.), § 137, p. 332. (Emphasis ours.)

The "could" or "might" as used by Stansbury refers to probability and not mere possibility. It is contemplated that the answer of the expert will be based on scientific knowledge and professional experience. *Moore v. Accident Assurance Corporation*, 173 N.C. 532, 92 S.E. 362; *Raulf v. Light Co.*, 176 N.C. 691, 97 S.E. 236. The expert witness draws no inferences from the testimony; he merely expresses his professional opinion upon an assumed finding of facts by the jury. *Godfrey v. Power Co.*, 190 N.C. 24, 128 S.E. 485. The expert may testify as to the causes capable of producing the result and whether or not the particular hypothesis was a capable cause. *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818. A medical expert may base his opinion in part upon statements made to him by the patient in the course of professional examination and treatment and in part on the hypothetical facts. *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432. The opinion is based on the reasonable probabilities known to the expert from scientific learning and experience. A result in a particular case may stem from a number of causes. The expert may express the opinion that a particular cause "could" or "might" have produced the result — indicating that the re-

sult is capable of proceeding from the particular cause as a scientific fact, *i. e.*, reasonable probability in the particular scientific field. If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not sufficient to establish *prima facie* the causal relation, and if the testimony is offered by the party having the burden of showing the causal relation, the testimony, upon objection, should not be admitted and, if admitted, should be stricken. The trial judge is not, of course, required to make subtle and refined distinctions and he has discretion in passing on the admissibility of expert testimony, and if in the exercise of his discretion it reasonably appears to him that the expert witness, in giving testimony supporting a particular causal relation, is addressing himself to reasonable probabilities according to scientific knowledge and experience, and the testimony *per se* does not show that the causal relation is merely speculative and mere possibility, the admission of the testimony will not be held erroneous.

It was stipulated that Dr. Wright is an expert in the field of psychiatry. It must be assumed that the text and substance of his testimony are scientific fact. Our concern is whether his testimony clearly shows that it is mere possibility or conjecture that plaintiff's attack of amnesia was produced as a direct result of the injuries suffered by him in the accident in question. If so, the testimony should have been excluded.

Dr. Wright's direct answer to the hypothetical question was: "It (the accident) may have had an influence on his condition." This statement, considered alone, does not indicate a reasonable scientific probability that the attack of amnesia resulted from plaintiff's physical injuries. In this view of the matter the evidence is not admissible.

However, Dr. Wright's further explanation, especially his testimony on cross-examination, puts a different light on the matter when considered with the non-expert testimony in the case. Dr. Wright testified in effect that the attack of amnesia was induced by a deep sense of insecurity, that plaintiff is by nature a perfectionist and for that reason is unusually sensitive to occurrences and conditions which threaten his security and is prone to worry, the injuries he suffered in the accident and the financial burdens and losses caused by his physical incapacity to work and attend to his business threatened his security and produced mental stress and worry, and this mental state set the stage for the amnesia attack, which was precipitated when one of his employees wrecked a customer's car, costing him $1200. There is non-expert testimony tending to show that plaintiff suffered pain in his back and leg, had severe headaches, slept poorly and was incapacitated to work and

supervise his service station business for more than two months. Some of his work had to go undone, the business was not properly supervised, and plaintiff had extreme difficulty in meeting the additional expenses entailed by his absence. The financial worries and mental stress and strain resulted directly from plaintiff's injuries and incapacity to work.

Dr. Wright stated: "If he (plaintiff) had been a normal person, this collision which resulted in some back pain and did not require hospitalization at that time and some leg pain, would not have brought on amnesia." The psychiatrist is saying that the accident and resulting physical injuries would not have caused amnesia in a person with ordinary susceptibility to worry and insecure feelings, but that plaintiff is more than ordinarily prone to suffer from these mental conditions and therefore the physical injuries were a cause which produced the conditions.

The general rule is that if the defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility, except insofar as he was on notice of the existence of such susceptibility, but if his misconduct amounted to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by plaintiff notwithstanding the fact that these damages were unusually extensive because of peculiar susceptibility. 64 A.L.R. 2d, Anno.: Torts-Emotional Disturbances, p. 131; 15 Am. Jur., Damages, § 81, p. 490. The measure of duty in determining whether a wrong has been committed is distinct from the measure of liability when the wrong has been committed. *Spade v. Lynn & B. R. Co.*, 52 N.E. 747 (Mass.).

From the testimony of the psychiatrist and the non-expert witnesses in the case it was permissible, but not compulsory, that the jury infer that the physical injuries suffered by plaintiff were the direct cause of his intense mental distress, worry and sense of insecurity, and that the mental distress and sense of insecurity were a factor in producing the amnesia, without which factor the amnestic condition would not have occurred. In this view of the matter, the challenged evidence was competent and admissible. A tort-feasor is liable to the injured party for all of the consequences which are the natural and direct result of his conduct although he was not able to have anticipated the peculiar consequences that did ensue. *Riddle v. Artis*, 243 N.C. 668, 91 S.E. 2d 894; *Richardson v. Cooke*, 238 N.C. 449, 78 S.E. 2d 208.

No error.

J. W. ALTMAN v. AMERICAN FOODS, INC.

(Filed 4 November, 1964.)

1. Corporations § 15—

The issuance of stock by a corporation to certain of its "key employees" does not make the issue a private offering, and such issue is not necessarily exempt from the provisions of the Securities Act of 1933.

2. Same; Sales § 13—Where chose tendered is materially different from that agreed upon, purchaser may refuse tender and recover consideration.

Plaintiff's evidence was to the effect that as an employee of defendant corporation he was given an option to buy certain stock of the corporation at a stipulated price for the purpose of investment, that he exercised the option and made the stipulated payment, but that the corporation refused to issue the stock unless plaintiff signed a letter stating that he was acquiring the stock for investment and not with view to public sale, and unless the stock certificate was imprinted with a stipulation that the shares represented by the certificate had not been registered under the Securities Act of 1933 and could not be transferred except in compliance with that Act. There was no evidence that plaintiff was an officer of the corporation cognizant of its fiscal affairs or had access to information which would charge him with notice of the plans under which the stock was to be issued. *Held:* While the representation with regard to the letter was immaterial in view of the limitation of the offering of stock for investment purposes, the provisions imprinted upon the certificate amounted to a material variation rendering the stock tendered substantially different from the stock defendant agreed to sell, and therefore plaintiff is entitled to refuse delivery of the stock and to recover the consideration paid.

APPEAL by plaintiff from *McLean, J.*, March 1964 Session of HENDERSON.

Plaintiff instituted this action in the General County Court of Henderson County to recover money he paid defendant for stock under its employees' restricted stock-option plan. He alleges that defendant retains his money but refuses to issue the stock except upon conditions not contained in the option. Defendant admits the receipt of plaintiff's money and alleges that it is ready to issue the stock to him "in accordance with applicable provisions of law."

Upon the trial the parties waived a jury, and only plaintiff offered evidence. At the conclusion of all the evidence, defendant's motion for judgment of nonsuit was denied and defendant excepted. The judge found the following facts, which are fully supported by the evidence:

Plaintiff is a citizen of Florida and a summer resident of North Carolina. Defendant is a Florida corporation owning real property in this State, which plaintiff has attached. In December 1961 plaintiff was in defendant's employ. During that month, at a meeting in defendant's

office in Florida, defendant's attorney informed plaintiff and other employees of a plan under which they might acquire stock in the corporation *for investment.* Plaintiff, in answer to a specific question, was told that he could sell the stock later if he decided, in good faith, not to keep it. Plaintiff received a "restricted stock purchase warrant" entitling him to purchase 5,500 shares of defendant's common stock at $1.8644 per share on or before November 6, 1971. The warrant could not be partially converted. It recited that it was subject to all the provisions of American Foods, Inc. Employees' Stock Option Plan approved October 2, 1961, on file in the office of the corporation, together with any amendments to same. The Plan itself was not read to the employees, nor were copies furnished them until July 1962. On February 20, 1962, plaintiff executed the following purchase form and delivered it, with his check, to defendant:

> "The undersigned hereby irrevocably elects to exercise the within warrant and to purchase the shares of stock of said Corporation called for thereby and hereby makes payment of $10,254.20 in payment of the purchase price thereof. In exercising this warrant it is my intention to retain such stock as an investment and not for distribution."

Beneath his signature plaintiff inserted the request, "Please issue in denominations of 100 shares."

Thereafter defendant refused to issue the stock until plaintiff signed and delivered to defendant "an investment letter" which contained, among other things, the following statement:

> "By my signature undersigned, I hereby advise American Foods, Inc. that the said shares will be acquired for investment when they are issued, and not with a view to the public sale or distribution thereof."

Defendant refused to deliver the stock unless, also, the following legend was imprinted upon the certificate:

> "The shares represented by this certificate have not been registered under the Securities Act of 1933. The shares have been acquired for investment and may not be transferred, except in compliance with the Securities Act of 1933."

Plaintiff refused to accept certificates containing this legend and to sign the investment letter. When defendant declined to refund his money, plaintiff instituted this action.

The Plan, introduced in evidence as plaintiff's Exhibit A, authorizes the issuance of 50,000 common shares of defendant to "a limited number of key employees" approved by the Board of Directors and eligible under Section 421 of the Internal Revenue Code of 1954. It makes no mention of the Securities Act of 1933, but provides that:

> "The exercise of any option shall be contingent upon receipt from the optionee of a representation that, at the time of such exercise, it is his then present intention to acquire the shares being purchased for investment and not for resale and upon receipt by the Company of cash payment of the full purchase price of such shares."

Upon the findings made, the General County Court held, in effect, that defendant had added additional terms and conditions to its offer to plaintiff after the latter had accepted the original offer; that plaintiff, rejecting the new conditions, was entitled to the return of his money. From a judgment that plaintiff recover $10,254.20 with interest from March 26, 1962, defendant appealed to the Superior Court of Henderson County, assigning, *inter alia*, that the court had erred in overruling defendant's motion for judgment as of nonsuit. When Judge McLean heard the appeal, he overruled all defendant's assignments of error except the one relating to the failure of the court to sustain his motion for nonsuit. He ruled that judgment as of nonsuit should have been entered at the close of all the evidence and remanded the case to the General County Court for a judgment dismissing the action. Plaintiff appealed to this Court.

Whitmire & Whitmire for plaintiff.
Redden, Redden & Redden for defendant.

SHARP, J. The record does not disclose whether the stock issue involved in this case has been registered under Florida's uniform sale of securities law, FLA. STAT., ch. 517. It is quite clear, however, that it has not been registered under the Securities Act of 1933, 15 U.S.C.A., §§ 77a-77b. With this Act, Congress broadly prohibited the use of the mails and facilities of interstate commerce to sell a security not registered thereunder, unless the security itself is of a class specifically exempt, § 77c, or is involved in an exempt transaction as defined by the Act, § 77d. Any person claiming the benefit of an exemption from registration has the burden of proving that he is entitled to it. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 97 L. Ed. 1494, 73 S. Ct. 981; *Gilligan, Will & Co. v. Securities and Exchange Com'n*, 267 F. 2d 461 (2d Cir.).

It may be that the stock in question was exempt from registration under the Act as a "security which is a part of an issue offered and sold only to persons resident within a single state or territory where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within such state or territory," § 77c. Also, it may be that defendant's offer to plaintiff of 5,500 shares under its stock-option plan to sell 50,000 shares of common stock to "key employees" was an exempt transaction as "not involving any public offering," § 77d(1). The limitation of an offering by the issuer to certain of its employees designated as "key employees" does not necessarily make it a private offering and thus an exempted transaction. As the court pointed out in *SEC v. Ralston Purina Co., supra*, absent a showing that those employee-offerees have access to the kind of information which registration would disclose, § 77aa, and are thus able to fend for themselves in dealings with their corporate employer, they are in as much need, as the rest of the "investing public," of the protection of the Act. In any event, neither the allegations of the complaint and the evidence, nor the findings of fact by the trial court are sufficient to determine whether this stock is exempt from registration under the Act.

Whether a transaction involves a public offering of stock is a question of fact involving many aspects.

> "An important factor to be considered is whether the securities offered have come to rest in the hands of the initially informed group or whether the purchasers are merely conduits for a wider distribution. . . . If the purchasers do in fact acquire the securities with a view to public distribution, the seller assumes the risk of possible violation of the registration requirements of the Act and consequent civil liabilities. This has led to the practice whereby the issuer secures from the initial purchasers representations that they have acquired the securities for investment. Sometimes a legend to this effect is placed on the stock certificates and stop-transfer instructions issued to the transfer agent," SEC Securities Act Release No. 33-4552, November 6, 1962.

An issuer, however, may not establish a private offering and claim an exemption under § 77d(1) of the Act merely by the device of collecting so-called "investment letters" if it knows, or should know, that the purchasers are in fact acquiring the stock with a view to its distribution, § 77b(11); SEC Securities Act Release No. 3825, August 12, 1957. Persons who act in this capacity are "underwriters" and subject to the registration provisions of the Act, § 77d.

Against this legal background we now consider whether plaintiff is required to accept the stock certificates which defendant has tendered him; if not, then he is entitled to the return of his money.

Plaintiff has neither alleged nor offered any evidence tending to show that defendant made any use of the mails or of any other interstate facility to promote, sell, or distribute the stock issue under consideration. He does not proceed under the civil-liabilities provisions of either the Securities Act of 1933, § 77l or FLA. STAT. § 517.23. Instead, he bases his suit on common-law principles of contract liability. We come, therefore, to this inquiry: Did defendant tender plaintiff the stock certificate which it contracted to sell him and which he had a right to expect in view of the information disclosed?

According to the evidence and the specific finding of the trial judge, defendant's attorney told plaintiff that the stock his option permitted him to purchase "as an investment" could be resold, "provided he later in good faith changed his mind" about keeping it. The evidence is that when the attorney explained the stock option plan to defendant's employees to whom the stock was being offered, he failed to disclose that the stock issue was not to be registered with the SEC; nor did he mention that the stock certificate would carry a legend which would restrict its marketability in the event plaintiff should desire to sell it. Likewise, neither the option plan nor the stock warrant contained this information. It is on the materiality of these omissions that the case must turn.

We think defendant omitted to disclose facts which, had they been known, would undoubtedly have deterred an average prudent investor who was not one of defendant's executive personnel from purchasing the stock as an ordinary investment. There is no evidence in the record suggesting that plaintiff was an officer of the corporation cognizant of its fiscal affairs or that he had access to information which would charge him with notice that the legend was calculated to protect defendant from penalties imposed by the Securities Act of 1933. Indeed, all the implications in the evidence are to the contrary. Plaintiff was not to be expected to have the information which defendant disclosed only when it tendered him the stock. He was among those employees needing protection as a member of the general public. That the stock certificate would be imprinted with the legend was a material fact which defendant had a duty to disclose to plaintiff, especially so in view of his specific questions as to his ability to sell the stock. Its failure to discharge this duty made the stock it tendered plaintiff substantially different from the stock it had agreed to sell him.

Although defendant's attorney failed to mention an investment letter when he explained the stock option plan to the employees, the statement, that plaintiff intended to hold the stock for investment and not for distribution, which he signed when he exercised his option makes this particular omission immaterial. Notwithstanding this statement by plaintiff, it is implicit in the evidence that he did not clearly understand the meaning of the investment representation contained in the option plan and the purchase form by which he exercised his option to buy the stock in question. The investment representation was, of course, to be used by defendant as evidence that the stock issue was a private offering and that the employee-offerees were not underwriters of the unregistered stock. Anyone who pays $10,254.20 for stock obviously makes an investment in the ordinary meaning of that term, and from time to time, in the prudent management of his portfolio, he will be expected to consider the advisability of selling that stock. When defendant's attorney explained to plaintiff and its other "key employees" the opportunity it was providing them to buy stock *for investment*, plaintiff inquired specifically whether he could sell some of the stock to get back the money he would borrow to buy it. The attorney told him that he could sell part of it and that he did not have to sell it all at one time. It is a fair assumption that it was in consequence of this representation that he requested his 5,500 shares be issued in denominations of one hundred, so as to facilitate their sale in part. (Of course, to obtain the tax advantage envisioned by the option plan and allowed by INT. REV. CODE OF 1954, § 421, for employee-restricted stock option plans, no employee could sell his stock within two years from the date of the option nor within six months after the transfer of the shares to him.)

A case somewhat analogous to this one is *McClure v. Central Trust Co.*, 165 N.Y. 108, 58 N.E. 777, 53 L.R.A. 153, reversing 28 App. Div. 433, 53 N.Y.S. 188. There, plaintiff sued to recover $7,500.00 he paid defendant Trust Company, a depository and transfer agent, for one hundred shares in an English company. *W*, the largest stockholder in the company, had devised a method of selling his stock in the United States through defendant, which issued certificates representing the number of shares sold. In due time these certificates would be exchanged for stock which had been transferred on the books of the company in London. White & Co., as brokers for *W*, the undisclosed owner, offered the stock for sale. Defendant took applications for the purchase of the stock and distributed *W's* prospectus from its counters. When plaintiff subscribed for his shares, he received from defendant a temporary receipt by which it agreed that, upon full payment and surrender

of the receipt, plaintiff would receive its certificate representing the number of shares for which he had subscribed and paid. When plaintiff completed his payments, he received certificates stating that one hundred shares, together with a deed of transfer, would be delivered to him. Thereafter, when plaintiff demanded his shares of stock, he discovered that *W* was largely indebted to the English company, that its by-laws gave it a paramount lien upon a stockholder's shares for any indebtedness to the company, and that the company refused to transfer any stock registered in *W's* name until its lien was discharged. Plaintiff sued defendant to rescind the sale and recover his money. The trial court entered a judgment of nonsuit, which the Court of Appeals reversed on the theory that defendant had breached its implied warranty that the stock it sold was marketable. The court said:

> "We thus reach the question whether the defendant tendered to the plaintiff what it agreed to sell him. Disregarding the mere form of the transaction, the thing sold was stock, and did the stock tendered answer the description of the stock sold? . . .
>
> "(W)hen the thing sold differs in substance from what the purchaser was led by the vendor to believe he was buying, and the difference in subject-matter is so substantial and essential in character as to amount to a failure of consideration, there is no contract, and the purchaser may recover back the money paid. . . .
>
> "We think it was a condition of the sale, whether called an 'implied warranty' or any other name, that the defendant was to deliver marketable stock free from lien; for that alone would meet the description of the thing sold, under the circumstances surrounding the parties when the sale was made. . . .
>
> "It knew, but the plaintiff did not know, that the shares in its possession were issued by the English company subject, in express terms, to its articles of association and regulations; that the deed of transfer was likewise 'subject to the several conditions on which' the transferrer held the shares 'immediately before the execution' thereof; and that it also contained a covenant on the part of the transferrer 'to accept and take the said shares subject to the conditions aforesaid.'" *Id.* at 121, 58 N.E. at 780, 53 L.R.A. at 160.

To sustain its position that plaintiff in this case is required to accept the stock it has tendered him and therefore is not entitled to recover his money, defendant relies upon *General Development Corp. v. Catlin*, 139 So. 2d 901 (Fla. 3d Dist.). That case differs from this one in that by the terms of Catlin's stock option he specifically agreed not to sell

or distribute any of the stock he obtained under it "otherwise than in compliance with the Securities Act of 1933, as amended, and the applicable rules and regulations thereto. . . ." Since the Florida law provides that there shall be no restriction upon the transfer of shares of stock represented by a certificate unless the restriction is stated upon the certificate, FLA. STAT. § 614.17, *and since Catlin had agreed to the restriction,* the court held that he was required to accept a restricted stock certificate. That case is a far cry, however, from holding that a prospective purchaser is required to accept a stock certificate containing a condition of which he was not informed when he contracted to purchase the stock and to which he has not agreed.

If plaintiff should be required to accept the stock certificate with the proposed legend, we cannot say, any more than can he, whether he could hereafter transfer it or what it would cost him in time, money, and effort if he could. First, if the proposed legend should mean that the stock must be registered with the SEC before it can be sold, a very expensive and time-consuming proceeding would be required, which might make the sale of plaintiff's stock entirely impractical. See generally, *Sale of Shares by Controlling Persons and Rule 154,* 18 U. MIAMI L. REV. 88. Second, if it means that an application must be made to the SEC for a waiver, or "no action letter," the sale of the stock would depend upon what action the Commission, in its discretion, then decided to take. In either case, the legend imposes a greater burden upon plaintiff than was contemplated by the option and amounts to a material condition to which plaintiff did not agree. We note that plaintiff is no longer an employee of defendant and doubtless could look for little cooperation from defendant in the sale of this stock. Further, we may assume that he could not sell the stock without the permission of defendant's transfer agent. "In accordance with the rules pertaining to the performance of contracts generally, the parties to a contract of sale of corporate stock are bound to perform it according to its terms," absent some legal prohibition or excuse. 18 C.J.S., *Corporations,* § 409 (1939).

Plaintiff's evidence was amply sufficient to withstand the defendant's motion for nonsuit and to support the judgment of the Henderson General County Court. The judge of the Superior Court erred in reversing its judgment and dismissing the action as of nonsuit.

The judgment of the Superior Court is

Reversed.

STATE v. NATHANIEL PARKER, GEORGE PORTER, GUS PARKER, AND JAMES EDWARD McCREE.

(Filed 4 November, 1964.)

1. Robbery § 1—

It is not required as an element of the offense condemned by G.S. 14-87 that any property be actually taken from the victim, and the offense is completed if the defendant either takes or attempts to take personal property from another by the use or threatened use of a dangerous weapon whereby the life of the victim is endangered or threatened.

2. Same; Larceny § 1—

In common law robbery and in larceny from the person there must be an actual taking of property, even though the value of the property taken is immaterial, G.S. 14-72; if no property is taken there can be only an attempt to commit the offense, which in itself is an infamous offense. G.S. 14-3.

3. Robbery § 5—

Where the evidence tends to show an assault with deadly weapons by defendants, inflicting serious injury upon their victim, pursuant to an agreement to rob, but the evidence fails to show that defendants actually took any personal property from their victim, the court is not required to submit the question of defendants' guilt of an attempt to commit common law robbery or an attempt to commit larceny from the person, since an attempt to take personal property from another under the circumstances delineated by G.S. 14-87 constitutes an accomplished offense.

4. Indictment and Warrant § 8; Criminal Law § 139; Assault and Battery § 5—

All elements of assault with a deadly weapon are included in the offense of robbery with firearms, and the Supreme Court will take notice *ex mero motu* of the duplication when the record discloses conviction of defendants of both offenses based upon the identical occurrence, and will quash the indictment charging the assault and arrest the judgment thereon.

APPEAL by defendants from *Fountain, J.*, July 13, 1964 Special Criminal Session, MECKLENBURG Superior Court.

In this criminal prosecution the defendants were arraigned on the following bill of indictment:

"The Grand Jurors for the State upon their oath present, That Nathaniel Parker, Milas Wesley Alexander, George Porter, Gus Parker, Jr., John Alfred Mason and James Edward McCree late of the County of Mecklenburg, on the 22nd day of December, 1961, with force and arms, at and in the County aforesaid, unlawfully, willfully, and feloniously, having in their possession and with the use and threatened use of firearms, and other dangerous weapons, implements and means, to wit: A CERTAIN .22 CAL-

IBRE PISTOL AND A CERTAIN AXE HANDLE, whereby the life of Erskine Hill was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously attempt take, steal, and carry away the PERSONAL PROPERTY of ERSKINE HILL, TO-WIT: MONEY, A POCKETBOOK AND OTHER VALUABLE PROPERTY from the presence, person, place of business and residence of ERSKINE HILL, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The Grand Jury returned a second bill of indictment which charged the defendants with a felonious assault with deadly weapons: a pistol and axe handle, with the intent to kill Erskine Hill, inflicting serious injury not resulting in death.

The State contended the assault was committed in the attempt to carry out the robbery charged in the first bill. After the defendants entered pleas of not guilty, the court ordered the two charges consolidated for trial. "Before the impaneling of the jury, the Assistant Solicitor for the State announced that the State would seek a verdict of attempted armed robbery and a verdict of assault with a deadly weapon as to all defendants."

The State offered plenary evidence of the attempt on the part of the defendants to rob, and the shooting and serious wounding of the victim, Erskine Hill. One of the shots struck the victim in the spine and caused his total paralysis. However, he lived for more than two years after the shooting but had died before the trial. The State's evidence that property was taken from Erskine Hill was equivocal.

Clarence Hill, the father of Erskine Hill, testified that he and the son were on their way to the grocery store at night when the four defendants and another attacked them with a pistol and axe handle, and attempted to take from them their money and pocketbooks. Both were severely beaten and seriously wounded by pistol shots.

Two State's witnesses testified they were in an automobile across the street, from which they witnessed the assault on the Hills; that the assailants used sticks, fired shots, and then ran, leaving both Clarence Hill and Erskine Hill on the ground, bloody and badly wounded.

According to the investigating officers, the defendant McCree made this statement: "About 10:00 p.m., me and Joe Parker, Gus Parker and Johnny Mason, and this other boy got to talking about getting some money. Gus, Joe and Mason said, 'Let's go get some money,' . . . Mason said, 'That man, a big, fat, colored man with the light skinny man had some money.' We followed the two men up Spring

Street. I had a .22 pistol one of the boys had handed me . . . Joe Parker had an axe handle. I ran up behind the fat man and throwed him on the ground. Joe Parker started hitting the man with the stick. Mason tried to get his pocketbook but he couldn't. Gus was just looking on. . . . The skinny man got a stick and tried to hit one of the boys. Mason said, 'Shoot him.' . . . I shot once at the skinny man. Joe Parker said, 'The man's getting a knife,' and I turned and shot him. I shot three or four times at the fat man. Then I started to run and gave the pistol to Joe Parker."

The officer testified that Gus Parker made this statement: "George Porter started talking about wanting money for the holidays. Mr. Hill (Clarence) and another man (apparently Erskine Hill) was in the cafe a little later. George (Porter) said, 'Want to get them because I need some money.' . . . Mr. Hill and the other man went on up Spring Street. When they got about in front of the House of Prayer, George Porter grabbed the tall man. Billie was also on the tall man. Nathaniel was on the other one. James McCree, John Mason and I got the fat one. . . . Mr. Hill fell and then got back up. This is about the time McCree started shooting. . . . I started running after the first shot."

Nathaniel Parker told the officer: "Friday night . . . December 22, George (Porter) said (to) Gus Parker, James McCree and this other boy in Rodman's Cafe, 'I have got to have some money on the week-end.' He said he knew some people we could hit. George said we could knock them out and take the money. George kept talking to us until we all agreed to go with him. We went to Bullis' Cafe on Spring Street. George said, 'See those two men, the fat one has the money.' . . . We caught up with the two men in front of the House of Prayer. George grabbed the fat man. . . . I hit the fat man with the axe handle twice. I hit the slim man once. Billie hit the fat man. James McCree had the pistol and shot about three times. I saw the slim man fall when McCree shot. We all ran. I throwed the axe handle away . . ."

George Porter, who did not make a statement to the officer, nevertheless testified at the trial in his own behalf, admitted he was with the others at the scene of the difficulty but that he took no part in it. The court was careful to instruct the jury to consider the admissions to the officers made by each defendant only as against the defendant who made it.

The jury rendered this verdict against all defendants: Guilty of attempted armed robbery and guilty of assault with a deadly weapon. Sentences of seven to ten years on the robbery charge were imposed on Nathaniel Parker and George Porter, and eight to ten years on Gus

Parker and James Edward McCree. Prayers for judgments were continued for five years on the assault charges. The defendants appealed.

T. W. Bruton, Attorney General, Richard T. Sanders, Assistant Attorney General, for the State.

T. O. Stennett for defendant appellants.

HIGGINS, J. The robbery with firearms statute, G.S. 14-87, under which the defendants were indicted, provides: "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, instrument, or means whereby the life of a person is endangered or threatened, unlawfully *takes or attempts to take* personal property from another . . . at any time, either night or day, or who aids or abets such person . . . shall be guilty of a felony and upon conviction shall be punished by imprisonment for not less than five nor more than 30 years." If all of the elements are present, the offense is complete whether the taking is successful or amounts only to an attempt to take personalty from the victim.

The statute was passed in 1929 following a series of bank robberies, in one of which the police officers appeared on the scene in time to prevent the robbers from getting possession of any money, though one employee of the bank was seriously wounded by gun fire. The statute wisely condemns a perpetrator "who *takes or attempts to take* personal property." (emphasis added).

In this case it should be noted that the bill charged that the defendants "did . . . attempt to take . . . the personal property of Erskine Hill, to-wit: money and a pocketbook."

The solicitor's announcement amounted to a bill of particulars giving notice that in making out the case the State would rely on proof the defendants attempted to take personal property from the victim rather than proof of the actual taking. The solicitor's announcement neither lessened the degree of guilt charged in the bill nor reduced the power of the court to punish for it. So great is the offense when life is endangered and threatened by the use of firearms or other dangerous weapons, that it is not of controlling consequence whether the assailants profit much or little, or nothing, from their felonious undertaking. The attempt to take property by the forbidden means, all other elements being present, completes the offense. Hence the defendants may not contend the solicitor's announcement worked a dismissal of the charge of robbery with firearms and reduced the charge in the bill to an attempt to commit that offense.

The defendants assign as error the following from the judge's charge:

"Now, if the State has satisfied you as to the guilt of one or more or all of the defendants from the evidence and beyond a reasonable doubt on the charge of robbery with firearms, then you would not consider his guilt or innocence as to that defendant or defendants of common law robbery, but if the State has failed to satisfy you from the evidence and beyond a reasonable doubt that firearms or other dangerous implements were used whereby the life of a person was endangered and threatened, then you would not convict either of the defendants on the charge of attempted highway robbery, but you would then consider the guilt or innocence of such defendants — I think I said highway robbery, I meant not convict of statutory robbery, that is robbery with firearms, the charge contained in the bill, but you would then consider the guilt or innocence of the defendant of highway robbery which does not include the element of the use of firearms or other dangerous weapons."

The State offered evidence tending to show that the four defendants, acting in concert, followed and fell upon Erskine Hill and his father, Clarence Hill, with intent to rob them and by the use of a pistol and an axe handle assaulted both; shot Clarence Hill through the kidney and through the shoulder; shot Erskine Hill three times — once through the spine, causing complete paralysis.

The court charged the jury in substance that if it rendered a verdict of guilty under the robbery with firearms bill, it became unnecessary to consider any other possible verdict. The State's evidence lacked positive proof that the defendants actually took any personal property from Erskine Hill. The attempt to take is sufficient in armed robbery. An attempt to take is not sufficient in common law robbery. The taking must be by violence or intimidation. *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853; *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834. In larceny from the person there must be a taking, though the value of the property is immaterial. G.S. 14-72; *State v. Stevens,* 252 N.C. 331, 113 S.E. 2d 577. In common law robbery and in larceny from the person the completed offense requires the taking of property; otherwise there is only an attempt to commit the offense.

An attempt to commit robbery with firearms is an infamous offense. G.S. 14-3. "An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission." *State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880. In this case, if the verdict be considered only for an at-

tempt to commit the crime of robbery with firearms, nevertheless that verdict is sufficient to support the judgment of seven to ten years imposed by the court. However, for the reasons assigned, we are inclined to the view that the conviction was for the major offense.

In robbery with firearms the offense requires the taking, *or the attempt to take.* A number of our decisions involving robbery with firearms fail to take note of the fact that the offense is complete if the assailant *attempts to take* the personal property of another by the means condemned by G.S. 14-87. *State v. Jones,* 227 N.C. 402, 42 S.E. 2d 465; *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364; *State v. Hare,* 243 N.C. 262, 90 S.E. 2d 550.

In this case the trial court did not commit error in failing to charge that the jury might return a verdict of guilty of an attempt to commit a common law robbery. There was no evidence of common law robbery. "It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. 42 C.J.S., Indictments and Information, §§ 275, 283, 293; *S. v. Jones, supra; S. v. Moore,* 211 N.C. 748, 191 S.E. 840; *S. v. Holt,* 192 N.C. 490, 135 S.E. 324; *S. v. Cody,* 60 N.C. 197. If the jury believed the testimony in the case under review, however, it was its duty to convict the defendants of robbery with firearms because all of the evidence tended to show that such offense was committed upon the prosecuting witness, Ernest Fox, as alleged in the indictment. There was no testimony tending to establish the commission of an included or lesser crime. The evidence necessarily restricted the jury to the return of one of two verdicts as to each defendant, namely, a verdict of guilty of robbery with firearms upon Ernest Fox, or a verdict of not guilty. It follows that the court did not err in failing to instruct the jury that they might acquit the defendants of the crime of robbery with firearms charged in the indictment in question and convict them of a lesser offense. *S. v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Cox,* 201 N.C. 357, 160 S.E. 358." *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834.

In this case, all the evidence shows the assaults on Erskine Hill with the pistol and axe handle were committed in connection with, as a part of, and included in the robbery. A conviction of that charge includes all elements of assault with a deadly weapon. This Court, *ex mero motu,* takes notice of the duplication, quashes the indictment charging the assault, sets aside the verdict, and arrests the judgment. We have exam-

ined the defendants' several assignments of error and find them without merit.

On the Robbery with Firearms Charge — No error.

On the Assault with a Deadly Weapon Charge — Judgment arrested.

SHIRLEE B. BECKER *v.* DAVID H. BECKER.

(Filed 4 November, 1964.)

1. Trial § 3—

Issues in a case are joined from and after the date of the filing of the answer of defendant, and defendant cannot be entitled as a matter of right under G.S. 1-173 to a continuance where the case is set for trial the third week of a term beginning over a month after the issue is joined when defendant is given notice some two weeks prior to the time of trial that plaintiff would withdraw his motion to strike matter from the answer.

2. Same—

Amendment to the pleadings will not entitle movant to a continuance when movant himself submits the amendment, certainly where the amendment raises no additional issue of fact.

3. Same—

A motion for continuance is addressed to the sound discretion of the trial judge and in the absence of a manifest abuse of discretion his ruling thereon is not reviewable.

4. Constitutional Law § 4—

A party waives the right to jury trial in a civil action by failure to follow the statutory procedure to preserve such right.

5. Same; Divorce and Alimony § 2—

A defendant waives his right to trial by jury in an action for divorce on the ground of two years' separation when he fails to file a request therefor prior to the call of the action for trial, G.S. 50-10, and the fact that defendant had alleged a cross action for divorce for adultery does not affect this result when defendant withdraws his cross action before the case is called.

6. Divorce and Alimony § 14; Evidence § 12—

In an action for divorce the court properly refuses to allow defendant husband to testify in regard to the alleged adulterous conduct of his wife. G.S. 8-46, G.S. 50-10.

7. Judgments § 18—

The procedure to attack a consent judgment for fraud or mutual mistake is by independent action, and therefore in the wife's action for divorce on the ground of two year's separation the husband is not entitled to attack

a prior separation agreement embodied in a consent judgment for fraud or mutual mistake, the action for divorce on the ground of separation not being bottomed on the consent judgment, and the consent judgment being relied upon merely to show the agreement to live separate and apart.

8. Divorce and Alimony §§ 4, 13—

In an action for divorce on the ground of two year's separation where the parties have lived separate and apart for more than two years pursuant to a separation agreement embodied in a consent judgment entered in a court of competent jurisdiction, the consent judgment legalizes the separation and the husband is not entitled to plead adultery of the wife as recrimination.

APPEAL by defendant from *Froneberger, J.*, 6 April 1964 Civil Session of BUNCOMBE.

This is an action instituted on 13 December 1963 for absolute divorce on the ground of two years separation, pursuant to a separation agreement executed by the parties on 12 December 1961.

The defendant filed an answer admitting the two years separation of the parties and further admitting that the separation agreement had been reduced to a consent judgment in the General County Court of Buncombe County, North Carolina, on 12 December 1961. Defendant, however, in his answer, pleaded the adultery of the plaintiff in recrimination and set up a cross action for an absolute divorce on the ground of the alleged adultery of his wife with various third persons.

The defendant also alleged that the above-mentioned consent judgment upon which the plaintiff bases her action for divorce, was obtained by fraudulent representations, and prayed that said judgment be set aside.

On 13 February 1964, plaintiff filed a motion to strike certain parts of defendant's answer on the ground that they were irrelevant and prejudicial to the plaintiff. Two weeks, however, before the call of the case for trial, plaintiff informed defendant's counsel that the motion to strike would be withdrawn, no hearing having been had thereon.

The case was calendared for trial on 8 April 1964, and counsel for plaintiff informed the court upon the call of the case that plaintiff would withdraw her motion to strike. Defendant then informed the court that he would withdraw his plea for relief on his cross action for divorce on the ground of adultery, but that he would amend or rely upon the adultery of his wife as alleged in his answer in recrimination to bar the action for divorce on the ground of two years separation. Defendant thereupon moved for a continuance.

The motion of the plaintiff to withdraw her motion to strike, and the motion of the defendant to withdraw his cross action and to amend his plea of adultery on the part of the plaintiff in recrimination as a bar to

plaintiff's prayer for divorce, were allowed. Defendant's motion for continuance was denied. The court then announced that the case would be tried under the provisions of G.S. 50-10, without a jury, on the plaintiff's complaint and the defendant's answer as amended. The defendant then for the first time demanded a jury trial. The court overruled the defendant's demand because defendant had failed to make a timely demand for a jury trial in accordance with the requirements of G.S. 50-10.

The court heard the evidence of the plaintiff and of the defendant, and answered the issues as follows:

"1. Has the plaintiff been a bona fide resident of the State of North Carolina for more than six months immediately preceding the institution of this action.

"ANSWER: Yes.

"2. Were plaintiff and defendant lawfully married, as alleged in plaintiff's complaint?

"ANSWER: Yes.

"3. Have plaintiff and defendant lived continuously separate and apart for more than two years prior to the institution of this action, as alleged in the plaintiff's complaint?

"ANSWER: Yes.

"4. Did the plaintiff commit adultery, as alleged in the answer?

"ANSWER: No."

Judgment was entered on the verdict, granting plaintiff an absolute divorce from the defendant.

Defendant appeals, assigning error.

Lamar Gudger for plaintiff appellee.

Shelby E. Horton, Jr., William J. Cocke for defendant appellant.

DENNY, C.J. Defendant's first four assignments of error are directed to the refusal of the court below to continue the case.

According to the record, summons and verified complaint were served on the defendant on 13 December 1963. The defendant filed answer on 29 January 1964. The calendar on which this case was placed for trial was a three weeks session of civil court. This case was set for trial on Wednesday, 8 April 1964, of the third week of the session, and two weeks before the case was called for trial the plaintiff's counsel informed defendant's counsel that the motion to strike would be with-

drawn. The defendant contends he was put to a great disadvantage because the motion to strike was not withdrawn until the call of the case and came as a surprise. This contention is feckless.

Defendant's counsel knew the motion would be withdrawn and had known it for two weeks. Moreover, unquestionably, the court calendar had been prepared and distributed to the members of the Buncombe County Bar some time prior to the beginning of the session, and defendant's counsel knew when this case was to be called for trial. As a matter of fact, the defendant amended his answer only in one respect after withdrawing his cross action. He simply inserted the name of an alleged correspondent in adultery. The defendant cannot claim the right to a continuance based on his own amendment which did not materially change his allegations of recrimination already pleaded in his answer. An amended pleading at the session the case is called for trial, which raises additional issues of fact, may justify the continuance of the case on motion of the opposing party. However, such amendment will not ordinarily justify a continuance on motion of the party submitting the amendment. The amendment to the defendant's answer raised no new issues of fact; therefore, the rule laid down in *Dobson v. Railway Co.*, 129 N.C. 289, 40 S.E. 42, is not applicable.

Moreover, in our opinion, G.S. 1-173, upon which the defendant relies, is not applicable to the facts in this case. The plaintiff tried her case on her original complaint which had been filed and served on the defendant on 13 December 1963. The defendant had filed his answer on 29 January 1964; therefore, the issues had been joined from and after that date. Furthermore, a motion for continuance is addressed to the sound discretion of the trial judge, and in the absence of manifest abuse of such discretion his ruling thereon is not reviewable. *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1; *Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123; *Sykes v. Blakey,* 215 N.C. 61, 200 S.E. 910. The defendant does not contend there was an abuse of discretion but claims he was entitled to a continuance as a matter of right under G.S. 1-173. We do not so hold and these assignments of error are overruled.

The defendant assigns as error the refusal of the court below to grant defendant a jury trial on plaintiff's cause of action for divorce, upon motion made after the case was called for trial.

G.S. 50-10 was amended by Chapter 540 of the Session Laws of North Carolina, 1963, by adding the following: "Notwithstanding the above provisions, the right to have the facts determined by a jury shall be deemed to be waived in divorce actions based on two (2) years separation as set forth in G.S. 50-5(4) or 50-6, where defendant has been personally served with summons, or where the defendant has accepted

service of summons, whether within or without the State, unless such defendant, or the plaintiff, files a request for a jury trial with the clerk of the court in which the action is pending, prior to the call of the action for trial.

"In all divorce actions tried without a jury as in this section provided the presiding judge shall answer the issues and render judgment thereon."

"A party may waive the right to a jury trial in civil actions by failure to follow the statutory procedure to preserve such right." Strong's N. C. Index, Constitutional Law, Volume 1, Section 4, page 518; *Caudle v. Swanson,* 248 N.C. 249, 103 S.E. 2d 357; *Furniture Co. v. Baron,* 243 N.C. 502, 91 S.E. 2d 236; *Bartlett v. Hopkins,* 235 N.C. 165, 69 S.E. 2d 236; *Chesson v. Container Co.,* 223 N.C. 378, 26 S.E. 2d 904.

The mere fact that the defendant decided to withdraw his cross action, which if it had been tried would have been tried by a jury, does not justify his position in demanding a jury for the trial of plaintiff's cause of action for divorce without complying with the statutory requirements. Doubtless, defendant knew he was going to withdraw his cross action before the case was called, but he failed to request a jury trial on plaintiff's cause of action. He never filed a request for a jury trial with the Clerk of the Superior Court of Buncombe County before the case was called for trial as required by G.S. 50-10.

This assignment of error is overruled.

The defendant further assigns as error the refusal of the court below to allow him to testify as to the adulterous disposition of the plaintiff in support of his allegations of recrimination.

Among other things, it is provided in G.S. 8-56: "* * * Nothing herein shall render any husband or wife competent or compellable to give any evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery; or, in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges * * *."

Likewise, it is provided in G.S. 50-10 that in a trial pursuant thereto, "neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact."

In the case of *Perkins v. Perkins,* 88 N.C. 41, *Ruffin, J.,* said: "The provision of the statute (Battle's Revisal, Chapter 17, Section 341, now G.S. 8-56) is so pointed and its language so plain — that in such trials,

neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either be received as evidence to prove such fact — as to leave no room for doubt or construction."

The proffered evidence was clearly inadmissible. G.S. 8-56; G.S. 50-10; *Knighten v. McClain,* 227 N.C. 682, 44 S.E. 2d 79; *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933; *McCall v. Galloway,* 162 N.C. 353, 78 S.E. 429; *Grant v. Mitchell,* 156 N.C. 15, 71 S.E. 1087, Ann. Cas. 1912D, 1119.

The defendant sought to introduce evidence to establish fraud in the procurement of the consent judgment entered on 12 December 1961 in the General County Court of Buncombe County. He assigns as error the refusal of the court below to admit such evidence. The ruling of the court below, in our opinion, was correct.

It is a well settled principle of law in this jurisdiction that a consent judgment cannot be modified or set aside without the consent of the parties thereto except for fraud or mutual mistake, and the proper procedure to vacate such judgment is by an independent action. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *King v. King,* 225 N.C. 639, 35 S.E. 2d 893; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209, and cited cases.

The plaintiff does not bottom her cause of action for divorce on the above judgment, but merely relies thereon to show when the plaintiff and the defendant entered into an agreement to live separate and apart from each other. Therefore, the defendant is not entitled to have such judgment set aside upon the ground of fraud in its procurement in this action. McIntosh, North Carolina Practice and Procedure, Judgments, section 1718, at page 174.

This assignment of error is likewise overruled.

The defendant admits in his answer that he and the plaintiff lived separate and apart for two years next preceding the institution of this action.

In *Sears v. Sears,* 253 N.C. 415, 117 S.E. 2d 7, the defendant had obtained a divorce from bed and board in the Supreme Court of New York because of the cruel and inhuman treatment by the defendant therein, the plaintiff herein, and the Court ordered the defendant husband to pay permanent support and maintenance. Thereafter, the defendant husband instituted this action in North Carolina for absolute divorce based on two years separation. Winborne, C.J., speaking for the Court, said: "* * * (I)n *Lockhart v. Lockhart,* 223 N.C. 559, 27 S.E. 2d 444, this Court held that the effect of a judgment granting a divorce *a mensa et thoro* was to legalize the separation of the parties which

theretofore had been caused by the husband's actions, and that after two years from the date of such judgment, the husband could proceed to an absolute divorce. See also *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296.

"In fine, the effect of the judgment in *Lockhart v. Lockhart, supra,* was to legalize the separation of the parties which theretofore had been an abandonment on the part of the plaintiff. He could not thereafter be charged with desertion.

"Therefore, the husband is entitled to bring his action for an absolute divorce regardless of fault since the New York judgment in 1952 had the effect of legalizing the separation date, and the wife cannot defend on the ground of recrimination." *Rouse v. Rouse,* 258 N.C. 520, 128 S.E. 2d 865; *Richardson v. Richardson,* 257 N.C. 705, 127 S.E. 2d 525.

Likewise, in the last cited case, *Bobbitt, J.,* speaking for the Court, said: "Plaintiff and defendant having lived together until their separation on February 29, 1960, and having then separated by mutual consent, defendant cannot attack the legality of their separation from and after February 29, 1960, on account of alleged misconduct while they were living together."

The remaining assignments of error have been expressly waived or abandoned for failure to bring them forward in the brief and argue them as required by Rule 28, Rules of Practice in the Supreme Court, 254 N.C. at page 810.

The judgment of the court below is

Affirmed.

IOWA MUTUAL INSURANCE COMPANY, A CORPORATION, PLAINTIFF v. FRED M. SIMMONS, INC., NORMAN L. HARRIS AND HERBERT H. HARRIS, TRADING AND DOING BUSINESS AS NORMAN HARRIS AND SON, DEFENDANTS.

(Filed 4 November, 1964.)

1. Insurance § 96—

The policy obligated insurer to pay all sums for which insured should become legally liable because of the destruction of property by accident, and provided that insurer should defend actions against insured within the coverage. *Held:* After recovery of judgment against insured in an action in which insurer participated, insurer, in insured's action against it, cannot relitigate the question of whether the damage resulted from an "accident".

2. Insurance § 95—

A policy providing that insurer should pay to insured all sums which insured becomes legally obligated because of damage to property of third persons caused by accident protects not merely against damage to property by accident but against liability for damage caused by accident, which includes damage resulting from negligence.

3. Same—

Insurer issued the policy obligating it to pay insured such sums as insured should become legally obligated to pay as damages resulting from the destruction of property by accident. Insured, in the course of reroofing a building for a third person in the usual and normal manner, put a covering across the unfinished portion of the roof, but water seeped in and damaged the building after ordinary rains. The building owner obtained judgment against insured for the damages to his building on the ground of insured's negligence in the performance of the contract. *Held:* Insurer is liable to insured under the terms of the policy.

4. Negligence § 1—

A person whose failure to use due care in the performance of a contract results in damage is liable for the damages thus inflicted as a result of such negligence.

APPEAL by defendant, Norman L. Harris, trading and doing business as Norman Harris and Son, from *Froneberger, J.*, October 1963 Regular Civil Term of CLEVELAND.

Plaintiff instituted this action for a declaratory judgment to determine its liability under a policy of insurance issued to Norman L. Harris, d/b/a Norman Harris and Son.

In July 1962, judgment was rendered declaring plaintiff did not insure Harris against the liability imposed by a judgment obtained by Simmons against Harris. The judgment obtained by plaintiff in 1962 was based on the pleadings and the court's interpretation of the policy provisions. Harris, the insured, appealed. The judgment was reversed. See *Insurance Co. v. Simmons, Inc.*, 258 N.C. 69, 128 S.E. 2d 19.

When the case was tried, as directed in the opinion on the first appeal, the parties waived trial by jury. The court made factual findings which, so far as deemed pertinent, are summarized in the opinion. Based on its findings, the court concluded the policy did not protect Harris. Judgment was entered accordingly. Harris excepted and appealed.

L. Lyndon Hobbs for defendant appellant.

Hamrick & Jones and Falls, Falls & Hamrick for plaintiff appellee.

RODMAN, J. Appellants have not properly challenged any of the findings of fact. The question for decision then is: Do the facts found suffice to support the judgment?

The policy issued by plaintiff is designated: "Comprehensive General and Automobile Liability Policy." It insures defendant Harris, an insulation contractor, for a term of one year from July 1, 1960. The "insuring agreements," stated in the policy, read:

"COVERAGE A — BODILY INJURY LIABILITY

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

"COVERAGE B — PROPERTY DAMAGE LIABILITY — AUTOMOBILE

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.

"COVERAGE C — PROPERTY DAMAGE LIABILITY — EXCEPT AUTOMOBILE

"To pay on behalf of the insured all sums which the insured shall shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident."

Plaintiff's liability under Coverage A is limited to $10,000 for each person injured. The maximum liability under that coverage is $40,000.

Liability under Coverage B is limited to $5,000 for each accident. The policy lists eleven motor vehicles owned by the insured.

Liability under Coverage C is limited to $5,000 for each accident, and to $25,000 for "aggregate operations."

The court found these facts: In the course of its business, insured contracted with defendant Simmons to put a new roof on its building. The area to be covered was small, 20 feet by 60 feet. "Work was started on the roof on September 27, 1960, by the defendant, Harris, and his employees. After a part of the roof had been removed and before it had been replaced with the new roof, and on the afternoon of September 27, 1960, an afternoon shower of rain fell in Shelby, North Carolina, and there was a morning shower of rain in Shelby, North

Carolina, on September 28, 1960. The rains which fell in Shelby, North Carolina, on September 27th and 28th, 1960, were ordinary and usual showers of rain in every respect. The defendant, Fred M. Simmons, Inc., contended that water from these rains leaked through the roof into the building and damaged the tangible and intangible property in the building, and sued the defendant, Harris, in the Superior Court of Cleveland County for the purpose of recovering the sum of $10,256.25, which the said Fred M. Simmons, Inc. alleged to be due by reason of the fact that the defendant, Harris, after removing the roof on the building belonging to Fred M. Simmons, Inc., negligently failed to cover the exposed portion of the roof, thereby permitting the rain water which fell on September 27th and 28th, 1960, to come through the partially exposed roof, causing water damage in the amount sued for. This case was tried out to its conclusion, and a verdict was rendered in favor of Fred M. Simmons, Inc. against the defendant, Norman L. Harris, trading and doing business as Norman Harris and Son, in the amount of $1,900.00, plus cost."

No appeal was taken from the judgment holding Harris liable to Simmons because of Harris' negligent failure to cover the exposed portion of the roof. Harris was represented in that litigation by an attorney provided by plaintiff under a non-waiver agreement. Harris, in his answer in the action brought by Simmons, admitted the rains causing the damage were ordinary and usual showers of rain.

Harris assigned three experienced roofers and two helpers to do the work on the Simmons building. Before it started raining, Harris sent polyethylene film to cover the Simmons roof to prevent water entering the building. The roof was covered with this material, which was held in place by concrete blocks. Harris and his men inspected the covering. They discovered no leaks.

"All of the evidence in this case shows that the polyethylene covering was put on the roof in the usual and normal manner in order to keep out the water; that it was weighted down with concrete blocks; that there were no holes or breaks in it; that it was at all times in place; that at no time was there any accident caused by a block falling or any rip or tear in the polyethylene fabric, but that at all times said fabric and the blocks were intact and in good condition."

Based on its findings, the court concluded: "[T]he policy of liability insurance issued by plaintiff * * * did not cover the loss sustained which Fred M. Simmons, Inc. suffered by rain coming into its building while it was being re-roofed."

The conclusion which the court reached is not, in our opinion, supported by the findings, but is based on a misapprehension of the protection which plaintiff, for the premiums paid, promised to provide.

The policy does not purport to protect the insured against injury or damage to property "caused by accident." The protection accorded is against liability for injury to person, or damage to property "caused by accident." Not until insured has been adjudged legally liable can he call on insurer to pay for injury to person, or damage to property.

To prevent an adjudication of liability, insured agreed to defend "any suit against insured alleging such injury * * * or destruction and seeking damages on account thereof." Not only did insurer have the duty of defending suits asserting liability, it had the right to investigate and settle asserted liability.

When insured's legal liability for damages resulting from his negligence and the amount thereof has been judicially determined in a suit defended by insurer under the terms of its policy, insurer cannot, when called upon to discharge insured's liability, relitigate the questions answered in the suit against insured. *Caterpillar Tr. Co. v. International Harvester Co.*, 120 F. 2d 82, 139 A.L.R. 1 and cases cited in annotations pp. 12-17; *Sheehan v. Goriansky*, 321 Mass. 200, 72 N.E. 2d 538, 173 A.L.R. 497; *Maryland Casualty Co. v. Sturgis*, 129 S.W. 2d 599, 123 A.L.R. 704, at 709; *B. Roth Tool Co. v. New Amsterdam Casualty Co.*, 161 F. 709; 30A AM. JUR., Judgments, Sec. 401, p. 456, note 2. Here the court's fifth finding establishes the fact that insured was adjudged liable to Simmons because of the negligent manner in which insured performed his contract. The findings by the court that Harris employed experienced roofers, that he sent materials to the building to protect against the expected showers, and that Harris had testified in the suit against him that he had acted diligently to protect Simmons' property are of no moment in determining plaintiff's liability. Insured's liability to Simmons based on negligence in performing the contract can not be relitigated.

One who, because of his failure to use due care, does damage to the property of another is liable for his negligent act. This is true whether the injuries result from failure to exercise care in the manner in which work contracted for is done, or in the enjoyment of pleasurable pursuits. *Peele v. Hartsell*, 258 N.C. 680, 129 S.E. 2d 97; *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893; *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144, 45 A.L.R. 2d 1; 38 AM. JUR. 662.

It having been established by the court's findings that liability was imposed because of insured's failure to exercise due care to protect

against an event which he could reasonably foresee, is plaintiff, insurer, under no obligation because the damage was not "caused by accident?"

The policy has three insuring agreements identical in form so far as the question now under consideration is concerned. Coverage A is limited to liability resulting from personal injuries inflicted. Coverage B is limited to liability for damages to property arising out of the use of an automobile. Coverage C is in the exact language of Coverage B, except Coverage C contains no limitation with respect to the instrumentality which causes the damage. To limit the word accident to "an unforseen event occurring without will or design of the person whose mere act causes it" would for all practical purposes render the policy valueless so far as the quoted coverages are concerned. To impose legal liability for injury to person or damage to property, the one causing the damage must have been able to reasonably forsee an injurious effect from the manner in which he acted. *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39; *Schloss v. Hallman*, 255 N.C. 686, 122 S.E. 2d 513; *Smith v. Pate*, 246 N.C. 63, 97 S.E. 2d 457; and cases collected in note 53, 3 Strong's N. C. Index, p. 449.

To interpret the policy provision, it is important to look at the title plaintiff gave to the document it issued. Its title is "Comprehensive General and Automobile Liability Policy." The Legislatures of 1953 and 1955 required operators of motor vehicles in this State to be "financially responsible." Proof of financial responsibility is defined in G.S. 20-279.1 as: "Proof of ability to respond in damages for *liability*, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of $5,000 because of bodily injury to or death of one person in any one *accident*, and, subject to said limit for one person, in the amount of $10,000 because of bodily injury to or death of two or more persons in any one *accident*, and in the amount of $5,000 because of injury to or destruction of property of others in any one *accident*." The insuring provisions are in the language of our statute with respect to proof of financial responsibility, except that Coverages A and C are not limited to injuries or damages resulting from the use of an automobile. It would be strange indeed to hold that insured was protected against liability arising under Coverage B because of damage to property from the negligent use of an automobile, but that he was not protected under Coverage A against liability for personal injuries resulting from the same negligence.

We are of the opinion, and hold, that the policy afforded the insured protection against legal liability for injury to person or property resulting from insured's negligent failure to exercise due care. *Rex Roofing*

Co., Inc. v. Lumber Mut. Cas. Ins. Co., 116 N.Y.S. 2d 876; *Employers Ins. Co. of Ala. v. Alabama Roofing & Sid. Co.*, 124 So. 2d 261; *Cross v. Zurich General Accident & Liability Ins. Co.*, 184 F. 2d 609; *Corbetta Const. Co. v. Michigan Mutual Liability Co.*, 247 N.Y.S. 2d 288 at 293; *Cross Properties, Inc. v. Home Indemnity Company*, 246 N.Y.S. 2d 683 at 685; *Wolk v. Royal Indemnity Company*, 210 N.Y.S. 2d 677; *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876. The conclusion here reached conforms with the conclusion reached in the prior opinion. Plaintiff did not allege in its amended complaint, on which the first judgment was rendered, that Simmons' judgment against Harris was based on the negligent manner in which Harris performed his contract. That fact now affirmatively appears in the court's findings of fact.

Because of the court's misinterpretation of the policy provisions, there must be a

New trial.

REVEREND JAMES R. WALKER, JR. v. CITY OF CHARLOTTE, AND WILLIAM H. JAMISON, SUPERINTENDENT OF BUILDING INSPECTION; AND THOMAS B. LACKEY, CHIEF HOUSING INSPECTOR FOR THE CITY OF CHARLOTTE.

(Filed 4 November, 1964.)

1. Injunctions § 5; Municipal Corporations § 34—

Injunction will not lie to restrain the enforcement of a statute or municipal ordinance on grounds of its unconstitutionality unless it is shown that there is a danger that property or personal rights will suffer irreparable injury which is both great and immediate, since ordinarily a defendant prosecuted for the violation of a statute or ordinance, has the adequate remedy at law of attacking its constitutionality in the prosecution, with right of appeal in the event of conviction.

2. Same—Plaintiff held not to have shown danger of irreparable injury, great and immediate, unless enforcement of ordinance was restrained.

Plaintiff alleged that under the building code of defendant municipality (G.S. 160-151, G.S. 160-162, G.S. 160-184, G.S. 14-4) he had been ordered to demolish a dwelling house owned by him and had once been prosecuted for beginning to renovate and repair the residence without first obtaining a written permit, but plaintiff did not allege that defendant had engaged in vexatious and oppressive prosecutions of him for violation of the housing ordinances of the city. Plaintiff further alleged that the dwelling is vacant, that hoodlums had extensively damaged its porches, windows and doors,

that the cost of repairs and alterations would exceed 50 per cent of its listed value for taxation, etc. *Held:* Plaintiffs allegations failed to show that there is danger that he will suffer irreparable injury which is both great and immediate to his property or personal rights if the city building ordinances were enforced, and an order denying a temporary injunction, with provision that defendant be restrained until final determination of the appeal, is affirmed.

APPEAL by plaintiff from an order of *Clark, S. J.,* 17 August 1964, Schedule "C" nonjury Session of MECKLENBURG.

Suit instituted 23 July 1964 under the Declaratory Judgment Act, G.S. 1-253 *et seq.,* by plaintiff against the city of Charlotte, a municipal corporation, and its Superintendent of Building Inspection and its Chief Housing Inspector for a declaration of the unconstitutionality of and a permanent injunction against the enforcement of ordinances of the city of Charlotte and of the State statutes, which authorize the enactment of such ordinances by the city of Charlotte, which ordinances provide, in part, that no person shall enlarge, alter, or repair any structure, or part thereof, in the city of Charlotte without first making application and obtaining a written permit from the inspection department therefor, and which further provide that any building, or part thereof, in the city which is in such a condition as to be dangerous to the health, safety or lives of the occupants, the general public or persons passing near or living in the vicinity, or dangerous to the security of adjoining property or especially dangerous to the lives of fire fighters in case of fire shall be held to be unsafe, and the inspector shall have the authority and it shall be his duty to declare such buildings unsafe and to take the necessary action to have such unsafe conditions corrected or removed, heard upon an order dated 23 July 1964 requiring defendants to show cause why a temporary injunction should not be issued pending a final hearing upon the merits.

According to Judge Clark's order, the order to show cause was heard by him solely on arguments by plaintiff, a lawyer, appearing *in propria persona,* and by counsel for the defendants. According to the record before us, it seems neither plaintiff nor defendants offered any evidence before Judge Clark: there is no evidence in the record. There is nothing in the record to indicate that plaintiff offered his complaint as an affidavit in evidence.

However, it is necessary to summarize the crucial allegations of fact and conclusions of law in plaintiff's complaint for an understanding of this appeal.

Plaintiff, who is engaged in the ministry and the general practice of the law in the State, is the owner of a six-room frame dwelling located at 1449 South Church Street in the city of Charlotte. The building

was formerly a church, and in 1901 was converted into a six-room dwelling. There is nothing in the complaint to indicate when plaintiff purchased the dwelling. He "vacated" the premises — the complaint does not allege when — in order to make alterations and repairs to meet his personal needs, and while it was vacant its porch, windows, and doors were extensively damaged by hoodlums, but even now it is in sound condition, and free from all dangers to the public, and is well suited for human habitation.

The cost of repairs and alterations to his dwelling will be more than 50% of the listed value of his dwelling for taxation, and in consequence such repair and alterations are forbidden by the city code and the "Remove and Demolish orders of the defendants."

In February 1964 he received a written notice dated 10 February 1964, from T. B. Lackey, Chief Housing Inspector for the city of Charlotte, entitled "Findings of Fact and Order," containing the following, which we summarize: James R. Walker, owner of the dwelling located at 1449 South Church Street in the city of Charlotte, was duly served with complaint and notice in regard to the dwelling located at 1449 South Church Street in the city of Charlotte, and pursuant thereto, a hearing was held on 7 February 1964. As a result of the evidence presented at the hearing, it is found as a fact that the said dwelling is unfit for human habitation in violation of the city ordinance in the following respects, beyond reasonable repair. The said dwelling cannot be repaired, altered or improved at a cost of less than 50% of the value of the dwelling. Therefore, it is ordered that the owner before 18 March 1964 shall remove or demolish said building. He alleges in his complaint that this order is based exclusively upon the provisions of Section 10A-8 of the Housing Code of the city of Charlotte, which ordinance the city of Charlotte was authorized to adopt by virtue of the provisions of G.S. 160-184.

In March 1964 he received a second written notice dated 24 March 1964 from T. B. Lackey, Chief Housing Inspector for the city of Charlotte, containing the following, which we summarize: A recent reinspection of the premises located at 1449 South Church Street in the city of Charlotte shows that nothing has been accomplished toward correcting the dangerous situation there existing, though prior to this date the owner Walker was notified by letter dated 12 April 1963 of the dangerous condition of this building. The building is open and unoccupied, and is dangerous to the health or lives of the general public and persons passing near or living in the vicinity. The building presents a hazard to children who may play in and around it, and endangers the security of the adjoining property by being open to va-

grants. Under the provisions of G.S. 160-151, the Charlotte Charter, Ch. 31(17), and the code of the city of Charlotte, Section 5-6(e), this building is declared unsafe and is condemned, and shall be removed within 30 days from the date of this letter. If this work is not accomplished within the specified time, they have no other alternative but to prosecute in accordance with the laws. He alleges in his complaint the prosecution of him referred to in this letter was authorized by G.S. 160-152 after a condemnation of his dwelling pursuant to the provisions of G.S. 160-151.

Prior to 10 February 1964 and 24 March 1964 defendants posted a notice on his dwelling, which reads as follows: "This building is unfit for human habitation; the use or occupation of this building for human habitation is prohibited and unlawful." He is in violation of the two "remove or demolish" orders served on him in that he wilfully refused, and still refuses, to demolish or remove his dwelling as directed by defendants, and that his intention is to return to work in order to make necessary repairs and alterations to bring his dwelling up to his personal standards, and that "all of the defendants' orders and criminal codes" prohibiting him from performing his right to repair, use, occupy, and enjoy his property is in violation of his rights under the Federal and State Constitutions. Unless defendants are permanently restrained from preventing him from repairing his homestead to his needs, he will be further prosecuted under the criminal laws by the defendants, because G.S. 160-152 provides a fine for each day an unsafe building is allowed to stand after notice as set forth in the statute, he will lose his homestead, he will be unable to further his education as a minister and to earn his living while practicing law in an office in his homestead and living in his homestead, and that his health will be impaired, his constitutional rights and his liberty will be curtailed and abridged, and he will suffer irreparable injury. That the statutes of the State of North Carolina and the ordinances of the city of Charlotte above referred to are unconstitutional as contrary to the provisions of the Fourth and Fourteenth Amendments to the United States Constitution, and as contrary to the provisions of Sections 1, 15, 17, 19, 29, 35, and 37 of Article I, and Section 1 of Article II, and Section 2 of Article X of the North Carolina Constitution.

W. H. Jamison, Superintendent of Building Inspection of the city of Charlotte, swore out a warrant against him charging him on 23 June 1964 with unlawfully and wilfully violating Section 5-4(c) of the code of the city of Charlotte by renovating or repairing his residence located at 1449 South Church Street without first making application and obtaining a written permit therefor from the building inspection

department of the city of Charlotte, all in violation of G.S. 14-4. On 9 July 1964 he was convicted and given a 30-day jail sentence. The complaint does not allege whether he appealed or served the sentence.

Judge Clark, without finding any facts, (1) restrained the defendants from demolishing the building located at 1449 South Church Street in the city of Charlotte until the final determination of this action; and (2) refused to issue a temporary restraining order against enforcement of the provisions of the building code of the city of Charlotte, including Sections 5-4(c) and 5-6(e) thereof, and declined to vacate the orders of 10 February and 24 March 1964, as requested by the plaintiff.

From this order plaintiff appeals.

Thomas H. Wyche, Charles V. Bell, Samuel S. Mitchell, and James R. Walker, Jr., for plaintiff appellant.

John T. Morrisey, Sr. and Jimmy W. Kiser for defendant appellees.

PARKER, J. Plaintiff in his brief states that the one question presented for decision is: Did Judge Clark commit prejudicial error in denying him a temporary restraining order enjoining defendants from further criminal prosecution of him for alleged violations of the housing provisions of the code of the city of Charlotte until the final determination of his suit?

G.S. 14-4 makes the violation of a municipal ordinance a criminal offense.

It is a general principle of well-established law that when a statute is enacted or a municipal ordinance is adopted regulating the doing of certain acts and making the violation thereof a criminal offense, an injunction will not ordinarily issue to restrain the enforcement of the statute or municipal ordinance on the ground of its alleged unconstitutionality. This general rule is based, in addition to other considerations, on the principle that equity is concerned only with the protection of civil and property rights, and is intended to supplement, and not usurp, the functions of the courts of law, and on the fact that the party has an adequate remedy at law, because if he is prosecuted for the violation of a statute or a municipal ordinance that is unconstitutional, its unconstitutionality is a complete defense upon a prosecution in the courts for its violation, and in case of a conviction, there can be an appeal. *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764; *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851; *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482; *Lanier v. Warsaw,* 226 N.C. 637, 39 S.E. 2d 817; *Jarrell v. Snow,* 225 N.C. 430, 35 S.E. 2d 273; *Loose-Wiles Bis-*

cuit Co. v. Sanford, 200 N.C. 467, 157 S.E. 432; *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469; *Wardens v. Washington,* 109 N.C. 21, 13 S.E. 700; *Cohen v. Commissioners,* 77 N.C. 2; Strong's N. C. Index, Vol. 2, Injunctions, § 5; McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. 2, § 2200; *Cline v. Frink Dairy Co.,* 274 U.S. 445, 71 L. Ed. 1146; *Fenner v. Boykin,* 271 U.S. 240, 70 L. Ed. 927; *Hygrade Provision Co. v. Sherman,* 266 U.S. 497, 69 L. Ed. 402; *Packard v. Banton,* 264 U.S. 140, 68 L. Ed. 596; 28 Am. Jur., Injunctions, § 242 (1959); 43 C.J.S., Injunctions, §§ 156, 159, and 160.

There is an exception to this general rule, as well established as the rule itself, that equity will enjoin the actual or threatened enforcement of an alleged unconstitutional statute or municipal ordinance, when it plainly appears that otherwise there is danger that property rights or the rights of persons will suffer irreparable injury which is both great and immediate. *Surplus Store, Inc. v. Hunter, supra; Roller v. Allen, supra; Lanier v. Warsaw, supra; Loose-Wiles Biscuit Co. v. Sanford, supra; Cline v. Frink Dairy Co., supra; Fenner v. Boykin, supra; Hygrade Provision Co. v. Sherman, supra; Packard v. Banton, supra;* McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. 2, §§ 2200 and 2201; 43 C.J.S., Injunctions, §§ 157 and 158.

While plaintiff alleges in his complaint that he has been prosecuted one time for a violation of the housing provisions of the code of the city of Charlotte, and unless the defendants are enjoined he will be further prosecuted for similar offenses by the defendants, he fails to allege or to show that defendants have engaged in vexatious and oppressive prosecutions of him for an alleged violation of the housing provisions of the code of the city of Charlotte.

According to the allegations of plaintiff's complaint, the dwelling he owns in the city of Charlotte was formerly a frame church and was converted into a dwelling house in 1901; that at present it is vacant, and its porch, windows, and doors have been extensively damaged by hoodlums; the cost of repairs and alterations will be more than 50% of its listed value for taxation; but that it is well suited for human habitation, a *non sequitur* conclusion. However, plaintiff further alleges in his complaint that defendants, after notice to him and a hearing, found as a fact that his house was unfit for human habitation as being beyond reasonable repair; is open and unoccupied; and is dangerous to the health or lives of the general public and persons living in the vicinity, and presents a hazard to children who play in and around it; and has been declared unsafe and condemned by defendants, and ordered removed or demolished. With such conflicting allegations of fact in his complaint about the condition of his house, plaintiff has

not made it plainly appear that there is danger his property rights will suffer irreparable injury which is both great and immediate if a temporary injunction as prayed by him is not granted. Further, Judge Clark restrained defendants from demolishing his dwelling until the final determination of this action, and defendants did not appeal.

Plaintiff has totally failed to allege or to show facts as to how his health will be impaired if a temporary injunction as requested by him is not granted. It seems plain that plaintiff has completely failed to allege or to show facts that there is danger that his civil rights, his desire to further prepare himself for the ministry, and to earn a living by practicing law will suffer irreparable damage both great and immediate, unless he can repair his dwelling in the condition he alleges it is now in and live in it, and unless a temporary injunction as requested by him is granted. Surely, the enjoyment by him of his fundamental human rights cannot be made to rest merely on such fragile foundations.

Plaintiff has completely failed to show such circumstances as to warrant the exercise by equity of its injunctive power. It is manifest that a court of law in a criminal prosecution can and will afford plaintiff an adequate legal remedy to test the constitutionality of the State statutes and municipal ordinances which he challenges here.

The order of Judge Clark is

Affirmed.

IN THE MATTER OF EFFIE MAE MORRIS, ADMINISTRATRIX OF THE ESTATE OF JOSEPH ROBERT COLLIE, DECEASED.

(Filed 4 November, 1964.)

Executors and Administrators § 5—

Where it appears that the executrix and sole beneficiary of one estate is also appointed administratrix of another estate having a chose which she claims had been assigned by her intestate to her testator, there is a conflict of interest justifying her removal as administratrix and the appointment of a successor administrator, but conflicting claims to the chose must be litigated prior to any final accounting.

APPEAL by respondent Effie Mae Morris from an order of *Hobgood, J.*, entered in Chambers in LOUISBURG on May 30, 1964.

The record disclosed (by stipulation) that Joseph Robert Collie, a resident of Franklin County, died intestate on February 1, 1962, leav-

ing Annie Hazel Collie, widow, and seven children, one of whom was under age but has been represented by guardian *ad litem* in this proceeding. On February 23, 1962, Effie Mae Morris presented to the Clerk of the Superior Court a paper writing signed in the name of the widow renouncing her right to administer on her husband's estate and recommending that Effie Mae Morris be appointed administratrix. The clerk made the recommended appointment and issued letters of administration.

The record here does not disclose any return or account filed by Effie Mae Morris, Administratrix. Her reasons for such failure are disclosed by her answer to a petition filed by the widow asking the court to remove her and to revoke her letters of administration. Motion to remove is based on two grounds: (1) Effie Mae Morris secured the movant's renunciation by fraud, and (2) as administratrix "she has willfully, unlawfully and feloniously converted to her own use . . . $11,075.55 (the proceeds of an insurance policy on the life of Joseph Robert Collie) in an attempt . . . to deal with herself as administratrix." The widow filed the petition for removal on February 11, 1964. The clerk issued notice to show cause why the demand for removal should not be granted.

In response to the show cause notice, Effie Mae Morris filed a verified answer in which she denied fraud in obtaining appointment as administratrix. She replied to the charge of having converted the proceeds of the insurance policy to her own use in great detail. Here is the substance of her explanation: John C. Matthews died in Franklin County on August 6, 1957, leaving a last will devising all his property to his wife, Mattie Lou Matthews, and appointing the respondent as his executrix. Among his assets was an indebtedness of $15,000.00 due by Joseph Robert Collie. To the evidence of this indebtedness was attached the insurance policy on the life of Joseph Robert Collie duly assigned to Matthews as security for Collie's indebtedness. Mattie Lou Matthews died (date not disclosed). Her will was probated in Franklin County on June 5, 1958. In the will she bequeathed and devised all her property to the respondent and appointed her executrix of the will. So that, according to the respondent's contentions, she became the owner of the Collie indebtedness to John C. Matthews, including the insurance policy. Respondent further alleged that she contacted the insurance company, which required the endorsement of the personal representatives of the Collie Estate and of the Matthews' Estates before payment would be made and for that reason she qualified as administratrix of the Collie Estate.

After hearing, the Clerk removed Effie Mae Morris as Administratrix of the Collie Estate and ordered that she turn over to the succes-

sor administrator "all assets coming into her hands as such administratrix." The respondent appealed to the Judge of the Superior Court. After a hearing, Judge Hobgood "approved and affirmed in every respect" the order of the clerk removing Effie Mae Morris as Administratrix of the Collie Estate and ordered and directed her "to turn over all assets coming into her hands as such administratrix," to W. H. Taylor, successor administrator. The respondent appealed.

Gaither M. Beam, Hobart Brantley for respondent appellant.
W. H. Taylor, E. C. Bulluck for petitioner appellee.

HIGGINS, J. The allegations and contentions of the parties as detailed in the foregoing statement of facts are sufficient to show a genuine controversy involving the ultimate right to the proceeds of the insurance policy on the life of Joseph Robert Collie. As Administratrix of the Collie Estate and as the executrix of the Estates of John C. Matthews and of Mattie Lou Matthews, and as sole beneficiary of the latter, Effie Mae Morris occupies positions in which the interests are conflicting. Her counsel admit this conflict justifies her removal as Administratrix of the Collie Estate.

The order of Judge Hobgood approving the clerk's removal of Effie Mae Morris as administratrix and appointing W. H. Taylor successor administrator is affirmed. Effie Mae Morris must account to the successor administrator for all assets of the estate which came into her hands as administratrix. However, a final accounting must await the resolution of the controversy between the Collie Estate and Effie Mae Morris as executrix and beneficiary of the Matthews' wills involving the proceeds of the insurance on Mr. Collie's life. If it be determined that the proceeds of the insurance policy belong to the Collie Estate, then Effie Mae Morris and her bondsman must account therefor to the successor administrator.

We think, however, Judge Hobgood's order contemplates that the parties by agreement or by litigation will settle their conflicting claims to the insurance before any final accounting is required as to that fund. As so understood, Judge Hobgood's order is

Affirmed.

EFFIE MAE MORRIS, ADMINISTRATRIX OF JOSEPH ROBERT COLLIE, DECEASED v. ANNIE HAZEL S. COLLIE, WIDOW, J.R. (CULLEN) COLLIE, CHARLES COLLIE, CLAYTON COLLIE, EARL COLLIE, ANTHONY COLLIE, VAN BUREN COLLIE, AND JOYCE COLLIE, A MINOR, HEIRS-AT-LAW OF JOSEPH ROBERT COLLIE, DECEASED.

(Filed 4 November, 1964.)

APPEAL by Effie Mae Morris from *Hobgood, J.*, in Chambers, FRANKLIN Superior Court, May 30, 1964.

The plaintiff instituted this adversary proceeding on May 7, 1964, to have the court accept, audit and approve her attached settlement and final account as Administratrix of the Estate of Joseph Robert Collie. The account showed the plaintiff had advanced $77.00 and had paid out that amount for bond and court costs; and that the estate was due her that amount.

A notation in the account showed that as Administratrix of Joseph Robert Collie and Executrix of John C. Matthews, she had received a check for $11,075.55 from Pilot Life Insurance Co., which had been assigned by Mr. Collie to John C. Matthews as security for a debt due by Collie to Matthews. Further facts in connection with this transaction are disclosed in the opinion filed this day in a companion case entitled, *"In the Matter of Effie Mae Morris, Administratrix of the Estate of Joseph Robert Collie, Deceased."* From an order dismissing this proceeding signed by Judge Hobgood, the plaintiff appealed.

Gaither M. Beam, Hobart Brantley for plaintiff appellant.
W. H. Taylor, E. C. Bulluck for respondent appellees.

PER CURIAM. The order dismissing the appeal in this case was based on Judge Hobgood's order entered May 30, 1964, upon the ground that relief is wholly incorporated in and adjudicated by the order in the companion proceeding above referred to, and for that reason the action should be dismissed.

In view of the order in the companion case, we agree that provision is made for the adjudication of the entire controversy. The order is

Affirmed.

NICHOLAS A. WALKER v. CARL O. STORY.

(Filed 4 November, 1964.)

1. Taxation § 42—

Where tax foreclosure action of a county and a municipality are consolidated for judgment, which judgment authorizes and directs the commissioner to sell the lands described in the county's action, *held*, the foreclosure is of the entire tract so described, notwithstanding the commissioner's notice of sale and his report of sale bear caption of the municipal foreclosure, since both refer to the judgment of foreclosure. Therefore, the contention that the commissioner's deed pursuant to the city tax foreclosure could not convey that part of the tract lying outside the municipality is inapplicable.

2. Judgments § 13; Taxation § 39—

G.S. 1-211(1) does not apply to a tax foreclosure, and where a summons in a tax foreclosure suit is served by publication, judgment by default upon a complaint with incomplete verification is not void but is merely irregular.

3. Judgments § 18—

The proper procedure to attack an irregular judgment is by motion in the cause.

4. Judgments § 21—

In attacking a default judgment for irregularity defendant must show due diligence and a meritorious defense.

APPEAL by plaintiff from *McLean, J.*, February 3, 1964 Session of POLK.

Action to remove a cloud from title to a tract of land in Columbus Township, Polk County, particularly described in the complaint and referred to hereafter as the subject lands.

In a prior action instituted December 20, 1958, judgment of involuntary nonsuit entered June 7, 1960, was affirmed by this Court. *Walker v. Story*, 253 N.C. 59, 116 S.E. 2d 147.

This action was instituted June 26, 1961. A judgment herein, which sustained defendant's plea of *res judicata* (based on said judgment in the prior action) and dismissed this action, was reversed by this Court. *Walker v. Story*, 256 N.C. 453, 124 S.E. 2d 113.

It was stipulated that, prior to the tax foreclosure actions referred to below, "Edward Mickler owned an undivided one-half interest in the property in question and Helen A. Ahern owned the other one-half interest in the property."

Plaintiff offered in evidence three deeds, each describing the subject lands, to wit: (1) Quitclaim deed dated October 28, 1958, from F. Juanita Page, unmarried, to Nicholas A. Walker; (2) quitclaim deed dated April ....., 1958, from Lillie A. Mickler, widow, Arthur Mickler

and wife, Pauline K. Mickler, and Betty Mickler Wides and husband, Norman Wides, to F. Juanita Page; (3) quitclaim deed dated April 10, 1958, from Joseph S. Ahern and wife, Helen A. Ahern, to F. Juanita Page.

Plaintiff offered, for the purpose of attack, the court files in two tax foreclosure actions, each relating to the subject lands, to wit:

1. Civil action (File No. 1465) instituted August 5, 1939, by Polk County against E. Mickler and wife, Mrs. E. Mickler, Helen A. Ahern and husband, Joseph S. Ahern, and others, for foreclosure of the subject lands for nonpayment of taxes in the amount of $583.67 due Polk County for the years 1931-1938, inclusive, referred to hereafter as the Polk County case.

2. Civil action (File No. 1503) instituted October 4, 1939, by Town of Columbus and William Pabodie, Fiscal Agent of the Town of Columbus, against E. Mickler and wife, Mrs. E. Mickler, Helen A. Ahern and husband, Joseph S. Ahern, and others, for foreclosure of the subject lands for nonpayment of taxes in the amount of $239.28 due the Town of Columbus for the years 1930-1938, inclusive, referred to hereafter as the Town of Columbus case.

In each tax foreclosure action, the service of summons was by publication. No answer or other pleading was filed by any defendant. The two cases were consolidated for judgment. Judgment in the consolidated cases was entered on Monday, December 11, 1939, in favor of each plaintiff for the amount of the unpaid taxes due it. J. T. Arledge was appointed commissioner to sell the subject lands. Thereafter, the court confirmed the sale of the subject lands to Polk County for $600.00 and ordered the commissioner to execute and deliver a deed to the purchaser.

Plaintiff then offered in evidence four deeds, each describing the subject lands, to wit: (1) deed dated February 12, 1940, from J. T. Arledge, Commissioner, to Polk County; (2) deed dated September 29, 1941, from Polk County to W. W. Foster and W. M. Newman; (3) warranty deed dated August 10, 1949, from W. W. Foster and wife, Nettie Foster, to C. O. Story; and (4) warranty deed dated August 5, 1950, from W. M. Newman and wife, Ollie Newman, to C. O. Story.

Plaintiff called two witnesses, J. F. Ormand and Frank Johnson.

Ormand testified that "a part of the land which is the subject of this controversy is inside the corporate limits of the Town of Columbus and a part is outside said limits." It was (then) stipulated: ". . . and the plaintiff agrees that they *(sic)* own no portion or part of the lands lying in or within the incorporate limits of the Town of Columbus."

Johnson, Polk County Accountant, testified: ". . . C. O. Story has listed and paid Polk County *ad valorem* taxes on the property in question for about 10 years, and plaintiff has never listed said property for taxes or paid taxes thereon."

At the conclusion of plaintiff's evidence, the court, on motion of defendant, entered judgment of involuntary nonsuit.

W. Y. Wilkins, Jr., for plaintiff appellant.
Jones & Jones for defendant appellee.

BOBBITT, J. Plaintiff undertakes to prove his title to the subject lands by connecting defendant with a common source of title and by showing in himself a better title from that source. *Mobley v. Griffin,* 104 N.C. 112, 115, 10 S.E. 142; *Vance v. Pritchard,* 213 N.C. 552, 555, 197 S.E. 182.

Plaintiff, during trial, disclaimed ownership of the portion of the subject lands lying within the corporate limits of the Town of Columbus. He does not attack on any ground the proceedings in the Town of Columbus case.

Plaintiff's present contention is that the sale and conveyance of the subject lands by Arledge, Commissioner, to Polk County, were made pursuant to authority conferred in the *Town of Columbus* case; and that the commissioner's deed is void as to the portion of the subject lands lying outside the corporate limits of the Town of Columbus.

Admittedly, the Town of Columbus had no tax lien on lands outside its corporate limits. However, the record does not support plaintiff's contention that the commissioner had authority to sell and convey only the portion of the subject lands lying within the corporate limits of the Town of Columbus. There was no separate judgment in the *Town of Columbus* case. The only judgment, which was entered Monday, December 11, 1939, (1) consolidated the two actions for judgment; (2) established the amount of unpaid taxes due each plaintiff; and (3) authorized and directed the commissioner to advertise and sell "the lands described in the Complaint." The descriptions in the complaints, in the commissioner's notice of sale, in the judgment confirming the sale, in the commissioner's deed, and in the complaint *in this action,* are identical.

Plaintiff stresses the fact that the commissioner's notice of sale, his report of sale and his report of receipts and disbursements bear the caption of the *Town of Columbus* case. The notice of sale and report of sale refer to the order and judgment entered Monday, December 11, 1939, "in the above captioned cause" or "in the captioned matter." The

fact that these papers did not carry the captions of both actions is immaterial. The function of the commissioner's notice of sale was to give notice to prospective purchasers. There was only one judgment and reference thereto disclosed the two tax foreclosure actions had been consolidated for judgment and one joint judgment entered therein. In this connection, see North Carolina Code of 1939 (Michie), § 7971(228)(j); G.S. 105-391(j). The commissioner's report of receipts and disbursements discloses plainly that Polk County had purchased the subject lands for the benefit of itself and of the Town of Columbus. See North Carolina Code of 1939 (Michie), § 7971(228)(u); G.S. 105-391(u).

The sufficiency of the service of summons by publication is not challenged. "From the time of service of the summons, in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings." C.S. 488; G.S. 1-101. The defendants in each tax foreclosure action were charged with notice of all proceedings therein.

Contrary to plaintiff's contention, the record discloses that the joint judgment of December 11, 1939, and the judgment of confirmation of February 12, 1940, (both of which bear the captions of both actions) authorized and directed the commissioner to sell and convey all the lands on which Polk County had a lien including, but not limited to, the portion thereof on which the Town of Columbus also had a lien.

Plaintiff, conditionally, contends: The judgment, with reference to the portion of the subject lands lying outside of the corporate limits of the Town of Columbus, is defective because the complaint in the Polk County suit was not verified. In this connection, the record shows the (verification) affidavit was signed by W. C. Hague, Tax Collector and Treasurer of Polk County, but does not show it was sworn to or subscribed before the clerk as contemplated by the blank form provided for the clerk's signature.

G.S. 1-211, subsection 1, on which plaintiff relies, applies to a cause of action for the breach of an express or implied contract to pay a sum of money fixed by the terms of the contract. ". . . a judgment by default final *in that kind of suit,* on an unverified complaint, is irregular and will be set aside *on motion made in apt time and on a proper show of merits.*" (Our italics). *McNair v. Yarboro,* 186 N.C. 111, 112, 118 S.E. 913, and cases cited. Motion in the cause is the proper course to pursue to obtain relief from an irregular judgment. *Pruitt v. Taylor,* 247 N.C. 380, 382, 100 S.E. 2d 841, and cases cited. It is noted that the complaint herein, if it were treated as a motion in the Polk County case, see *Beck v. Voncannon,* 237 N.C. 707, 713, 75 S.E. 2d 895, does

not show plaintiff or those under whom he claims acted with due diligence or had a meritorious defense to Polk County's tax foreclosure action.

It is noted that the judgment of December 11, 1939, contains the following: "Pursuant to the statutory mandate requiring proof to be made of the demand mentioned in the Complaint in actions where the service of summons was by publication, the *plaintiffs* have been required to submit proof of the demand mentioned in the complaint as required by law and after the submission of such proof, the Court finds as a matter of fact that the plaintiffs are entitled to a judgment against the property for the sums hereinafter stated." (Our italics). See G.S. 1-211, subsection 3.

In view of the foregoing, it is unnecessary to consider whether (with reference to the undivided one-half interest owned by Edward Mickler prior to the tax foreclosure actions) plaintiff's evidence is sufficient to connect his title with the title of Edward Mickler. In this connection, see *McDonald v. McCrummen,* 235 N.C. 550, 70 S.E. 2d 703.

Plaintiff has failed to prove title to the subject lands. Indeed, upon the present record, it appears defendant has the better title thereto. Hence, the judgment of involuntary nonsuit is affirmed.

Affirmed.

WACHOVIA BANK & TRUST COMPANY v. WAYNE FINANCE COMPANY.

(Filed 4 November, 1964.)

1. Chattel Mortgages and Conditional Sales § 12; Registration § 4—

Where a mortgagor is permitted to retain possession of the chattel, the mortgagee acquires no lien as against purchasers or lien creditors but from the registration of the chattel mortgage.

2. Same; Automobiles § 4—

G.S. 20-28(a) does not prevent a mortgagee having actual possession of the pledged vehicle from acquiring a lien having priority over other liens not then perfected, and therefore a mortgagee who has his lien first recorded and who retains possession of the vehicle mortgaged has a lien prior to a mortgagee subsequently recording his instrument who does not transmit the certificate of title to the Department of Motor Vehicles within ten days of the date of its loan and mortgage.

3. Estoppel § 4—

Estoppel is not available to protect one against his own negligence, and where a chattel mortgagee of automobiles would have had priority of lien,

if it had transmitted the certificates of title to the Department of Motor Vehicles within ten days of its mortgage, but fails to do so, it may not assert estoppel as against a prior registered lien on the ground that the certificates of title failed to show the existence of any liens.

4. Marshalling—

A creditor cannot assert the remedy of marshalling of assets as against another creditor on the ground that a third person had guaranteed payment of such other creditor's debt when the guarantor of payment would be subrogated to the rights of such other creditor.

APPEAL by defendant from *Clark (Edward B.), S. J.*, May 1964 Session of WAYNE.

This action was instituted to determine who is entitled to the proceeds derived from the sale of 12 automobiles described in mortgages given by John Long Motor Sales (Long) to plaintiff and to defendant. Long is a limited partnership engaged in buying and selling new and used automobiles in Wayne County. John Long is the general partner. He operates the business. John C. Cobb is the limited partner.

In March 1961, plaintiff agreed that it would make loans to Long to purchase automobiles. Each loan was to be evidenced by a note. Payment was to be secured by chattel mortgage on the vehicle for which the loan was to be made. Cobb, the limited partner, guaranteed payment of the loans.

In April and May 1963, plaintiff, pursuant to its agreement with Long, made twelve loans aggregating $10,660.00. Payment of these loans was secured by chattel mortgages on 12 second hand automobiles. These twelve mortgages were not filed for record until 4:20 p.m. on June 19, 1963. Plaintiff then took possession of the automobiles. The liens of the mortgages were not noted on the certificates of title issued for the vehicles.

In July 1962, defendant agreed to make loans to Long to enable him to purchase automobiles. Plaintiff did not know of Long's arrangement with defendant.

In April, May and June 1963, defendant made loans aggregating $9,050.00 to Long. The loans made by defendant were from one to eight days subsequent to the loans made by plaintiff. A chattel mortgage on each of the 12 automobiles was given to defendant on the same day the loan was made. These mortgages, the earliest dated April 9, 1963, the latest dated June 1, 1963, were not filed for record until 12:10 p.m. on June 20, 1963, twenty hours after plaintiff's mortgages were recorded and it had taken physical possession of the automobiles.

Long had possession of the vehicles and the certificates of title therefor when plaintiff made its loans. It examined, but did not retain pos-

session of the certificates of title. The certificates did not indicate that the vehicles were subject to any liens.

Defendant, before making its loans to Long, examined each of the vehicles, which were then in Long's possession, and examined and took possession of the certificates of title covering each of the vehicles. It did not transmit the certificates to the Department of Motor Vehicles to have its liens noted thereon. There was nothing on any certificate to indicate that any vehicle was subject to a lien. Defendant retained possession of the certificates of title until July 19, 1963, when it and plaintiff agreed that the vehicles would be sold and the rights of the parties transferred to the proceeds of sale.

The vehicles were sold in August 1963, for $6,987.14. This sum is insufficient to pay the debt due plaintiff secured by Long's mortgages to it, or the debt due defendant secured by Long's mortgages to it.

Based on the agreed facts, the court adjudged plaintiff was entitled to the proceeds of sale. Defendant excepted and appealed.

Sasser & Duke for defendant appellant.

Taylor, Allen & Warren by John H. Kerr, III, for plaintiff appellee.

RODMAN, J. G.S. 47-20 provides: "No * * * mortgage of * * * personal property * * * shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the * * * mortgagor, but from the time of registration thereof * * *." This statute has been interpreted in multitudinous opinions. The conclusions reached are consistently to the effect that where a mortgagor is permitted to retain possession of chattels, the mortgagee acquires no lien as against purchasers or creditors, but from the registration of the instrument.

The word creditor, as used in the statute, does not mean a general creditor; it means a lien creditor — one who has a recorded mortgage, or has possession of the chattel for the purpose of securing mortgagor's debt. *Credit Co. v. Norwood,* 257 N.C. 87, 125 S.E. 2d 369; *Finance Corp. v. Hodges,* 230 N.C. 580, 55 S.E. 2d 201. Since plaintiff's mortgages were first recorded, and it had physical possession of the chattels when defendant filed its mortgages for record, it had, if the provisions of G.S. 47-20 were here controlling, a prior claim to the fund. *Fleming v. Burgin,* 37 N.C. 584; *Robinson v. Willoughby,* 70 N.C. 358; *Todd v. Outlaw,* 79 N.C. 235; *Hodges v. Wilkinson,* 111 N.C. 56, 15 S.E. 941; *Collins v. Davis,* 132 N.C. 106, 43 S.E. 579; *McHan v. Dorsey,* 173 N.C. 694, 92 S.E. 598; *Cowan v. Dale,* 189 N.C. 684, 128 S.E. 155; *Eaton v. Doub,* 190 N.C. 14, 128 S.E. 494; *Jordan v. Wetmur,* 202

N.C. 279, 162 S.E. 610; *Glass v. Shoe Co.*, 212 N.C. 70, 192 S.E. 899; *Finance Corp. v. Hodges, supra; Rubber Co. v. Crawford*, 253 N.C. 100, 116 S.E. 2d 491.

The Legislatures of 1923 and 1937 required the owner of a motor vehicle to register it, and to obtain a certificate of title showing all liens thereon, G.S. 20-52, G.S. 20-57. But these statutes did not repeal or modify our recording laws. Priority, where the mortgagor retained possession of the chattels, was determined by priority in filing for record in the proper office. *Corporation v. Motor Co.*, 190 N.C. 157, 129 S.E. 414.

The 1961 Legislature, by the enactment of Chapter 835 of that Session, revolutionized the laws of this State as they relate to chattel mortgages on property for which it is necessary to have a certificate of title.

It is not necessary and, in fact, unusual, for an act of the Legislature to carry a preamble explaining the reason for its enactment, but Chapter 835, S.L. 1961, does. It says that:

"WHEREAS, the present motor vehicle certificate of title law provides for a declaration of all existing liens at the time of application for registration, but does not require that liens given thereafter be declared and entered on the certificate of title; and

"WHEREAS, the certificate of title, often regarded as absolute, is not conclusive as to liens and may not be relied upon to show good title for purpose of sale or encumbrance, except as it relates to lien perfection under Section 213 of the Interstate Commerce Act; that is, liens on equipment of interstate common and contract carriers; and

"WHEREAS, the present certificate of title law does not meet the requisites of the Uniform Title Code because the certificate of title is not in and of itself adequate notice to third parties of existing liens; and

"WHEREAS, a certificate of title that can be relied upon as a ready means by which all legal interests in motor vehicles may be determined would be to the public interest."

This statute, effective January 1, 1962, G.S. 20-58.10, made important changes in our registration laws as they relate to automobiles. The place where the lien is to be recorded is changed from the office of the Register of Deeds to the Department of Motor Vehicles, G.S. 20-58.2. Now the lien, if the agreement to pay is filed with the Department within ten days from its date, relates back to the day the lien was created, G.S. 20-58(b). To that extent, the 1961 law adopts the philosophy of our earliest recording acts, sec. 1, c. 7, Laws of 1715, Potter's Revisal 104.

May a creditor, having actual possession of an automobile, acquire a valid lien without having the pledge noted on the certificate of title? By uniform interpretation, our recording statutes have been limited to those cases where the mortgagor retained possession of the chattel. They have no application when the creditor takes actual possession of the chattel which secures payment of the debt. *Doak v. Bank,* 28 N.C. 309; *Cowan v. Dale, supra; Bundy v. Credit Co.,* 202 N.C. 604, 163 S.E. 676; *Finance Corp. v. Hodges, supra; Rubber Co. v. Crawford, supra.*

No language of the 1961 statute expressly prohibits the creation of a pledge; nor does the reason given for the enactment lead one to conclude the Legislature intended to prevent the creation of a valid lien by delivering possession of the chattel to the creditor. People do not normally purchase or lend money on second hand automobiles merely upon the exhibition of the certificate of title. They want to see the vehicle itself. They neither purchase nor loan without such an examination. There is, we think, clear implication in G.S. 20-58(a) that the Legislature did not intend to prevent a mortgagee who has actual possession of the pledged vehicle from acquiring a lien having priority over liens not then perfected.

Neither party had a perfected lien prior to June 19, 1963. On that date, Long surrendered possession of the automobiles to plaintiff to hold as security for the sums loaned. It acquired a valid lien from the moment it took possession. Cases cited, *supra;* 15 AM. JUR. (2d) 309.

Plaintiff, having acquired a lien by taking possession of the chattels, is not now estopped to assert that lien against defendant. Plaintiff had neither actual nor constructive knowledge of the fact that Long was also borrowing from defendant. Plaintiff did nothing to prevent defendant from perfecting its lien. Had it transmitted the certificates to the Department of Motor Vehicles within ten days of the dates of the loans and mortgages, defendant would have the prior lien. The priority here declared results from defendant's negligence. Estoppel is not available to protect one against his own negligence. *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745; *Hawkins v. Finance Corp.,* 238 N.C. 174, 77 S.E. 2d 669; *Ramsey v. Nebel,* 226 N.C. 590, 39 S.E. 2d 616; 31 C.J.S. 529.

We find no merit in defendant's contention that it should be adjudged the owner of the proceeds of the sale on the theory of marshalling of assets. It says plaintiff should call on Cobb, the limited partner, who has guaranteed payment; such payment would discharge plaintiff's lien,

leaving the fund subject to defendant's claim. This argument ignores the fact that Cobb, if required to pay, would be subrogated to all of plaintiff's rights, 83 C.J.S. 683, 24 AM. JUR. 955.

Affirmed.

MINNIE BROWN LUTHER v. NATIONWIDE MUTUAL INSURANCE COMPANY.

AND

JOE EMMITT LUTHER v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 4 November, 1964.)

1. Insurance § 57 —

Where a dealer accepts a purchaser's old car as down payment on another car and the purchaser signs the title certificate on the car turned in and agrees on the payments to be made and signs a contract for the car purchased, the dealer's garage liability policy does not cover damages inflicted in a collision occurring some month thereafter while the car purchased was being driven by the purchaser, even though the car purchased is damaged in the collision to such extent that the purchaser refuses to accept repairs but permits the dealer to collect the collision insurance and sell the car to another after repair.

2. Insurance § 60—

Ordinarily, failure to give notice to insurer of an accident within the time stipulated in the policy precludes recovery.

APPEAL by plaintiffs from *Parker, J.*, May Civil Session 1964 of NASH.

This is an action to recover from defendant the amount of an unsatisfied judgment entered against one George Elton Lamm on 19 October 1960 in the Superior Court of Nash County, North Carolina, as the result of an automobile accident on 20 October 1957 between a 1956 Ford automobile driven by Lamm and an automobile in which the plaintiffs, Minnie Brown Luther and Joe Emmitt Luther, were riding.

The plaintiffs allege that the 1956 Ford automobile driven by Lamm at the time of the collision complained of, was owned by the Lee Motor Company and was being driven by Lamm with its permission. It is further alleged by the plaintiffs in their respective complaints that some time prior to 20 October 1957, the defendant insurance company issued a Garage Liability Policy to the Lee Motor Company, Inc., Elm City,

North Carolina, as named insured, wherein defendant insurance company's policy contained the following provisions:

"* * * To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury * * * arising out of * * *

"The ownership, maintenance or use of the premises for the purpose of an automobile sales agency * * * and all operations necessary or incidental thereto; and the ownership, maintenance or use of any automobile in connection with the above defined operations * * *.

"With respect to the insurance under Coverages A, B and D the unqualified word 'Insured' includes the Named Insured and also includes * * * any person while using an automobile covered by this policy, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the Named Insured or with his permission. * * *

"When an accident occurs written notice shall be given by or on behalf of the Insured to the Company or any of its authorized representatives as soon as practicable. * * *

"If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representatives."

The defendant admitted the issuance of the insurance policy as alleged, and further admitted it was in effect on 20 October 1957. Defendant denied that on 20 October 1957 the Lee Motor Company, Inc., was the owner of the 1956 Ford automobile driven by Lamm, or that it was being used in connection with its sales agency, and expressly denied that Lamm was operating said automobile at the time complained of with the consent and permission of Lee Motor Company, Inc.

The defendant likewise pleaded the failure to give notice of the accident, as required by the policy. One of the attorneys for plaintiffs orally notified the defendant's agent in Wilson, North Carolina, of the alleged claim on 4 January 1960, and the first written notice to the company was given by plaintiffs' attorneys by letter dated 16 August 1960.

These cases were consolidated for trial by consent of the parties.

The plaintiffs' evidence tends to show that on Sunday, 29 September 1957, Lamm saw Ricks, a salesman for Lee Motor Company, at a service station near Elm City. Ricks was driving a 1956 Ford and asked Lamm if he was interested in trading again, that Lamm had paid enough on his 1955 Ford to make a down payment on the 1956 Ford

Ricks was driving. The following morning, Ricks left the 1956 Ford with Lamm to drive, taking Lamm's 1955 Ford back to Lee Motor Company. That same day, 30 September 1957, after driving the 1956 Ford "a little bit," Lamm went to the Lee Motor Company and talked to Mr. James Lee about a trade. An agreement was reached whereby Lamm's 1955 Ford was to be taken in as a down payment on the 1956 Ford, with monthly payments to start thirty days thereafter. Lamm did not sign a title certificate for the 1956 Ford, nor did he remember signing a conditional sales contract. He testified: "On the day that I made my trade with Lee Motor Company I left the '55 Ford that I had owned at Lee Motor Co. After the day I traded, on or about September 30, 1957, I have never made any demand on Lee Motor Co. to return to me the 1955 Ford. I left the '55 Ford there at Lee Motor Co. on that day and signed the title certificate for it. I drove the '56 Ford away from there on the same day. When I left there I parked that car at my home, drove it to work and to other places. I did not ask any officer of Lee Motor Company where I could drive it and did not make any report to Lee Motor Company as to where I was driving it."

This witness also testified that he considered the 1956 Ford his own property. He further testified: "I don't remember when my first payment was due on the 1956 car that I bought; I would say in a month or forty-five days. I agreed with them on the payments and when they were to be made. I signed a paper. I knew the amount I was being allowed for my car and the amount that I would have to pay on the new car and knew the amount of the payments at that time and when they were to be made. I also knew that I would get the title free and clear when I made all my payments. That was the understanding and agreement I had with Mr. Lee."

The 1956 Ford was damaged in the collision on 20 October 1957 to the extent of approximately $1,200. On the next day after the collision, the car was towed to Perry Auto Parts in Wilson, North Carolina. Later, Lee's wrecker got the car and took it to Lee Motor Company in Elm City. The car was damaged to such an extent that Mr. Lamm declined to authorize repairs or agree to accept it if it were repaired. The Lee Motor Company collected collision insurance on the car, repaired it and sold it. Neither the cost of the repairs nor the sale price of the car is disclosed by the record.

At the close of plaintiffs' evidence, the defendant moved for judgment as of nonsuit. The motion was allowed as to each plaintiff's cause of action. The plaintiffs appeal, assigning error.

Spruill, Trotter, Biggs & Lane; William L. Thorp, Jr., for plaintiff appellants.

Lucas, Rand, Rose & Morris for defendant appellee.

DENNY, C.J. This Court said in the case of *Credit Co. v. Norwood,* 257 N.C. 87, 125 S.E. 2d 369: "Prior to 1961 a purchaser of a motor vehicle acquired title notwithstanding the failure of his vendor to deliver vendor's certificate of title or vendee's failure to apply for a new certificate. In *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745, the court charged: 'Now, the law does not prohibit the sale of a motor vehicle without a transfer and delivery of certificate of registration of title; in other words, one can sell a motor vehicle on one day and the title pass, and deliver or transfer the paper certificate of title on a later date.' This Court, in approving that instruction, said: '(I)t is observed that the instruction as given is precisely in accord with the decision in *Corporation v. Motor Co.,* 190 N.C. 157, 129 S.E. 414.' Similar interpretation was given the statute in *Finance Co. v. Pittman,* 253 N.C. 550, 117 S.E. 2d 423; 32 N.C. Law Review 545."

In *Godwin v. Casualty Co.,* 256 N.C. 730, 125 S.E. 2d 23, the purchaser had made the required initial cash payment and executed a conditional sales contract in blank, the precise number and amount of installments covering the balance of the purchase price had not been determined. The court below, however, held all the essential elements of the contract of sale by Ben Brewer, trading as Brewer Motor Company, to Paul J. Hinson, had been completed. Hinson took possession of the car involved on 18 December 1958, and on 19 December 1958 signed an application for a certificate of title. Hinson had exclusive possession of the car until the collision on 24 December 1958. Plaintiff Godwin, who was injured in the collision, obtained judgment against Hinson who failed to satisfy same. Godwin brought an action against Brewer's insurer who had issued to him a Garage Liability Policy similar to that involved in the instant case. Judgment of nonsuit was entered below and, upon appeal, we affirmed.

In our opinion, the plaintiffs' evidence herein is insufficient to support a finding that the Lee Motor Company, Inc., was the owner of the 1956 Ford on 20 October 1957. Moreover, it is admitted that no notice, oral or otherwise, was given to the defendant or its agent with respect to the collision complained of until after the expiration of more than twenty-six months. See *Muncie v. Insurance Co.,* 253 N.C. 74, 116 S.E. 2d 474.

The judgment of the court below is

Affirmed.

IREDELL COUNTY AND CITY OF STATESVILLE, N. C. v. ADOLPH CRAWFORD, ADMINISTRATOR OF THE ESTATE OF ADOLPH CRAWFORD; MRS. MARTHA CRAWFORD; LUCILLE THOMPSON, JAMES CRAWFORD, MAE HANCOCK, ROSA LEE ROSEBORO; BESSIE GRAY AND JAMES R. WALKER, JR.

(Filed 4 November, 1964.)

1. Appeal and Error § 47—

It cannot be determined whether appellant is prejudiced by the denial of his motion to be allowed to file an amendment to the answer when the purpose or content of the amendment does not appear.

2. Appeal and Error § 19—

An exception must be assigned as error in order to present the question for review.

3. Limitation of Actions § 16—

A statute of limitations cannot be taken advantage of by demurrer or by motion to bar the action, but may be properly invoked only by answer. G.S. 1-15.

4. Same; Taxation § 39—

A defendant in a tax foreclosure suit cannot avail himself of the ten year statute of limitations set forth in G.S. 105-422 when he does not plead the statute in his answer.

5. Appeal and Error § 1—

Ordinarily, the Supreme Court will not pass on constitutional questions unless they are squarely presented, and where defendant does not attack in his answer the constitutionality of a statutory exception, and, further, the determination of the constitutionality of the exception would not affect the judgment below, the constitutional question will not be decided.

APPEAL by defendant James R. Walker, Jr., from *Walker, S. J.*, March Session 1964 of IREDELL.

This is a civil action to foreclose tax liens upon real estate and to sell the real estate for taxes due the County of Iredell and the City of Statesville as authorized by G.S. 105-414.

This action was instituted on 30 June 1962 and the complaint was filed on said date, and the summons, together with a copy of the complaint, was served on defendant Walker on 12 July 1962.

The taxes in default, as set out in the complaint, due the County of Iredell, were for taxes levied for the years 1945 through 1955 and for the year 1961. The taxes in default due the City of Statesville, as set out in the complaint, were for taxes levied for the years 1937 through 1955.

Defendant Walker filed answer on 17 December 1962, and at no time has said defendant pleaded the ten-year statute of limitations as a bar to the relief sought, or any part thereof.

On 14 October 1963, the appellant filed a motion in bar to said action in which he sought to have the action abated as to all taxes levied prior to 29 June 1952. Thereafter, on 2 December 1963, the appellant filed a supplemental motion to bar the action on the ground that G.S. 105-422 is void and unconstitutional as being in conflict with Article II, Section 29 of the Constitution of North Carolina, which prohibits the passing of "any local, private, or special act * * * extending the time for the assessment or collection of taxes * * *." These motions were heard by the Presiding Judge at the December Session 1962 of the Superior Court of Iredell County and were denied. Appellant excepted.

It appears from the record that when this cause came on for hearing at the March Session 1964 of the Superior Court of Iredell County, "defendant, James R. Walker, Jr., in open court, submitted to judgment being entered, based on the complaint filed in this action."

Judgment was entered as prayed for by the plaintiffs and a commissioner appointed to sell the lands involved.

The appellant, James R. Walker, Jr., appeals, assigning error.

Collier, Harris & Collier, and Marvin V. Bondurant for plaintiff appellees.

Samuel S. Mitchell, T. H. Wyche, Charles V. Bell, James R. Walker, Jr., for defendant appellant.

DENNY, C.J. The appellant seeks to challenge the validity of the exemption contained in G.S. 105-422 on the ground that the exemption of Iredell and thirty-four other counties from the provision of the statute makes the exemption unconstitutional. He contends that such exemption violates Article II, Section 29 of the Constitution of North Carolina, which prohibits the General Assembly from passing "any local, private, or special act * * * extending the time for the assessment or collection of taxes * * *."

G.S. 105-422, in pertinent part, reads as follows: "No action shall be maintained by any county or municipality to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens held by counties and municipalities whether such taxes or tax liens are evidenced by the original tax books or tax sales certificates or otherwise, unless such action shall be instituted within ten years from the time such taxes became due: Provided, that as to tax foreclosure actions which under existing laws are not and will not be barred prior to

December 31st, 1948, foreclosure actions may be instituted thereon prior to December 31st, 1948: Provided, further, that this section shall not be construed as applying to the liens for street and/or sidewalk improvements; and provided further, that this section shall not be applicable to any pending tax foreclosure actions." (Iredell and thirty-four other counties were originally exempted from the provisions of the act.)

Chapter 885 of the Session Laws of North Carolina, 1961, removed Iredell County from the exemption provision of the above statute and provided that it should be subject thereto from and after 1 July 1962.

The appellant contends that all taxes levied on the appellant's property prior to 29 June 1952 are barred by the ten-year statute of limitations on the ground that the exemption in G.S. 105-422, purporting to exempt Iredell and thirty-four other counties from the ten-year statute of limitations provision therein, is void and unconstitutional.

Ordinarily, we do not pass upon constitutional questions unless they are squarely presented. Here, the appellant has not pleaded the ten-year statute of limitations, nor has he attacked the constitutionality of G.S. 105-422, nor any of its provisions in his answer.

It does appear, however, in the findings by Walker, S. J., in his judgment entered below, that appellant filed an answer in apt time, that he filed a motion to bar action, a supplemental motion to bar action, and a motion to amend further answer, all of which were denied, and that the appellant entered an exception to each denial. However, the record does not set out the purpose or content of any proposed amendment to the further answer. Furthermore, the exception to such denial has not been preserved by bringing it forward and assigning it as error. This Court has repeatedly said that the statute of limitations cannot be taken advantage of by demurrer but only by answer. G.S. 1-15; *Elliott v. Goss,* 250 N.C. 185, 108 S.E. 2d 475; *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125; *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320; *Moody v. Wike,* 170 N.C. 541, 87 S.E. 350; *Oldham v. Rieger,* 145 N.C. 254, 58 S.E. 1091; *King v. Powell,* 127 N.C. 10, 37 S.E. 62; *Albertson v. Terry,* 109 N.C. 8, 13 S.E. 713; *Randolph v. Randolph,* 107 N.C. 506, 12 S.E. 374; *Guthrie v. Bacon,* 107 N.C. 337, 12 S.E. 204; *Bacon v. Berry,* 85 N.C. 124; *Long v. Bank,* 81 N.C. 41; *Green v. N. C. Railroad Co.,* 73 N.C. 524.

A statute of limitations is not available as a defense or bar to an action unless pleaded, nor can it be raised, ordinarily, by motion to dismiss. *Reid v. Holden, supra; Oldham v. Rieger, supra.*

In view of the failure of the appellant to plead the ten-year statute of limitations in his answer, or to attack in his answer the provisions

of G.S. 105-422, the statute he seeks to have declared unconstitutional, we hold the constitutional question has not been properly presented. Moreover, any decision we might render with respect to the validity of the statute complained of, could have no bearing on the judgment entered below.

The judgment of the court below is

Affirmed.

STATE v. JACOB DAVIS PHILLIPS.

(Filed 11 November, 1964.)

1. Homicide § 20—

Evidence tending to show that defendant was seated in the back seat of his automobile with a married woman not his wife, at night, that some person opened the door on the woman's side, that she screamed, and defendant got a shotgun from the front seat of the car, got out of the car and fired twice in the direction of the fleeing intruder whose identity he did not know, together with evidence that the shots so fired caused death, *held* sufficient to be submitted to the jury in a prosecution of defendant for homicide.

2. Homicide § 9—

Evidence tending to show that defendant was sitting in a parked car with a married woman not his wife, that an intruder opened the door on her side of the car, that she screamed, and that defendant got a gun from the front seat of the car, got out of the car, and intentionly fired twice into the body of the intruder as he ran from the scene, *is held* not to show actual or apparent necessity prerequisite to self-defense.

3. Homicide § 14; Criminal Law § 33—

Defendant shot and killed an intruder as the intruder was leaving the scene after he had opened the door of the car in which defendant and a woman, not his wife, were parked. *Held:* The introduction of evidence that defendant was a married man, and that his companion was a married woman but not his wife, is competent as revealing part of the background in the light of which defendant's conduct must be judged.

4. Criminal Law § 97—

Argument of the solicitor outside the record tending to prejudice defendant by attacking his character *held* rendered harmless by correction and admonition.

APPEAL by defendant from *Huskins, J.*, June, 1964 Session, BURKE Superior Court.

In this criminal prosecution the defendant Jacob Davis Phillips was charged with the capital felony of murder in the shooting of Tillman Edward Orders. Upon arraignment, the solicitor announced the State would not ask for a conviction of murder in the first degree, but only for murder in the second degree or manslaughter, as the evidence warranted. The State called and examined Deputy Sheriff McGalliard, who testified:

"On the 4th of February 1964 I was a Deputy Sheriff of Burke County. I saw the defendant, Jacob Davis Phillips, on that day in the Sheriff's office at 9:10 o'clock, p.m. . . .

"When I saw the defendant he came in the office and asked to speak to me. Marjorie Poteat was with him in the office. At that time Jacob Davis Phillips stated that he and Marjorie Poteat were sitting in his automobile in the back seat off of a dirt road located off the Golf Course Road, down below the Showboat, and that while they were sitting in the back seat talking that someone came up to the rear door of the car on her side and jerked the door open, and at that time she started screaming and he reached in the front seat of his car and got a shotgun and stepped to the rear of his car and fired twice in the direction the figure ran. He said in the direction of the figure of a man running. . . .

"I did go to the location where he told me this occurred with Deputy Robinson. We drove to the Golf Course Road and then onto a dirt road to the right and drove up that road about 500 feet and approximately 21 feet to my right was a body lying face down in the field. From the identification of the body, it was Tillman Orders. He was dead at that time."

Dr. John Reece performed an autopsy on the body of Tillman Edward Orders which disclosed penetrating gunshot wounds, both in the chest and back. Dr. Reece testified in his opinion these wounds caused death.

The State introduced, over defendant's objection, evidence that J. D. Phillips, the defendant, is a married man; that his companion, Marjorie Poteat, is a married woman, but not the wife of the defendant. The State also introduced evidence that the automobile of the deceased was parked beside a pumping station near a stream about 500 feet from the place where the shooting occurred. In the vehicle were a number of steel traps and other trapping paraphernalia. A witness testified he saw the deceased wading the stream about five o'clock, wearing hip boots and carrying a number of steel traps, apparently tending his trap line.

The Sheriff had heard complaints from the deceased that his traps were being molested. In the deceased's pocket the officers found a paper on which were written several automobile license numbers, including the defendant's. The reason for the deceased's approach to the defendant's vehicle, whether in the attempt to discover who was robbing his traps, or otherwise, are matters of speculation.

The defendant did not offer evidence. His motion to dismiss was overruled. The jury found the defendant guilty of manslaughter. From a judgment of imprisonment, he appealed.

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

Patton, Ervin & Starnes, by Sam J. Ervin, III, John H. McMurray, for defendant appellant.

HIGGINS, J. The defendant reported to the officers that he and Marjorie Poteat were in the back seat of his automobile, parked off the golf course road, when some person opened the door on the woman's side, she screamed, the defendant grabbed a double-barreled shotgun from the front seat, got out of the automobile and, although it was dark, he fired two loads of buckshot in the direction of the fleeing intruder whose identity he did not know. He and his companion left the scene, went directly to the Sheriff's office and reported what had occurred. The officers accompanied the defendant to the scene of the shooting where they found the dead body of Tillman Edward Orders. The body was about 40 feet from the point where the defendant's vehicle had been parked. "J. D. Phillips told me that he hadn't seen Tillman Orders for several years but said he knew him well. . . . he said if he had known who it was he would not have shot."

The defendant's own story fails to disclose any justification for the shooting. The defendant attempted to rely on the right to kill in his necessary self-defense. The court charged at great length on that right. Frankly, the evidence fails to disclose any danger — real or apparent — which would justify the defendant in firing the fatal shots. The evidence shows not one, but two charges of buckshot were intentionally fired into the body of Tillman Edward Orders as he ran from the scene. Ordinarily, one must be in danger, or believe he is, and have grounds for that belief, before he may open fire on a human being. When a state of war exists, or hostilities are imminent, military and naval orders are frequently given to shoot first and investigate and ask questions afterwards. The wisdom of this rule has its foundation in the necessity to guard against the hazards of surprise attack. In civil life a different

rule exists. There must be actual or apparent necessity to shoot; otherwise, shooting at a human being is unlawful. The defendant's motion for a directed verdict of not guilty was properly denied.

The defendant took exceptions to several portions of the court's charge. These we have examined with the care the importance of this case requires. We find them without merit.

The defendant relies for a new trial upon the admission of the evidence, over his objection, that the defendant at the time of the shooting was a married man, his companion was a married woman, but not his wife. The defendant contends this evidence amounted to proof of his bad character which the State had no right to offer since he neither testified nor offered evidence of his good character.

The defendant, in substance, told the officers he was out in lovers' lane with another man's wife, and realizing this situation exposed him to danger, in order to protect himself he carried along, and had handy a double-barreled shotgun, loaded with buckshot. In this situation when someone opened the door, the woman screamed, he grabbed the gun, got out of the car and fired two shots at an unknown intruder leaving the scene.

The foregoing is the background, in the light of which the defendant's conduct should be judged. The marriage status of the parties was a revealing part of the background and properly admitted in evidence. "While he (the judge) shall reject as too remote every fact which merely furnishes a forceful analogy, . . . he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble light on the question in issue." *State v. Stone,* 240 N.C. 606, 83 S.E. 2d 543; Wharton's Criminal Evidence, 11th Ed., Vol. 1, § 224, p. 268; *State v. Payne,* 213 N.C. 719, 197 S.E. 573; *State v. Lawrence,* 196 N.C. 562, 146 S.E. 395.

Another of defendant's exceptive assignments relates to the solicitor's argument: "And he (defendant) says, 'Don't do anything to me . . . after I tore up another man's home, was out with another man's wife.' " Upon objection, the court said, "I will instruct counsel on both sides not to make an argument outside the evidence. Mr. McMurray's (defendant's counsel) argument was outside the evidence and I think that aspect of yours is, too . . . outside the evidence."

While the judge very well might have instructed the jury not to be influenced by argument outside the record by either side, the caution, we believe, had that effect. Ordinarily, this Court undertakes "to correct the errors of the judge, and not those committed by attorneys. Their errors are to be corrected by the trial judge, and when he fails in his duty it becomes a ground of exception," which may be presented for

review here upon proper exception and assignment. *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Fogleman,* 204 N.C. 401, 168 S.E. 536; *Lamborn v. Hollingsworth,* 195 N.C. 350, 142 S.E. 19; *State v. Harrison,* 145 N.C. 408, 59 S.E. 867.

It may be said to the credit of both the defendant and his companion that, notwithstanding their embarrassing position, nevertheless they reported this regrettable occurrence to the Sheriff's office immediately after it happened. This conduct may have reduced the verdict from murder in the second degree to manslaughter.

We have examined this record with care, and in the trial we find

No error.

MRS. BERTIE BRANCH v. MARGARET GRIFFIN SEITZ.

(Filed 4 November, 1964.)

1. Appeal and Error § 41—

The exclusion of evidence cannot be prejudicial when evidence of the same import is thereafter admitted.

2. Evidence § 44—

The trial court may permit a medical expert to give a qualified opinion.

3. Appeal and Error § 12—

After appeal, the case is no longer in Superior Court and it has no jurisdiction pending the appeal to hear motion for a new trial for newly discovered evidence.

4. Trial § 49—

A new trial for newly discovered evidence will not ordinarily be granted for evidence which is merely corroborative of the testimony at the trial.

5. Same—

In order to be entitled to a new trial for newly discovered evidence, movant must show that a different conclusion would probably have been reached if the evidence had been available at the trial.

APPEAL by plaintiff from *Riddle, S. J.,* February 1964 Civil Session of BURKE.

Plaintiff, a guest, was injured when riding to work with defendant. The journey started from defendant's home at the corner of White and Concord Streets in Morganton. White Street is 23 feet wide. It runs north and south. Concord runs east and west. The next street north of

Concord is Meeting House; the next north of that is Union. There is a sharp ridge at the intersection of White and Meeting House. Plaintiff was injured between 10:30 and 11:00 p.m. Defendant was driving.

Shortly after passing the intersection of White and Meeting House Streets, the right front wheel of defendant's car struck the curb. Defendant lost control. The car left the roadway and struck a telephone pole. Plaintiff's leg was injured by the collision.

Plaintiff bases her right to recover on allegations of unreasonable speed, and failure to keep a proper lookout, resulting in loss of control.

Defendant denied the charge of unreasonable speed. She alleges she was driving in her proper lane; cars were parked on the west side of White Street between Meeting House and Union Streets; shortly after she passed Meeting House Street, a car with blinding headlights came suddenly from behind one of the cars parked on the west side of White Street; this car came into her lane of travel, forcing her to pull to the right to avoid a head-on collision.

An issue based on plaintiff's allegations of negligence was submitted to a jury. It answered in the negative. Plaintiff moved to set the verdict aside. The motion was denied. Judgment was signed during the session that plaintiff take nothing. Plaintiff excepted and appealed.

Russell Berry and Simpson & Simpson for appellant.
Patton, Ervin & Starnes for defendant appellee.

PER CURIAM. Plaintiff, when asked how defendant drove, replied: "She started off at a high rate of speed." This answer was, on defendant's motion, stricken. Immediately thereafter, plaintiff testified, without objection, that defendant, when she crossed Meeting House Street, was driving between 50 and 55 miles per hour. Conceding, without deciding, the court erred, the error was harmless.

Plaintiff testified defendant was not confronted by an approaching car. On cross examination of plaintiff, she was asked about a written statement purportedly made by her on August 30, 1961. This statement detailed events leading to the collision. It negatives plaintiff's charge of excessive speed. It affirms defendant's assertion that she left the roadway to avoid a collision with an approaching car. The statement concludes: "I have read the above two page statement which is true and correct and I adopt said statement as my own." Then followed what purported to be plaintiff's signature. Plaintiff refused to admit or to deny the genuineness of the signature.

Defendant offered testimony from other witnesses that plaintiff, while a patient in the hospital for treatment the first time, stated that the collision was caused in the manner claimed by defendant.

Plaintiff attempted to explain her refusal to admit she signed the statement, and made the oral statement attributed to her by patients in the hospital, by asserting she was in such pain from the injuries and was so affected by drugs administered that she had no recollection of anything she said or did.

Plaintiff was hospitalized from August 23, 1961 to September 3, 1961 for treatment of the injuries caused by the collision. She was again admitted for skin grafting on September 18, 1961. She remained until October 18, 1961. Dr. Hairfield was the attending physician during the second admission.

The hospital records, showing the treatment given and drugs administered, were offered in evidence. Defendant then inquired of Dr. Hairfield, if the jury should find plaintiff was injured and treated as shown by the records, would such treatment, in his opinion, produce unconsciousness or lack of memory by plaintiff. The witness said: "It is sort of hard to answer that yes or no." The court then said: "You can answer it 'yes,' and then qualify it." Plaintiff objected. The objection was overruled. The witness answered: "I would have to qualify from the standpoint that I didn't actually see this particular patient; and from the standpoint that one patient may have a different reaction from medication from another; and that I would have to say that it is not to a particular patient, but in the average case or ordinary case similar to it that I could give you an opinion on it. My opinion on that would be that it would not be sufficient to be unconscious from it."

Plaintiff's argument that the court should not have permitted the witness to express a qualified opinion is without merit. Even if error be assumed, we cannot see how plaintiff was prejudiced by the answer.

At the March Session, plaintiff moved for a new trial for newly discovered evidence. The motion was supported by two affidavits tending to contradict defendant's testimony that she was confronted by an oncoming car. The motion was denied.

When plaintiff appealed to this Court, the Superior Court's jurisdiction terminated. Judge Riddle correctly refused to allow the motion for a new trial. *Clark v. Cagle,* 226 N.C. 230, 37 S.E. 2d 672; *Green v. Insurance Co.,* 233 N.C. 321, 64 S.E. 2d 162.

Plaintiff moves in this Court for a new trial for newly discovered evidence. The evidence on which she relies is the same relied on in the motion made in the Superior Court. What must be shown to justify this Court in awarding a new trial is stated in *Alexander v. Cedar Works,*

177 N.C. 536, 98 S.E. 780, cited by movant. We have examined the affidavits on which movant relies. They tend to corroborate plaintiff's testimony at the trial, and to that extent contradict defendant. A careful examination of the affidavits fails to convince us that the jury would probably have reached a different conclusion if the evidence had been available at the trial. Movant has failed to carry the burden. *Moore v. Stone Co.*, 251 N.C. 69, 110 S.E. 2d 459. The motion is denied.

No error.

ATLANTIC COAST LINE RAILROAD COMPANY AND ATLANTIC & EAST CAROLINA RAILWAY COMPANY v. WEYERHAEUSER COMPANY.

(Filed 4 November, 1964.)

1. Carriers § 5—

The shipment in question would have carried a lower rate if the carrier had furnished larger cars so that a greater number of units could be carried in one car, and the shipper had repeatedly requested the railroad to furnish such larger cars. *Held:* In the absence of an exception to the failure of the court to find whether the railroad was justified in failing to furnish the cars requested and in the absence of an exception to the finding that the higher rate applied to the shipment, judgment for the recovery of the higher rate by the railroad must be affirmed.

2. Appeal and Error § 22—

Where there is no exception and assignment of error to a finding of fact, it will be presumed that the finding was supported by competent evidence and it is binding on appeal.

APPEAL by defendant from *Walker, S. J.*, February Civil Session 1964 of BEAUFORT.

This is a civil action to collect a deficiency in the amount of freight charges collected and the amount alleged to be due for moving 140 carloads of wood chips from Hines Junction to Kinston, North Carolina, over the Atlantic & East Carolina Railway Company (hereinafter called A&EC Railway), thence from Kinston over the Atlantic Coast Line Railroad Company to Plymouth, North Carolina, where the shipments were delivered to the defendant (hereinafter called defendant or consignee). The above shipments aggregated 1983.78 units, 190 cubic feet per unit, and weighed 9,993,150 pounds.

The Willis Hines Lumber Company, Inc. (hereinafter called consignor) owned and operated a lumber plant located at Hines Junction

on the A&EC Railway and produced wood chips as a by-product. Some time prior to August 1962 the consignor requested that the A&EC Railway (now operated by the Southern Railway as a part of its system) furnish it cars of a capacity of 6,800 cubic feet. The request was made orally several times over a period of three months and then given in writing on 2 April 1962. The request for larger cars was never granted, and the railway continued to furnish cars of the capacity of 2,678 cubic feet. These smaller cars are rated to carry only thirteen units of 190 cubic feet each; the larger cars will carry 33 units of 190 cubic feet each. The rate on the smaller cars per unit from Hines Junction to Kinston is $1.69, while the rate per unit for the larger cars is $1.40. There is no controversy over the rate collected from Kinston to Plymouth.

The bills of lading from Hines Junction to Kinston, made out by the consignor, show a rate of $1.40, while the evidence is to the effect that the rate on the smaller cars should have been $1.69.

The court below found as a fact the following:

"1. That the following stipulation was entered into in open court by all parties to this action: 'It is stipulated by and between all parties to this litigation that there is no question raised at this hearing relative to the amount shipped during the period August 7, 1962, and ending January 11, 1963, on Atlantic Coast Line Railroad Company and Atlantic and East Carolina Railway Company lines, whether it be considered on a unit basis or a pound basis and the sole question relates to whether or not the rate on the Atlantic and East Carolina Railway Company is $1.40 per unit or $1.69 per unit, as appear in Supplement 302 to Tariff 740-C, page 73, or Plaintiffs' Exhibit B, and further whether or not Item 1807 of Tariff 740-C ICC 1297, applies to the shipments involved in this controversy.'

"2. The freight rate applicable to the shipments referred to in the complaint during the period August 7, 1962, through January 11, 1963, is as set forth in Supplement 302 to Tariff 740-C ICC 1297 Column A $1.69 per unit and is not $1.40 per unit as contended by the defendant.

"3. That Item 1807 of Tariff 740-C 1297 does not apply to this case nor does it control the rate on the shipments involved in this case."

Whereupon, the court below concluded as a matter of law that the rate of $1.69 was the correct rate and that the defendant was indebted to the plaintiffs in the sum of $575.92.

The defendant appeals, assigning error.

John A. Wilkinson and Rodman & Rodman for plaintiffs appellee.
Norman, Rodman & Hutchins for defendant appellant.

PER CURIAM. There is ample evidence in the record to establish the fact that the consignor requested cars with the capacity of 6,800 cubic feet in which to ship the wood chips involved. There is no evidence tending to show that the A&EC Railway did not have such cars available. Its only explanation for not furnishing the requested cars was that the consignor could not load cars of the requested size; that such cars were too high for the consignor's loading facilities. The consignor introduced evidence to the effect that its loading spout could have been extended or adjusted in a matter of thirty or forty minutes so that it could have loaded the larger cars. The consignee likewise offered evidence to the effect that it could unload the larger cars.

However, the court below made no finding of fact with respect to whether or not there was any justification for the failure of the A&EC Railway to furnish the cars requested. *Garrison v. R. R.*, 150 N.C. 575, 64 S.E. 578; G.S. 60-111, which was repealed by Chapter 1165 of the Session Laws of North Carolina, 1963, but at the time this controversy arose it was in effect. See also 13 C.J.S., Carriers, sections 35 and 36, page 69, *et seq.*, and 13 Am. Jur. 2d, Carriers, section 120, page 659.

Even so, we must decide this appeal on the record as submitted, based on the defendant's exceptions and assignments of error.

The defendant did not except to the failure of the court below to find whether or not the A&EC Railway was justified in failing to furnish the cars requested, nor did the defendant except to finding of fact No. 2, which is to the effect that the freight rate applicable to the shipments involved is $1.69 per unit and not $1.40 per unit as contended by the defendant.

We have repeatedly held that where a finding of fact is not excepted to and assigned as error it is presumed to be supported by competent evidence and is binding on appeal. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486, and cited cases.

In our opinion, the appellant's assignments of error fail to disclose any error of sufficient prejudicial effect to warrant a new trial. Hence, the judgment entered below is

Affirmed.

BURTON *v.* HYDER.

W. T. BURTON, ROSA PALMER, AND JOHN Y. HUTCHESON, EXECUTORS, PETITIONERS v. MRS. HENRY S. (ALICE BASKERVILL) HYDER, MRS. BERNARD (VIRGINIA) KOTKIN, PETER G. SEAMAN, JR., FAIRFAX MITCHELL LYERLY, TOMMY SIMPSON, ELIZABETH T. PALMER, LUCY BASKERVILL VAN PELT, FRANK P. HUNTER, JR., ROBERT WILLARD BASKERVILL, JR., A MINOR, GEORGE EDWARD BASKERVILL, JR., A MINOR, BARBARA JEAN BASKERVILL, A MINOR, SUSAN RAINES GARRETT, A MINOR, SARA BURTON WARD, ROSA PALMER, FRANCES TARWATER, MRS. PETER SEAMAN, BYRD BEDDOE, ALICE TAYLOR JONES, JOHN Y. HUTCHESON, MARGARET TRAYNHAM, MRS. LLOYD H. COOK, WILL BOBBITT, MAGGIE BURNETT ALSTON, ANY AND ALL OTHER PERSONS IN BEING AND NOT IN BEING WHO HAVE OR MAY IN ANY CONTINGENCY HAVE AN INTEREST IN THE ESTATE OF SADYE BASKERVILL PALMER, CHARLES T. JOHNSON, JR., GUARDIAN AD LITEM FOR ROBERT WILLARD BASKERVILL, JR., GEORGE EDWARD BASKERVILL, JR. AND BARBARA JEAN BASKERVILL, MINORS, CHARLES M. WHITE, III, GUARDIAN AD LITEM FOR SUSAN RAINES GARRETT, MINOR, JULIUS BANZET, III, GUARDIAN AD LITEM FOR ANY AND ALL OTHER PERSONS WHETHER NAMED RESPONDENTS OR NOT OR WHETHER IN BEING OR NOT IN BEING WHO HAVE OR MAY IN ANY CONTINGENCY HAVE AN INTEREST IN THE ESTATE OF SADYE BASKERVILL PALMER, RESPONDENTS.

(Filed 4 November, 1964.)

Wills § 56—

By the use of parallel language in two successive residuary clauses testatrix devised one-half of her property not otherwise passing under the will to a named beneficiary and one-half of such property to another named beneficiary, followed by an item devising all of the residue and remainder of her estate to designated persons. *Held:* The last clause would be operative only if prior legacies had lapsed, and the second bequest of half of the residuary estate was of one-half of the entire residuary estate and not only a fourth thereof.

APPEAL by respondents Robert Willard Baskervill, Jr., George Edward Baskervill, Jr., and Barbara Jean Baskervill, minors, through their guardian *ad litem,* Charles T. Johnson, Jr., from *Hobgood, J.,* in chambers in WARREN.

This action was instituted by the executors of Sadye Baskervill Palmer for a construction of her will. The testatrix, a widow, died October 9, 1963, leaving no lineal descendants or ascendants. The first seventeen items of the will contained specific bequests of personal property followed by a specific devise in Item 18. Her executors were then authorized by Item 19 to sell and reduce to cash "all the rest of my property not otherwise disposed of herein." The last three items of the will provided as follows:

"Item 20. I give to my sister, Mrs. Henry S. (Alice Baskervill) Hyder, if she survive me, one-half of my property not otherwise passing under this will.

"Item 21. I give to my niece, Mrs. Bernard (Virginia) Kotkin, one-half of my property not otherwise passing under this will.

"Item 22. All the rest, residue, and remainder of my estate I give to my great niece and two great nephews, sons and daughter of my nephews, W. R. Baskervill and G. Edward Baskervill, and to the survivor of them and the issue of those who may be dead by stock."

Mrs. Hyder, the beneficiary named in Item 20, survived Mrs. Palmer, and the executors are prepared to distribute to her one-half of the residuary estate, after payment of all debts, federal and state taxes, and the costs of administration. Being uncertain whether Mrs. Kotkin is entitled to the remaining one-half of the estate or whether she must divide that one-half with the beneficiaries named in Item 22, the executors instituted this action for specific instructions upon this question and others, not involved on this appeal.

The judge below heard the matter upon the stipulations of the parties and the undisputed facts as alleged in the petition. He entered judgment construing the will and giving the executors the advice requested. His Honor held, *inter alia,* that Mrs. Kotkin took all of the estate remaining after the distribution to Mrs. Hyder and that the grandniece and two grandnephews named in Item 22 of the will (all minors) took nothing, since none of the gifts in items 1 through 21 of the will lapsed.

From his judgment construing the will, only the beneficiaries under Item 22 appeal and they contest only his ruling that they take nothing. It is their contention that, as a group, they take one-fourth of the residuary estate.

Thomas S. Curtin and Henry C. Fisher for minor respondents appellants and Charles T. Johnson, Jr., their guardian ad litem.

Willis, MacCracken, Butler & Scheifly by Arthur B. Willis; Womble, Carlyle, Sandridge & Rice by Leon L. Rice, Jr., Charles F. Vance, Jr., and Allan R. Gitter for Mrs. Bernard (Virginia) Kotkin, respondent appellee.

John H. Kerr, Jr.; John Y. Hutcheson; and John H. Kerr, III, for petitioners appellees.

PER CURIAM. In Item 19 of her will, Mrs. Palmer directed her executors to sell all the property she had not specifically bequeathed or

devised in items 1 through 18. The cash thus derived is the residuary estate, which she described in items 20 and 21 as "my property not otherwise passing under this will." Mrs. Palmer disposed of this property by the use of parallel language in two successive residuary clauses, items 20 and 21. Thus, it seems clear to us that she did not intend the bequest in Item 22 to reduce the bequest in Item 21. The two items are totally unrelated. Item 22 would have operated only if Mrs. Hyder had predeceased the testatrix or if any of the legacies in items 1 through 18 had lapsed. We hold that it was the intention of testatrix to leave one-half of her residuary estate to her sister, Mrs. Hyder, if she survived her, and the other half to her niece, Mrs. Kotkin.

His Honor correctly interpreted the will and his judgment is

Affirmed.

WILLIE SMITH v. FRED HAUSER, E. G. LACKEY, BESS WARREN, SOL COLTRANE AND JACK COVINGTON, MEMBERS OF THE FORSYTH COUNTY BOARD OF COMMISSIONERS, AND E. G. SHORE, SHERIFF OF FORSYTH COUNTY.

(Filed 4 November, 1964.)

Injunctions § 5; Municipal Corporations § 34—

The enforcement of a municipal Sunday observance ordinance will not be restrained when it is apparent that the party seeking the injunctive relief has an adequate remedy at law in attacking the constitutionality of the ordinance as a defense in the prosecutions against him for its violations.

APPEAL by plaintiff from *Brock, Special Judge,* September 7, 1964, Civil Session of FORSYTH.

This cause was heard below, on the complaint, answer and agreed statement of facts, to determine whether the temporary restraining order issued July 27, 1964, when this action was commenced, should be made permanent.

The stipulated facts, except when quoted, are summarized as follows:

At a meeting held in April of 1964, the Board of Commissioners of Forsyth County, pursuant to Chapter 1071, 1953 Session Laws, as amended by Chapter 943, 1961 Session Laws, adopted a resolution (regulation) worded as follows:

"It shall be unlawful for any person, firm, corporation or association and same are hereby prohibited from operation between the hours of 2:00 o'clock a.m., on Sunday and 12:00 o'clock midnight Sunday, any

club where persons may associate for a common purpose, which club is located within 300 yards of the property on which is located any public school or church building, and at any such club all music shall cease at 1:00 o'clock a.m. on Sunday and same shall not be resumed until after 12:00 o'clock midnight on Sunday; that this regulation shall be applicable in all portions of Forsyth County not embraced within the jurisdiction of the City of Winston-Salem and the Town of Kernersville."

(The cited statutes provide that "an appropriate resolution" adopted by the Board of Commissioners of Forsyth County in accordance with prescribed procedures shall have the effect of a "legislative enactment," and that any person who violates such resolution shall be guilty of a misdemeanor and subject to punishment by fine "not exceeding fifty dollars ($50.00)" or by imprisonment "not exceeding thirty (30) days.")

Plaintiff owns and operates a night club in Forsyth County. He operates it as a business enterprise for gain or profit. It is located "within three hundred (300) yards of a church building in Forsyth County." It is "some miles removed from the center of Winston-Salem." He operates it "one night per week, to wit, during the hours of Saturday evening and early Sunday morning, and, before the passage of said resolution . . ., operated until 3:00 a.m. Sunday morning." A part of its operation "involves the playing of music for those patrons who desire to dance."

Since the adoption of said resolution, plaintiff has been arrested twice, once because "he had not closed his place of business by 2:00 a.m.," and later because "music was played in his establishment after 1:00 a.m." Plaintiff was convicted in the Municipal Court of Winston-Salem on May 8, 1964, "for a violation" of said resolution. He appealed "to the May 18, 1964, term of the Superior Court of Forsyth County, and said appeal is presently pending in the Forsyth County Superior Court."

"The plaintiff has some servants and employees who are paid wages for their work and labor from the proceeds derived from the operation of his club to the hour of 3:00 a.m. each Sunday morning. Most of the plaintiff's patrons are colored persons."

Plaintiff seeks to enjoin the enforcement of said resolution. He attacks said resolution on the ground the statutory provisions relied on as authority therefor are unconstitutional and therefore void.

The court, being of opinion plaintiff's "proper remedy is in the criminal action which is pending against him and not by separate action on the civil side," vacated the temporary restraining order and dismissed the action. Plaintiff excepted and appealed.

Hatfield & Allman and Roy G. Hall, Jr., for plaintiff appellant.
Roddey M. Ligon, Jr., for defendant appellees.

PER CURIAM. The cause, which was before Judge Brock for final hearing, was submitted upon an agreed statement of facts.

If, as plaintiff asserts, the statutory provisions relied on by the Board of Commissioners of Forsyth County as authority for their resolution of April, 1964, are unconstitutional and therefore void, plaintiff has an adequate remedy at law in that he has a complete defense to a criminal prosecution for violation of said resolution. In our view, the stipulated facts fail to show circumstances sufficient to warrant equitable (injunctive) relief; and the general rule, as stated in *Walker v. Charlotte, ante,* 697, ... S.E. 2d ....., and cases cited, applies. Hence, the judgment of the court below is affirmed.

Affirmed.

IN THE MATTER OF THE DETENTION OF KEITH ALEXANDER WHITE BY PATSY P. WHITE.

(Filed 4 November, 1964.)

1. Habeas Corpus § 3—

Where the evidence is sufficient to support the court's findings that the father is a suitable person to have custody of his son and that the best interests of the child would be served by awarding the child's custody to him, order awarding the custody to the father is proper, even though the evidence would also support a finding that the child's mother is a fit and suitable person and that the best interests of the child would be served by awarding custody to her.

2. Appeal and Error § 35—

Where the court settles the case on appeal upon disagreement of counsel, motion of one party to amend the case on appeal by incorporating therein certain affidavits will be denied when the record does not disclose to what extent, if any, the facts asserted in the affidavits entered into the court's findings.

APPEAL by Patsy P. White from an order of *Johnston, J.*, made in Chambers in FORSYTH on September 3, 1964.

A. J. White (petitioner) and Patsy P. White (respondent), parents of Keith Alexander White (Keith), born July 1, 1956, separated October 2, 1961. On January 9, 1962, they entered into a separation agree-

ment. The agreement provided that respondent should have custody of the infant; petitioner would make weekly payments to the respondent for the support of the child.

On June 30, 1962, petitioner, alleging Keith's best interest would be served by awarding custody to petitioner, filed a petition praying for the issuance of a writ of *habeas corpus*. The writ issued; respondent answered. She denied the allegations of the petition, and asserted the best interest of the child would be served by awarding custody to her. On August 25, 1962, Judge Johnston made an order awarding custody. He recites that the order is made "after a full and complete consideration of the evidence introduced by both parties." He found that the best interest of the child would be served by awarding custody to respondent, "subject to the following terms and conditions: (1) That the respondent not associate with Claude Turner, and (2) That the respondent and the child reside in the home of the maternal grandparents." Respondent excepted to, but did not appeal this order.

On September 1, 1962, Judge Johnston made another order. He directed respondent to appear on September 8, 1962, and show cause why the award of custody theretofore made should not be revoked because of respondent's failure to comply with the conditions there enumerated. At the time fixed, after hearing the parties, Judge Johnston found that respondent had violated each of the conditions enumerated in his order of August 25th. He then found that the best welfare of the child would be served by awarding custody to the father, petitioner; and, on the findings, he made the award of custody. Respondent excepted to the order and gave notice of appeal to this Court, but the appeal was not perfected.

On May 9, 1963, respondent filed a petition with Judge Johnston. She alleged that she had not complied with that part of the order requiring her to live with her parents because they did not have room to accomodate her and her child. She alleged that she had established a suitable home in which she and the child could live, and that the best interest of the child would be served by awarding custody to her. On June 8, 1963, Judge Johnston heard the parties on the petition last filed by respondent. With their consent, and with the approval of counsel representing each, Judge Johnston awarded custody to the father, petitioner, from September first of each year to June 4th of the following year. During this period, respondent was given the right of visitation from 6:00 p.m. Friday until 6:00 p.m. Sunday, and with the right to have custody for one week during the Christmas holidays. Respondent was given custody for the summer months, and petitioner, during

that period, was required to pay $10.00 per week for the support of the child.

In August 1964, respondent made a motion in the cause again seeking custody of the child. She alleged that petitioner was not a proper person and not capable of properly caring for the infant and, because of such neglect, he had failed to make satisfactory progress in his school work. Petitioner answered. He asserted he was competent and would provide proper care. He alleged respondent was associating with Claude Turner, in violation of the conditions set out in the order of August 25, 1962. The court heard the evidence offered by the parties. Based on the evidence, the court found that petitioner was a proper and fit person to have the custody and control of the minor; petitioner's home is a fit and suitable place for the minor to live, and that it is to the best interest of the minor "that he remain in the custody of his father, Alexander J. White." Based on these findings, the court denied respondent's motion, and ordered "that Keith Alexander White remain in the custody and control of his father, Alexander J. White."

Respondent excepted to the findings, and the judgment based thereon, and appealed to this Court.

Deal, Hutchins and Minor, Edwin T. Pullen and Thomas W. Moore, Jr., for appellant.

Buford T. Henderson for appellee.

PER CURIAM. Each of the parties offered evidence in support of their contentions. The evidence offered would warrant, but not compel, the court to find that either of the parties was proper and fit, and that the best interest of the child would be served by awarding custody to either. In that situation, the findings made by the court are conclusive. *Spitzer v. Lewark*, 259 N.C. 50, 120 S.E. 2d 620. The order, based on the established facts, is proper, G.S. 17-39.1, *Spitzer v. Lewark, supra.*

Upon disagreement of counsel as to what should constitute the case on appeal, Judge Johnston, by order dated September 19, 1964, settled the case on appeal. Respondent now moves in this Court to amend the case on appeal by incorporating therein an affidavit dated September 3, 1964, the date of the hearing, and an affidavit dated September 10, 1964. The record does not disclose to what extent, if any, the facts asserted in the affidavits entered into the court's findings. The motion is denied. The judgment is

Affirmed.

W. R. ADAMS v. CLYDE BESHEARS AND WIFE, DEWIE L. BESHEARS AND OSLER LANKFORD AND WIFE, JEANNETTE B. LANKFORD.

(Filed 4 November, 1964.)

Highways § 13; Easements § 4—

Allegations to the effect that plaintiff and his predecessors in title had used a cartway with definite boundaries across the lands of defendants to a highway as the only ingress and egress to a public way, that such use was adverse to defendants and their predecessors in title for more than 100 years, *held* to state a cause of action to establish an easement by prescription and not one to establish a neighborhood public road, and therefore demurrer on the ground that the clerk had exclusive original jurisdiction should have been overruled.

APPEAL by plaintiff from *McLaughlin, J.*, June 1964 Special Session of WILKES.

Action to restrain defendants from interfering with plaintiff's right to use a road extending from plaintiff's 84-acre tract across defendants' (adjoining) 10.35-acre tract to hard surface road No. 1514.

Plaintiff alleged, *inter alia*, the following: The road across defendants' said tract is the only way of ingress and egress from No. 1514 to plaintiff's said tract and tenant houses thereon. This road "has been used by the plaintiff and his predecessors in title continuously and exclusively under well defined and specific lines and adversely to the defendants and their predecessors in title for more than 100 years . . ." Defendants purchased their tract with full knowledge of said road and plaintiff's *easement* therein.

Defendants answered. Thereafter, when the case was called for trial, defendants demurred *ore tenus*. Defendants asserted, as ground for demurrer, that the superior court had no jurisdiction for that the facts alleged in the complaint "plead a cause for the establishment of a neighborhood public road, and . . . allege a special proceeding . . . required to be instituted before the Clerk Superior Court."

The court entered judgment sustaining the demurrer *ore tenus*, dismissing the action and taxing plaintiff with the costs. (A temporary restraining order was continued in effect pending decision on appeal and "final disposition" of the cause.) Plaintiff excepted and appealed.

E. James Moore for plaintiff appellant.
Ralph Davis and Moore & Rousseau for defendant appellees.

PER CURIAM. In our view, the cause of action alleged by plaintiff is that he has an easement appurtenant to his tract, acquired by prescription, as a way of access between his tract and No. 1514. Plaintiff,

by brief, asserts this is his alleged cause of action. His complaint does not use the phrase "neighborhood public road," and he does not contend his alleged cause of action is for the establishment of such road.

Defendant, if so advised, may move that the court require the complaint "to be made definite and certain by amendment." G.S. 1-153.

Reversed.

MARGARET E. SKIPPER v. HAMORE CORP., D/B/A HOWARD JOHNSON'S MOTOR LODGE.

(Filed 4 November, 1964.)

Negligence § 37f—

Evidence *held* insufficient to show negligence on the part of the proprietor causing fall of patron when she failed to observe the difference of five inches in elevation between the floor and door of a motel room and the walk.

APPEAL by plaintiff from a judgment of nonsuit entered by *McConnell, J.*, at the May 25, 1964 Session, FORSYTH Superior Court.

Plaintiff alleged that as an invitee she entered the defendant's motel room No. 105 as the guest of the occupants, Mr. and Mrs. Grice. The entrance to the room was from the outside and elevated about five inches above the concrete walk constructed along the building and as a part of it. After remaining in the room for about 30 minutes, she attempted to leave but failed to observe the difference in elevation between the door and the walk, lost her balance, fell, and was injured. She testified the lights were somewhat dim and there was little or no contrast in the colors of the floor of the room and the walk. However, the evidence disclosed there was an outside light on the wall between rooms 105 and 104. Also, there were lights on the top of the building illuminating the parking area which bordered the walkway. She introduced evidence of rather serious injuries necessitating the payment of hospital bills and causing loss of time from work.

The defendant answered, denied negligence, and affirmatively alleged the building and entrance to the rooms were constructed according to standard building plans and practices, and that ample light on the outside of room No. 105 disclosed the difference in elevation between the walk and the room; that plaintiff's fall was a result of her own failure to look where she was placing her feet, although 30 minutes be-

fore her fall she had entered the room by the same door. Hence she was, or should have been, familiar with the difference in the elevations.

From the judgment dismissing the action, plaintiff appealed.

Harold R. Wilson, Alvin A. Thomas for plaintiff appellant.

Deal, Hutchins and Minor, by John M. Minor, Thomas W. Moore, Jr., for defendant appellee.

PER CURIAM. If we concede the complaint states a cause of action, the evidence fails to show the plaintiff's fall and injury in stepping down from the level of the room to the level of the walk resulted from defendant's negligence. The plaintiff had stepped from the walk to the door only 30 minutes before her fall. Neither the light nor the color of the walk had changed. Hence she was charged with notice of the difference in the elevations. Evidence of actionable negligence is lacking. The judgment of nonsuit is

Affirmed.

G. T. BADGER, JR., ADMINISTRATOR OF ERIKA INGRID HASTINGS, DECEASED v. PETE MEDLEY.

(Filed 4 November, 1964.)

Automobiles § 41m—

Evidence *held* insufficient to show that collision of defendant's vehicle with a child on the highway was the result of negligence.

APPEAL by plaintiff from *McLaughlin, J.*, May 1964 Civil Session of ASHE.

Action for damages for wrongful death of plaintiff's intestate, an 8-year old child, who was fatally injured when struck by an automobile driven by defendant.

The accident occurred about 6:30 P.M., 15 April 1963, on N. C. Highway 88, about two-tenths of a mile west of the town of Jefferson in Ashe County. The hardsurface is about 20 feet wide. Defendant was headed west and, as he approached the point of the accident, was on a long curve to his right and passing through a cut. There were high embankments on both sides of the highway, and it was about 13 feet from the foot of the embankment on the north side of the highway to the north edge of the hardsurface. Defendant's maximum limit of vision

forward with respect to the north edge of the highway was 300 feet. The accident occurred about the west end of the cut, on the north edge of the highway. Deceased came in contact with the right front fender of defendant's car, "on top about the headlight rim." Death was instantaneous. Deceased was wearing a red dress. Defendant stated at the scene that he did not see the child until after he struck her and at the time of the impact "he thought he might have struck a dog."

Plaintiff alleges that deceased's fatal injury was caused by the actionable negligence of defendant, for that (1) he operated the automobile at a speed greater than was reasonable and prudent under the circumstances, (2) he failed to keep a reasonable lookout, (3) he "should have known that children customarily were in close proximity to said highway and frequently crossed the same," and (4) he did not give audible warning of his approach.

At the close of plaintiff's evidence the court sustained defendant's motion for nonsuit. Judgment was entered dismissing the action.

Bowie, Bowie & Vannoy for plaintiff.
John E. Hall for defendant. McElwee & Hall, of counsel.

PER CURIAM. There were no eyewitnesses other than defendant and deceased. Defendant did not see deceased until after the impact. Evidence is totally lacking as to speed; there is no showing that defendant knew children were customarily on or near the highway in this vicinity. There is no evidence that any other child was on or near the highway at the time of the accident. It may be inferred that defendant did not sound his horn, and there is evidence that he did not see the child before he struck her. Assuming that defendant failed to keep a reasonable lookout, there is not sufficient evidence from which it may be inferred that his inattention was a proximate cause of the accident and that in the exercise of reasonable care he might have avoided the accident. *Ennis v. Dupree,* 262 N.C. 224, 136 S.E. 2d 702, and cases therein cited.

Affirmed.

MAMIE M. CARVER, FLORENCE M. CARVER AND ANNIE M. COZART v. SALLIE C. CHAMBERS, WILLIE J. CLAYTON, RANIE T. CLAYTON, BAXTER B. CLAYTON, FANNIE LOU PROCISE, ALMA C. FERGUSON, JACK CLAYTON, VIVIAN C. RICE, WILLIE OWEN, CLARENCE OWEN, IKE OWEN, OZIE MORRIS, LOTTIE M. HARRIS, ELMER S. MORRIS, LESSIE M. HARRIS, ELWOOD MORRIS, GRAHAM MORRIS, BAXTER HOBGOOD, ROSA M. RILEY, AND MUSIAL MORRIS.

(Filed 4 November, 1964.)

APPEAL by defendants Willie Owen, Clarence Owen and Ike Owen, from *McKinnon, J.*, February Civil Session 1964 of PERSON.

This is a special proceeding for the sale of land devised by John D. Clayton to his daughter, Ella Clayton Owen, for her lifetime, for partition.

John D. Clayton executed his last will and testament on 16 April 1888, which will was duly probated on 12 January 1901. He devised certain land to his son, C. H. Clayton, other land to his daughter, Emma Clayton Morris, and her husband, and the remainder of his real estate to his daughter, Ella Clayton Owen, "for her to hold and to have her lifetime."

Ella Clayton Owen, C. H. Clayton and Emma Clayton Morris, the three children of the testator, as well as his widow, are all deceased.

The court below held that upon the death of John D. Clayton, testator, the remainder in the lands devised to Ella Clayton Owen for life, immediately vested in the heirs of the testator *per stirpes,* subject to the life estate devised to the widow of the testator. The court set out in the judgment below the respective interests of the grandchildren and the great-grandchildren of the testator, and authorized the sale of the lands involved for partition.

Defendants Willie Owen, Clarence Owen and Ike Owen appeal, assigning error.

R. B. Dawes, Charles B. Wood for appellees.
Ramsey, Davis & Long for appellants.

PER CURIAM. If John D. Clayton devised to his daughter, Ella Clayton Owen, only a life estate in his last will and testament, there is no contention that the judgment entered below does not set out the respective interests of the parties correctly. Moreover, in the case of *Owen v. Gates,* 241 N.C. 407, 85 S.E. 2d 340, this Court held that Ella Owen took only a life estate in the lands devised to her under her father's will. Therefore, the judgment of the court below is

Affirmed.

JIMMIE THOMAS GREGORY v. EDWIN COTHRAN.

(Filed 11 November, 1964.)

Trial § 5—

A solemn stipulation of counsel incorporated by the court in its order that plaintiff should recover a stipulated sum for digging a well on defendant's land if a designated party certified, after test, that the well had a stipulated flow of water, is binding on the parties, and judgment for plaintiff entered in accordance with these stipulations and procedure is proper.

APPEAL by defendant from *Hobgood, J.*, 27 July 1964 Civil Session of PERSON.

Civil action to recover $2,236.50 for drilling a well on defendant's property pursuant to an oral contract entered into between the plaintiff and the defendant. Plaintiff alleges in his complaint in substance that the contract was entered into on 15 February 1963, and that by its terms he was to drill a well on defendant's property at a price of $4.50 a foot. Between 19 February 1963 and 8 July 1963 he drilled a well on defendant's property to a depth of 497 feet, and furnished in connection thereto necessary well casing and other material. The amount due for drilling the well is $2,236.50, none of which has been paid, though demand therefor has been made.

Defendant in his answer admitted that he entered into an oral contract with plaintiff to drill a well on his property. In further answer and as a defense he alleges in effect the plaintiff told him he would not be required to pay for the well unless it had and maintained a sufficient amount of water to furnish his home with an adequate supply of water. The hole drilled in the ground by plaintiff did not reach sufficient water for its use as a well. He alleges a counterclaim in substance that plaintiff in drilling the well used dynamite, and blasts from dynamite cracked the walls of his home and broke out window panes causing damage in the amount of $225.

This action came on to be heard at May 1964 Civil Session of Person County superior court before McKinnon, J., and defendant by his counsel stipulated that plaintiff drilled a well on his property, and he is willing to pay the contract price for the well, if the well will now produce a flow of water equal to one gallon per minute. Whereupon, plaintiff and defendant by their counsel agreed and stipulated that the well may be tested by Heater Well Company, who shall make a report of its findings, and if its findings are that the well will produce a flow of water equal to one gallon per minute under then prevailing conditions, defendant has agreed to pay plaintiff the amount he demands. Judge McKinnon entered an order putting the agreement and stipulation of

the parties into effect, and in his order decreed that Heater Well Company should make the test to determine the flow of water in the well, after five days' notice to the parties, so they could be present, if they desired, and make a report of its findings to the court, and if the well will produce a flow of water equal to one gallon per minute under then prevailing conditions, plaintiff is to have and recover of defendant the amount prayed for in the complaint. To this order defendant did not object or except.

Heater Well Company on 17 June 1964 made its written report to the court, in which it stated: "This is to certify that we have bailed the well owned by Mr. Ed Cothran of Roxboro, North Carolina, for 1½ hours to reach the bottom of the well or a constant head. After reaching this point we have bailed the well for 1½ hours and find it has a capacity of 2.75 gallons of water per minute, for a period of 1½ hours."

On 22 June 1964 the attorney for defendant made a motion that a submersion pump be placed in the well to test the flow of water therein, that this is an accurate method of testing the flow of water in a well, and that the bailing process used by Heater Well Company is not.

On 24 June 1964 plaintiff made a motion praying the court to deny defendant's motion and to render a judgment for plaintiff in the amount of $2,236.50. On the same day Judge McKinnon, presiding over a session of court in Person County, denied defendant's motion for a further test, and continued plaintiff's motion for judgment until the July session of court. Defendant excepted.

At the 27 July 1964 Civil Session, Judge Hobgood made findings of fact that the parties had entered into the agreement and stipulation before Judge McKinnon, as set forth above, that Judge McKinnon had entered an order at the May Session 1964 as above set forth, and that the Heater Well Company had made the report as quoted *verbatim* above, and based upon his findings of fact he ordered that plaintiff have and recover of defendant the sum of $2,236.50, with interest, and the costs. Judge Hobgood in his judgment denied a motion made by defendant to order Heater Well Company to make another test of the flow of water in the well under regulations prescribed by him.

From this judgment defendant appeals.

Ramsey, Davis & Long by James E. Ramsey for defendant appellant.
Melvin H. Burke for plaintiff appellee.

PER CURIAM. Litigation in court is generally conducted by counsel. The judicial or solemn agreement and stipulation made by defendant by his counsel in open court before Judge McKinnon is conclusive and

binding upon him, in the absence of fraud and mutual mistake, and neither fraud nor mutual mistake is suggested. *Simmons v. Williams*, 251 N.C. 83, 110 S.E. 2d 487; *In re Estate of Reynolds*, 221 N.C. 449, 20 S.E. 2d 348; *Farmer v. Wilson*, 202 N.C. 775, 164 S.E. 356; Stansbury, N. C. Evidence, 2d Ed. §§ 166 and 171. Judge McKinnon incorporated this judicial or solemn agreement and stipulation in his order set forth above, and to this order defendant did not object or except. Consequently, the judgment entered by Judge Hobgood in strict accord with defendant's judicial or solemn agreement and stipulation in open court, which is incorporated in Judge McKinnon's order, and based upon the report of Heater Well Company, is final and binding on defendant.

Defendant's assignments of error are overruled. The judgment below is

Affirmed.

STATE v. CHARLES ROBERT VINES.

(Filed 11 November, 1964.)

1. Burglary § 2—

Breaking is not an essential element of the offense of entering a building with the felonious intent to commit the crime of larceny. G.S. 14-54.

2. Criminal Law § 164—

Where concurrent sentences are imposed on two separate counts of the indictment, error relating to the count on which the lesser sentence is imposed cannot be prejudicial in the absence of error affecting the other count.

APPEAL by defendant Charles Robert Vines from *Walker, Special Judge*, April 27, 1964, Assigned Criminal Session of WAKE.

Charles Robert Vines and Robert Lee Kittrell were indicted in a bill containing three counts, to wit: First, feloniously breaking and entering H. W. Arnold's store; second, larceny of merchandise of the value of $50.00; and third, receiving stolen property with felonious intent.

The court, in accordance with G.S. 15-4.1, appointed counsel for each defendant; and at trial, each defendant was represented by his court-appointed counsel. As to each defendant, the jury returned verdicts of

guilty as charged in the first and second counts of the bill of indictment.

As to appellant, the court pronounced judgments as follows: (1) Based on his conviction of breaking and entering as charged in the first count, the court pronounced judgment that Vines "be imprisoned in the State's Prison for a term of NOT LESS THAN FIVE YEARS NOR MORE THAN SEVEN YEARS." (2) Based on his conviction of larceny as charged in the second count, the court pronounced judgment that Vines "be imprisoned in the State's Prison for a term of NOT LESS THAN FOUR YEARS NOR MORE THAN SIX YEARS."

Vines, in open court, gave notice of appeal.

Later, court-appointed *trial* counsel for Vines was permitted to withdraw and was relieved of further duties; and orders were entered in which the court appointed new counsel to perfect Vines' appeal and represent him in connection therewith and ordered that Wake County pay all necessary expenses incident to such appeal. The appeal has been perfected and Vines is represented in this Court by his present *(appellate)* counsel.

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

E. E. Hollowell for defendant appellant.

PER CURIAM. According to the State's evidence, the arresting officer found Vines in Arnold's Store on Monday, April 13, 1964, at 3:25 a.m., with "some groceries in his arms"; and shortly before he found Vines, the arresting officer saw Kittrell "coming from the window" with groceries "in his arms."

Vines testified that he was in Arnold's Store when apprehended. His explanation was that he had noticed an open window and a light shining outside; that he was a friend of Mr. Arnold and was concerned for his health; and that he entered the store to see if Mr. Arnold was there and was all right. It is noted that Mr. Arnold testified that he closed his business and locked the doors and windows about 7:30 p.m. "on the Friday before the 13th day of April, 1964," and did not return to the store "until about 3:00 A.M. on April 13, 1964," after he had received a call from officers.

Appellant assigns as error this excerpt from the charge: "You will notice, Members of the Jury, that the Statute does not say breaking and entering, it says breaking or entering with felonious intent. The court instructs you that if you find that on the 13th day of April in the early morning hours of 1964 these defendants or either of them went

into W. H. Arnold's store here in the City of Raleigh with the intent to commit a felony, to wit, larceny and did, in fact, go in the building whether they broke in the building or someone else had broken in it before then, or, if they entered the building without a breaking with the intent to commit the crime of larceny, the felonious crime of larceny then in that event, if the State has satisfied you beyond a reasonable doubt they would be guilty as charged of breaking or entering."

The court had read G.S. 14-54, the statute on which the first count in the bill of indictment is based; and the quoted excerpt related the provisions of this statute to the facts in evidence. Here, there was ample evidence to support a finding as to breaking *and* entering. However, as the court stated correctly, the crime defined in G.S. 14-54 is complete, all other elements being present, if there was *an entry* with felonious intent. *S. v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201; *S. v. Best,* 232 N.C. 575, 61 S.E. 2d 612.

Appellant assigns as error designated excerpts from the court's charge bearing upon the second (larceny) count. While certain of these instructions were inexact, it seems improbable that they confused the jury or otherwise prejudiced Vines with reference to the second (larceny) count. Be that as it may, the sentence imposed on the second (larceny) count is less than that imposed on the first (breaking and entering) count. Since the two sentences run concurrently, error, if any, with reference to the second (larceny) count was not prejudicial to Vines. *S. v. Booker,* 250 N.C. 272, 273, 108 S.E. 2d 426; *S. v. Walker,* 251 N.C. 465, 478, 112 S.E. 2d 61.

Each of appellant's remaining assignments of error has received full consideration. However, none discloses prejudicial error or merits discussion in detail.

No error.

NANCY G. ROBBINS v. H. E. ROBBINS.

(Filed 11 November, 1964.)

1. Divorce and Alimony § 1—

The wife may institute action under G.S. 50-16 in the county in which they were living at the time of the husband's alleged abandonment.

2. Divorce and Alimony § 22—

The Superior Court has jurisdiction to award the custody of a child of the marriage in an action for divorce, G.S. 50-16, when no writ of *habeas*

corpus is filed prior to said pleadings and motion in the divorce action for the custody of such child.

APPEAL by defendant from *Martin, S. J.*, 27 July 1964 Civil Session of WAKE.

This is a civil action instituted by the plaintiff on 29 May 1964, pursuant to the provisions of G.S. 50-16, for subsistence, attorney fees, and custody of the minor child born of the marriage between the plaintiff and defendant.

Plaintiff and defendant were married on 24 November 1960. Of this union one child was born on 4 May 1962.

In November 1963 the plaintiff and the defendant became reconciled after a period of separation. They lived together as husband and wife in Wake County, North Carolina, until 27 May 1964, when the defendant moved out of the home of plaintiff and defendant in Wake County and moved into the home of his mother in New Bern, North Carolina, at which time he took the minor child with him along with certain personal property. The evidence tends to show that the defendant did not intend to return to his home in Wake County.

On Tuesday, 26 May 1964, the plaintiff left Raleigh on a bus, around 12:30 a.m., to visit her grandmother in Asheville, North Carolina, who had suffered a heart attack. Before leaving, plaintiff told the defendant that she would return in two or three days. The plaintiff and the defendant placed the child, Harry Eugene Robbins, III, in a nursery before the plaintiff left Raleigh.

The plaintiff returned to Raleigh on Thursday, 28 May 1964, and found the defendant and the two-year-old child gone. Plaintiff had no idea where her husband and child were until she read a note saying they were in New Bern.

It appears that prior to their reconciliation in November 1963, it was understood as a condition to their living together again that plaintiff would not be required to live in New Bern. Plaintiff had lived in Raleigh since her marriage to the defendant in November 1960.

From an order allowing plaintiff subsistence *pendente lite*, attorney fees, and custody of the minor child born of the marriage, the defendant appealed to the Supreme Court, assigning error.

John W. Liles, Jr., for plaintiff appellee.

Stanley Seligson and Charles L. Abernethy for defendant appellant.

PER CURIAM. The defendant assigns as error the refusal of the court below to remove this case to Craven County for trial on the ground that the husband's domicile is in that county.

In the case of *Miller v. Miller,* 205 N.C. 753, 172 S.E. 493, this Court held: "In a proceeding for alimony without divorce * * * 'the wife may institute an action in the superior court of the county in which the cause of action arose'; * * * *Rector v. Rector, supra* (186 N.C. 618, 120 S.E. 195) * * *."

The court below found as a fact that the defendant herein has abandoned the plaintiff and that she is entitled to the relief demanded. This assignment of error is overruled.

The defendant also assigns as error the awarding of custody of the minor child in this proceeding. He contends the court below had no jurisdiction of the child.

G.S. 50-16 was amended by Chapter 925 of the 1953 Session Laws of North Carolina, as follows: "In a proceeding instituted under this Section, the plaintiff or the defendant may ask for custody of the children of said parties, either in the original pleadings or in a motion in the cause. Whereupon, the court may enter such orders in respect to said custody as might be entered upon a hearing on a writ of *habeas corpus* issued for the purpose of determining the custody of said children. Such request for custody of the children shall be in lieu of a petition for a writ of *habeas corpus,* but it shall be lawful for the custody of said children to be determined upon a writ of *habeas corpus.* provided the petition for said writ is filed prior to the filing of said pleadings or motion for such custody in the cause instituted under this Section."

There is nothing in the record before us to show that a petition for a writ of *habeas corpus,* to determine the custody of the minor child involved herein, was pending at the time this action was instituted. Therefore, the order of the court below is

Affirmed.

WORTH WARDSWORTH THREADGILL, MINOR, BY HIS NEXT FRIEND, WORTH JAMIE THREADGILL v. MARK LINSON KENDALL.

(Filed 11 November, 1964.)

Automobiles § 41a; Pleadings § 28—

Where plaintiff alleges that he was riding his bicycle in his proper traffic lane and that the collision was caused by defendant's wrongful use of that lane, but his proof is that defendant was in defendant's proper lane and only left it to avoid a collision made imminent by plaintiff's turning from

the shoulder of the highway across defendant's lane of travel, nonsuit for variance is proper.

APPEAL by plaintiff from *Armstrong, J.*, May 11, 1964, Civil Session of STANLY.

Plaintiff, a 10 year old boy, seeks by this action compensation for personal injuries resulting from the alleged negligent operation of defendant's automobile.

Plaintiff alleged he was, on the afternoon of April 4, 1964, riding his bicycle "in a northerly direction over and along the traffic lane of North Carolina Highway No. 1901, provided for northbound traffic * * * when struck by the right front and right front fender of * * * [an] automobile owned and operated by the defendant over and along said highway in a southern direction." He amplifies and particularizes the negligence of defendant, which entitles him to compensation. He charges: (1) Unreasonable speed; (2) failure to decrease speed; (3) driving "in the left lane of traffic, in violation of Section 20-146 of the General Statutes"; (4) failing "to give to the plaintiff and the bicycle ridden by him one-half of the main-traveled portion of the highway and to pass on the right"; (5) failing to keep a proper lookout.

At the conclusion of plaintiff's evidence, the court, on motion of defendant, entered a judgment of nonsuit. Plaintiff, having excepted, appealed.

D. D. Smith and Hobart Morton for plaintiff.
Richard L. Brown, Jr., for defendant.

PER CURIAM. The evidence suffices to show these facts: The collision occurred on a rural road. It is paved. The paved area is 23 feet wide. The center line is painted, dividing the paved area into one lane for northbound traffic; the other for southbound. On each side of the road are shoulders four or more feet in width.

The collision occurred about one mile south of Albemarle, in or just north of a valley. The distance from the low point in the road to the crest of the hill to the north is 300 feet, and a similar distance to the crest of the hill to the south. The road is straight. There are no signs limiting the speed at which vehicles may travel. There are no intersecting highways in the immediate vicinity, although there is a private drive on the west side of the highway. Defendant, traveling south at 45 miles per hour, was in the western, defendant's right hand lane. Plaintiff was riding his bicycle on the shoulder on the west side of the

highway. Plaintiff turned to his right in front of defendant's automobile. When plaintiff turned into the paved portion of the highway, defendant turned to his left to avoid a collision, but was unable to do so.

Plaintiff, to recover, must offer proof of the negligence alleged. Plaintiff alleges he was riding in his proper traffic lane; the collision was caused by defendant's wrongful use of that lane. His proof is that defendant was in his proper lane and only left it to avoid a collision made imminent by plaintiff's wrongful use of defendant's lane. The variance between the allegations and proof is apparent. The nonsuit was proper. *Hall v. Poteat*, 257 N.C. 458, 125 S.E. 2d 924; Strong's N. C. Index, Pleading, sec. 28, Notes 364 and 365.

Affirmed.

STATE OF NORTH CAROLINA v. ROBERT EARL HOLLOWAY.

(Filed 11 November, 1964.)

1. Larceny §§ 5, 8—

An instruction to the effect that the recent possession of stolen property placed the burden upon defendant to offer evidence in explanation sufficient to raise a reasonable doubt of defendant's guilt of breaking and entering or larceny is prejudicial, notwithstanding that the charge in another portion correctly instructed the jury that the burden remained upon the State throughout the trial to prove defendant guilty beyond a reasonable doubt.

2. Criminal Law § 161—

Conflicting instructions upon the burden of proof must be held prejudicial.

APPEAL by defendant from *Bickett, J.*, December 9, 1963 Criminal Term of WAKE.

Defendant was prosecuted upon a three-count bill of indictment charging him with (1) breaking and entering a building occupied by Telerent, Inc., wherein merchandise was stored, with the intent to steal such merchandise; (2) larceny of thirty-six General Electric televisions at a value of $2,700; and (3) receiving the aforesaid thirty-six televisions knowing them to have been feloniously stolen. The offenses allegedly occurred on May 21, 1963.

The State offered evidence tending to show that after May 23, 1963, defendant had in his possession some of the stolen televisions. The jury returned a verdict of guilty as charged on the first two counts, and the

judge imposed concurrent prison sentences of not less than seven nor more than ten years. On March 24, 1964, we allowed defendant's petition for *certiorari* and heard the case at this term.

Attorney General Bruton and Assistant Attorney General Richard T. Sanders for the State.

Charles H. Sedberry for defendant.

PER CURIAM. To convict defendant, the State relied upon the rule of evidence that recent possession of stolen property tends to show the possessor guilty of the theft. *State v. Holbrook*, 223 N.C. 622, 27 S.E. 2d 725. Defendant challenges the following italicized portions of his Honor's charge:

> "The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law and is strong or weak as the time elapsing between the stealing of the goods, and the finding them in the possession of the defendant, is short or long and this presumption is to be considered by you merely as an evidential fact, along with the other evidence in the case in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendants' guilt (E) *and the duty to offer such explanation of possession as is sufficient to raise in the minds of the jury a reasonable doubt that they stole the property or broke into the building* (F) and the burden is not placed upon the defendants however recent the possession by them may be or may have been if you find such to be the case from the evidence and beyond a reasonable doubt, the possession, and the burden is still upon the State and remains upon the State to satisfy you from the evidence and beyond a reasonable doubt, as the Court has heretofore defined the term 'reasonable doubt' to you, the State relying upon what is known as the doctrine of recent possession as I have tried to explain that term to you . . . (M) *I have already instructed you that it is his (defendant's) duty to offer such explanation of his possession as is sufficient to raise in the minds of the jury a reasonable doubt that he neither stole the property or broke or entered the building* (N) but the burden of establishing a reasonable doubt as to his guilt is not placed on the defendants or either of them however recent the possession may have been but the burden is still upon the State to satisfy you from the evidence and beyond a reasonable doubt of his guilt or either of them."

Those portions of the charge to which defendant excepts are clearly erroneous. *State v. Ramsey,* 241 N.C. 181, 84 S.E. 2d 807. After telling the jurors that the burden was on the State to satisfy them beyond a reasonable doubt that defendant was guilty, the judge charged that it was defendant's duty to raise in the minds of the jury a reasonable doubt that he had neither entered the building nor stolen the televisions. The jury is not supposed to know which of two conflicting instructions is correct. *State v. Starnes,* 220 N.C. 384, 17 S.E. 2d 346; *State v. Faulkner,* 182 N.C. 793, 108 S.E. 756.

For this prejudicial error there must be a

New trial.

APPENDIX.

STATE OF NORTH CAROLINA EX REL., JACK PAYNE, BERRY EDSOM AND ENOCH GUNTER, RELATORS v. EDNA RAMSEY, DEMOCRATIC JUDGE OF VOTING PRECINCT ESTABLISHED AS TOWNSHIP 2, WARD 3, COMMONLY KNOWN AS GUNTERTOWN; KATHERINE R. FRANKLIN, REX ALLEN, CHAIRMAN, TED R. RUSSELL, SECRETARY, AND VERNON E. WOOD, MEMBER OF MADISON COUNTY BOARD OF ELECTIONS, DEFENDANTS.

AND

STATE OF NORTH CAROLINA EX REL., JACK PAYNE, BERRY EDSOM AND ENOCH GUNTER, RELATORS v. ROY FRANKLIN, REGISTRAR OF VOTING PRECINCT ESTABLISHED AS TOWNSHIP 2, WARD 3, COMMONLY KNOWN AS GUNTERTOWN; JIM WALLIN; REX ALLEN, CHAIRMAN, TED R. RUSSELL, SECRETARY, AND VERNON E. WOOD, MEMBERS OF MADISON COUNTY BOARD OF ELECTIONS, DEFENDANTS.

(Filed 2 October 1964.)

1. Appeal and Error § 2—

The Supreme Court will issue a Writ of Prohibition in the exercise of its supervisory jurisdiction to prevent an unwarranted interference with election officials when such extraordinary Writ is necessary to insure an orderly election.

2. Elections § 7—

The sole procedure to test the validity of the appointments by a county board of elections of precinct judges of elections and registrars of voting precincts is by appeal to the State Board of Elections, and a judge of the Superior Court has no original jurisdiction of an action instituted to try title to such offices and to restrain the county board of elections from turning over to its appointees the necessary materials for the conduct of an imminent election. See Rules adopted by State Board of Elections governing contests with respect to elections and removal of election officials.

WRIT OF PROHIBITION.

It appearing to the Court from the verified application of Ted R. Russell, Secretary and Member of the Madison County Board of Elections, and it further appearing to the Court from the pleadings and orders attached to said application that there are now pending in the Superior Court of Madison County two actions which purport to be instituted in the nature of *quo warranto* proceedings in which both the former precinct judge of elections and the present judge of elections and the present Board of Elections of Madison County are made parties defendants and also in the second action the former registrar of a voting precinct and the present registrar of a voting precinct, as well as the Madison County Board of Elections, are parties defendants; and

It further appearing to the Court that the primary object of said actions is an attempt to try the title to the offices of the present judge and

registrar of elections of Madison County and to again reinstate the former registrar and judge of the precincts set forth in the pleadings, and that this relief is sought in behalf of the registrars and judges in seven precincts, all of which former officials have been removed from office by action of the Madison County Board of Elections; and

It further appearing to the Court that the purported relators in these two actions have applied to the Honorable Harry C. Martin, Judge of the Superior Court of North Carolina, and have obtained temporary restraining orders which at the present time restrain and enjoin the Madison County Board of Elections from carrying out its duties with reference to the coming General Election to be held on November 3, 1964, and also restraining said Board of Elections from delivering necessary election materials to the present precinct election officials which have been appointed by the present Board of Elections of Madison County and from holding and conducting a new registration of voters as provided by law, and said Board of Elections of Madison County is further restrained from recognizing any persons as judges and registrars of election or voting precincts except those who have heretofore been removed from office by said Board of Elections of Madison County; and

It further appearing to the Court that in said temporary restraining order, above referred to, the said Board of Elections of Madison County is commanded and directed to deliver all election materials necessary to conduct the new registration and to hold the General Election of November 3, 1964, to said former judges and registrars who have been removed from office by the present Board of Elections of Madison County; and

It further appearing to the Court that the Superior Court of Madison County, as well as the Judge of the Superior Court who issued said two temporary restraining orders, do not have jurisdiction to institute and maintain said actions or to issue said restraining orders but that the remedy, if any, is for the former judges and registrars of the precincts of Madison County who have been removed by the present Board to appeal to the North Carolina State Board of Elections from said order of removal:

NOW, THEREFORE, IT IS ORDERED, by the Supreme Court of North Carolina, pursuant to its constitutional authority to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts, and pursuant to any other constitutional provisions and statutes that may be applicable, and pur-

suant to any common law powers and authority of the Court, as follows:

(a) That the plaintiffs or relators in the said two actions now pending in the Superior Court of Madison County, as well as their officers, agents, attorneys and the Clerk of the Superior Court of Madison County, be, and they are hereby, prohibited, ordered and commanded to refrain from prosecuting any further the two said actions now pending in said Court, copies of the pleadings being attached to this Order, and said parties shall not, by order of this Court, take any further action in said suits or proceedings heretofore instituted in the Superior Court of Madison County, nor shall said plaintiffs, or relators, their officers, agents or attorneys, or any other persons or parties, institute any other or further actions or proceedings of any nature which shall have as their objectives the actions or relief sought in the pleadings attached hereto or any other relief which shall seek to change the status of the present election officials appointed by the present Board of Elections of Madison County;

(b) That these two proceedings now pending in the Superior Court of Madison County, as above designated, be, and the same are hereby, dismissed, and it is further ordered and declared by this Court that the Superior Court of Madison County has no jurisdiction to entertain such proceedings and that the remedy of the former election officials, who have been removed from office by the Madison County Board of Elections, is hereby declared to be an appeal to the North Carolina State Board of Elections in Raleigh, North Carolina, from said order of removal, and said remedy of appeal heretofore set forth is declared to be applicable also to any electors of Madison County who may be interested in said proceeding;

(c) That the two restraining orders issued in these proceedings by the Honorable Harry C. Martin, on the 30th of September, 1964, are hereby vacated, and said Judge of the Superior Court, as well as any other Judge of the Superior Court, are hereby prohibited by this Court from enforcing and carrying out the commands and orders contained in said two restraining orders, and all judicial officials inferior to the Supreme Court of North Carolina, and all other persons, are hereby prohibited from taking any further action or orders in these proceedings or from interfering in any way or manner with the present Board of Elections of Madison County in its discharge and execution of its statutory duties in conducting all proceedings necessary for the General Election to be held on November 3, 1964;

(d) That the present Board of Elections of Madison County is commanded to deliver and make available any and all necessary elec-

tion materials to its duly appointed precinct officers and officials and to carry out any and all duties and proceedings necessary and as provided by law to hold the General Election of November 3, 1964, and that the same shall be done and performed without any interference or hindrance on the part of these plaintiffs or relators, their officers, agents, attorneys, judges of the Superior Court or any other persons whatsoever;

(e) That this Order shall remain in complete force and effect until the termination or conclusion of the General Election to be held on November 3, 1964, and thereafter until all election returns have been made to the proper officials and the results of same have been canvassed and certified in the manner provided by law.

IT IS, THEREFORE, ORDERED BY THE COURT that this Writ of Prohibition shall be in full force and effect from and after the date herein issued by this Court.

This the 2nd day of October, 1964.

SHARP, J.
For the Court

A TRUE COPY:

ADRIAN J. NEWTON
Clerk of Supreme Court of North Carolina.

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Whiskey—Where owner-driver permits search, passenger may not object to finding of his whiskey in trunk, *S. v. Dawson*, 607.

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Zoning Regulations — See Municipal Corporations.

ANALYTICAL INDEX

ABATEMENT AND REVIVAL.

§ 3. Abatement for Pendency of Prior Action in General.

The test for determining a plea in abatement for pendency of a prior action is whether the two actions are substantially identical as to parties, subject matter, issues involved and relief demanded. *Products Co. v. Christy*, 579.

An action solely between the drivers of the two vehicles involved in the collision will not support a plea in abatement to a counterclaim asserted by the owner-driver in a separate action instituted by the owner of the other vehicle involved in the collision. *Ibid.*

The owner of a vehicle may not object to the joinder of his driver for the purpose of a counterclaim by defendant-driver, notwithstanding the pendency of another action between the two drivers based upon the same collision, the right to object in such instances being solely in the driver so joined. *Ibid.*

§ 10. Action for Negligent Injury Causing Death.

An action for wrongful death survives the death of the tort-feasor. *In re Miles*, 647.

ACTIONS.

§ 10. Commencement of Actions.

An action is begun from the time of issuance of summons and not its service. *In re Miles*, 647.

ADMINISTRATIVE LAW.

§ 4. Appeal, Certiorari and Review.

Certiorari lies to review an order of the Board of Trustees of the University of North Carolina affirming the suspension of a student from the University for cheating, since the Board of Trustees is not an agency in the legislative or judicial branches of the government, nor an agency governed by G.S. Ch. 150, and therefore no other statutory provision exists for review of its actions. *In re Carter*, 360.

ADOPTION.

§ 1. Nature, Construction and Operation of Statutes.

The statutes give the clerk of the Superior Court exclusive original jurisdiction of adoption proceedings. *In re Simpson*, 206.

ADVERSE POSSESSION

§ 2. Hostile and Permissive Use in General.

Testimony of one plaintiff that his father had a deed to the land and that plaintiffs claimed the land and thought it was theirs until they "found out his deed was not recorded" *is held* not to negate the hostile character of the

ADVERSE POSSESSION—*Continued.*

possession, there being no question of lappage and plaintiffs' claim of ownership being unequivocal as to all the land embraced within the known and visible boundaries. *Mallett v. Huske*, 177.

§ 7. Adverse Possession Among Heirs and Tenants in Common.

The possession of one tenant in common is in law the possession of all his cotenants unless and until there has been an actual ouster or a sole adverse possession for 20 years from which an ouster would be presumed. *Morehead v. Harris*, 330.

Less than 20 years prior to the institution of this action defendants' grantor acquired by deed, as an innocent purchaser, an undivided interest in the *locus in quo*. Defendants drained and graded the land and occasionally cleared it of rubbish and mowed it, and leased a right of way for ingress and egress across it, collected the rents and paid the taxes. *Held:* Such possession did not amount to an ouster of defendant's cotenants and therefore such possession for a period of less than 20 years does not ripen title in them as to the interest of their cotenants. *Ibid.*

§ 8. Adverse Possession by Surviving Wife.

Where widow remains in possession and purchases at foreclosure of mortgage on the lands her possession is not adverse to heirs, her dower not having been allotted, until there is some open and positive change in the character of her possession sufficient to show that she was claiming in the character of owner. *Morehead v. Harris*, 330.

§ 15. What Constitutes Color of Title.

The deed to a widow purchasing at the foreclosure sale of the property is color of title, notwithstanding that her title is impressed with a trust in favor of the heirs at law, but the fact that the deed is color of title does not in itself constitute her possession thereunder adverse. *Morehead v. Harris*, 330.

§ 16. Presumptive Possession to Outermost Boundaries of Deed.

The rule that possession under an instrument constituting color of title will be extended to the outermost boundaries of the description in the instrument applies when the conveyance is of a single tract, but where the instrument conveys two separate tracts, and the grantee goes into possession of only one of them, the constructive possession of the grantee will not be extended to the other tract, even though the tracts be contiguous. *Morehead v. Harris*, 330.

§ 22. Competency and Relevancy of Evidence.

While a witness may not testify that a certain person "owned" the land, when the witness explains that he meant that such person was in possession of the land, the testimony is not prejudicial, since a witness may testify in regard to possession. *Mallett v. Huske*, 177.

Testimony of declarations of plaintiffs' predecessor that he owned the land is competent for the purpose of showing the character of his possession. *Ibid.*

The conveyance of the property by the person in possession is evidence that the possession was in the character of owner. *Morehead v. Harris*, 330.

ADVERSE POSSESSION—*Continued.*

§ 23. Sufficiency of Evidence of Adverse Possession and Nonsuit.

Plaintiffs' evidence that they claimed the tract in question under definite, known and visible boundaries, that the cleared land was suitable for farming and the wooded portion for timber and firewood, that they and their father, under whom they claim, continuously farmed the cleared land or rented it out for farming and cut timber and firewood from the wooded land for more than twenty years, *is held* sufficient to be submitted to the jury on the issue of acquisition of title by adverse possession, and defendants' contention that plaintiffs' evidence is insufficient because it failed to relate any act of possession to particular portions of the tract, is untenable. *Mallett v. Huske*, 177.

ALTERATION OF INSTRUMENTS.

Uncontradicted evidence that the contract between the parties was to convey all of a subdivision except lots which had already been sold, that the deed described the entire tract but excepted fourteen lots by number, that the number "3" in the list of lots excepted was marked through prior to registration with the consent of the president of the granting corporation as indicated by his signature in the margin beside the alteration, and that lot "3" had not been sold at the time of the execution of the deed, *is held* to establish a conveyance of lot "3" to the grantee as a matter of law, regardless of whether the alteration was made before or after delivery, since the alteration was with the consent of the granting corporation, and the redelivery to grantees being, in legal effect, a re-execution of the instrument. *Krechel v. Mercer*, 243.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

Ordinarily, the Supreme Court will not pass on constitutional questions unless they are squarely presented, and where defendant does not attack in his answer the constitutionality of a statutory exception, and, further, the determination of the constitutionality of the exception would not affect the judgment below, the constitutional question will not be decided. *Iredell County v. Crawford*, 720.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court will issue a Writ of Prohibition in the exercise of its supervisory jurisdiction to prevent an unwarranted interference with election officials when such extraordinary Writ is necessary to insure an orderly election. Appendix, 757.

The Supreme Court must take cognizance *ex mero motu* of a fatal defect appearing on the face of the complaint, constituting a part of the record proper. *Goodwin v. Whitener*, 582.

§ 12. Jurisdiction of Lower Court After Appeal.

After appeal the case is no longer in Superior Court and it has no jurisdiction pending the appeal to hear motion for a new trial for newly discovered evidence. *Branch v. Seitz*, 727.

APPEAL AND ERROR—*Continued.*

§ 19. Exceptions and Assignments of Error in General.

Where it does not appear that the court was requested to pass upon the question of attorney's fees, an exception to his failure to do so, appearing nowhere in the record except in a purported assignment of error, does not present the matter for review. *Bunn v. Bunn*, 67.

An exception must be assigned as error in order to present the question for review. *Iredell County v. Crawford*, 720.

Only those exceptions which present a single question of law should be grouped under one assignment of error. *Horton v. Redevelopment Comm.*, 306.

The bringing forward of exceptions exactly as they appear in the record, without further argument or citation of authority, does not comply with the rules. *Ibid.*

An assignment of error and the discussion in the brief should contain references to the printed pages of the record at which the apposite exception appears. *Ibid.*

§ 20. Parties Entitled to Object and Take Exception.

Appellant may not complain of asserted errors committed in regard to issues answered in his own favor. *Jones v. Hester*, 487.

§ 21. Exception and Assignment of Error to Judgment.

An exception to the signing of the judgment presents the questions whether the facts found support the conclusions of law and the judgment entered thereon and whether any error of law appears on the face of the record. *Taney v. Brown*, 438.

§ 22. Exceptions and Assignments of Error to Findings of Fact.

Where there are no exceptions to the admission of evidence or to the findings of fact, the findings are presumed to be supported by competent evidence, and an exception to the refusal of defendant's motion for judgment of compulsory nonsuit does not present the question whether the findings are supported by competent evidence. *Taney v. Brown*, 438.

Where there is no exception and assignment of error to a finding of fact, it will be presumed that the finding was supported by competent evidence and it is binding on appeal. *R. R. v. Weyerhaeuser Co.*, 730.

§ 24. Exceptions and Assignments of Error to Charge.

Assignments of error to the charge which do not specifically set out the particular portions of the charge objected to and which do not present the errors relied upon without the necessity of going beyond the assignments themselves, are ineffectual. *Hill v. Logan*, 488.

An exception to the charge on the ground that the court failed to charge the applicable law as required by statute is ineffectual as a broadside exception. *Bell v. Price*, 490.

A broadside assignment of error to the charge may be aided by a subsequent assignment of error which particularizes the objection to the charge, and the two assignments of error in this case are held sufficient to present the question of error in the failure of the court to charge the law applicable to specified aspects presented by the evidence. *Adams v. Adams*, 556.

APPEAL AND ERROR—*Continued.*

§ 35. Matters Included in Record.

Where the court settles the case on appeal upon disagreement of counsel, motion of one party to amend the case on appeal by incorporating therein certain affidavits will be denied when the record does not disclose to what extent if any, the facts asserted in the affidavits entered into the court's findings. *In re White*, 737.

§ 38. Failure to Discuss Exceptions in the Brief.

Exceptions and assignments of error not discussed in the brief are deemed abandoned. *Horton v. Redevelopment Comm.*, 306.

§ 39. Presumptions and Burden of Showing Error.

Appellant has the burden not only to show error but also that a different result would likely have ensued except for the error. *Construction Co. v. Board of Education*, 295.

§ 40. Harmless and Prejudicial Error in General.

In order to be entitled to a new trial, appellant must show not only error but that the error adversely affected her chance of success on the issue in question. *Davis v. Parnell*, 616; *Whaley v. Marshburn*, 623.

Where the court erroneously sustains demurrer for misjoinder of parties and causes, but does not dismiss the action but grants leave to amend, plaintiff is not prejudiced by the error when the complaint is such as to require amendment. *Short v. Realty Co.*, 576.

§ 41. Harmless and Prejudicial Error in the Admission or Exclusion of Evidence.

Where taking plaintiff's evidence as true and considering it in the light most favorable to plaintiff nonsuit is proper, the exclusion of testimony tending to establish facts already in evidence cannot be prejudicial. *Mangum v. Gasperson*, 32.

Even if it be conceded that plaintiff's evidence is insufficient to establish a permanent injury, the admission of the mortuary tables in evidence will not be held ground for a new trial when there is nothing in the record or verdict to indicate prejudice to defendant resulting therefrom. *McPherson v. Haire*, 71.

The exclusion of evidence cannot be prejudicial when evidence of the same import is thereafter admitted. *Branch v. Seitz*, 727.

The admission of evidence over objection cannot be held prejudicial when evidence of the same import is thereafter admitted without objection. *Mallett v. Huske*, 177; *Carver v. Lykes*, 345.

Defendant was under contract to pay plaintiff a stated amount per cubic yard for stone excavated. The subcontractor who excavated the stone testified as to the number of cubic yards excavated by him. Judgment in favor of the subcontractor against plaintiff which showed the excacation of a much smaller number of cubic yards was admitted in evidence. Recovery was allowed on the smaller number of cubic yards excavated as shown by the judgment. *Held:* Defendant was not prejudiced by the admission of the subcontractor's judgment in evidence. *Construction Co. v. Board of Education*, 295.

An instruction, given at the end of a protracted trial, that the jury should not consider certain incompetent evidence theretofore admitted over a period

APPEAL AND ERROR—*Continued.*

of days may not cure the error when it is apparent that the instruction could not have erased the prejudicial effect from the minds of the jurors. *Light Co. v. Creasman*, 390.

§ 42. Harmless and Prejudicial Error in Instructions.

Where the court correctly defines the substantive common and statutory law involved and correctly places the burden of proof, exception to the charge will not be sustained when the charge construed as a whole is without prejudicial error. *McPherson v. Haire*, 71.

An instruction omitting the element of foreseeability in charging upon proximate cause cannot be prejudicial to plaintiff. *Hardee v. York*, 237.

An erroneous instruction in regard to the law must be held for error notwithstanding it is contained in the statement of a contention. *Light Co. v. Creasman*, 390.

§ 45. Error Cured by Verdict.

Where the jury finds that plaintiffs are the owners of land upon evidence tending to show that they and their father before them had been in continuous adverse possession for more than 55 years, such possession is sufficient to ripen title, even though plaintiffs' father had taken possession as a tenant in common, and therefore the exclusion of evidence offered for the purpose of showing that plaintiffs' grandfather owned the land, and an instruction to the effect that there is no evidence that plaintiffs' grandfather acquired title by adverse possession, cannot be prejudicial to defendants in view of the verdict. *Mallett v. Huske*, 177.

§ 46. Review of Discretionary Matters.

A discretionary ruling of the trial court is conclusive on appeal in the absence of abuse or arbitrariness or some imputed error of law or legal inference. *Highway Comm. v. Coggins*, 25.

§ 47. Review of Order Relating to Pleadings.

If plaintiff is entitled to introduce evidence of the predicate facts under his general denial of new matter set up in the answer, the striking of allegation of such facts from his pleading will not be disturbed, since he is not prejudiced thereby. *Gamble v. Stutts*, 276.

It cannot be determined whether appellant is prejudiced by the denial of his motion to be allowed to file an amendment to the answer when the purpose or content of the amendment does not appear. *Iredell County v. Crawford*, 720.

§ 49. Review of Findings or of Judgments on Findings.

Findings of fact by the court which are supported by competent evidence are binding and conclusive on appeal notwithstanding there may be evidence *contra*. *Johnson v. Johnson*, 39; *McCallum v. Ins. Co.*, 375; *Burgess v. Gibbs*, 462.

A finding of fact will not be disturbed on exception when such finding is in no way prejudicial to appellant. *Johnston v. Ins. Co.*, 253.

Where no exceptions are taken to the admission of evidence or to the findings of fact, or if taken, are not preserved, the findings are presumed to be

APPEAL AND ERROR—*Continued.*

supported by competent evidence and are binding on appeal. *Horton v. Redevelopment Comm.*, 306; *Taney v. Brown*, 438.

In a trial by the court upon waiver of jury trial, the rules as to the admission and exclusion of evidence are not so strictly enforced. *McCallum v. Ins. Co.*, 375.

§ 51. Review of Judgments on Motions to Nonsuit.

On appeal from a judgment of involuntary nonsuit, competent evidence offered by plaintiff will be considered notwithstanding it was excluded in the court below. *Lane v. Coe*, 8; *Norburn v. Mackie*, 16.

Refusal of nonsuit will not be disturbed, notwithstanding the admission of incompetent evidence, when there is competent evidence to sustain an affirmative finding upon the issue. *Construction Co. v. Board of Education*, 295.

Where a new trial is awarded, the Supreme Court will refrain from discussing the evidence except to the extent necessary to pass upon the exceptions. *Norburn v. Mackie*, 16.

Where defendant introduces evidence, only his motion for nonsuit made at the close of all of the evidence need be considered on appeal. *Mallett v. Huske*, 177.

§ 55. Remand.

Where there are no findings as to whether a proposed pedestrian plaza over the tracks of a railroad as a part of an urban redevelopment project could be classified as a park project and therefore for a public purpose or, if judicially determined to be a public purpose, whether the right to construct the plaza could be acquired by eminent domain, G.S. 160-456(q2), the cause must be remanded for findings necessary to a determination of the question. *Horton v. Redevelopment Comm.*, 306.

§ 60. Law of the Case and Subsequent Proceedings.

Decision on former appeal overruling nonsuit is not conclusive upon a subsequent trial when the evidence upon the subsequent trial is materially different from that of the first so as to attract a different principle of law. *Ennis v. Duprce*, 224.

Decision on appeal becomes the law of the case and is controlling upon the second trial. *McCallum v. Ins. Co.*, 375; *In re Kenan*, 627.

ARREST AND BAIL.

§ 6. Resisting Arrest.

In order to charge a violation of G.S. 14-223, the warrant or bill of indictment must identify the officer by name and indicate the official duties he was discharging or attempting to discharge and should point out, in a general way at least, the manner in which defendant is charged with having resisted, delayed or obstructed such officer. *S. v. Smith*, 472.

ARSON.

§ 4. Sufficiency of Evidence and Nonsuit.

The circumstantial evidence in this case, including evidence tending to show that defendant was heavily involved in debt and had certain cottages

ARSON—*Continued.*

and a hotel, owned by him and operated as a unit, grossly over-insured, that some 33 hours after defendant left the unoccupied property fire was discovered in two of the cottages and before it could be brought under control fire broke out on the top floor of the hotel, and that after the fire in the hotel had been extinguished firemen found in various places in the hotel four candles which had been burning some 33 hours, that each candle had the wax about one inch from the base cut through to the wick and paper inserted in the slit in each candle and extending some several inches from the sides of the candles to other combustibles, *is held* sufficient to be submitted to the jury on the question of defendant's guilt in a prosecution for violating G.S. 14-62. *S. v. Moore*, 431.

ASSAULT AND BATTERY.

§ 1. Right of Action for Civil Assault.

Baseball club and manager held not liable for assault made on umpire under facts. *Toone v. Adams*, 403.

§ 5. Assault with Deadly Weapon Resulting in Serious Injury.

Offense is included in the offense of robbery with firearms. *S. v. Parker*, 679.

§ 16. Submission of Question of Guilt of Less Degrees of Offense.

Assault is not a less degree of the crime of larceny from the person, and therefore in a prosecution for larceny the court is not required to submit the question of defendant's guilt of assault, even though there be evidence thereof. *S. v. Acrey*, 90.

AUTOMOBILES.

§ 4. Title, Certificate of Title and Transfer.

G.S. 20-28(a) does not prevent a mortgagee having actual possession of the pledged vehicle from acquiring a lien having priority over other liens not then perfected, and therefore a mortgagee who has his lien first recorded and who retains possession of the vehicle mortgaged has a lien prior to a mortgagee subsequently recording his instrument who does not transmit the certificate of title to the Department of Motor Vehicles within ten days of the date of its loan and mortgage. *Trust Co. v. Finance Co.*, 711.

§ 5. Warranties in Sale.

Plaintiff declared upon an express warranty against defect in materials and workmanship in the car purchased by him, which warranty stipulated it should be fulfilled by the dealer replacing free of charge any defective part. The uncontradicted evidence tended to show that the dealer replaced or adjusted as far as the purchaser would permit every defective part called to his attention, but that the purchaser refused to permit him to replace or adjust additional items and did not advise him of other asserted defects. *Held:* Nonsuit was properly entered, since under the terms of the warranty the seller was entitled to notice of defects and an opportunity to remedy any deficiencies, there being no contention of a failure of consideration. *Lilley v. Motor Co.*, 468.

AUTOMOBILES—*Continued.*

§ 6. Safety Statutes and Ordinances in General.

Ordinarily, the violation of a statute or ordinance enacted for the safety of motorists on the highway is negligence *per se* and proof of breach of the statute or ordinance establishes negligence, since in such circumstance the common law rule does not obtain but the statute itself imposes the duty, and the question of proximate cause is to be determined by the other facts and circumstances. *Cowan v. Transfer Co.*, 550.

Where a statute or ordinance provides that its violation should not be negligence *per se*, the common law obtains and the duty is to exercise due care under the circumstances, so that whether such violation constitutes negligence and whether such negligence constitutes a proximate cause of injury is to be determined from facts and circumstances of the case. *Ibid.*

§ 8. Turning and Turn Signals.

G.S. 20-154(a) requires that a motorist before turning from a direct line should first ascertain that such movement can be made in safety, and a violation of this provision is negligence *per se*, but a motorist is not required to ascertain that a turning motion is absolutely free from danger. *Cowan v. Transfer Co.*, 550; *McNamara v. Outlaw*, 612.

§ 13. Skidding.

It is not negligence *per se* to drive a vehicle on a highway covered with snow or ice. *Robertson v. Ghee*, 584.

While the mere skidding of a vehicle does not imply negligence, liability may attach if the skidding is the result of fault on the part of the driver, as where a motorist fails to exercise the care of a reasonably prudent person in the presence of ice and snow and the skidding results from the failure to exercise such care. *Hardee v. York*, 237.

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

Driver must sound his horn before passing or attempting to pass vehicle traveling in same direction on highway. *McPherson v. Haire*, 71.

Evidence held not to show that plaintiff was following preceeding vehicle too closely. *Robertson v. Ghee*, 584.

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

When a motorist sees, or in the exercise of ordinary care should see, another motorist approaching from the opposite direction on the wrong side of the highway, the first motorist is under duty to exercise due diligence under the conditions then existing to prevent an accident, and, when possible, to slow down, turn from a direct line, drive off the highway, stop, or take such other evasive action as a person of ordinary prudence would take under similar circumstances. *Forgy v. Schwartz*, 186.

§ 17. Intersections.

A motorist traveling along a servient highway is not required to stop at the place where the stop sign is located on the highway, but is required to bring his car to a full stop at a place where his precaution may be effective and not

AUTOMOBILES—*Continued.*

to enter upon the intersection with the dominant highway until he exercises due care to see that he may do so in safety, yielding the right of way to vehicles upon the dominant highway. *Ledbetter v. Thomas*, 569.

§ 19. Sudden Emergencies.

A person confronted with a sudden emergency is not held to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence, similarly situated, would have made. *Robertson v. Ghee*, 584.

Where a motorist is confronted with a sudden emergency when a car approaching from the opposite direction pulls to its left side of the highway to pass other vehicles, such motorist will not be held to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence similarly situated would have made, and the failure to take certain evasive action cannot be held for negligence when it is merely speculative whether such action would have avoided the accident. *Forgy v. Schwartz*, 186.

§ 33. Pedestrians.

A pedestrian crossing a highway at a place other than a crosswalk is under duty to exercise care for his own safety commensurate with the apparent danger and must yield the right of way to vehicular traffic. *Blake v. Mallard*, 62.

If there is nothing to put a motorist on notice to the contrary, the motorist is entitled to assume, up to the moment of impact, that a pedestrian crossing at a place other than a crosswalk will yield the right of way. *Ibid.*

While the failure of a pedestrian to yield the right of way to a motorist when crossing at a point other than a crosswalk is not contributory negligence *per se*, if all of the evidence establishes such failure as a proximate cause of his injury so clearly that no other reasonable conclusion is possible, nonsuit is proper. *Holloway v. Holloway*, 258.

§ 34. Children.

A driver is not an insurer of the safety of children along the highway, and, when nothing puts or should put him on notice of their presence, he may not be held liable for hitting a child who runs or rides a bicycle into his lane of travel from behind an obstruction under circumstances in which the motorist, in the exercise of due care and a proper lookout, could not have seen the child in time to have avoided collision. *Ennis v. Dupree*, 224.

§ 38. Opinion Evidence as to Speed.

Witnesses having a reasonable opportunity to observe and judge the speed of a car may testify as to their opinion of such speed. *S. v. Colson*, 506.

The admission of testimony of a witness that defendant's car was "moving pretty fast" is not prejudicial even though the witness had no reasonable opportunity to judge the speed of defendant's car when defendant himself testifies that he was traveling between 55 and 60 miles per hour. *Ibid.*

§ 39. Physical Facts at Scene.

Evidence that defendant's car, traveling in a 55 mile per hour zone, left skid marks for 126 feet to the point of impact and 33 feet of scuff marks be-

AUTOMOBILES—*Continued.*

yond the point of collision, *held* not to support an inference that defendant was traveling at excessive speed. *Clayton v. Rimmer*, 302.

The physical facts at the scene of an accident may be more convincing than oral testimony, and their import is ordinarily a matter for the determination of the jury. *Randall v. Rogers*, 544.

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

Evidence permitting the jury to find that defendant was an occupant of the automobile owned by him, that he had the right to control the driver in the operation of the car, that he knew the driver to be intoxicated and that the driver in approaching and rounding a sharp curve ran off the road and into a tree resulting in injury to plaintiff, who was asleep in the car, that the car was in good mechanical condition and that there was no other traffic on the road at the time, together with the physical facts at the scene of the accident, *is held* sufficient to take the issue of negligence to the jury, since it permits the inference that the accident was the result of the intoxication of the driver and his reckless operation of the vehicle, or his failure to maintain a proper lookout so that he did not see the curve, or that he negligently failed to keep the vehicle under control. *Randall v. Rogers*, 544.

In these actions by a passenger to recover for injuries sustained when the driver failed to follow a curve, hit the shoulder, and lost control of the vehicle, the evidence *is held* sufficient to be submitted to the jury on authority of *Randall v. Rogers, ante*, 544. *Whaley v. Marshburn*, 623.

Where plaintiff alleges that he was riding his bicycle in his proper traffic lane and that the collision was caused by defendant's wrongful use of that lane, but his proof is that defendant was in defendant's proper lane and only left it to avoid a collision made imminent by plaintiff's turning from the shoulder of the highway across defendant's lane of travel, nonsuit for variance is proper. *Threadgill v. Kendall*, 751.

§ 41d. Negligence in Passing Cars Traveling in Same Direction.

While the failure of the operator of a motor vehicle passing another vehicle in open country to give audible warning of the intent to pass is not negligence *per se*, if there is evidence tending to show circumstances which would support a finding that a reasonably prudent person under similar conditions would not have attempted to pass without sounding his horn and that defendant driver failed to do so, and that such failure was a proximate cause of the accident, the issue of negligence is for the determination of the jury. *McPherson v. Haire*, 71.

Evidence tending to show that defendant had followed plaintiff's vehicle on the highway for about two miles at a speed of approximately 45 miles per hour, that as plaintiff's vehicle slowed down and was turning left into a private driveway defendant's vehicle, which was attempting to pass, struck plaintiff's vehicle, that defendant gave no warning of his intention to pass, with evidence favorable to plaintiff that plaintiff gave timely signal for a left turn, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Cowan v. Transfer Co.*, 550.

§ 41e. Negligence in Stopping Without Signal or Parking Without Lights.

The failure to set out flares or other devices to warn motorists of an unlighted tractor-trailer obstructing a lane of travel on a highway at nighttime

AUTOMOBILES—*Continued.*

is sufficient to support a finding of negligence under both statutory and common law, and whether there is a causal connection between such negligence and a collision is largely a question of fact for the jury. *Kirby v. Fulbright*, 144.

§ 41f. Negligence in Following too Closely and Hitting Vehicle in Lane of Travel.

Evidence *held* sufficient to be submitted to the jury in this action to recover for injuries sustained when defendant driver drove his truck into the rear of plaintiff's automobile, notwithstanding that the lights of the stationary vehicle were burning and a person was attempting to flag the truck down with a flashlight. *Respess v. Brickhouse*, 485.

The bridge in question was some 400 feet long, cresting in the middle, so that motorists approaching from the south could not see vehicles at the north end. Evidence tending to show that both lanes were blocked at the north end because of the congregation of cars there sequent to several collisions, and that plaintiff driver could not avoid skidding and hitting the side of the bridge before stopping, and was then successively hit by the cars of defendants, which were following him, without more, *held* insufficient to be submitted to the jury on the issue of defendant's negligence. *Hall v. Little*, 618.

§ 41h. Negligence in Turning.

Findings to the effect that the driver of a truck intending to enter an intersecting rural road, without warning or signal turned to the left so that his left front wheel crossed the centerline of the highway for a distance of a yard, that at that time the truck driver knew or should have known that a car, which was attempting to pass, had reached a point where its front was about even with the left door of the cab, and that the driver of the car confronted by the emergency turned to the left to avoid the truck, resulting in loss of control of the car and the injury in suit, *held* to support the conclusion of law that the truck driver was guilty of actionable negligence. *Taney v. Brown*, 438.

§ 41m. Negligence in Striking Children.

Evidence held insufficient to show that motorist could have seen cyclist in time to have avoided collision. *Ennis v. Dupree*, 224.

Evidence *held* insufficient to show that collision of defendant's vehicle with a child on the highway was the result of negligence. *Badger v. Medley*, 742.

§ 41p. Sufficiency of Evidence of Identity of Driver.

Testimony to the effect that immediately before the accident a witness sitting on a bench in front of a store saw a large man wearing a tee shirt as the passenger on the front seat, together with evidence that plaintiff's intestate was a large man wearing a tee shirt and that only intestate and defendant's husband were on the front seat, *is held* sufficient to be submitted to the jury as to whether defendant's husband was the driver of the car at the time of the collision, notwithstanding the testimony on cross-examination of a back seat passenger that intestate was the driver. *Thomas v. Morgan*, 292.

§ 42a. Nonsuit for Contributory Negligence in General.

Nonsuit for contributory negligence is properly denied, even if all the evidence establishes contributory negligence, if the evidence also discloses that the

AUTOMOBILES—*Continued.*

contributory negligence was not a proximate cause of the injury. *Taney v. Brown*, 438.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Motorist traveling at lawful speed held not contributorily negligent as matter of law in hitting unlighted vehicle. *Kirby v. Fulbright*, 144.

Evidence that plaintiff reduced his speed to some twenty miles per hour in entering an area of fog and smoke, and collided with defendant's vehicle which was standing without lights in his lane of travel some twenty-five feet in the fog, *held* not to show contributory negligence as a matter of law. *Forbes v. Britton*, 493.

§ 42e. Contributory Negligence in Following and Passing Preceding Vehicle.

Evidence tending to show that the preceding vehicle had collided with a stationary vehicle, throwing an occupant thereof into the middle of the highway, that another occupant jumped out and had stood over the person lying in the highway for a couple of minutes before the following vehicle reached the scene, *held* not to show that the following vehicle was following more closely than 300 feet. *Robertson v. Ghee*, 584.

Evidence tending to show that plaintiff was driving a tractor-trailer at a speed of some 15 miles per hour on a highway upon which there was snow and ice, that as he was driving over the crest of a hill he could not see a person lying prone on the highway until such person was picked up by the lights of his vehicle when some 50 to 75 yards away, that, apprehending he could not stop his vehicle on the ice and snow before hitting such person, he drove to his left off the side of the highway, resulting in damage to the vehicle, *is held* not to show contributory negligence as a matter of law. *Ibid.*

§ 42g. Nonsuit for Contributory Negligence in Entering Intersection.

Evidence that plaintiff, traveling west along a servient highway, stopped before its intersection with a dominant highway, that lights of a car approaching from the south could be seen for a distance of some 265 to 300 feet, and that plaintiff drove into the intersection in attempting to make a left turn and had traveled a distance of 12 feet when he was struck by defendant's car, which approached from the south, *is held* to show contributory negligence as a matter of law on the part of plaintiff. *Clayton v. Rimmer*, 302.

Evidence to the effect that the motorist traveling east along the servient highway stopped before entering an intersection with a dominant highway at the place where the stop sign was erected, saw no vehicle approaching along the dominant highway, and then without again stopping drove into the intersection and collided in the southeast quadrant of the intersection with a vehicle approaching from the south along the dominant highway, and that a vehicle could be seen approaching from the south for one-quarter to one-half mile, *is held* to disclose contributory negligence constituting a proximate cause of the collision as a matter of law. *Howard v. Melvin*, 569.

§ 42h. Contributory Negligence in Turning.

Evidence tending to show that plaintiff looked in his rear view mirror some 400 feet before making a left turn and looked again when 40 feet away from

AUTOMOBILES—*Continued.*

his turn, and saw defendant's following vehicle in his right hand lane, that plaintiff did not look again to the rear, and was struck by defendant's vehicle which was attempting to pass him as he was making his turn, *is held* not to disclose a violation of G.S. 20-154(a) as a matter of law, since under the circumstances of the case whether plaintiff could reasonably assume that he could make the movement in safety is a question for the jury. *Cowan v. Transfer Co.*, 550.

Evidence held not to show contributory negligence as a matter of law in making left turn. *Cowan v. Transfer Co.*, 550; *McNamara v. Outlaw*, 612.

§ 42k. Nonsuit for Contributory Negligence of Pedestrian.

While the failure of a pedestrian to yield the right of way to a motorist at a point other than a crosswalk is not contributory negligence *per se* but only evidence of contributory negligence, nevertheless when all of the evidence establishes his failure to yield the right of way as one of the proximate causes of his injury so clearly that no other reasonable conclusion is possible, nonsuit is proper. *Blake v. Mallard*, 62; *Holloway v. Holloway*, 258.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Negligence of driver hitting unlighted truck held not to insulate negligence of other driver in failing to maintain flares. *Kirby v. Fulbright*, 144.

Even though a head-on collision results from the negligence of one motorist in pulling to his left and traveling at excessive speed in passing preceding vehicles, a passenger may hold both drivers liable as joint tort-feasors if the second motorist fails to exercise ordinary care to avoid the accident by taking evasive action and such failure is a proximate cause of the accident, but the evidence in this case *is held* insufficient to be submitted to the jury on the question of the second motorist's failure to take evasive action. *Forgy v. Schwartz*, 186.

§ 46. Instructions in Auto Accident Cases.

An instruction that G.S. 20-149(b) places the duty on a motorist to blow his horn as a reasonably prudent person would do in the act of passing and to give such warning in reasonable time to avoid an injury which would likely result from a left turn by the preceding motorist, all in the discharge of the duty to use reasonable care under the circumstances, *is held* without prejudicial error, and objection that the court did not sufficiently explain that the violation of the statute should not constitute negligence *per se* is untenable. *Cowan v. Transfer Co.*, 550.

§ 52. Liability of Owner for Driver's Negligence in General.

Ordinarily, the owner-occupant of a car has the right to direct its operation by the driver and therefore is responsible for the driver's negligence irrespective of agency, as such, and the provisions of G.S. 20-71.1. *Randall v. Rogers*, 544.

Allegations in the complaint that the automobile was owned by defendant and registered in his name and was being negligently operated at the time by defendant or by some person with his permission, and that the negligence in the respects specified was the proximate cause of plaintiff's injury, when aided

AUTOMOBILES—*Continued.*

by allegations in the answer that defendant was an occupant of the car at the time of the accident, *is held* sufficient to allege defendant's liability for the driver's negligence. *Ibid.*

§ 54f. Sufficiency of Evidence and Nonsuit on Issue of Respondeat Superior.

Where, in an action by a passenger against the drivers involved in a collision, plaintiff makes out a *prima facie* case of negligence on the part of the driver of the car, proof or admission that the additional defendant was the registered owner of the car establishes *prima facie* that the driver was such owner's agent and was acting in the course and scope of the employment, and entitles the defendants to have the owner of the car joined for contribution. *McPherson v. Haire*, 71.

§ 59. Sufficiency of Evidence of Culpable Negligence and Nonsuit.

Evidence of culpable negligence in striking boys on highway held for jury. *S. v. Colson*, 506.

§ 60. Instructions in Manslaughter Prosecutions.

In this manslaughter prosecution, the charge *is held* to have properly instructed the jury on the question of death by accident or misadventure. *S. v. Colson*, 506.

"Reasonable prevision" and "reasonable foreseeability" have substantially the same significance when applied to the question of proximate cause in a manslaughter prosecution, and therefore the use of the phrase "reasonable prevision" instead of "reasonable foreseeability" in charging upon the element of proximate cause, is not prejudicial. *Ibid.*

§ 61. Verdict and Judgment in Homicide Prosecutions.

The acquittal of defendant on charges of speeding and the conviction of defendant of manslaughter are not incongrous when the State in regard to the manslaughter charge relies not only on excessive speed but also upon failure to maintain a reasonable lookout and reckless driving amounting to a heedless disregard of the probable consequences of a dangerous nature, when tested by the rule of reasonable prevision. *S. v. Colson*, 506.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for Drunken Driving.

Evidence tending to show that defendant's automobile was standing partly on the tracks at a grade crossing, that defendant got in and out of the car several times in attempting to back it off the tracks, together with defendant's statement after his car had been struck by a train that he had driven the car on the tracks, *is held* sufficient to be submitted to the jury on the question of whether defendant had driven the car, notwithstanding that at the time of making the statements defendant was so drunk that his conversation was incoherent and the witness could understand little of what he was saying except that he had driven the car. *S. v. Stephens*, 45.

Testimony that defendant was drunk is sufficient to be submitted to the jury in a prosecution under G.S. 20-138, since if a person is "drunk" he is perforce "under the influence." *Ibid.*

BANKS AND BANKING.

§ 10. Paying Checks of Depositor.

Where a bank admits the deposit of funds the burden is on the bank to show satisfaction of the debt so created. *Nationwide Homes v. Trust Co.*, 79.

An agent making a deposit does not have implied authority to draw checks on the account. *Ibid.*

Where a bank admits deposits and disbursements of the funds on checks drawn by the agent who made the deposits but offers no evidence of valid authority of the agent to draw checks on the account or of apparent authority of the agent by showing when the depositor first had notice of the payment of checks drawn by the agent so as to establish the depositor's failure to object within a reasonable time thereafter, nonsuit in the depositor's action against the bank is error. *Ibid.*

G.S. 53-52 entitles a bank to credit for forged or unauthorized withdrawals by an agent of the depositor only for those checks received by the depositor in its bank statement for more than sixty days without giving notice to the bank that the withdrawals were not authorized. *Ibid.*

BASTARDS.

§ 1. Elements of Offense of Wilful Refusal to Support.

The question of paternity is merely preliminary in a prosecution under G.S. 49-2, since the wilfull failure to support, and not the begetting of the child, is the offense. *S. v. Ellis*, 446.

§ 8. Issues and Verdict in Prosecutions for Wilful Refusal to Support.

In a prosecution for wilful refusal to support an illegitimate child the statutes contemplate the submission of issues to the jury, and while an affirmative finding on the issue of paternity will not alone support conviction, the offense is a continuing one, and the accused is not entitled to have the question of paternity re-litigated in a subsequent prosecution for the offense. *S. v. Ellis*, 446.

In a prosecution under G.S. 49-2, the court may enter judgment, without a general verdict of guilty, upon a finding by the jury that defendant is the father of the illegitimate child in question and has wilfully refused, after demand, to support said child, or the court may instruct the jury that upon affirmative findings upon these issues the jury should enter a general verdict of guilty, and enter judgment upon such verdict. *Ibid.*

A finding by the jury that defendant is the father of the illegitimate child in question and that defendant wilfully neglected and refused to support and maintain said illegitimate child, is fatally defective as a special verdict, since such verdict omits any finding that such wilful refusal subsisted after demand was made upon defendant and before the institution of the prosecution. *Ibid.*

BILL OF DISCOVERY.

§ 1. Examination of Adverse Party in General.

The discretionary authority of "the presiding judge of a Superior Court" to compel the disclosure of the privileged portion of hospital records is limited to the judge presiding at the trial and does not extend to compelling disclosure by deposition prior to trial. *Johnston v. Ins. Co.*, 253.

BILL OF DISCOVERY—*Continued.*

Where insured in his application for an accident policy authorizes any physician to disclose information obtained in treating insured and, after injury, insured signs an authorization that any hospital, physician, or other persons might furnish all information with respect to the treatment of insured, such authorization constitutes waiver of the statutory privilege with respect to the hospital records, G.S. 8-53, but since such records are not in the possession of insured within the meaning of G.S. 8-89, the question of whether the hospital should be required to produce the records in response to subpoena is not presented. *Ibid.*

BILLS AND NOTES.

§ 4. Consideration.

Approval of an application for a loan by the lender cannot create a debt on the part of the applicant before he receives the proceeds of the loan, notwithstanding the note is signed by the borrower and bears the date of the application rather than the date the loan is actually made, which date is set up on the books of the lender as the date of the loan and the date from which interest is charged. *McCallum v. Ins. Co.*, 375.

BOUNDARIES.

§ 2. Courses and Distances and Calls to Natural Objects.

A call to a natural object which is permanently located controls course and distance, and a well recognized corner of an adjacent tract is a call to a natural object within the meaning of this rule. *Allen v. Cates*, 268.

A call to a stone without additional description is insufficient to constitute a call to a permanently located natural object, and such call cannot control course and distance. *Ibid.*

Where petitioners in a processioning proceeding introduce evidence fixing the corner of a contiguous tract, and the next call in their description is by course and distance to a stone (a corner in dispute), and the evidence is to the effect that the stone was small and had been moved, the disputed corner must, as a matter of law, be fixed at the distance called for from the established corner, with the result that petitioners' evidence is sufficient to support a finding of the corner as contended by them. *Ibid.*

§ 7. Nature and Essentials of Processioning Proceedings.

A processioning proceeding does not put in issue title to real estate but only the location of a disputed boundary between the land of petitioners and adjacent lands. *Pruden v. Keemer*, 212.

Where the petition in processioning proceedings does not allege what boundary is in dispute between petitioners and respondents, and, while containing a legal description of the lands claimed by petitioners, fails to locate any lines as claimed by petitioners on the earth's surface, the petition is fatally defective and insufficient to confer jurisdiction on the court. *Ibid.*

§ 8. General Rules; Questions of Law and of Fact.

In a processioning proceeding, what constitutes the boundary line is a matter of law, where it is located is a matter of fact. *Pruden v. Keemer*, 212.

BOUNDARIES—*Continued.*

§ 9. Sufficiency of Description and Competency of Evidence Aliunde.

A description which leaves the identity of the land absolutely uncertain and refers to nothing extrinsic by which it may be identified with certainty is patently ambiguous and may not be aided by parol; a description which, although insufficient in itself to identify the property, refers to something extrinsic by which identification may be possible is latently ambiguous, in which case plaintiff may offer evidence *dehors* the instrument to identify the property and defendant may offer evidence tending to show impossibility of identification and thus show a fatal ambiguity. *Lane v. Coe*, 8.

The memorandum of the contract in suit described the subject lands as a house and lots on a specified highway where the seller's residence is located. *Held:* The description is not, as a matter of construction, patently ambiguous, and evidence *dehors* the memorandum is competent to identify the lands provided such evidence does not tend to substitute a new and different contract in contradiction of the writing. *Ibid.*

BROKERS AND FACTORS.

§ 3. Powers and Authority of Broker.

Declarations by a broker as to the quantity and condition of the land, made in negotiations with a prospective purchaser, are within the scope of his employment and are competent in evidence against his principals. *Norburn v. Mackie*, 16.

The principal may be held liable in damages for fraud of the broker in making such misrepresentations. *Ibid.*

§ 5. Liabilities of Broker.

The broker may be held personally liable by the purchaser for fraud inducing the purchase. *Norburn v. Mackie*, 16.

A real estate broker engaged to sell land for the owner owes the owner the duty to exercise reasonable care and diligence to effect a sale to the best advantage of the owner, which he cannot do without first determining the reasonable market value of the land, and the owner has the right to rely upon the broker's knowledge and advice without making an independent investigation. *Carver v. Lykes*, 345.

Where the owner of land shows a substantial discrepancy between the price obtained by the broker and the market value of the property, the owner may recover of the broker for the broker's negligence in failing to obtain an adequate price. *Ibid.*

Evidence of prices paid by a power company for other lands in the vicinity is without probative force in establishing the fair market value of defendant's land when such other lands were not purchased on the open market but were acquired under threat of condemnation, and further when such other lands are dissimilar in size, condition, frontage on public highways, improvements, etc. Nor was it the duty of the broker to find out at what prices the power company had obtained such other properties. *Ibid.*

Evidence tending to show that plaintiff broker, in selling to a power company, obtained the highest price the power company would pay without resorting to condemnation, and without evidence of any conflict in interest or

BROKERS AND FACTORS.—*Continued.*

bad faith on the part of the broker or evidence of any probative force that the price obtained for plaintiff's land from the power company was substantially less than the market value, is insufficient to be submitted to the jury on the owner's counterclaim against the broker for negligence of the broker in failing to exercise reasonable diligence to obtain the best price possible. *Ibid.*

A broker may not be held liable by the owner for mere error of judgment in advising sale at a stipulated price, there being no evidence of bad faith on the part of the broker or that he had any interest in procuring a sale at less than the fair market value. *Ibid.*

A contract of purchase and sale sent the purchaser with stipulation that the deposit made by the purchaser would be used to defray the expense of a survey if the purchaser did not take the property, *held* competent in evidence, even though not executed by the purchaser, to corroborate the purchaser's testimony that he did not agree to pay for the survey and to contradict the broker's testimony that he did. *Ibid.*

BURGLARY.

§ 2. Breaking and Entering Otherwise Than Burglariously.

Breaking is not an essential element of the offense of entering a building with the felonious intent to commit the crime of larceny. *S. v. Vines*, 747.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. For Fraud.

Where the Highway Commission introduces evidence of a conveyance of a right of way as shown by a map, testimony of petitioner that he did not understand maps, that he signed the instrument in reliance upon the representation that it affected certain of his lands but did not affect another parcel of land owned by him upon which he operated a parking lot, and that he would not have signed the right of way agreement if he had known the right of way adversely affected his parking lot, is sufficient to raise an issue of fraud for the determination of a jury. *Wescott v. Highway Comm.*, 522.

CARRIERS.

§ 5. Rates for Carriage of Goods.

The shipment in question would have carried a lower rate if the carrier had furnished larger cars so that a greater number of units could be carried in one car, and the shipper had repeatedly requested the railroad to furnish such larger cars. *Held:* In the absence of an exception to the failure of the court to find whether the railroad was justified in failing to furnish the cars requested and in the absence of an exception to the finding that the higher rate applied to the shipment, judgment for the recovery of the higher rate by the railroad must be affirmed. *R. R. v. Weyerhaeuser Co.*, 730.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 12. Priorities.

Registered chattel mortgagee held entitled to lien prior to that of claimant not perfecting his lien by transmitting his certificate of title to the Department of Motor Vehicles. *Trust Co. v. Finance Co.*, 711.

CLERKS OF COURT.

§ 1. Jurisdiction and Authority in General.

The clerk of the Superior Court has no common law or equitable jurisdiction but only that jurisdiction conferred by statute. *Pruden v. Keemer*, 212.

§ 12. Liabilities of Clerk for Funds Paid Into Office.

The statutory authority for the clerk of the Superior Court to collect or receive moneys for fines, penalties, judgment costs, etc., carries with it the duty to pay the sums collected to the parties entitled thereto, G.S. 1-241, G.S. 2-3, which duty includes interest or earnings on the funds, and while the allocation of earnings to the persons entitled to the funds may present problems in accounting, that fact does not justify the deprivation of the owners of their property and their share of the earnings. *McMillan v. Robeson County*, 413.

COLLEGES AND UNIVERSITIES.

Where, after remand of a cause involving the suspension of a student at the University of North Carolina, an order to show cause why the record should not be returned to the Superior Court is issued on allegation that the administrative agencies had misinterpreted the order of remand and were not proceeding in accordance therewith, the only question before the court is whether the cause should be returned to the court or not, and all adjudications in the order outside the scope of this inquiry must be stricken on appeal. *In re Carter*, 360.

Under the Constitution and statutes of this State, the management of the University of North Carolina is delegated to and invested in the Board of Trustees, and the Board of Trustees may make all necessary and proper and reasonable rules and regulations for the orderly management and government of the University of North Carolina and for the preservation of discipline of its students. *Ibid.*

It would seem that the Board of Trustees of the University of North Carolina and its Executive Committee has authority under the Constitution of North Carolina and applicable statutes to delegate to the faculty and administrative officers of the University and to the student government organized under a written constitution a limited authority to act in matters pertaining to student discipline so long as the Board retains final jurisdiction. *Ibid.*

Order held to remand cause for further proceedings and not to entitle student to summary exoneration. *Ibid.*

COMPROMISE AND SETTLEMENT.

Compromise agreements are governed by legal principles applicable to contracts generally, and must be mutually binding. *McNair v. Goodwin*, 1.

Where each motorist claims that the collision was caused solely by the negligence of the other, a payment by one in compromise and settlement precludes either from thereafter maintaining an action against the other, but if payment is made by a third person who acts without authority from claimant, such payment does not bar claimant unless subsequently ratified by him. *Gamble v. Stutts*, 276.

A payment by insurer in settlement of the claim of one motorist against insured motorist, solely for the purpose of terminating the liability of insurer

COMPROMISE AND SETTLEMENT—*Continued.*

and reserving the insured motorist's rights, does not preclude the insured motorist from thereafter maintaining an action against the other. *Ibid.*

A consumated agreement to compromise and settle disputed claims is conclusive and binding on the parties to the agreement and those who knowingly accept its benefits. *Keith v. Glenn*, 284.

When an insurance carrier of one motorist, under rights conferred upon it by the policy, compromises and settles liabilities under the policy to the other motorist, such settlement does not bind the insured motorist in the absence of his assent or his subquent ratification. *Ibid.*

If the motorist who has accepted a settlement by insurer files a counterclaim, plaintiff motorist is put to his election: if he pleads the settlement in bar of the counterclaim, he ratifies the settlement and may not maintain his action. *Ibid.*

A creditor accepting a check in full settlement of the amount due under contract is precluded from thereafter asserting a claim for an additional amount. *Barger v. Krimminger*, 596.

CONSTITUTIONAL LAW.

§ 4. Right to Trial by Jury.

A party waives the right to jury trial in a civil action by failure to follow the statutory procedure to preserve such right. *Becker v. Becker*, 685.

§ 7. Delegation of Power by General Assembly.

A statute requiring the levy of taxes in a school administrative unit sufficient to provide funds for current expenditures per pupil equal to that of the average for the State as certified by the State Board of Education is not unconstitutional as a delegation of legislative power, since the ascertainment of the amount of the tax is merely a matter of mathematical computation and does not involve the exercise of discretion. *Peacock v. Scotland County*, 199.

G.S. 160-466 merely provides an alternative method for the sale of bonds issued by an Urban Redevelopment Commission, and is constitutional, certainly in regard to bonds and notes for which the city itself is not obligated. *Horton v. Redevelopment Comm.*, 306.

§ 10. Judicial Powers.

It is the function of the courts to declare the law and not to make it, and therefore if a law should be changed, only the Legislature and not the judiciary may properly change it. *S. v. Cobb*, 262; *Perry v. Bakeries Co.*, 272.

§ 11. Police Power in General.

The original police power of the State reposes in the General Assembly and municipalities may exercise only that police power which has been delegated to them by statute. *Schloss v. Jamison*, 108.

§ 20. Equal Protection, Application and Enforcement of Laws.

Negro cannot be convicted of trespass in refusing to leave restaurant if there is a city ordinance requiring segregation. *S. v. Avent*, 425.

CONSTITUTIONAL LAW—*Continued.*

Indians residing in a reservation within the State are citizens of the United States, this State, and of the County in which the reservation is situate, and are entitled to equal benefit and protection of the laws. Fourteenth Amendment to the United States Constitution. *Board of Public Welfare v. Comrs. of Swain*, 475.

§ 23. Rights and Interests Protected by Due Process Clause.

The constitutional provision that no person shall be deprived of his property except by the law of the land applies to interest or earnings on funds in the same manner as it applies to principal. *McMillan v. Robeson County*, 413.

§ 24. What Constitutes Due Process.

Notice and opportunity to be heard are required by both the Federal and State Constitutions before a citizen may be deprived of his property. *McMillan v. Robeson County*, 413.

A litigant is entitled to trial by jury when the evidence raises an issue of fact determinative of title to property. *Wescott v. Highway Comm.*, 522.

§ 25. Impairment of Obligations of Contract.

The trust in question was revocable and provided that the trustor should receive for life the income from the trust estate. The trustor later became mentally incompetent, and the jury found that there was no prospect for her recovery. *Held:* Modification of the trust by making it irrevocable and donating the income for the life of the trustor to certain designated charities does not rewrite the contract so as to affect the rights of the ultimate beneficiaries, but merely authorizes the trustees to do those things which the trustor, if competent, would probably have done. *In re Kenan*, 627.

§ 28. Necessity for and Sufficiency of Indictment.

A valid indictment returned by a legally constituted grand jury is an essential of jurisdiction, and proof of discrepancies in the ratio of Negroes on the grand jury establishes discrimination *prima facie*, requiring quashal in absence of evidence and findings of nondiscrimination. *S. v. Wilson*, 419.

§ 29. Right to Jury Trial.

Statutory provisions respecting qualifications and selection of jurors are constitutional. *S. v. Wilson*, 419.

Person has no right to insist that persons of his race be represented on the jury in any proportion, and the preparation of the jury list from the tax list is not perforce discriminatory, but proof of discrepancies in ratio of Negroes on jury list establishes discrimination *prima facie*. *Ibid.*

§ 32. Right to Counsel.

A person charged with a felony is entitled to counsel unless he waives such right, and conviction in a trial in which he was denied his right to representation must be set aside. *Bottoms v. State*, 483.

Where defendant does not request or desire counsel, it is not required that he be represented by counsel in a trial for a misdemeanor. *S. v. Oates*, 532.

CONSTITUTIONAL LAW—*Continued.*

§ 36. Cruel and Unusual Punishment.

Legislature may prescribe higher penalty for repeated offenses, and fact that defendant is alcoholic is no defense to punishment for public drunkeness. *S. v. Driver*, 92.

CONTRACTS.

§ 6. Contracts Against Public Policy.

Preincorporation agreement between promoters of a corporation that they would vote their stock and use their influence to secure the election of each other as director held not void as against public policy. *Wilson v. McClenny*, 121.

§ 12. General Rules of Construction.

A contract must be construed to ascertain the intent of the parties, and where the agreement is in writing this must be ascertained from the language used with regard to the purpose to be accomplished, the situation of the parties at the time the agreement was entered into, and the subject matter of the contract. *Wilson v. McClenny*, 121.

§ 19. Novation and Substitution.

A novation is a substitution of another agreement for a pre-existing one so that the old contract is extinguished in accordance with the intent of the parties. *Wilson v. McClenny*, 121.

§ 20. Impossibility of Performance as Exercising Breach.

The fact that the promisor's ability to perform is dependent upon the cooperation of a third person does not relieve the promisor from liability for damages if he cannot get the third person to act, since he, himself, contracted to procure the cooperation of such third party. *Lane v. Coe*, 8.

§ 25. Pleadings.

A plaintiff may not create several causes of action out of a single tortious act, nor may he create several causes of action out of a single failure to comply with a contract in its differing terms. *Crouch v. Trucking Co.*, 85.

§ 31. Right of Action for Interference with Contractual Rights by Third Persons.

No action will lie against corporate officer for interfering in good faith with contract between another person and the corporation. *Wilson v. McClenny*, 121.

CORPORATIONS.

§ 1. Incorporation.

Preincorporation agreement among promoters that they would use their influence to have each other elected officers of the corporation is valid and contention of defendant promoter that he breached the contract because plaintiff promoter used alcoholic beverages to excess is an affirmative defense which cannot justify nonsuit. *Wilson v. McClenny*, 121.

CORPORATIONS—*Continued.*

§ 4. Authority and Duties of Directors.

Directors owe the duty of fidelity to the corporation and to use due care in the management of its business, and therefore the actions of directors in causing the terminating of the employment of certain persons by the corporation cannot be held a wrongful interference of the contracts of employment provided the directors act in good faith to protect the interests of the corporation. *Wilson v. McClenny*, 121.

§ 7. Authority of President to Bind Corporation.

An alteration in the deed of a corporation initialed or signed by the president of the corporation and redelivered to the grantee is binding on the corporation. *Krechel v. Mercer*, 243.

§ 12. Liability of Officers and Agents for Mismanagement.

Mismanagement of corporation affairs by directors, causing the corporation to become insolvent, gives rise to a cause of action in favor of the corporation, and a creditor may not sue the directors on such cause of action in the absence of an allegation of demand on and refusal of the corporation or its receiver to institute such action, and even in that instance the corporation must be made a party. *Goodwin v. Whitener*, 582.

§ 15. Sale of Stock and Securities.

Any officers, directors, or agents of a corporation actively participating in the violation of G.S. 78-23 of the Securities Law in the conduct of the company's business, or which such conduct they have actively directed, may be held criminally liable individually therefor. *S. v. Franks*, 94.

The evidence in this case *is held* amply sufficient to be submitted to the jury on the charge of unlawfully causing to be sold through the acts of designated agents and divers other persons certain debentures in violation of the Securities Law, and defendant's motion for nonsuit on this count was properly overruled, but as to the count charging defendant with causing to be sold certain debentures to named persons in violation of the Securities Law, nonsuit should have been allowed, there being no evidence to support the charge of sales to the persons named. *Ibid.*

The issuance of stock by a corporation to certain of its "key employees" does not make the issue a private offering, and such issue is not necessarily exempt from the provisions of the Securities Act of 1933. *Altman v. American Foods, Inc.*, 671.

Employee subscribing to stock under employees' option plan *held* entitled to refuse certificates imprinted with stipulation that shares represented thereby had not been registered under the Securities Act. *Ibid.*

§ 24. Contracts and Notes.

Evidence held to show contract by corporation for maintenance of airplane and not to show that contract was *ultra vires*. *Piedmont Aviation v. Motor Lines*, 135.

§ 26. Liability of Corporation for Torts.

Evidence tending to show that the general manager of a motel in complete charge of its operations had a car towed from its premises under the mistaken

CORPORATIONS—*Continued.*

belief that the owner of the car was not a guest, and that when the guest refused to pay his bill without deducting the unwarranted towing charges, instituted a prosecution of the guest under G.S. 14-110, *is held* sufficient to be submitted to the jury on the issue of *respondeat superior* in an action against the motel, the acts of the manager having been performed in furtherance of the motel's business. *Ross v. Dellinger*, 589.

COSTS.

§ 4. Items of Costs and Recovery of Costs.

The recovery of costs is exclusively statutory, and in an action to padlock a public nuisance the apportionment of costs rests in the discretion of court so that if the judgment directs that the costs be paid from the proceeds of sale of the personal property seized, such judgment does not provide for personal liability for costs. *Morris v. Shinn*, 88.

COUNTIES.

§ 1. Nature and Functions and Legislative Control.

The General Assembly has the power to impose the duty upon the counties to raise a part of the matching funds for Social Security payments, and the county is liable for such matching funds for payments to Indians residing in a reservation in the county. *Board of Public Welfare v. Comrs. of Swain*, 475.

§ 3.1. Zoning Regulations.

A zoning ordinance passed pursuant to an enabling statute is presumed valid, with the burden upon the property owner who asserts its invalidity to prove it. *Durham County v. Addison*, 280.

The mere fact that a zoning ordinance adversely affects the value of particular property is insufficient to establish the invalidity of the ordinance. *Ibid.*

Where a property owner begins construction of a dwelling in violation of a county zoning ordinance, notwithstanding the denial of a building permit by the zoning administrator, upheld by the Board of Adjustment, the county is entitled as a matter of law to enjoin further construction, the property owner having failed to pursue his remedy by *certiorari* to present the defenses of discrimination and confiscation. *Ibid.*

§ 5. Fiscal Management and Debt.

Objection that the bonds to be issued by a county upon the approval of its voters would raise the county's outstanding indebtedness to an amount in excess of five per cent of the county's assessed valuation and that, therefore, the proposed bond issue was invalid, G.S. 153-87, *held* untenable when a portion of the county's debt was incurred under a statute exempting bonds issued thereunder from the limitation of G.S. 153-87, the total amount of the county's debt, excluding the special issue, not being in excess of the limitation of the statute. *Peacock v. Scotland County*, 199.

COURTS.

§ 2. Jurisdiction in General.

It is the duty of a court plea, motion, or *ex mero motu*, to dismiss a proceeding whenever it becomes apparent that the court is without jurisdiction of the matter. *Burgess v. Gibbs*, 462.

COURTS—*Continued.*

Every court necessarily has inherent judicial power to inquire into, hear and determine questions relating to its jurisdiction, whether of law or fact. *Ibid.*

§ 6. Appeals to Superior Court from Clerk.

Even if it be conceded that the judge of the Superior Court is bound by the findings of the clerk on appeal from the clerk's refusal to set aside his order approving the final account and discharging an administratrix, the court may review the clerk's conclusions of law and may properly set aside conclusions not supported by the facts, and the court's findings of certain additional facts which are irrelevant to the rights of the parties and therefore not prejudicial, will not be disturbed. *In re Miles*, 647.

§ 16. Jurisdiction of Adoption and Custody of Children.

The clerk of the Superior Court has exclusive original jurisdiction in adoption proceedings, and the Superior Court has no jurisdiction except on appeal from the clerk. *In re Simpson*, 206.

The juvenile court has exclusive original jurisdiction to determine the right to custody of children under 16 years of age in all cases except those in which the Superior Court is given jurisdiction by G.S. 17-39 or G.S. 50-13, and thus has exclusive jurisdiction to award the custody of an abandoned child, G.S. 110.21. *Ibid.*

Where children have been adjudged abandoned by the juvenile court and their custody placed in the county superintendent of public welfare, who has placed the children in a licensed foster home, *held* the legal custody of the children remains in the county superintendent, though the actual custody is in the operators of the foster home. *Ibid.*

Where order of the juvenile court has adjudged certain children abandoned and placed their legal custody in the county superintendent of public welfare who has placed them in a licensed foster home, and thereafter the children are taken away pursuant to preliminary adoption proceedings, the Superior Court does not have original jurisdiction to entertain a petition by the operators of the home to award their custody to the operators, but the matter is determinable by the juvenile court with right of appeal to the Superior Court. *Ibid.*

§ 20. What Law Controls — Laws of This and Other States.

An action growing out of a collision occurring in another state is governed in regard to substantive rights, including whether the evidence is sufficient to require its submission to the jury, by the laws of such other state, while the adjective law, including the rule that in passing on motion to nonsuit the evidence must be considered in the light most favorable to plaintiff and discrepancies resolved in his favor, is governed by the laws of this State. *Kirby v. Fulbright*, 144.

CRIMINAL LAW.

§ 1. Nature and Elements of Crime in General.

A man's conduct must be judged by the law as it exists at the time his conduct is called into question and not by the law as he and others think it should be rewritten in the interest of social justice. *S. v. Cobb*, 262.

CRIMINAL LAW—*Continued.*

§ 19. Transfer of Cause to Superior Court upon Demand for Jury Trial.

Where a prosecution in an inferior court is transferred to the Superior Court upon defendant's demand for a jury trial, defendant must be tried in the Superior Court upon an indictment, and trial on the original warrant is a nullity. *S. v. Evans*, 492.

§ 26. Former Jeopardy.

Where sentence is vacated on *habeas corpus* on the ground that defendant's constitutional rights were not protected in the trial, the State may try him for the second time for the same offense. *S. v. Anderson*, 491.

§ 33. Facts in Issue and Relevant to Issues in General.

Evidence disclosing the background in the light of which defendant's conduct must be judged is competent. *S. v. Phillips*, 723.

§ 39. Evidence in Rebuttal of Facts Brought out by Adverse Party.

Where, in a prosecution for arson, the State has introduced evidence that candles, with a cut through the wax near the base, with paper inserted in the cuts and extending beyond the candles to other inflammables, were found burning in defendant's property, and has introduced testimony that in a test fire spread to the inflammables around such candles, it is competent for defendant to offer evidence of his expert witness, from knowledge and after tests, that the contraption would probably not start a fire. *S. v. Moore*, 431.

§ 48. Silence of Defendant as Implied Admission of Guilt.

It is error to permit an investigating officer to testify that defendant refused to make any statement after accusation, and then permit the officer to testify as to the incriminating circumstances he recounted to defendant and that he stated that he and his assistant firmly believed defendant guilty, since the statement by the officer of the belief of guilt cannot be interpreted as an admission of guilt by defendant, either directly or by implication. *S. v. Moore*, 431.

Silence in the face of an accusation of guilt is competent as an implied admission only when a person who has firsthand knowledge makes an accusation based thereon in defendant's presence under circumstances calling for a denial if the accusation be untrue, and silence in the face of an accusation by an investigating officer is incompetent, defendant not being required to defend himself to an investigating officer. *Ibid.*

§ 51. Qualification of Experts.

Where defendant brings out on cross-examination that the witness in question was a lawyer with several years experience as a security deputy in the office of the Secretary of State in the administration of the Securities Law, the evidence is sufficient to show that such witness is an expert in his particular field. *S. v. Franks*, 94.

§ 56. Expert Testimony of Accountants.

An expert who has examined the records of a corporation may testify from his examination as to facts ascertained by him from a large number of separate

CRIMINAL LAW—*Continued.*

entries, such as the total amount of debentures sold by the corporation as shown, by the records for the period in question. *S. v. Franks*, 94.

The security deputy in the office of the Secretary of State may testify that from a search of the books and records in the office the debentures in evidence were not registered in that office, and were not exempt from registration. *Ibid.*

§ 71. Confessions.

Defendant's intoxication does not render his confession incompetent unless he is so drunk that he is unconscious of the meaning of his words, but evidence relating to the degree of his intoxication is proper to be considered by the jury on the question of the weight to be given his declarations. *S. v. Stephens*, 45.

§ 75. Books, Records and Private Writings.

Corporate records held sufficiently identified and authenticated and their admission in evidence held not error, even though proper foundation was not laid until after their admission. *S. v. Franks*, 94.

§ 79. Evidence Obtained by Unlawful Means.

Defendant may not object to introduction of liquor obtained from trunk of car without search warrant when the person having lawful possession of the car consents to the search. *S. v. Dawson*, 607.

§ 87. Consolidation of Indictments for Trial.

An indictment charging defendants with rape and an indictment charging defendants with armed robbery may be consolidated for trial when it appears that defendants stopped the car in which husband and wife were riding, forced them into the woods where each raped the wife while the other held a pistol on the husband, and that one of them committed robbery from the person of the husband while he was being held at the point of the pistol, since the crimes are so connected in time and place that the evidence on the trial of the one is competent and admissible on the trial of the other. *S. v. Morrow*, 592.

§ 97. Argument and Conduct of Solicitor and Counsel.

Any inference in the solicitor's argument in regard to defendant's failure to testify in his own behalf *held* cured by the court's immediate instruction upon objection that defendant had the right not to testify and his failure to do so should not prejudice him, and by the court's instruction to the same effect in the charge to the jury. *S. v. Stephens*, 45.

Argument of the solicitor outside the record tending to prejudice defendant by attacking his character held rendered harmless by correction and admonition. *S. v. Phillips*, 723.

§ 98. Function of Court and Jury in General.

While discharging its duty to find the facts upon motion to quash indictments on the ground that the solicitor was in the grand jury room during the grand jury's deliberations, it is for the court to find the ultimate issues when different inferences can be drawn from the evidence. *S. v. Colson*, 506.

§ 99. Consideration of Evidence on Motion to Nonsuit.

Only evidence favorable to the State is considered on motion to dismiss. *S. v. Moore*, 431.

CRIMINAL LAW—*Continued.*

On motion to nonsuit, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and defendant's evidence is not to be considered except to the extent it is favorable to the State *S. v. Colson*, 506.

§ 107. Statement of Evidence and Application of Law Thereto.

The charge must be complete within itself, and the defendant and his counsel are entitled to hear the instructions and to have them for review upon appeal, and therefore it is prejudicial error for the court to instruct the jury to take into consideration definitions and instructions which the court had given them in other cases or instructions that they had heard in other cases. *S. v. Forrest*, 625.

§ 109. Instructions on Less Degrees of Crime and Possible Verdicts.

Assault is not less degree of crime of larceny from the person, and therefore in larceny prosecution the court is not required to submit question of guilt of assault even though there be evidence of assault. *S. v. Acrey*, 90.

§ 119. Special Verdict.

In this State a judgment in a criminal prosecution may rest upon a general verdict or a special verdict. *S. v. Ellis*, 446.

A special verdict is one in which the jury finds the ultimate material facts, usually by written recital, and if the facts found constitute the offense charged the court may declare the defendant guilty and enter judgment accordingly without a general verdict of guilty, and such judgment does not violate the provisions of Article I, §§ 11 and 13 of the Constitution of North Carolina. *Ibid.*

A special verdict must find sufficient facts to permit the conclusion of law upon which the judgment rests, and is fatally defective if a material finding is omitted. *Ibid.*

§ 121. Motions in Arrest of Judgment.

Motion in arrest of judgment lies only for defect of the record proper, and is inappropriate to present the contention of irregularity in proceedings before the grand jury. *S. v. Colson*, 506.

Arrest of judgment for fatal defect of the indictment does not entitle defendant to his discharge, since the State, if it so elects, may put defendant to trial on a proper bill. *S. v. Whaley*, 536.

§ 125. Motions for New Trial for Newly Discovered Evidence.

A motion for a new trial for newly discovered evidence may be made only at the trial term and, in the event of an appeal, at the term next succeeding affirmance of the judgment on appeal. *S. v. Morrow*, 592.

The Superior Court is without jurisdiction to hear a motion for a new trial for newly discovered evidence during the pendency of an appeal, and its denial of motion so made is a nullity and an appeal from such denial must be dismissed. *Ibid.*

§ 127. Form and Requisites of Judgment in General.

In the absence of statutory requirement, the failure of the judge to sign the minutes of the court or the judgment does not affect the validity of the judgment in prosecutions for less than capital offenses. *S. v. Dawkins*, 298.

CRIMINAL LAW—*Continued.*

§ 131. Severity of Sentence.

Where defendant petitions and obtains a new trial under the Post Conviction Hearing Act, G.S. 15-217 *et seq.*, he must accept the hazards as well as the benefits and may not complain if sentence imposed upon conviction in the second trial exceeds that imposed at the first. *S. v. White*, 52.

No statute requires that a defendant convicted a second time upon a new trial obtained under the Post Conviction Hearing Act shall be given credit for the time he has served on the sentence imposed at the first trial, and when the sentence imposed at the second trial, together with the time served on the first sentence, is within the maximum permitted by law it will not be disturbed on appeal. *Ibid.*

Upon conviction for the same offense upon retrial after sentence in the original trial has been vacated, defendant is not entitled to credit on the last sentence for the time served on the first. *S. v. Anderson*, 491.

Sentences upon conviction of separate misdemeanors of 12 months on each warrant, the sentences to run consecutively, are not excessive. *S. v. Oates*, 532.

§ 134. Sentence for Repeated Offenses.

The Legislature may require the courts to take into account in imposing punishment the persistence of an accused in a course of criminal conduct, and thus provide a more severe penalty for repeated violations by a person of the same statute. *S. v. Driver*, 92.

§ 136. Revocation of Suspension of Sentence.

A capias directing defendant to answer a charge of "failure to comply — $80 in arrears in alimony" is sufficient to constitute a substantial compliance with G.S. 15-200.1 in proceedings to revoke a suspended sentence entered in a prosecution of defendant for wilful failure to support his minor children. *S. v. Dawkins*, 298.

While the hearing in the Superior Court on appeal from an order of the inferior court revoking suspension of sentence is *de novo*, it is solely on the question whether defendant had violated the terms upon which the sentence was suspended, and the jurisdiction of the Superior Court is derivative and limited to that question and G.S. 15-200.2 is not applicable. *Ibid.*

A finding that defendant has wilfully failed to make payments required as a condition for suspension of sentence for wilful failure to support his minor children is a sufficient finding as to the fact of the violation of the condition of suspension. *Ibid.*

§ 139. Nature and Grounds of Appellate Jurisdiction.

Supreme Court will grant *certiorari* to correct judgment imposing sentence in excess of that allowed by law. *S. v. Canup*, 606.

Supreme Court will take cognizance *ex mero motu* of duplication in conviction of armed robbery and assault. *S. v. Parker*, 679.

§ 149. Certiorari.

Where defendant appeals on the record proper upon his contention that the indictments upon which he was convicted were fatally defective, and files a petition for *certiorari* in the event judgment is not arrested in any one or more of

CRIMINAL LAW—*Continued.*

the bills, the petition will be allowed upon the bill which is free from fatal defect. *S. v. Smith*, 472.

§ 161. Harmless and Prejudicial Error in Instructions.

Conflicting instructions upon the burden of proof must be held prejudicial. *S. v. Holloway*, 753.

§ 164. Whether Error Relating to One Count Alone is Prejudicial.

Where concurrent sentences are imposed on two separate counts of the indictment, error relating to the count on which the lessor sentence is imposed cannot be prejudicial in the absence of error affecting the other count. *S. v. Vines*, 747.

§ 165½. Invited Error.

Upon defendant's denial on cross-examination that he had been convicted of shoplifting, defendant's counsel moved for mistrial on the ground that the solicitor had no basis for the question. The next day the court stated that it appeared that defendant had been charged with shoplifting but had been acquitted by a jury, and the court found as a fact that the question regarding his guilt had been made in good faith by the solicitor. *Held:* Any prejudice resulting to defendant from the remarks of the court was invited by defendant's counsel, and defendant is not entitled to a new trial therefor. *S. v. Heard*, 599.

§ 167. Review of Findings and Discretionary Orders.

The findings of fact by the trial court upon the hearing of defendant's plea in abatement and motion to quash the indictments for alleged irregularities before the grand jury are conclusive on appeal when supported by competent evidence unless so grossly wrong as to amount to denial of due process. *S. v. Colson*, 506.

§ 169. Remand.

Where sentences on subsequent counts are made to begin at the expiration of the sentence on the count upon which judgment is arrested, the judgments on such counts must be set aside and the cause remanded for judgments thereon. *S. v. Whaley*, 536.

§ 173. Post Conviction Hearing.

A new trial awarded under the Post Conviction Hearing Act is a retrial of the whole case, verdict, judgment, and sentence. *S. v. White*, 52.

Even though a post-conviction hearing is denied because petition therefor was not filed until more than five years after the trial, the Supreme Court will grant *certiorari* when it appears on the face of the record proper that defendant had been sentenced to imprisonment in excess of the maximum allowed by law for the offense charged, and the Court will vacate the judgment and remand the cause for proper judgment, with credit under such circumstances for time served, including any allowance for good behavior. *S. v. Canup*, 606.

DAMAGES.

§ 3. Damages for Personal Injuries.

Ordinarily, if defendant's act would not have resulted in any injury to an ordinary person, defendant may not be held liable for the harmful consequences

DAMAGES—*Continued.*

of his act to a plaintiff of peculiar susceptibility except insofar as defendant was on notice of the existence of plaintiff's susceptibility; if defendant's act amounted to a breach of duty to a person of ordinary susceptibility, defendant is liable for damages suffered by plaintiff, notwithstanding that these damages were unusually extensive because of plaintiff's peculiar susceptibility. *Lockwood v. McCaskill*, 663.

Where defendant's negligence causes physical injury and suffering to the plaintiff, defendant is liable for all the consequences which are the natural and direct result of his conduct, even though a part of such result occurs because of plaintiff's peculiar susceptibility of which defendant had no knowledge. *Ibid.*

DEAD BODIES.

§ 1. Right to Possession for Burial.

Upon the death of husband or wife, the surviving spouse has the primary right to the custody of the body for burial and to direct and control its preparation therefor. *Parker v. Quinn-McGowen Co.*, 560.

§ 3. Mutilation of Dead Bodies.

The person entitled to possession of a dead body for the purpose of burial may maintain an action for mental suffering against a person mutilating the dead body, either intentionally, or negligently, or by unlawful autopsy, and if such conduct is wilful or wanton, actually malicious or grossly negligent, punitive damages may also be recovered. *Parker v. Quinn-McGowen Co.*, 560.

An autopsy and embalming are different in purpose and effect, and the mere fact of an unauthorized embalming without more, does not constitute such a mishandling or mutilation of the body as will support a cause of action. *Ibid.*

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

The right of action for wrongful death is exclusively statutory. *In re Miles*, 647.

An action for wrongful death survives the death of the tort-feasor and may be maintained against the executor or administrator of the tort-feasor. *Ibid.*

§ 4. Limitation on Action for Wrongful Death.

An action for wrongful death must be brought within two years. *In re Miles*, 647.

DEEDS.

§ 7. Delivery, Acceptance and Registration.

The fact that a deed is registered raises a rebuttable presumption that it was duly executed and delivered. *Vettori v. Fay*, 481.

§ 12. Estates Conveyed.

The statute abolishes survivorship as an incident of joint tenancy, G.S. 41-2, does not prohibit written contracts making the future rights of the parties

DEEDS—*Continued.*

to depend upon survivorship, and a deed, accepted by the grantees, conveying land to them and the heirs and assigns of the survivor creates the right of survivorship by contract. *Vettori v. Fay*, 481.

A deed reciting that the grantors did "sell and convey" to the grantee a described tract of land, with habendum "to have and to hold the same for railroad purposes in fee simple forever" conveys the fee simple and not a mere easement for railroad purposes. *Craig v. R. R.*, 538.

§ 16. Conditions.

A duly executed and registered deed is an executed contract, and the grantee by acceptance of the deed becomes bound in its stipulations, recitals and limitations, even though he has not signed the instrument, and the subsequent execution of a mortgage by him is evidence of his acceptance of the deed according to its terms. *Vettori v. Fay*, 481.

DESCENT AND DISTRIBUTION.

§ 1. Nature of Titles by Descent in General.

Proof of the death of a person raises a presumption that such person died intestate and, nothing else appearing, such person's real estate passes to her descendants. *Collins v. Coleman & Co.*, 478.

DISORDERLY CONDUCT AND PUBLIC DRUNKENESS.

A jail sentence of two years imposed upon a defendant convicted in Durham County of public drunkeness constituting a fifth offense within a twelve month period is authorized by G.S. 14-335(12), and defendant's contention that such sentence is cruel and unusual punishment in view of the fact that he is an admitted alcoholic is not tenable. *S. v. Driver*, 92.

A bill of indictment charging that defendant "unlawfully and wilfully did appear in a public place in a rude and disorderly manner and did use profane and indecent language in the presence of two or more persons" is insufficient to charge a violation of G.S. 14-197, in failing to charge that the indecent or profane language was spoken on a public road or highway and in a loud and boisterous manner. *S. v. Smith*, 472.

DIVORCE AND ALIMONY.

§ 1. Jurisdiction and Pleadings.

The wife may institute action under G.S. 50-16 in the county in which they were living at the time of the husband's alleged abandonment. *Robbins v. Robbins*, 749.

§ 2. Requirement That Facts be Found by Jury.

A defendant waives his right to trial by jury in an action for divorce on the ground of two years' separation when he fails to file a request therefor prior to the call of the action for trial, G.S. 50-10, and the fact that defendant had alleged a cross action for divorce for adultery does not affect this result when defendant withdraws his cross action before the case is called. *Becker v. Becker*, 685.

DIVORCE AND ALIMONY—*Continued.*

§ 3. Condonation.

Where plaintiff's action for subsistence and counsel fees is predicated upon defendant's leaving plaintiff after a four-day period of reconciliation, and defendant seeks to justify his leaving plaintiff at the end of the four-day period only on the basis of what occurred during that period and does not plead condonation, the court properly excludes evidence tending to show that defendant left plaintiff prior to the period of reconciliation because of abusive language. *Adams v. Adams*, 556.

§ 4. Recrimination.

In an action for divorce on the ground of two year's separation where the parties have lived separate and apart for more than two years pursuant to a separation agreement embodied in a consent judgment entered in a court of competent jurisdiction, the consent judgment legalizes the separation and the husband is not entitled to plead adultery of the wife as recrimination. *Becker v. Becker*, 685.

§ 8. Abandonment.

Where the evidence tends to show that plaintiff and defendant lived together for a period of four days after a reconciliation, and defendant testifies to the effect that at the end of the four-day period he packed his belongings and left, without any contention that he left because plaintiff ordered him to get out, the court is not required to charge the jury on the law that would have been applicable if defendant had left because of plaintiff's order for him to do so, even though the testimony of another witness might be susceptible to the interpretation that plaintiff did order defendant to leave the home. *Adams v. Adams*, 556.

§ 14. Divorce on the Ground of Adultery.

Testimony of a witness by deposition that defendant had sexual intercourse with her forcibly and against her will, and was prosecuted therefor, is sufficient to be submitted to the jury in plaintiff's action for divorce on the ground of adultery. *Dawson v. Dawson*, 494.

The husband may not testify as to alleged adulterous conduct of wife. *Becker v. Becker*, 685.

§ 19. Modification of Decrees for Support and Alimony.

Payments provided in separation agreement are not constituted alimony by judgment approving agreement, but are constituted alimony by consent judgment directing payments to be made as provided in the agreement, in which case payments may be enforced by contempt and court has power to modify for change of condition. *Bunn v. Bunn*, 67.

§ 22. Jurisdiction to Award Custody of Children.

The Superior Court has jurisdiction to award the custody of a child of the marriage in an action for divorce, G.S. 50-16, when no writ of *habeas corpus* is filed prior to said pleadings and motion in the divorce action for the custody of such child. *Robbins v. Robbins*, 749.

DOWER.

§ 8. Allotment of Dower.

Where the widow remains in possession after the death of her husband, the heirs are entitled at any time to have dower allotted and take possession of the property outside the dower allotment, and equity will not aid them in asserting their rights if they are not diligent but are guilty of unreasonable delay in asserting them. *Morehead v. Harris*, 330.

EASEMENTS.

§ 4. Easements by Prescription.

Complaint held to state cause of action to establish easement by prescription, and proceeding was not to establish cartway within exclusive jurisdiction of clerk. *Adams v. Beshears*, 740.

ELECTIONS.

§ 3. Boards of Elections and Election Officials.

The State Board of Elections has been given broad supervisory powers over primaries and general elections by G.S. 163-10, to the end that, insofar as possible, the results of primaries and general elections will not be influenced or tainted with fraud, corruption or other illegal conduct on the part of election officials or others, and the authority thus given by statute to investigate alleged fraud and irregularities is not limited by G.S. 163-10(11) to the purpose of reporting them to the Attorney General or solicitor for further investigation. *Ponder v. Joslin*, 496.

While returns certified to the State Board of Elections by a county board of elections, nothing else appearing, will be deemed *prima facie* correct, such certification is not conclusive and may be collaterally attacked. *Ibid.*

The sole procedure to test the validity of the appointments by a county board of elections of precinct judges of elections and registrars of voting precincts is by appeal to the State Board of Elections, and a judge of the Superior Court has no original jurisdiction of an action instituted to try title to such offices and to restrain the county board of elections from turning over to its appointees the necessary materials for the conduct of an imminent election. See Rules adopted by State Board of Elections governing contests with respect to elections and removal of election officials. Appendix, 757.

§ 6. Canvassing and Proclamation of Results.

A county board of elections is the proper agency to canvass the returns for county offices in primary as well as in general elections, G.S. 163-86, but the State Board of Elections is the proper agency to canvass and judicially declare the results of an election in a district composed of more than one county. *Ponder v. Joslin*, 496.

After certification of primary returns by a county board, the State Board may go behind returns and declare the nominee. *Ibid.*

EMINENT DOMAIN.

§ 2. Acts Constituting a "Taking."

To entitle a land owner to damages for the closing of a portion of a highway he must show injury different in kind, and not merely in degree, from that

suffered by the general public, which requires a showing of a taking of property or a property right or physical damage to property or an interference with a property right. *Snow v. Highway Comm.*, 169.

Impairment of the value of property resulting from the exercise of the police power does not entitle the property owner to compensation when no property or property right is taken. *Ibid.*

Plaintiff's property abutted an old highway kept open after the construction of a new highway, but plaintiff's property did not abut the new highway. Upon the improvement of the new highway into a nonaccess highway the old highway was barricaded at the intersection, leaving plaintiff's property in a cul-de-sac, so that plaintiff's route to the new highway and to a municipality was made more circuitous and inconvenient. *Held:* Plaintiff's inconvenience was different in degree but not in kind to that suffered by the public generally and there was no "taking" of any property right so as to entitle plaintiff to compensation. *Ibid.*

§ 5. Amount of Compensation.

Where respondent, in the use of his land, has treated it as an entity, it must be so considered when condemnor takes a part thereof, and the respondent is entitled to compensation for the fair market value of the land taken and for the permanent injuries to the remaining property by reason of the severance and also by reason of the use to which the land taken may or probably will be put, but he is not entitled to compensation for damages sustained to his remaining land by reason of the use to which condemnor puts its other lands located in the vicinity, since these damages do not result from the taking but are common to all property in the neighborhood. *Light Co. v. Creasman*, 390.

§ 6. Evidence of Value.

Whether property involved in a voluntary sale is sufficiently similar in nature, location and condition to property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion. *Highway Comm. v. Coggins*, 25.

Where, as between the property condemned and other properties along the same highway, there is evidence before the court of substantial dissimilarities in size, topography, nearness to a developed business district of a municipality, available services and zoning, the discretionary determination of the trial judge that the sale prices of such other properties were not competent in fixing the value of the property condemned will not be disturbed. *Ibid.*

Where land is taken by condemnation, its value within a reasonable time before the taking is competent on the question of its value at the time of the taking, provided the evidence relates to its value sufficiently near the time of taking as to have a reasonable tendency to show its value at that time. *Ibid.*

Evidence of the sale and sale price of the property less than a year and a half before the property was condemned *held* competent as some evidence of its value at the time of the taking, changes in condition occurring prior to the sale being irrelevant to the question of the required similarity of conditions, and there being no evidence of other changes in conditions of the property or of the area of sufficient import to render the evidence incompetent. Further, in this case, defendants' contentions that the charge of the court limited the jury's

EMINENT DOMAIN—*Continued.*

consideration to changes in the physical condition of the subject property alone without consideration of changes in the area generally, are untenable. *Ibid.*

The evidence disclosed that the owner had purchased the property condemned less than a year and a half prior to the taking. The evidence further tended to show that the seller had offered the property for sale at the sale price some four years prior to obtaining a purchaser at that price. *Held:* The court correctly referred to the sale price on the date of the sale rather than the date the property was first offered for sale, since it is the actual sale by a seller willing to sell but not obligated to sell to a buyer willing to buy but not obligated to buy that renders evidence of the sale price competent upon the question of market value. *Ibid.*

In the condemnation by a power company of a small part of respondent's land solely for the purpose of access to water impounded by dams in connection with its power plant, evidence of depreciation in value of defendant's remaining land incident to the maintenance and operation of the power plant and railroad for the transportation of coal thereto, the change in the nature of the locality from residential to industrial, and the maintenance of the dam and the like, is incompetent, since such damages are common to the entire locality and do not result to respondent's remaining land from the taking of the small portion thereof. *Light Co. v. Creasman*, 390.

Evidence of speculative and conjectural inconveniences from insects, fog, ashes, smoke, etc., anticipated from the maintenance of condemnor's dam and power plant, is incompetent. *Ibid.*

§ 7a. Proceedings to Take Land and Assess Compensation in General.

The petition in condemnation proceedings should describe the land sought to be condemned by reference to uncontroverted monuments, and condemnor absent an amendment, may ordinarily acquire only the property described. G.S. 40-12, and it is not according to the usual course and practice for controversy as to the location of the land to be settled in the condemnation proceedings. *Light Co. v. Creasman*, 390.

By its express provisions G.S. 136-108 does not apply to a proceeding for compensation for the taking of property for a highway instituted prior to July 1, 1960, but such proceeding is governed by G.S. 136-19, making the statutes relating to eminent domain applicable as near as may be *Wescott v. Highway Comm.*, 522.

Where in proceedings for compensation for the taking of land the respondent relies upon a conveyance by petitioner of the right of way in question, but petitioner offers evidence that the conveyance of the right of way was procured by fraudulent misrepresentation, the proceeding is, in effect, converted from a condemnation proceeding into an action in ejectment or trespass to try title, and petitioner is entitled to a jury trial upon the issue of title. *Ibid.*

Petition to recover damages to the remainder of petitioner's land resulting from large quantities of sand "negligently and carelessly" deposited or blown thereon as the result of the construction of the highway, is insufficient to present the question of petitioner's right to recover compensation, it not appearing whether respondent with its own force constructed the highway, whether the sand drifted on petitioner's property because of the negligent manner in which the work was done or as a result of the manner in which the work was neces-

EMINENT DOMAIN—*Continued.*

sarily done, or whether petitioner seeks damages for a tortious act or compensation for a taking. *Ibid.*

§ 12. Judgment and Costs.

The court is authorized to tax counsel fees as a part of the cost in eminent domain proceedings only in regard to counsel appointed by the court to protect the rights of parties unknown. *Light Co. v. Creasman*, 390.

EQUITY.

§ 2. Laches.

Findings which disclose that an action was brought within the statutory limitation and that delay in bringing the action did not prejudice or disadvantage the defendant, do not support the conclusion that plaintiff was guilty of laches. *In re Miles*, 647.

ESTOPPEL.

§ 3. Estoppel by Record.

Where a partner accepts without objection the accounting rendered by a referee appointed on his own motion, participates without objection in the sale of the partnership assets by the receiver appointed to liquidate the partnership, and accepts his share of the proceeds of the sale by the receiver of the partnership as a going concern, such partner waives any rights to thereafter maintain an action against his co-partner to specifically enforce an agreement to sell the partnership assets to him. *Johnson v. Johnson*, 39.

§ 4. Equitable Estoppel.

Conduct which does not mislead the adverse party cannot constitute the basis of estoppel. *Wilson v. McClenny*, 121.

Estoppel is not available to protect one against his own negligence, and where a chattel mortgagee of automobiles would have priority of lien if it had transmitted the certificates of title to the Department of Motor Vehicles within ten days of its mortgage but fails to do so, it may not assert estoppel as against a prior registered lien on the ground that the certificates of title failed to show the existence of any liens. *Trust Co. v. Finance Co.*, 711.

EVIDENCE.

§ 2. Judicial Notice.

Our courts are required to take judicial notice of the pertinent statutory laws of a sister state. *Kirby v. Fulbright*, 144.

The rule that the courts will not take judicial notice of municipal ordinances does not preclude the courts, when called upon to construe an excerpt from an ordinance set out in a bill of indictment, from interpreting the excerpt correctly by construing it with the rest of the ordinance, certainly when the entire ordinance is before the court by stipulation of the parties. *S. v. Fox*, 193.

§ 4. Presumptions.

Nothing else appearing, it will be presumed that a person dies intestate. *Collins v. Coleman & Co.*, 478.

EVIDENCE—*Continued.*

§ 12. Transactions and Communications Between Husband and Wife.

In an action for divorce the court properly refuses to allow defendant husband to testify in regard to the alleged adulterous conduct of his wife. *Becker v. Becker*, 685.

§ 14. Privileged Communications — Physician and Patient.

The privileged relationship between physician and patient extends to hospital records and the power of the presiding judge to compel disclosure within his discretion does not extend to compulsion of disclosure prior to trial, and whether authorization by the patient to the hospital to furnish such information constitutes a waiver is not presented, since such records are not in the possession of the patient within the meaning of the statute. *Johnston v. Ins. Co.*, 253.

§ 20. Competency of Allegations in Pleadings.

Admissions in the pleadings of the adverse party obviate proof. *Lane v. Coe*, 8; *Norburn v. Mackie*, 16.

§ 27. Parol or Extrinsic Evidence Affecting Writings.

In this action to recover damages for breach of contract to convey, plaintiff introduced in evidence the memorandum signed by defendant. *Held:* Testimony of declarations of defendant with respect to the boundaries, descriptions and areas of the lands, made prior to or contemporaneously with the execution of the writing, is properly excluded as tending to substitute a new and different contract from that evidenced by the writing. *Lane v. Coe*, 8.

In the purchaser's action for damages for breach of contract to convey, the vendor may set up the defense that the contract was subject to a condition precedent, since such condition does not contradict the written instrument but only postpone its effectiveness. *Ibid.*

Evidence of a prior oral agreement is incompetent to contradict or vary the terms of a subsequently written contract. *Barger v. Krimminger*, 596.

§ 44. Testimony of Medical Experts.

It is proper for a medical expert to testify from his own knowledge or from facts assumed in a proper hypothetical question, or in part upon such hypothetical facts and in part on statements made by the patient in the course of a professional examination, that a particular cause could or might have produced the result in question when the testimony indicates a reasonable probability in that particular scientific field, but an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility. *Lockwood v. McCaskill*, 665.

Testimony of an expert to the effect that amnesia was probably the result of injury held competent. *Ibid.*

The trial court may permit a medical expert to give a qualified opinion. *Branch v. Seitz*, 727.

§ 55. Corroborative Evidence.

Where a party has testified as to his version of the accident, an officer, who arrived at the scene some 15 or 20 minutes after the accident occurred, should be permitted to testify in corroboration that the party at that time made state-

EVIDENCE—*Continued.*

ments of the same import in regard to how the accident occurred, and the exclusion of the corroborative evidence is error. *Walker v. Baking Co.*, 534.

§ 58. Cross-Examination.

In cross-examining a witness, counsel may not ask the witness, in the absence of actual proof as to the sales price, if the witness did not know that a certain individual sold his property for a stated sum, since the predicate facts are established only by assumptions in the question. *Carver v. Lykes*, 345.

EXECUTORS AND ADMINISTRATORS.

§ 5. Removal and Appointment of Successor.

Where it appears that the executrix and sole beneficiary of one estate is also appointed administratrix of another estate having an chose which she claims had been assigned by her intestate to her testator, there is a conflict of interest justifying her removal as administratrix and the appointment of a successor administrator, but conflicting claims to the chose must be litigated prior to any final accounting. *In re Morris*, 703.

§ 18. Filing of Claims and Limitations.

Even if it be conceded that G.S. 28-113 is applicable to a claim for unliquidated damages, the statute would bar a claim only as to assets paid out by the personal representative and would not bar a claim for damages for wrongful death, instituted within the statutory limitation, as against undistributed assets of the estate. *In re Miles*, 647.

§ 33. Acceptance of Final Account and Discharge of Personal Representative.

An order approving the final account of an administratrix and discharging her may be set aside by motion in the cause without a showing of fraud or mistake or the necessity of surcharging the final account, it being sufficient if movant show a valid claim against the estate not barred by any statute of limitations, and assets of the estate available for the payment of such claim. *In re Miles*, 647.

An administrator who institutes action for the wrongful death of his intestate within the statutory time, G.S. 1-53(4), against the estate of the deceased tort-feasor is entitled to have the order of the clerk discharging the administratrix of the deceased tort-feasor set aside by motion in the cause upon showing a policy of liability insurance in the hands of the administratrix of the deceased tort-feasor available for the payment of the claim. *Ibid.*

Where the Superior Court sets aside the order of the clerk discharging an administratrix and approving her final account so as to permit the assertion of a claim for wrongful death against the undistributed assets of the estate, the court should not direct that the clerk appoint a public administrator or some other suitable person, since such appointment would be necessary only in the event the administratrix resigned. *Ibid.*

FRAUD.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence that the broker in negotiating with a prospective purchaser knew that the purchaser, because of his physical condition, was unable to inspect the

FRAUD—*Continued.*

land personally, that the broker represented that he knew the land well and made a positive and grossly erroneous statement as to the number of acres of pasture in the tract, and that the purchaser in reliance on the representation paid a purchase price computed on the number of acres of pasture land in the entire tract, *is held* sufficient to be submitted to the jury in an action for fraud. *Norburn v. Mackie*, 16.

FRAUDS, STATUTE OF.

§ 2. Sufficiency of Memorandum.

In order to be sufficient to overcome the plea of the statute of frauds, the writing signed by the party to be charged must contain, expressly or by necessary implication, all features of an agreement to sell, and contain a description of the lands certain in itself or capable of being reduced to a certainty by something extrinsic to which it refers. *Lane v. Coe*, 8.

§ 5. Contracts to Answer for Debt or Default of Another.

Evidence tending to show that plaintiff, before undertaking to perform work in the maintenance and repair of airplanes, called the president of defendant corporation and obtained the promise of the president that defendant corporation would pay the amounts which should become due under the contract, and further that at least some of the work and labor performed under the contract was for the benefit of defendant corporation, *is held* to repel nonsuit on the defense that the action is barred under the provisions of G.S. 22-1, since the evidence tends to show the promise was an original promise not coming within the statute. *Piedmont Aviation v. Motor Lines*, 135.

GAMES AND EXHIBITIONS.

§ 3. Liability of Proprietor to Participants.

In this action by an umpire against a baseball club and its manager to recover for an assault made by a patron, the complaint alleged the relationship between the parties, and therefore allegations in the complaint setting forth contractual duties of the club to the umpire in respect to his protection were properly stricken on motion. *Toone v. Adams*, 403.

Rules governing the conduct of games may be admissible in evidence in proper instances as tending to show the care required of the parties in the relationship created by the contract, even though allegations in regard to such rules may properly be stricken from the complaint as being evidentiary. *Ibid.*

Allegations to the effect that two policemen were escorting plaintiff umpire to the dressing room for protection when plaintiff was assaulted without provocation or warning by a patron at the game, *held* to affirmatively disclose that failure to provide police protection was not one of the proximate causes of the injury. *Ibid.*

Baseball club and manager held not liable for assault made on umpire under facts. *Ibid.*

GRAND JURY.

§ 1. Selection and Qualifications.

Discrepancies in ratio of Negroes on grand jury held to establish *prima facie* case requiring quashal in absence of evidence and findings of nondiscrimination. *S. v. Wilson*, 419.

HABEAS CORPUS.

§ 3. To Determine Right to Custody of Infants.

Where juvenile court has adjudged children to be abandoned and has placed them in custody of home, that court has exclusive original jurisdiction of custody and adoption proceedings. *In re Simpson*, 206.

Where the evidence is sufficient to support the court's findings that petitioner is a suitable person to have custody of his son and that the best interests of the child would be served by awarding the child's custody to him, order awarding the custody to the father is proper, even though the evidence would also support a finding that the child's mother is a fit and suitable person and that the best interests of the child would be served by awarding custody to her. *In re White*, 737.

HIGHWAYS.

§ 5. Rights of Way and Access to Highways.

The right of the owner of land to access to a highway is an easement appurtenant constituting a property right beyond his right as a member of the general public, but such right of access obtains only to lands which abut the highway. *Snow v. Highway Comm.*, 169.

The Highway Commission has authority in the exercise of delegated police power to eliminate grade crossings and intersections, and to change a highway into a limited access highway. *Ibid.*

§ 6. Alteration of Routes and Abandoned Sections.

The fact that a section of an old highway is kept open and thus constitutes a neighborhood public road, G.S. 136-67, does not preclude the Highway Commission from barricading it at its intersection with a new highway upon constituting the new highway a nonaccess highway. *Snow v. Highway Comm.*, 169.

§ 7. Injuries on Highways Under Construction.

Where a contractor for the improvement of an airport is granted permission by the Highway Commission to construct a dirt ramp over the highway to protect it from heavy equipment, the Commission's requirements with reference to signs and flagmen are primarily for the protection of the users of the highway and do not confer on the contractor special privileges in respect to right of way. *Mangum v. Gasperson*, 32.

Irrespective of G.S. 20-156(a), a contractor for the improvement of an airport who is granted permission to maintain a dirt ramp across a highway is under duty, before operating its earth moving equipment onto and across the ramp, to exercise due care to see that such movement can be made with safety and without injury to users of the highway. *Ibid.*

Evidence held to show contributory negligence causing collision between truck and plaintiff's equipment crossing highway on dirt ramp. *Ibid.*

§ 12. Nature and Grounds of Right to Cartway.

A land owner is entitled to establish a cartway over the lands of another if he has no proper access to a public way and if he satisfies the court that it is necessary, reasonable and just that he have such private way. *Taylor v. Paper Co.*, 452.

HIGHWAYS—*Continued.*

A person entitled to a private way across the lands of another under G.S. 136-69 is not entitled as a matter of law to select his route or to access to existing private roads on respondent's land, regardless of how expedient and economical the use of the private roads would be to him, but the location of the right of way is the task of a jury of view with its determination reviewable by the court. *Ibid.*

The statutes providing for the establishment of cartways reasonably necessary for access to a public road are in derogation of the rights of private property and must be strictly construed. *Ibid.*

Petitioner instituted this proceeding to establish a cartway over the lands of respondent to transport his timber to market. The evidence disclosed that petitioner had access to a navigable creek and that timber had theretofore been transported by means of the creek. *Held:* While access to a navigable stream would not in every instance be sufficient, the finding of the court that in this particular situation such means of transportation was adequate is conclusive when supported by evidence, and the existence of such adequate access precludes the relief sought. *Ibid.*

Petitioner, for the purpose of transporting timber to market, sought a cartway to private roads on respondent's land with right to use the private roads to the public highway. Respondent offered to permit petitioner the right to construct a cartway by the shortest route to either one or the other of the public highways adjacent respondent's land. *Held:* The tender of an adequate permissive way meets the requirements of G.S. 136-69, and petitioner is not entitled to connect with respondent's private roads. *Ibid.*

Allegations to the effect that plaintiff and his predecessors in title had used a cartway with definite boundaries across the lands of defendants to a highway as the only ingress and egress to a public way, that such use was adverse to defendants and their predecessors in title for more than 100 years, *held* to state a cause of action to establish an easement by prescription and not one to establish a neighborhood public road, and therefore demurrer on the ground that the clerk had exclusive original jurisdiction should have been overruled. *Adams v. Beshears*, 740.

HOMICIDE.

§ 9. Self-Defense.

Evidence tending to show that defendant was sitting in a parked car with a married woman not his wife, that an intruder opened the door on her side of the car, that she screamed, and that defendant got a gun from the front seat of the car, got out of the car, and intentionly fired twice into the body of the intruder as he ran from the scene, *is held* not to show actual or apparent necessity prerequisite to self-defense. *S. v. Phillips*, 723.

§ 14. Relevancy and Competency of Evidence.

Defendant shot and killed an intruder as the intruder was leaving the scene after he had opened the door of the car in which defendant and a woman, not his wife, were parked. *Held:* The introduction of evidence that defendant was a married man, and that his companion was a married woman but not his wife, is competent as revealing part of the background in the light of which defendant's conduct must be judged. *S. v. Phillips*, 723.

HOMICIDE—*Continued.*

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant was seated in the back seat of his automobile with a married woman not his wife, at night, that some person opened the door on the woman's side, that she screamed, and defendant got a shotgun from the front seat of the car, got out of the car and fired twice in the direction of the fleeing intruder whose identity he did not know, together with evidence that the shot so fired caused death, *held* sufficient to be submitted to the jury in a prosecution of defendant for homicide. *S. v. Phillips*, 723.

HUSBAND AND WIFE.

§ 2. Marital Rights and Disabilities in General.

Where a deed of bargain and sale conveys a joint tenancy in the grantees with right of survivorship, the subsequent marriage of one of the grantees does not sever the unity of title and possession. Constitution of North Carolina, Art. X, § 6. *Vettori v. Fay*, 482.

§ 3. Husband as Agent for Wife.

A husband is not the agent of his wife solely by reason of the relationship, and no presumption of agency arises therefrom. *Norburn v. Mackie*, 16.

Agency of a husband to act for his wife in a particular transaction may be established by direct or circumstantial evidence, and only slight evidence of agency is necessary when the wife receives and retains the benefits of the contract negotiated by him. *Ibid.*

Admissions in the joint answer of the husband and wife that they owned the lands in question, that the husband verbally authorized a broker to sell the lands, that the purchase money was paid to the husband alone but that "defendants" paid the broker's commission for the sale, permits the inference that the wife received or obtained the benefit of a part of the purchase price and is sufficient to be submitted to the jury on the question of the husband's agency. *Ibid.*

§ 11. Construction and Operation of Separation Agreements.

Payments provided in separation agreement are not constituted alimony by judgment approving agreement, but are constituted alimony by consent judgment directing payments to be made as provided in the agreement, in which case payments may be enforced by contempt and court has power to modify for change of condition. *Bunn v. Bunn*, 67.

INDIANS.

Indians residing in a reservation within the State are citizens of the United States, this State, and of the County in which the reservation is situate, and are entitled to the equal benefits and protection of the laws. Fourteenth Amendment to the United States Constitution. *Board of Public Welfare v. Comrs. of Swain*, 475.

The fact that a large part of a county consists of an Indian Reservation owned by the United States and exempt from taxation does not affect the duty of the county to pay its part of the matching funds for Social Security payments to Indians residing within its boundaries, there being no statutory pro-

INDIANS—*Continued.*

vision impairing the rights of the Indians to benefits under the Social Security Act as implemented by statute in this State. *Ibid.*

INDICTMENT AND WARRANT.

§ 4. Evidence and Proceedings Before Grand Jury.

Findings held to support conclusions that presence of solicitor in grand jury room was not prejudicial. *S. v. Colson*, 506.

The grand jurors' oath of secrecy does not preclude the court, under proper circumstances, from calling grand jurors to testify in respect to a charge that the solicitor influenced their proceedings, and the court properly interrogates them in regard to the matter and properly permits counsel to ask competent questions in regard thereto. *Ibid.*

§ 8. Joinder and Merger of Counts.

All elements of assault with a deadly weapon are included in the offense of robbery with firearms, and the Supreme Court will take notice *ex mero motu* of the duplication when the record discloses conviction of defendants of both offenses based upon the identical occurrence, and will quash the indictment charging the assault and arrest the judgment thereon. *S. v. Parker*, 679.

§ 9. Charge of Crime.

An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified a sum of money, charges the crime of larceny and not that of robbery, G.S. 14-72, the words "with force and arms" being merely a formal phrase traditionally included in bills of indictment and having no significance as an element of the specific crime charged. *S. v. Acrey*, 90.

Indictment for felony must use word "feloniously." *S. v. Whaley*, 536.

§ 14. Time of Making Motions to Quash.

Plea in abatement and motion to quash the indictments for irregularity in the proceedings before the grand jury are addressed to the discretion of the court when not made until after conviction, and the exercise of such discretion by the court ordinarily is not reviewable on appeal. *S. v. Colson*, 506.

§ 15. Grounds for Motions to Quash.

A plea in abatement or motion to quash the indictment is the proper procedure to present the contention that the solicitor was in the grand jury room and procured the finding of the indictment. *S. v. Colson*, 506.

§ 16. Effect of Quashal.

Quashal of an indictment for insufficient showing that members of defendant's race had not been arbitrarily excluded from the jury list does not entitle defendant to his discharge, but he may be held until an indictment is returned by an unexceptional grand jury. *S. v. Wilson*, 419.

INJUNCTIONS.

§ 5. Enjoining Enforcement of Ordinance.

An ordinance enacted in exercise of public policy will not be interferred with by the courts unless it is so unreasonable, oppressive and subversive as to amount to an abuse rather than a legitimate exercise of the legislative

INJUNCTIONS—*Continued.*

power; but where the ordinance is subject to recall by the voters its enforcement may be enjoined until the expiration of time for the filing of a recall petition. *Stroupe v. Eller*, 573.

Enforcement of ordinance may not ordinarily be restrained. *Skipper v. Hamore Corp.*, 741; *Walker v. Charlotte*, 697.

§ 13. Issuance of Temporary Orders Upon a Hearing and Continuance of Temporary Orders.

Upon the hearing of an order to show cause, the only question before the court is the right to have the temporary order continued, and the court may not grant relief entirely distinct from that prayed and all adjudications outside the scope of the inquiry must be stricken on appeal. *In re Carter*, 360.

INSANE PERSONS.

§ 4. Control and Management of Estate by Guardian.

Court has authority to authorize trustee to make gifts from incompetent's estate upon findings that incompetent would probably make such gifts if he were competent. *In re Kenan*, 627.

§ 10. Actions Against Insane Persons.

Where service of process in a civil action is made upon defendant who is *non compos mentis*, the court correctly refuses to quash the summons and vacate the service, but the court should see to it that defendant is properly represented before any action is taken which is detrimental to his interests. *Bell v. Smith*, 540.

INSURANCE.

§ 7. Reformation of Policies.

In this action to reform a certificate of insurance issued under a group policy on the lives of borrowers, evidence that the premium was paid for a twelve-month period, that the effective date of the certificate as typewritten thereon antedated the time the loan was actually made by three days, together with evidence of prior custom between the parties, etc., *is held* sufficient to overrule insurer's motion to nonsuit. *McCallum v. Ins. Co.*, 375.

§ 57. Drivers Insured Under Liability Policies.

Where a dealer accepts a purchaser's old car as down payment on another car and the purchaser signs the title certificate on the car turned in and agrees on the payments to be made and signs a contract for the car purchased, the dealer's garage liability policy does not cover damages inflicted in a collision occurring some month thereafter while the car purchased was being driven by the purchaser, even though the car purchased is damaged in the collision to such extent that the purchaser refuses to accept repairs but permits the dealer to collect the collision insurance and sell the car to another after repair. *Luther v. Ins. Co.*, 716.

§ 60. Notice of Accident to Insurer.

Ordinarily, failure to give notice to insurer of an accident within the time stipulated in the policy precludes recovery. *Luther v. Ins. Co.*, 716.

INSURANCE—*Continued.*

§ 65. Rights of Injured Party Against Insurer After Judgment Against Insured.

In an action to recover under an insurance policy, the burden is upon plaintiff to allege and prove coverage and the burden of showing exclusion from coverage is upon insurer. *Brevard v. Ins. Co.*, 458.

Where insured is not the owner of the car inflicting the injury, and judgment against him is based solely on the doctrine of *respondeat superior*, the injured third person in his action against insurer must allege facts showing coverage of the policy. *Ibid.*

§ 95. Construction of Property Damage Policies.

A policy providing that insurer should pay to insured all sums which insured becomes legally obligated because of damage to property of third persons caused by accident protects not merely against damage to property by accident but against liability for damage caused by accident, which includes damage resulting from negligence. *Ins. Co. v. Simmons*, 691.

Insurer issued the policy obligating it to pay insured such sums as insured should become legally obligated to pay as damages resulting from the destruction of property by accident. Insured, in the course of reroofing a building for a third person in the usual and normal manner, put a covering across the unfinished portion of the roof, but water seeped in and damaged the building after ordinary rains. The building owner obtained judgment against insured for the damages to his building on the ground of insured's negligence in the performance of the contract. *Held:* Insurer is liable to insured under the terms of the policy. *Ibid.*

§ 96. Actions on Property Damage Policies.

The policy obligated insurer to pay all sums for which insured should become legally liable because of the destruction of property by accident, and provided that insurer should defend actions against insured within the coverage. *Held:* After recovery of judgment against insured in an action in which insurer participated, insurer, in insured's action against it, cannot relitigate the question of whether the damage resulted from an "accident." *Ins. Co. v. Simmons*, 691.

JUDGMENTS.

§ 4. Definitions, Construction and Operation.

The effect of an order or judgment is not determined by its recitals but by what may or must be done pursuant thereto. *McNair v. Goodwin*, 1.

§ 13. Judgments by Default in General.

Failure to answer admits the facts alleged in the complaint or petition and entitles plaintiffs or petitioners to such judgment only as is proper upon the facts thus admitted, so that if the facts alleged are insufficient to constitute a cause of action, default judgment rendered thereon is a nullity. *Pruden v. Keemer*, 212.

G.S. 1-211(1) does not apply to a tax foreclosure, and where a summons in a tax foreclosure suit is served by publication, judgment by default upon a

complaint with incomplete verification is not void but is merely irregular. *Walker v. Story*, 707.

§ 18. Direct and Collateral Attack.

The procedure to attack a consent judgment for fraud or mutual mistake is by independent action, and therefore in the wife's action for divorce on the ground of two year's separation the husband is not entitled to attack a prior separation agreement embodied in a consent judgment for fraud or mutual mistake, the action for divorce on the ground of separation not being bottomed on the consent judgment, and the consent judgment being relied upon merely to show the agreement to live separate and apart. *Becker v. Becker*, 685.

The proper procedure to attack an irregular judgment is by motion in the cause. *Walker v. Story*, 707.

§ 19. Void Judgments.

A void judgment is a nullity. *Pruden v. Keemer*, 212.

A judgment rendered against a person who was dead at the time of the institution of the action is void. *Collins v. Coleman & Co.*, 478.

§ 21. Attack of Irregular Judgments.

In attacking a default judgment for irregularity defendant must show due diligence and a meritorious defense. *Walker v. Story*, 707.

§ 28. Conclusiveness of Judgment and Bar in General.

In order for a judgment to bar a subsequent action under the doctrine of *res judicata*, it is required that there be identity of parties, subject matter, and relief demanded. *Shaw v. Eaves*, 656.

Estoppel by judgment must be mutual, and the estoppel is mutual only if the party taking advantage of the earlier adjudication would have been bound by it had it gone against him. *Ibid.*

An unsatisfied judgment against one joint tort-feasor is no bar to the prosecution of actions against the other tort-feasor. *Ibid.*

Judgment for contribution is not *res judicata* as between plaintiff and additional defendant. *Ibid.*

JURY.

§ 3. Selection, Examination and Qualifications.

Statutory provisions in this State, respecting the qualifications, selection, listing, drawing and attendance of jurors is fair and nondiscriminatory and meets all constitutional tests. *S. v. Wilson*, 419.

A person has no right to insist that he be indicted or tried by juries composed of persons of his race or on which persons of his race are represented in any proportion, but only that the juries be selected from all qualified persons regardless of race, and that no person of his race be systematically excluded therefrom. *Ibid.*

A jury list is not perforce discriminatory because it is made from the tax list. *Ibid.*

JURY—*Continued.*

§ 5. Right to Trial by Jury.

Where all acts of an Urban Redevelopment Commission in regard to the redevelopment plan in suit are substantially in evidence and set out in the record, and there is no allegation that defendants acted arbitrarily or capriciously, whether such acts disclose a compliance with the requirements of the Urban Redevelopment Law does not present an issue of fact to be determined by a jury but presents a question of fact or law for the determination of the court. *Horton v. Redevelopment Comm.*, 306.

Where the evidence raises issues of fact in respect to the title to property, a party asserting ownership is entitled to a trial of the issues by a jury. *Wescott v. Highway Comm.*, 522.

LARCENY.

§ 1. Elements and Essentials of Offense.

To constitute larceny there must be an actual taking of property of some value; if nothing is taken the offense cannot amount to more than an attempt to commit larceny. *S. v. Parker*, 679.

§ 4. Warrant and Indictment.

Indictment charging defendant with taking and carrying away from a named person a specified sum of money charges larceny and not robbery notwithstanding it uses the words "with force and arms." *S. v. Acrey*, 90.

§ 5. Presumptions and Burden of Proof.

The defendant is not under the burden of offering evidence in explanation of his recent possession of stolen property. *S. v. Holloway*, 753.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence that within less than three days after clothing of a value of some $600 was stolen many of the articles of clothing were found concealed in the trunk of the automobile which defendant was driving is sufficient to take the case to the jury under the presumption arising from the recent possession of stolen property, and defendant's explanation that he had bought the clothing somewhere for the sum of $80.00 is not such an explanation as is calculated to weaken the presumption. *S. v. Jolly*, 603.

§ 8. Instructions.

In prosecution for larceny from the person the court is not required to submit question of guilt of assault even though there is evidence thereof. *S. v. Acrey*, 90.

It is error to charge that defendant has the burden of offering evidence in explanation of his recent possession of stolen property. *S. v. Holloway*, 753.

LIMITATION OF ACTIONS.

§ 16. Procedure to Invoke Statute.

A statute of limitations cannot be taken advantage of by demurrer or by motion to bar the action, but may be properly invoked only by answer. *Iredell County v. Crawford*, 720.

LIMITATION OF ACTIONS—*Continued.*

A defendant in a tax foreclosure suit cannot avail himself of the ten year statute of limitations set forth in G.S. 105-422 when he does not plead the statute in his answer. *Ibid.*

MALICIOUS PROSECUTIONS.

§ 2. "Prosecutions" Which Will Support Action.

In this jurisdiction actions for malicious prosecution may be based not only upon criminal prosecutions but also civil proceedings which involve an arrest of the person or seizure of property or the loss of a legally protected right. *Carver v. Lykes*, 345.

A real estate broker may maintain an action for malicious prosecution against a person who maliciously and without probable cause institutes proceedings before the Real Estate Licensing Board, terminated in favor of the broker, charging conduct constituting ground for revocation or suspension of the broker's license. *Ibid.*

§ 4. Want of Probable Cause.

The right of action for malicious prosecution is based upon the malicious institution of a proceeding without probable cause, irrespective of any specific intent as to the motive or purpose in instituting the proceeding, and therefore in an action for malicious prosecution based upon the institution of proceedings for the revocation of a real estate broker's license, an instruction to answer the issue as to whether defendant instituted the proceedings in the affirmative if the jury found that defendant filed the complaint with the licensing Board and did so for the purpose of revoking or suspending plaintiff's license, is erroneous. *Carver v. Lykes*, 345.

§ 13. Damages.

Damages for malicious prosecution include loss of business, injury to reputation, mental suffering, and expenses reasonably necessary in defending the charge against plaintiff, together with any other loss proximately resulting from defendant's malicious prosecution, and if actual malice is established, the jury may also allow punitive damages. *Carver v. Lykes*, 345.

MANDAMUS.

§ 1. Nature and Grounds of the Writ.

A mandatory injunction to compel a board of public official to perform an asserted duty and a *mandamus* to compel the performance of such duty are identical in function and purpose, and will not lie except to compel the performance of a clear and positive legal duty at the instance of a person having a clear legal right to demand performance; it will not lie to control the exercise of a discretionary function or the discharge of a judicial or *quasi*-judicial function unless there has been a clear abuse of discretion. *Ponder v. Joslin*, 496.

MARSHALLING.

A creditor cannot assert the remedy of marshalling of assets as against another creditor having a prior lien on the ground that a third person had

MARSHALLING—*Continued.*

guaranteed payment of such other creditor's debt when the guarantor of payment would be subrogated to the rights of such other creditor. *Trust Co. v. Finance Co.*, 711.

MASTER AND SERVANT.

§ 10. Duration of Employment and Wrongful Discharge.

A contract of employment is subject to the implied condition that the employment may be terminated at any time for cause, and the use of alcohol to the extent that it interfers with the proper discharge of the duties of the employment is cause for discharge. *Wilson v. McClenny*, 121.

§ 53. Injuries Compensable in General.

The law of estoppel applies in compensation proceedings as in other cases, and in proper instances will preclude insurer from denying that the act out of which the injury arose was performed in the course of the employment. *Aldridge v. Motor Co.*, 248.

§ 54. Causal Relation Between Employment and Injury.

In order for an injury to arise out of the employment the injury must be a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. *Perry v. Bakeries Co.*, 272.

Injury while diving in pool of inn for personal recreation after termination of sales meeting at the inn held not to arise out of the employment. *Ibid.*

§ 59. Acts Performed by Injured Employee for Third Person.

Evidence that the officers of a close corporation owned certain realty, including the building in which the corporate business was carried on, that they employed claimant to keep their several properties in repair, told the local agent of insurer they wanted the employee covered by the corporation's compensation insurance policy and, in response to the agent's assurance that this would accomplish this purpose, put the employee on the corporation's payroll, so that his remuneration was included in computing the insurance premium, *is held* to estop insurer from denying that an injury to such employee while repairing property unconnected with the corporate business was within the coverage of the policy. *Aldridge v. Motor Co.*, 248.

§ 65. Compensation Act — Heart Disease.

Where the evidence does not disclose that the employee was doing work essentially different from that which had been customarily performed by him over the years, his death as a result of a coronary thrombosis is not the result of an accident within the meaning of the North Carolina Workmen's Compensation Act. *Ferrell v. Sales Co.*, 76.

§ 69. Computation of Average Weekly Wage.

A person surreptitiously employed by defendant's truck driver to aid in unloading the truck at terminals on interstate runs is, at most, a casual employee, and his average weekly wage must be computed on the basis of the

MASTER AND SERVANT—*Continued.*

wage actually paid him. G.S. 97-2(5), unaffected by the minimum wage under the Fair Labor Standards Act for persons engaged in interstate commerce, subject to the minimum of $10.00 per week. *Lovette v. Mfg. Co.*, 288.

§ 84. Jurisdiction of Commission — Exclusion of Common Law Action.

Where, in an action in the Superior Court to recover for personal injuries, defendant alleges as a plea in bar that the Industrial Commission has exclusive original jurisdiction, and the court finds upon supporting evidence that plaintiff and defendant were co-employees and that the injuries in suit occurred while defendant was transporting plaintiff from work to his home, and that the transportation was furnished by the employer as a part of the employment, *held*, the findings support the conclusion that the Industrial Commission has exclusive original jurisdiction, and it was not error for the court, without the intervention of a jury, to dismiss the action as a matter of law for want of jurisdiction. *Burgess v. Gibbs*, 462.

§ 93. Review of Award in Superior Court.

While the findings of the Industrial Commission are conclusive on appeal when supported by competent evidence, a finding that an accident arose out of and in the course of the employment involves a mixed question of law and fact, and the courts are authorized to review the legal aspects of the question upon the facts found. *Perry v. Bakeries Co.*, 272.

MORTGAGES AND DEEDS OF TRUST.

§ 28. Parties Who May Bid in and Purchase the Property.

Where the widow in possession of property and entitled to dower therein purchases at the foreclosure sale of a deed of trust which had been executed by her and her husband, as between herself and the heirs at law she acquires title solely for the protection of her dower and holds the fee for the benefit of the heirs at law. *Morehead v. Harris*, 330.

MUNICIPAL CORPORATIONS.

§ 4. Authority and Powers — Urban Redevelopment.

The evidence in this case *is held* sufficient to support a finding of the lower court that the area of defendant municipality embraced within the redevelopment plan in suit is a blighted area as defined in G.S. 160-456(q). *Horton v. Redevelopment Co.*, 306.

Evidence as to the number of families displaced in the execution of an urban redevelopment plan, the number of dwelling units available in public housing, and the number of private units that would be on the market, *is held* to show adequate provision for the relocation of persons who would be displaced by the execution of the plan and that the Federal Government had made adequate appropriation to pay relocation expenses. *Ibid.*

Municipality must submit urban redevelopment plan to vote when it does not finance its obligations thereunder solely from revenue derived from sources other than taxes. *Ibid.*

§ 24. Nature and Extent of Police Power and Construction of Ordinances.

A municipal ordinance, like a statute or other written instrument, should not be interpreted as detached, unrelated sentences, but must be construed as a

MUNICIPAL CORPORATIONS—*Continued.*

whole. *S. v. Fox*, 193. Therefore, when only a portion of an ordinance is set forth in the indictment the courts will construe it within its setting with the balance of the ordinance. *Ibid.*

A municipal ordinance for the fluoridation of the city water supply is enacted in the exercise of public policy and the courts will not interfere therewith in the absence of a showing that the ordinance is so unreasonable, oppressive and subversive as to amount to an abuse rather than a legitimate exercise of the legislative power. *Stroupe v. Eller*, 573.

Only residents of a municipality may vote in a referendum to recall a fluoridation ordinance, notwithstanding the city also sells drinking water to persons living outside its boundaries. *Ibid.*

§ 25. Zoning Regulations.

Municipal corporations have only such zoning power as is delegated to them by statute. *Schloss v. Jamison*, 108.

A zoning ordinance must bear a substantial relation to the public health, safety, morals or general welfare. *Ibid.*

Municipalities have been delegated power to adopt comprehensive zoning ordinances, and where such an ordinance regulates all types of business advertising solely with reference to the various zones and not with regard to billboards or poster panels as such, the regulation relates to the zoning power and not to the power to regulate the erection of billboards, signs, and other structures under G.S. 160-200(9). *Ibid.*

If a zoning ordinance is adopted in the proper exercise of the police power any resultant loss to property owners is a misfortune imposed upon them as members of society and does not affect the validity of the ordinance. *Ibid.*

Zoning ordinance may prohibit signs advertising goods, services or entertainment not offered on premises. *Ibid.*

§ 28. Control Over and Regulation of Streets.

Where a municipal ordinance deals with the obstruction of streets incident to excavation and construction, individuals may not be prosecuted under an excerpt from the ordinance for obstructing a street with their persons by standing and sitting down in the portion of the street ordinarily reserved for vehicular traffic, since the ordinance was not intended to apply to such situation. *S. v. Fox*, 193.

§ 29. Parking Ordinances.

A municipality may not issue bonds to construct off-street parking lots until there has been an adjudication in a manner provided by law that the construction of such parking lots is for a public purpose in that particular municipality. *Horton v. Redevelopment Comm.*, 306.

§ 34. Enforcement, Validity and Attack of Ordinances.

A zoning ordinance duly enacted by a municipal corporation is presumed to be a valid exercise of the police power and the burden is upon a property owner asserting invalidity to establish it. *Schloss v. Jamison*, 108.

A court, in the exercise of its equity jurisdiction, may refuse to dismiss an action to restrain a municipality from enforcing its ordinance for the fluo-

MUNICIPAL CORPORATIONS—*Continued.*

ridation of the city water supply, even though no ground for injunctive relief is established, until its voters have an opportunity to petition for a referendum to recall the ordinance, it appearing that the changeover to fluoridation would involve expense, that the city charter provides that a recall petition might be filed after the passage of an ordinance and before it goes into effect, and that on an occasion some seven years prior the voters had disapproved fluoridation. *Stroupe v. Eller*, 573.

The enforcement of a municipal ordinance may not be restrained except to prevent the irreparable damage to property or personal rights. *Walker v. Charlotte*, 697; *Smith v. Hauser*, 735.

§ 36. Issuance of Bonds and Levy of Taxes.

Since a municipality may not spend any revenue derived from taxes as local grants-in-aid for an urban redevelopment project without a vote unless such expenditures are for a necessary municipal purpose, and since a municipality is required by statute to provide a legal and feasible plan for the financing of its obligations in connection with a redevelopment project, G.S. 160-463(d)(7), a municipality should be restrained from the expenditure of any funds or revenues in furtherance of such plan until it is judicially determined that its proposed grants-in-aid are from non-tax revenue and are within its power to provide. *Horton v. Redevelopment Comm.*, 306.

§ 37. Application of Revenue.

Water and sewer receipts of a municipality may not be treated by it as surplus funds until all expenses of operating, managing, maintaining, and extending its water and sewer facilities, as well as the interest and principal required to be paid during the next succeeding year on bonds issued for such interprises, have been paid. *Yokley v. Clark*, 219.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Whether an act or omission constitutes negligence is to be judged by the circumstances existing at the time. *Hardee v. York*, 237.

A person whose failure to use due care in the performance of a contract results in damage is liable for the damages thus inflicted as a result of such negligence. *Ins. Co. v. Simmons*, 691.

Breach of contract cannot give rise to a cause of action in tort, nor may a contract substitute a different standard of care for that prescribed by the common law, but a contract may create a relationship between the parties out of which a duty arises, the breach of which may constitute negligence. *Toone v. Adams*, 403.

The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care to protect others from harm, and if a person intentionally creates a situation which he knows, or should know, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another, he may be held liable for the resulting injury, but he may not be held liable if the wrongful act on the part of the other could not have been reasonably foreseen under the circumstances. *Ibid.*

NEGLIGENCE—*Continued.*

A person who cleans a rug with the permission of the owner in order to demonstrate a rug cleaning compound may be held liable by the owner for damages to the rug resulting from an excessive amount of detergent in the cleaning compound. *Loan Asso. v. Jarrett Co.*, 624.

§ 7. Proximate Cause and Foreseeability of Injury.

Proximate cause is a question of fact to be determined from the attendant circumstances, and when conflicting inferences of causation arise from the evidence the question is for the determination of the jury or, in a trial by the court under agreement of the parties, for the determination of the court. *Taney v. Brown*, 438.

"Reasonable prevision" and "reasonable foreseeability" have substantially the same significance when applied to the question of proximate cause. *S. v. Colson*, 506.

§ 9. Primary and Secondary Liability and Indemnity.

Primary and secondary liability between defendants exists only when they are jointly and severally liable to plaintiff and the one passively negligent is exposed to liability through the active negligence of the other or the one is derivatively liable for the negligence of the other, and the doctrine cannot arise if one defendant is solely liable to plaintiff. *Edwards v. Hamil*, 528.

The right to contribution and the right to indemnity are mutually inconsistant since the right to indemnity is based only on derivitive liability. *Ibid.*

§ 11. Contributory Negligence in General.

Contributory negligence *ex vi termini* implies negligence on the part of defendant. *Robertson v. Ghee*, 584.

Only contributory negligence which is a proximate cause or one of the proximate causes of the injury under judicial investigation is of legal import. *Taney v. Brown*, 438.

Negligence on the part of the plaintiff bars recovery if such contributory negligence is a proximate cause of the injury. *Ledbetter v. Thomas*, 569.

§ 19. Parties.

A defendant claiming that a third party was solely liable to plaintiff is not entitled to have such third party joined, since in such instance the defendant cannot claim either the right to contribution or the right to indemnity. *Edwards v. Hamil*, 528.

§ 21. Presumptions and Burden of Proof.

The burden of proof on the issue of contributory negligence is on defendant. *Kirby v. Fulbright*, 144.

§ 24a. Sufficiency of Evidence of Negligence and Nonsuit in General.

It is not necessary that negligence be proved by direct and positive evidence, but it may be established by circumstantial evidence, either alone or in combination with direct evidence. *Randall v. Rogers*, 544.

Evidence that a rug which defendant had cleaned with permission of plaintiff for the purpose of demonstrating a rug cleaning compound, shrunk and developed numerous brownish spots and became sticky to the touch, with tes-

timony of an expert in the field that the damage resulted from an excessive amount of detergent in the cleaning compound, together with evidence as to the amount of the damage, *held* sufficient to take the case to the jury. *Loan Asso. v. Jarrett Co.*, 624.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit for contributory negligence is proper when plaintiff's own evidence, considered in the light most favorable to him, induces this conclusion as the sole reasonable one that can be drawn from the evidence. *Mangum v. Gasperson*, 32; *Kirby v. Fulbright*, 444; *Ramey v. R. R.*, 230; *Cowan v. Transfer Co.*, 550; *Robertson v. Ghee*, 584; *McNamara v. Outlaw*, 612.

On motion to nonsuit on the ground of the contributory negligence of plaintiff, the evidence must be considered in the light most favorable to her. *Long v. Food Stores*, 57.

No inflexible rule can be laid down as to whether the evidence discloses contributory negligence as a matter of law, but each case must be determined upon its own particular facts. *Ramey v. R. R.*, 230.

Conflicting inferences of causation carry the issue to the jury. *McNamara v. Outlaw*, 612.

§ 31. Culpable Negligence.

Culpable negligence in the law of crimes implies something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Colson*, 506.

If culpable negligence proximately causes death, the actor is guilty of manslaughter, and, under some circumstances, of murder. *Ibid.*

The wilful, wanton or intentional violation of a safety statute or the unintentional or inadvertent violation of such statute which is accompanied by recklessness or a thoughtless disregard of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, constitutes culpable negligence. *Ibid.*

§ 34. Condition and Maintenance of Walkways.

Slight depressions, unevenness and irregularities in outdoor walkways are so common that their presence is to be anticipated by prudent persons, and therefore a complaint alleging that plaintiff fell when her heel caught in a depression slightly more than a half-inch in depth in the pavement of an outdoor walk to the parking area of a restaurant, fails to state a cause of action. *Evans v. Batten*, 601.

§ 37a. Definition of Invitee.

A customer entering a store during business hours to purchase goods therein is an invitee. *Long v. Food Stores*, 57.

Where the owner of land maintains adequate paved driveways and entrances to its buildings sufficient to accommodate its tenants and their visitors, a visitor electing to approach the premises over the private property of an adjacent landowner and to walk over an unlighted area with which she was unfamiliar, may not recover for a fall over a reinforcing rod embedded in a broken piece of concrete. *Jones v. Housing Authority*, 604.

NEGLIGENCE—*Continued.*

§ 37b. Duty of Proprietor to Invitees.

A proprietor of a store is not an insurer of the safety of its customers but is under duty to exercise ordinary care to keep the aisles and passageways of the store where customers are expected to go in a reasonably safe condition so as not to unnecessarily expose customers to danger and to give warning of hidden dangers or unsafe conditions of which the proprietor has knowledge or of which, in the exercise of reasonable supervision and inspection, he should have knowledge. *Long v. Food Stores*, 57.

A proprietor is charged with notice of an unsafe condition, arising from dangerous substances on the floor of the aisles of its store, if the unsafe condition is created by an employee acting within the scope of his employment or if the condition has remained for sufficient time for the proprietor to know, or by the exercise of reasonable care to have known, of its existence. *Ibid.*

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Res ipsa loquitur does not apply in an action by a customer to recover for a fall in a store, and no inference of negligence arises solely by reason of the injury. *Long v. Food Stores*, 57.

Evidence tending to show that plaintiff in walking along the aisle of a self-service grocery store fell when her foot slipped on grapes lying in the aisle and that the grapes were full of lint and dirt, *is held* sufficient to overrule nonsuit in the customer's action to recover for the fall. *Ibid.*

Evidence *held* insufficient to show negligence on the part of the proprietor causing fall of patron when she failed to observe the difference of five inches in elevation between the floor and door of a motel room and the walk. *Skipper v. Hamore Corp.*, 741.

§ 37g. Contributory Negligence of Invitee.

In plaintiff's action to recover for injuries sustained when she fell when her foot slipped on grapes in the aisle of defendant's store, nonsuit on the ground that plaintiff's evidence establishes contributory negligence as a matter of law is properly denied when plaintiff's evidence discloses that the grapes were dark and full of lint and dirt and were nearly the same shade or color as the floor and that there was heavy dirt on the floor, since the evidence fails to disclose that the dangerous condition of the aisles was patent and obvious so that plaintiff, in the exercise of reasonable care for her own safety, should have seen and avoided the danger. *Long v. Food Stores*, 57.

NUISANCE.

§ 12. Public Nuisance — Abatement — Disbursement of Proceeds of Sale of Personalty Seized.

Upon the return of an affirmative verdict in an action to abate a public nuisance, the opportionment of costs rests in the discretion of the court, G.S. 6-20, and where the judgment directs that the costs of the action, including attorney's fees, be paid from the proceeds of the sale of the personal property seized, such judgment does not provide for personal liability of the defendants, and when the sale of the personal property brings a sum insufficient to pay the attorney's fees in full it is error for the court at a later term to impose a lien

NUISANCE—*Continued.*

on the realty to provide for the discharge of the unpaid balance. *Morris v. Shinn*, 88.

OBSCENITY.

The fact that a venitian blind lacks some six to ten inches of reaching the window sill is entirely irrelevant in a prosecution of defendant for peeping into a room occupied by a female. *S. v. Bivens*, 93.

PARENT AND CHILD.

§ 8. Prosecutions for Abandonment and Nonsupport.

Where judgment against defendant for his wilful failure to support his children is suspended on condition that he make payments stipulated for their support, defendant may not contend that his failure to make the payments as directed was not wilful because he was seeking an adjudication of his right to visit the children, there being no authority in criminal prosecutions for nonsupport to determine visitation rights, and further, in no event would refusal of visitation rights excuse defendant from wilful refusal to support his children. *S. v. Dawkins*, 298.

PARTIES.

§ 1. Necessary Parties.

If necessary parties are absent they may be brought in by motion, order, and service of process. *Short v. Realty Co.*, 576.

Parties who have no property right in a chose are not necessary parties in an action involving its disposition. *In re Kenan*, 627.

§ 9. Deletion of Parties.

If an unnecessary party be joined, the remedy is by motion to dismiss as to such party. *Short v. Realty Co.*, 576.

PHYSICIANS AND SURGEONS.

§ 11. Nature and Extent of Liability of Physician or Surgeon for Malpractice.

Except in emergencies, consent of the patient or someone duly authorized to consent for him is required before a surgeon undertakes an operation. Such consent must be based upon a disclosure of the risks involved of which the surgeon has knowledge and the patient has not, so that the patient may make an informed decision, but the extent of such disclosure must be balanced against the surgeon's primary duty to act in the best interest of the patient. *Watson v. Clutts*, 153.

§ 15. Competency of Evidence in Malpractice Cases.

Where plaintiff's own expert witness testifies that surgery was indicated in plaintiff's case, and plaintiff's own allegations are to the effect that she was advised that the operation was serious and involved some risk, testimony by plaintiff that she would not have consented to the operation had she been ad-

PHYSICIANS AND SURGEONS—*Continued.*

vised that it involved a danger of paralysis of her vocal cords, is properly excluded, since plaintiff will not be permitted to change her decision as to consent in light of conditions after the operation rather than before. *Watson v. Clutts*, 153.

The court properly excludes that part of hospital records relating to a second operation indicating that a nerve had been cut in a prior operation when such records were made by a physician other than the surgeon performing the operation and plaintiff's own expert witness who actually performed the second operation testifies that he found no evidence that a nerve had been cut. *Ibid.*

§ 16. Sufficiency of Evidence and Nonsuit in Malpractice Cases.

Res ipsa loquitur does not apply in malpractice cases and liability must be based on proof of actionable negligence. *Watson v. Clutts*, 153.

Where plaintiff's own expert witness testifies to the effect that the paralysis depriving her of the use of her vocal cords was not due to the cutting of a nerve during the thyroidectory performed by defendant surgeon, but was due to the natural growth of scar tissue which choked off the blood supply to the nerves, plaintiff's evidence fails to make out a cause of action upon the theory that defendant surgeon negligently severed a nerve during the thyroidectomy. *Ibid.*

PLEADINGS.

§ 2. Statement of Cause of Action in General.

Plaintiff must allege facts necessary to constitute his cause of action so as to disclose the issuable facts upon which his right to relief depends, and mere allegation of legal conclusions is insufficient. *Brevard v. Ins. Co.*, 458.

§ 3. Joinder of Causes.

A cause of action by the driver of one vehicle to recover for personal injuries, and a cause of action by the owner of such vehicle to recover for damages to the vehicle are separate and distinct and may not be joined, even though both are against the driver-owner of the other vehicle involved in the collision and both allege the same acts of negligence. *Products Co. v. Christy*, 579.

§ 10. Office and Necessity for Reply.

New matter alleged in the answer, provided it does not amount to a counterclaim, is deemed controverted without the necessity of a reply, G.S. 1-159, and therefore plaintiff may offer evidence avoiding a plea in bar set up in the answer without the necessity of alleging the facts by way of reply. *Gamble v. Stutts*, 276; *Wescott v. Highway Comm.*, 522.

Petitioner's motion to be allowed to file a reply may be allowed on appeal to facilitate formulation of the issues to be submitted to a jury. *Wescott v. Highway Comm.*, 522.

§ 18—Demurrer for Misjoinder of Parties and Causes.

If the complaint states but one cause of action with several items or elements of damage, there can be no misjoinder of causes and the remedy in regard to parties is by motion to join necessary parties and to dismiss as to unnecessary parties. *Short v. Realty Co.*, 576.

PLEADINGS—*Continued.*

Where the court sustains demurrer for misjoinder of parties and causes of action, the court should dismiss the action. *Ibid.*

§ 19—Demurrer for Failure of Pleading to State Cause of Action.

Where the allegations of an amended complaint and the amendment to the amended complaint are so vague and contradictory that facts sufficient to constitute a cause of action cannot be deduced therefrom, demurrer is properly allowed. *Johnson v. Johnson*, 39.

The rule of liberal construction does not permit the court to read into a pleading facts which it does not contain. *Brevard v. Ins. Co.*, 458.

A demurrer admits the truth of the facts properly pleaded but does not admit inferences or conclusions of law. *Ibid.*

Where the facts alleged in the complaint, taken as true, disclose that plaintiff has no cause of action, the court properly dismisses the action. *Evans v. Batten*, 601.

§ 20. Aider by Answer.

The omission of a material allegation from the complaint may be supplied by a positive allegation of the crucial fact in the answer. *Randall v. Rogers*, 544.

§ 28. Variance.

Nonsuit for variance held proper in this case. *Threadgill v. Kendall*, 751.

§ 29. Issues Raised by Pleadings and Necessity for Proof.

Admissions in the pleadings of the adverse party obviate proof. *Lane v. Coe*, 8; *Norburn v. Mackie*, 16.

The admission in the answer of the truth of the predicate facts of an issue establishes such facts, and therefore if the issue is submitted to the jury the court should instruct the jury to answer it in accordance with the admitted facts. *Carver v. Lykes*, 345.

Where defendant alleges in his answer and testifies at the trial that at the time of the collision he was operating one of the automobiles involved therein, he may not contend that his motion for nonsuit should have been allowed because plaintiff failed to identify him as the driver of the car. *Hill v. Logan*, 488.

§ 30. Motion for Judgment on the Pleadings.

Judgment in favor of a pedestrian against one driver and in favor of such driver against a second driver joined for contribution cannot entitle the pedestrian to judgment on the pleadings on his counterclaim in a subsequent action instituted by the second driver against the first driver, the pedestrian and the pedestrian's superior. *A fortiori*, the superior, who was not a party to the other action, is not entitled to judgment on the pleadings on his counterclaim. *Shaw v. Eaves*, 656.

Judgment on the pleadings is proper only when as a matter of law the allegations of the opposing party, taken as true, are insufficient to constitute a cause of action or a defense, and such motion must be determined on the pleadings alone without extrinsic evidence and may not be entered when the pleadings raise an issue of fact on any single material proposition. *Ibid.*

PLEADINGS—*Continued.*

§ 34. Right to Have Allegations Stricken on Motion.

If a party is entitled to introduce evidence in support of matter alleged in his pleading, it is error for the court to strike such matter, but if the party is entitled under his general or statutory denial to introduce evidence in regard to the facts alleged without the necessity of alleging them, the striking of the allegations is not prejudicial. *Gamble v. Stutts*, 276.

Allegations which are irrelevant or evidentiary are properly stricken on motion. *Toone v. Adams*, 403.

PRINCIPAL AND AGENT.

§ 5. Scope of Authority.

Declarations by a broker as to the quantity and condition of the land, made in negotiations with a prospective purchaser, are within the scope of his employment and are competent in evidence against his principals. *Norburn v. Mackie*, 16.

A party relying upon the authority of an agent to act for his principal must ascertain the extent of such agent's authority, but the principal is liable not only for acts expressly authorized but also for acts within the apparent scope of the authority with which the principal has clothed the agent. *Nationwide Homes v. Trust Co.*, 79.

Where a contractor knows that the building committee of a church is limited to a specified sum in contracting for a building, the contractor cannot assert a claim for building the church in a sum in excess of the known limitation of authority. *Barger v. Krimminger*, 596.

§ 8. Knowledge of Agent as Knowledge of Principal.

As a general rule, a principal is chargeable with and bound by the knowledge of or notice to his agent while the agent is acting within the scope of his authority and in reference to matters over which his authority extends, although the agent does not in fact inform his principal thereof. *Norburn v. Mackie*, 16.

§ 9. Liability of Principal for Torts of Agent.

A a general rule, the principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority, even though the principal did not know of or authorize the commission of the fraudulent acts. *Norburn v. Mackie*, 16.

§ 11. Liabilities of Agent to Third Persons.

A person is personally liable for a fraud committed by him notwithstanding that he was acting as agent for another. *Norburn v. Mackie*, 16.

PROCESS.

§ 2. Issuance and Service in General.

A summons which is not delivered to the sheriff or to someone for him expressly or by implication, but is delivered by the clerk to the attorney for

PROCESS—*Continued.*

plaintiff, and retained in the possession of the attorney, is not issued. *Deaton v. Thomas*, 565.

§ 3. Alias and Pluries Summons and Extension of Time for Service.

In order for plaintiff to be entitled to an extension of time for service of summons under G.S. 1-95, it is necessary that the clerk endorse the extension of time upon a live summons, G.S. 1-89, and where, after the return of the original summons "not to be found" the summons is not again issued by the clerk to an officer for service but is delivered to the attorney for plaintiff, who keeps the summons in his possession for over 90 days, such summons may not thereafter be used as a basis for the issuance of an alias process or an extension of time for service. *Deaton v. Thomas*, 565.

§ 6. Personal Service on Resident Individuals.

Where service of process in a civil action is made upon defendant who is *non compos mentis*, the court correctly refuses to quash the summons and vacate the service, but the court should see to it that defendant is properly represented before any action is taken which is detrimental to his interests. *Bell v. Smith*, 540.

§ 15. Service on Nonresident by Service on Commissioner of Motor Vehicles.

Where, in an action against a nonresident bus owner to recover for the negligent operation of the bus in this State, service on the nonresident is had by service on the Commissioner of Motor Vehicles, G.S. 1-105, the nonresident's motion to quash the service should be denied when the nonresident offers no evidence in support of its allegations that it had leased the bus to be operated solely by and under the exclusive control of a resident corporation and under the resident corporation's franchise right. *Israel v. R. R.*, 83.

QUIETING TITLE.

§ 2. Actions to Remove Cloud from Title.

Plaintiff's proof of a common source of title and that the defendants claim under a tax foreclosure against the title of such common source, with further proof that the tax foreclosure was void, precludes nonsuit. *Collins v. Coleman & Co.*, 478.

RAILROADS.

§ 3. Extent of Title in Right of Way.

A deed reciting that the grantors did "sell and convey" to the grantee a described tract of land, with habendum "to have and to hold the same for railroad purposes in fee simple forever" conveys the fee simple and not a mere easement for railroad purposes. *Craig v. R. R.*, 538.

§ 5. Accidents at Crossings.

A railroad grade crossing is in itself a warning of danger. *Ramey v. R. R.*, 230.

A motorist cognizant of the custom of the railroad to have a flagman at a grade crossing has the right to place some reliance upon the custom, but is not

RAILROADS—*Continued.*

entitled to rely entirely thereon and omit the exercise of all care for his own safety. *Ibid.*

In this action to recover for a collision at a railroad crissing, evidence that the view of an approaching train was obstructed by a bank and vegetation, that it was the custom of the railroad to have a flagman present and have the whistle blow and a bell ring, and stop the train until the flagman waived it to proceed, and that on the occasion in question there was no flagman or sound of whistle or bell, *is held* sufficient to be submitted to the jury on the issue of the railroad company's negligence, and not to show contributory negligence as a matter of law on the part of the motorist. *Ibid.*

REFORMATION OF INSTRUMENTS.

§ 1. For Mutual Mistake.

Whether a party seeking reformation will be denied relief on the ground that he was negligent in failing to read the instrument and discover the mistake at the time the instrument was executed depends on the facts and circumstances of each particular case, including whether the rights of innocent parties intervened and whether the reformation of the agreement will not prejudice the other party but merely require him to conform to the agreement actually made. *McCallum v. Ins. Co.*, 375.

§ 6. Competency and Relevancy of Evidence.

Evidence of the course and dealings between the parties and the terms of related contracts held competent as tending to show that the contract in question was contrary to the previous understanding of the parties. *McCallum v. Ins. Co.*, 375.

REGISTRATION.

§ 4. Priorities.

A mortgagee of an automobile who first registers his instrument has priority over another mortgagee subsequently registering his instrument and who has not transmitted the certificates of title to the Department of Motor Vehicles within ten days. *Trust Co. v. Finance Co.*, 711.

§ 5. Parties Protected by Registration.

An innocent purchaser under the registration laws is one who purchases without notice, actual or constructive, of any defect in his grantor's title and who pays a valuable consideration. *Morehead v. Harris*, 330.

The burden of proof is on the party claiming to be an innocent purchaser to so show. *Ibid.*

A purchaser is charged with notice, not only of the existence and legal effect of every instrument in his grantor's chain of title but, if there is anything therein which would put a reasonable person upon inquiry, of all matters which such reasonable inquiry would have disclosed. Nevertheless he need look only to the muniments of title and he is not required to take notice and examine collateral records, instruments, or documents which are not muniments of his title and which are not referred to by any instrument in his chain of title. *Ibid.*

REGISTRATION—*Continued.*

Where the widow, appointed administrix, purchases the *locus* at the foreclosure sale under a deed of trust executed by herself and her husband, and then deeds is a part of the locus to defendant's grantor, *held* the muniments in defendants' chain of title do not show that the husband was dead at the time of foreclosure or that the purchaser at the foreclosure sale was the widow administratrix, and therefore an examiner would be entitled to assume that the foreclosure cut off any interest of the husband or those claiming under him, and so defendants are not chargeable with the equity of the husband's heirs. *Ibid.*

Even though a grantor cannot convey an estate of greater dignity than the one he has, an innocent purchaser for value is protected by the registration statute and takes free from equities which might have been enforced against his grantor but of which he has no actual or constructive notice. *Ibid.*

ROBBERY.

§ 1. Nature and Elements of the Offense.

Robbery is the taking of money or goods with felonious intent from the person of another, or in his presence, against his will, by violence or putting him in fear, and the felonious intent with respect to the law of robbery is the intent to deprive the owner of his goods and to appropriate them to the defendant's own use. *S. v. Lawrence*, 162.

The violation of G.S. 14-89.1 is a felony, and an indictment therefor which does not contain the word "feloniously" is fatally defective. *S. v. Whaley*, 536.

It is not required as an element of the offense condemned by G.S. 14-87 that any property be actually taken from the victim, and the offense is completed if the defendant either takes or attempts to take personal property from another by the use or threatened use of a dangerous weapon whereby the life of the victim is endangered or threatened. *S. v. Parker*, 679.

In common law robbery and in larceny from the person there must be an actual taking of property, even though the value of the property taken is immaterial, G.S. 14-72; if no property is taken there can be only an attempt to commit the offense, which in itself is an infamous offense. *Ibid.*

§ 2. Indictment.

An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified a sum of money, charges the crime of larceny and not that of robbery, G.S. 14-72, the words "with force and arms" being merely a formal phrase traditionally included in bills of indictment and having no significance as an element of the specific crime charged. *S. v. Acrey*, 90.

§ 5. *Instructions.*

In defining robbery as the felonious taking of personal property from the person of another, or in his presence without his consent, against his will, by violence or putting him in fear, it is proper for the court to explain to the jury that the felonious intent is the intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker, and the failure of the court to do so must be held for prejudicial error when defendant introduces evidence that the taking amounted only to a forceful tres-

ROBBERY—*Continued.*

pass. Further, an instruction that "taking unlawfully" would support conviction, is error. *S. v. Lawrence*, 162.

Where the evidence tends to show an assault with deadly weapons by defendants, inflicting serious injury upon their victim, pursuant to an agreement to rob, but the evidence fails to show that defendants actually took any personal property from their victim, the court is not required to submit the question of defendants' guilt of an attempt to commit common law robbery or an attempt to commit larceny from the person, since an attempt to take personal property from another under the circumstances delineated by G.S. 14-87 constitutes an accomplished offense. *S. v. Parker*, 679.

§ 6. Judgment and Sentence.

Defendant may be sentenced to imprisonment not to exceed thirty years upon conviction of armed robbery. *S. v. White*, 52.

SALES.

§ 5. Express Warranties.

Ordinarily, an express warranty excludes an implied warranty, and while there are exceptions to this rule, a stipulation in the express warranty excluding implied warranties is held valid in almost all cases. *Lilly v. Motor Co.*, 468.

Replacement or adjustment of defective parts in accordance with terms of warranty precludes liability on part of seller. *Ibid.*

§ 13. Rescission and Recovery of Purchase Price.

Where chose tendered is materially different from that agreed upon, purchaser may refuse tender and recover consideration. *Altman v. American Foods, Inc.*, 671.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant.

Defendant, who had paid the person having the lawful possession of a car a sum of money to drive defendant on a trip to get whiskey, may not complain that whiskey belonging to defendant was found in the trunk of the car, without a search warrant, after the person having possession of the car had given the officer permission to search the car, since under the facts defendant is not a lessee of the car and has no right to object to a search. *S. v. Dawson*, 706.

SOCIAL SECURITY.

A county must pay its matching fund for social security payments to Indians residing in a tax exempt reservation. *Board of Public Welfare v. Comrs. of Swain*, 475.

STATE.

§ 5d. Tort Claims Act — Negligence of State Employee and Contributory Negligence of Person Injured.

In these proceedings by the driver and owner of the truck which was struck in its lane of travel by a road roller of the Highway Commission, the evidence

STATE—*Continued.*

is held to support the findings of the Industrial Commission that claimants were injured by the negligence of the Highway Commission and its employees and not to show that claimants were contributorily negligent. *Stuckey v. Highway Comm.*, 620.

STATUTES.

§ 2. Constitution Prohibition Against Enactment of Special or Local Acts Relating to Designated Subjects.

A statute enabling the consolidation of county and city school administrative units under the general laws and the levy of certain taxes for the construction and operation of the schools of the consolidated unit, does not violate Article II, Section 29 of the State Constitution, since it does not in itself undertake to establish or change the lines of a school district but merely provides machinery for action by local units under the general law, and further provisions of the statute requiring that the merger and the levy of the taxes be approved by a vote does not alter this result. *Peacock v. Scotland County*, 199.

TAXATION.

§ 6. Necessary Expenses and Necessity for Vote.

A contract between a county and one of its municipalities to contribute funds for the construction and operation of an airport, without submitting the question to a vote, is invalid, even if the contribution of funds for the construction of the airport is made from nontax revenue, since the contract is indivisible and the pledging of future operating funds is unlimited, and, even if limited to nontax revenue, would be unconstitutional. *Yokley v. Clark*, 219.

Intangible tax receipts of a county may not be treated by it as nontax revenue which it may spend for an unnecessary purpose without a vote, since the State levies and collects such taxes for and on behalf of its political subdivisions. *Ibid.*

Where urban redevelopment plan involves expenditure of tax moneys or unlimited pledge of credit by municipality for purposes which are not necessary governmental expenses, question must be submitted to a vote. *Horton v. Redevelopment Comm.*, 306.

§ 7. Public Purpose.

A municipality may not issue bonds to construct off-street parking lots until there has been an adjudication in a manner provided by law that the construction of such parking lots is for a public purpose in that particular municipality. *Horton v. Redevelopment Comm.*, 306.

§ 20. Exemption of Federal Property from Taxation.

The Federal statute exempting the area within an Indian Reservation from taxation is valid, since title to the property is vested in the United States and is held by it pursuant to a governmental function. *Board of Public Welfare v. Comrs. of Swain*, 475.

§ 34. Suit by Taxpayer to Restrain the Issuance of Bonds or Levy of Tax.

Since a municipality may not spend any revenue derived from taxes as local grants-in-aid for an urban redevelopment project without a vote unless

TAXATION—*Continued.*

such expenditures are for a necessary municipal purpose, and since a municipality is required by statute to provide a legal and feasible plan for the financing of its obligations in connection with a redevelopment project, G.S. 160-463 (d)(7), a municipality should be restrained from the expenditure of any funds or revenues in furtherance of such plan until it is judicially determined that its proposed grants-in-aid are from non-tax revenue and are within its power to provide. *Horton v. Redevelopment Comm.*, 306.

§ 39. Foreclose of Tax Lien.

Proof that a person died intestate in January 1930 renders void an attempted foreclosure of tax liens for the years 1930 and 1931 when neither notice of listing nor foreclosure has been accorded intestate's heirs at law. *Collins v. Coleman & Co.*, 478.

Default judgment on complaint having incomplete verification is not void but is merely irregular. *Walker v. Story*, 707.

Defendant in a tax foreclosure must plead the ten year statute if he relies thereon. *Iredell County v. Crawford*, 720.

§ 42. Validity and Attack of Tax Foreclosure.

Where tax foreclosure of a county and a municipality are consolidated for judgment, which judgment authorizes and directs the commissioner to sell the lands described in the county's action, *held*, the foreclosure, is of the entire tract so described, notwithstanding the commissioner's notice of sale and his report of sale bear caption of the municipal foreclosure, since both refer to the judgment of foreclosure. Therefore, the contention that the commissioner's deed pursuant to the city tax foreclosure could not convey that part of the tract lying outside the municipality is inapplicable. *Walker v. Story*, 707.

TENDER.

Tender of an amount which is insufficient to cover the debt with legal interest from the time the debt was due to the time of tender, may be rejected. *Construction Co. v. Board of Education*, 295.

TORTS.

§ 1. Nature and Elements of Torts in General.

A plaintiff may not create several causes of action out of a single tortious act, nor may he create several causes of action out of a single failure to comply with a contract in its differing terms. *Crouch v. Trucking Co.*, 85.

§ 4. Joinder of Joint Tort Feasors.

A defendant claiming that a third party was solely liable to plaintiff is not entitled to the joinder of such third party, since in such instance defendant cannot claim either the right to contribution or the right to indemnity. *Edwards v. Hamil*, 528.

Only the person joined may object to the joinder on the ground of a prior action pending. *Products Co. v. Christy*, 579.

Where the original defendant has another joined for contribution, the additional defendant and plaintiff are not legal adversaries and have no oppor-

tunity to litigate their rights *inter se*, and therefore plaintiff if successful, is not entitled to a joint and several judgment against both defendants, but is entitled to judgment only against the original defendant, and the original defendant, if successful in his cross action, is entitled to judgment for contribution against the additional defendant. *Shaw v. Eaves*, 656.

§ 7. Releases from Liability and Covenants Not to Sue.

Since there can be only one recovery by the injured party for a single tort, a release of one tort-feasor releases all. *McNair v. Goodwin*, 1.

A covenant not to sue does not extinguish a cause of action for tortious injury, and therefore a covenant not to sue one joint tort-feasor does not release the others, although the others are entitled to a credit for the amount paid as consideration for the covenant on any judgment thereafter obtained against them by the injured party. *Ibid.*

A judgment against one of two or more joint tort-feasors, followed by an acceptance of satisfaction, bars any further legal proceeding against the other tort-feasors even though the judgment attempts to reserve the rights of the injured party against them. *Ibid.*

In a proceeding to obtain authorization of the court for the execution by the guardian *ad litem* for a minor of a covenant not to sue one joint tort-feasor, the order of the court approving the amount and authorizing the guardian *ad litem* to execute the covenant is not a judgment extinguishing the cause of action and barring further proceedings against the other tort-feasors, notwithstanding the order recites the minor's "claim" and "compromise and settlement of the claim." *Ibid.*

Where the language of a release is clear and explicit the courts must declare the plain meaning irrespective of what either party thought the contract to be. *Ibid.*

A contract releasing any and all causes of action whatsoever which the releasor has, or which may thereafter in any way grow out of the accident specified, bars the payee-releasor as well as the payor-releasee from thereafter maintaining a cross-action against the other for contribution pursuant to G.S. 1-240, and further provisions of the release that payment made thereunder should not be construed as an admission of liability and that it was understood that the injuries for which the release was given might be permanent and recovery therefrom uncertain, etc., clarifies rather than restricts the coverage of the release. *Ibid.*

TRESPASS.

§ 1. Trespass to Realty in General.

The person in lawful possession may maintain an action for trespass even though he does not have title. *Short v. Realty Co.*, 576.

§ 12. Criminal Trespass.

The proprietor of a private business has the right to select the clientele he will serve and, if he so desires may arbitrarily exclude from his premises any individual or group of individuals for any reason satisfactory to himself, and his right to be protected against wrongful invasion of his property and his right to maintain undisputed possession is protected by G.S. 14-134, rendering

TRESPASS—*Continued.*

it a criminal trespass for a person to refuse to leave the premises after having been requested to do so by the person in lawful possession. *S. v. Cobb*, 262.

The amusement business is not one affected with a public interest, and therefore the proprietor of a theatre, unlike an innkeeper or public carrier, may admit or exclude any person for any reason satisfactory to himself, *Ibid.*

Where the parties are cognizant of the policy of a theatre to segregate its white and colored patrons, colored persons, having procured tickets previously purchased by a white person, may not assert that as the holder of such tickets they are entitled to be seated in the section reserved for white patrons, and such claim cannot be under a *bona fide* belief that they have a legal right to be seated in the section. *Ibid.*

§ 13. Prosecutions for Criminal Trespass.

Negro cannot be convicted of trespass in refusing to leave restaurant if there is a municipal ordinance requiring segregation. *S. v. Avent*, 425.

A bill of indictment charging that defendant did unlawfully, wilfully and intentionally fail and refuse to leave private property after having been ordered to do so by the person in lawful possession, is sufficient to charge a criminal trespass. *S. v. Smith*, 472.

TRESPASS TO TRY TITLE.

§ 1. Nature and Essentials of Right of Action.

A party may allege ownership of realty and that defendants had trespassed thereon to his damage in a stated amount, or he may allege that he is in lawful possession of land and that defendant had committed trespass against his possession to his damage in a stated amount, in which case plaintiff is not required to prove title but only lawful possession and damages. *Short v. Realty Co.*, 576.

§ 2. Pleadings and Parties.

Allegations to the effect that plaintiffs were the owners of certain land by record title and the owners of contiguous lands by adverse possession, and that defendants had committed several acts of trespass against both tracts constitute but a single cause of action, so there can be neither misjoinder of parties nor causes. *Short v. Realty Co.*, 576.

TRIAL.

§ 3. Time of Trial and Continuance.

Issues in a case are joined from and after the date of the filing of the answer of defendant, and defendant cannot be entitled as a matter of right under G.S. 1-173 to a continuance where the case is set for trial the third week of a term beginning over a month after the issue is joined when defendant is given notice some two weeks prior to the time of trial that plaintiff would withdraw his motion to strike matter from the answer. *Becker v. Becker*, 685.

Amendment to the pleadings will not entitle movant to a continuance when movant himself submits the amendment, certainly where the amendment raises no additional issue of fact. *Ibid.*

TRIAL—*Continued.*

A motion for continuance is addressed to the sound discretion of the trial judge and in the absence of a manifest abuse of discretion his ruling thereon is not reviewable. *Ibid.*

§ 6. Stipulations.

A solemn stipulation of counsel incorporated by the court in its order that plaintiff should recover a stipulated sum for digging a well on defendant's land if a designated party certified, after test, that the well had a stipulated flow of water, is binding on the parties, and judgment for plaintiff entered in accordance with these stipulations and procedure is proper. *Gregory v. Cothran*, 745.

§ 7. Pre-Trial.

While pretrial instruction to the jury is contrary to the usual practice in this jurisdiction, pretrial instructions will not be held prejudicial when they are correct and do not charge upon an abstract principle of law not presented by the evidence. *Hardee v. York*, 237.

§ 15. Objection and Exceptions to Evidence.

G.S. 1-206 is applicable when the evidence is admitted over objection and does not obviate the necessity for an exception when evidence is excluded upon objection of the adverse party. *Barger v. Krimminger*, 596.

§ 18. Province of Court and Jury in General.

It is the province of the court to determine whether the evidence, circumstantial, direct, or a combination of both, considered in the light most favorable to plaintiff, is sufficient to permit a legitimate inference of the facts essential to recovery, and it is the province of the jury to weigh the evidence and determine what it proves or fails to prove. *Thomas v. Morgan*, 292.

Questions of law are for the determination of the court and only issues of fact must be submitted to a jury. *Wescott v. Highway Comm.*, 522.

§ 21. Consideration of Evidence on Motion to Nonsuit.

Since the evidence must be considered in the light most favorable to plaintiff on motion to nonsuit, discrepancies and contradictions in plaintiff's evidence are for the jury to resolve and do not justify nonsuit. *Thomas v. Morgan*, 292.

§ 27. Nonsuit on Affirmative Defense.

Where plaintiff makes out a *prima facie* case, defendant's affirmative defense cannot justify nonsuit when plaintiff has made no admissions in regard to the defense and has offered no evidence to establish it. *Lane v. Coe*, 8; *Wilson v. McClenny*, 121.

§ 32. Form and Sufficiency of Instructions in General.

The fact that the charge of the court is not in the usual form is not ground for objection if the charge fairly applies the law to the ultimate facts which each party, respectively, contends is established by the evidence, and gives proper balance to the opposing contentions. *Davis v. Parnell*, 616.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

Where the court, in applying the law to the facts with reference to the presence of ice and snow, instructs the jury to the effect that plaintiff had the

burden of making out her case "regardless of" the existence of the ice and snow, such instruction must be held for prejudicial error notwithstanding a later correct instruction that the existence of the ice and snow was a circumstance to be considered in determining what care a reasonably prudent person would have exercised under similar circumstances, since it cannot be ascertained which of the conflicting instructions on the material point was followed by the jury. *Hardee v. York*, 237.

In charging the law contained in an applicable statute it is preferable for the court to give a plain and simple application of the principles of law rather than to read to the jury the technical language of the statute. *Cowan v. Transfer Co.*, 550.

§ 34. Instructions on Burden of Proof.

A charge that if the jury should "believe" by the greater weight of the evidence that certain facts existed to answer the issue in the affirmative will not be held for prejudicial error since the jury must have understood and treated the word "believe" to be synonymous with "find." *McPherson v. Haire*, 71.

The charge of the court that the burden is upon plaintiff to satisfy the jury by the greater weight of the evidence of the affirmative of the issues will not be held for error in failing to define "greater weight of the evidence" in the absence of a special request. *Hardee v. York*, 237.

§ 40. Form and Sufficiency of Issues.

Where issues submitted are determinable, refusal of issue tendered will not be held for error. *Mallett v. Huske*, 177. Submission of case to jury on single issue of indebtedness held error. *Piedmont Aviation v. Motor Lines*, 135.

§ 49. New Trial for Newly Discovered Evidence.

A new trial for newly discovered evidence will not ordinarily be granted for evidence which is merely corroborative of the testimony at the trial. *Branch v. Seitz*, 727.

In order to be entitled to a new trial for newly discovered evidence, movant must show that a different conclusion would probably have been reached if the evidence had been available at the trial. *Ibid.*

§ 52. Setting Aside Verdict for Inadequate or Excessive Award.

The amount of damages is to be decided by the jury and not the court, and the court does not commit error in refusing to set aside the verdict on the issues of compensatory and punitive damages because the jury has answered the issues in the sum of one dollar each. *Jones v. Hester*, 487.

§ 56. Trial and Hearing by the Court.

Where different reasonable inferences can be drawn from the evidence in a trial by the court under agreement of the parties, the determination of which inference shall be drawn from the evidence is for the court. *McCallum v. Ins. Co.*, 375.

The rules of evidence are not so strictly enforced in a trial by the court. *Ibid.*

TRIAL—*Continued.*

§ 57. Findings and Judgment in Trial by the Court.

In a trial by the court under agreement of the parties, it is the duty of the court to weigh the evidence and find the facts, including inferences of fact to be found from the facts in evidence. *Taney v. Brown*, 438.

TROVER AND CONVERSION.

§ 2. Actions in Trover and Conversion.

The owner of personalty may recover the value of the property at the time of its conversion with interest but may not recover in addition thereto damages for the loss of the use of the property subsequent to the conversion, and demurrer to the statement of the cause of action to recover for loss of use of the property should be sustained. *Crouch v. Trucking Co.*, 85.

TRUSTS.

§ 5. Construction, Operation and Modification of Trusts for Private Beneficiaries.

Court has authority to authorize trustee to make gifts from incompetent's estate upon findings that incompetent would probably make such gifts if he were competent. *In re Kenan*, 627.

Such modification does not inpair contractual rights. *Ibid.*

VENDOR AND PURCHASER.

§ 1. Requisites, Validity and Construction of Contracts to Sell Realty.

Requirements of statute of frauds see Frauds, Statute of.

A contract to convey realty may be made subject to a condition precedent, as the owner would sell subject to the condition that his wife would "sign the papers"; but when the contract is unconditionally to sell certain lands held by the entireties, the refusal of the wife to join in the deed precludes specific performance but is no defense to an action for damages. *Lane v. Coe*, 8.

§ 3. Description and Amount of Land.

Where, in an action for damages for breach of contract to convey, the purchaser introduces a memorandum signed by defendant describing the lands as house and lots where the vendor's residence is, and the vendor's answer identifies the property by lot number with reference to recorded deeds and a recorded map, and there is competent evidence tending to show that the lots were one connected body of land and that defendant had no other property on the highway specified, *held*, the identity of the land was sufficient as against the vendor's motion for nonsuit. *Lane v. Coe*, 8.

§ 7. Remedies of Purchaser.

Facts that husband is unable to get wife to sign deed to lands held by entireties is no defense to purchaser's action for damages for breach of contract to sell. *Lane v. Coe*, 8.

The measure of damages for breach of contract to convey is the difference between the contract price and the market value of the lands. *Ibid.*

VENDOR AND PURCHASER—*Continued.*

Where there is conflict as to whether the agreement of the purchaser to buy the tract in question was exclusive or inclusive of an encircling road, containing approximately two acres, shown on the map, it is error for the court to instruct the jury in effect that the purchaser would be entitled to a return of his deposit upon the inability of the seller to tender an unencumbered title to the entire tract including the road. *Carver v. Lykes*, 345.

WATERS AND WATERCOURSES.

§ 5. Navigable Waters.

A stream navigable in fact is navigable in law, and its capacity for trade and travel in the usual and ordinary modes is the test and not the extent or manner of such use, and therefore evidence that logs were rafted down a creek to a river is sufficient to sustain a finding that the creek is navigable. *Taylor v. Paper Co.*, 452.

A navigable stream is a public way. *Ibid.*

WILLS.

§ 1. Nature and Requisites of Testamentary Disposition of Property.

Beneficiaries named in a will have no interest in the estate until the death of the testator and therefore are not necessary parties to an action to authorize the guardian of an incompetent to make gifts from the estate in accordance with what the incompetent would probably make if competent. *In re Kenan*, 627.

§ 56. Description of Amount or Share.

By the use of parallel language in two successive residuary clauses testatrix devised one-half of her property not otherwise passing under the will to a named beneficiary and one-half of such property to another named beneficiary, followed by an item devising all of the residue and remainder of her estate to designated persons. *Held:* The last clause would be operative only if prior legacies had lapsed, and the second bequest of half of the residuary estate was of one-half of the entire residuary estate and not only a fourth thereof. *Burton v. Hyder*, 733.

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G.S.

1-15. Statute of limitations cannot be taken advantage of by demurrer or motion to bar the action. *Iredell County v. Crawford*, 720.

1-53(4). Action for wrongful death must be brought within two years and if so brought may be maintained against estate of tort-feasor even though administratrix thereof has been discharged. *In re Miles*, 647.

1-89, 1-95. In order for extension of time for service under the statute it is necessary that clerk endorse the extension upon a live summons. *Deaton v. Thomas*, 565.

1-104. Nonresident beneficiaries given notice may not object that they were not parties to action to authorize trustees to make gifts to charity from incompetent's estate. *In re Kenan*, 627.

1-105. Bus owner served under statute has burden of showing that it had leased the bus to be operated only by and under the exclusive control of the resident's franchise rights in order to be entitled to quashal. *Israel v. R. R.*, 83.

1-153. Allegations which are irrelevant are properly stricken. *Toone v. Adams*, 404.

1-159. Admission in answer of truth of facts alleged establishes such facts. *Carver v. Lykes*, 345.
New matter alleged in answer deemed controverted without necessity of reply. *Wescott v. Highway Comm.*, 522; *Gamble v. Stutts*, 276.

1-183. Question of sufficiency of evidence is for court in trial by court under agreement of the parties. *Taney v. Brown*, 438.

1-185. In trial by court, the court is required to state only ultimate facts. *McCallum v. Insurance Co.*, 375.

1-206. Is applicable only when evidence is admitted over objection and does not obviate necessity for exception when evidence is excluded upon objection of adverse party. *Barger v. Krimminger*, 596.

1-211(1). Does not apply to tax foreclosure. *Walker v. Story*, 707.

1-240. Defendant who is secondarily liable may have defendant primarily liable joined regardless of statute. *Edwards v. Hamil*, 528.
Release bars payee-releasor as well as payor-releasee from maintaining cross-action against the other for contribution. *McNair v. Goodwin*, 1.

1-241, 2-3. Statutory duty of clerk to receive fines, penalties, costs, etc. carries with it the duty to pay sums collected to parties entitled thereto. *McMillan v. Robeson County*, 413.

1-260. Cause remanded for joinder of necessary parties. *McMillan v. Robeson County*, 413.

6-20. Apportionment of costs upon abatement of public nuisance rests in discretion of court. *Morris v. Shinn*, 88.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

7-201. Failure of judge to sign the minutes does not affect validity of judgment for less than capital offense. *S. v. Dawkins*, 298.

8-4. Courts are required to take jurisdictional notice of statutes of a sister state. *Kirby v. Fulbright*, 144.

8-46, 50-10. Husband may not testify as to alleged adulterous conduct of wife. *Becker v. Becker*, 685.

8-53, 8-89. Insured held to have waived statutory privilege with respect to hospital records, but whether hospital should be required to produce the record not presented. *Johnston v. Insurance Co.*, 253.

9-1, 9-3, 9-4, 9-7, 9-24. Statutory provisions for selection of jurors are constitutional, *S. v. Wilson*, 419.

11-11. Grand jurors' oath of secrecy does not preclude court from calling on jurors to testify in regard to charge of undue influence. *S. v. Colson*, 506.

14-54. Breaking is not an essential element of the offense. *S. v. Vines*, 747.

14-62. Evidence of guilt of arson held sufficient. *S. v. Moore*, 431.

14-72. Indictment charging that defendant "with force and arms" feloniously stole, etc., charges larceny and not robbery. *S. v. Acrey*, 90.

14-72, 14-3. Common law robbery and larceny from the person require that property of some value be taken from the victim. *S. v. Parker*, 679.

14-87. Sentence for armed robbery is for term not exceeding 30 years. *S. v. White*, 52.

It is not required to complete the offense that any property be taken from victim. *S. v. Parker*, 679.

14-89.1. Indictment must contain the word "feloniously." *S. v. Whaley*, 536.

14-134. Proprietor of private business may arbitrarily exclude from premises any individual or group for any reason. *S. v. Cobb*, 262.

14-197. Indictment which fails to charge that profane language was spoken on a public road or highway is insufficient. *S. v. Smith*, 472.

14-202. Failure to have blinds completely cover window is irrelevant in a prosecution under the statute. *S. v. Bivins*, 93.

14-223. Warrant must identify the officer by name and indicate official duties he was discharging. *S. v. Smith*, 472.

14-336(12). Jail sentence of two years upon conviction of fifth offense of public drunkenness within 12 month period is authorized. *S. v. Driver*, 92.

15-152. Indictments may be consolidated for trial when offenses are so connected that evidence in trial of one would be competent on the trial of the other. *S. v. Morrow*, 592.

15-200.1. Notice of proceeding to invoke suspended sentence held sufficient. *S. v. Dawkins*, 298.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

15-200.2. On appeal from order of inferior court revoking suspended sentence, the hearing is *de novo* and jurisdiction of Superior Court is derivative and limited to whether defendant had violated term of suspension. *S. v. Dawkins*, 298.

15-217. Defendant obtaining new trial under Post Conviction Hearing Act accepts hazard that second sentence may exceed the first. *S. v. White*, 52.

17-39, 50-13, 110-21. Juvenile court has exclusive jurisdiction to award custody of adopted child. *In re Custody of Simpson*, 206.

20-28(a). Does not prevent mortgagee having actual possession from acquiring lien having priority over other liens not then perfected. *Trust Co. v. Finance Co.*, 711.

20-71.1. Owner-occupant is ordinarily responsible for driver's negligence. *Randall v. Rogers*, 544.

20-138. If person is "drunk" he is perforce "under the influence." *S. v. Stephens*, 45.

20-140. Evidence of culpable negligence in striking boys on highway held sufficient. *S. v. Colson*, 506.

20-149(b). Instruction held not to charge that violation of statute would constitute negligence *per se*. *Cowan v. Transfer Co.*, 550.

20-154(a). Evidence held not to show contributory negligence as a matter of law in making left turn. *McNamara v. Outlaw*, 612.
Evidence held not to disclose a violation of the statute as a matter of law. *Cowan v. Transfer Co.*, 550.

20-174(a). Pedestrian crossing highway at place not a crosswalk or marked intersection must yield right of way to vehicular traffic. *Blake v. Mallard*, 62.

20-279.21(f)(3). Payment by insurer does not preclude insured from maintaining an action for negligence. *Gamble v. Stutts*, 276.

22-1. Statute does not apply to original promise. *Piedmont Aviation v. Motor Lines*, 135.

22-2. Sufficiency of memorandum to repeal statute of frauds. *Lane v. Coe*, 8.

28-173, 28-174. Action for wrongful death is statutory and survives death of tort-feasor. *In re Miles*, 647.

29-1(1). Proof of death, without more, raises presumption that person died intestate. *Collins v. Coleman & Co.*, 478.

38-1. Petition failing to allege what boundary is in dispute and which fails to locate any lines as claimed by petitioner is fatally defective. *Pruden v. Keemer*, 212.

40-12. It is contrary to the usual practice for controversy as to location of land to be settled in condemnation proceedings. *Light Co. v. Creasman*, 390.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

40-19, 40-24. Court may tax counsel fees as part of costs in eminent domain only in regard to counsel appointed by court to protect rights of parties unknown. *Light Co. v. Creasman*, 390.

41-2. Statute does not prohibit written contract providing for survivorship. *Vettori v. Fay*, 481.

48-12, 48-27. Clerk has the exclusive jurisdiction in adoption proceedings. *In re Custody of Simpson*, 206.

49-2. Court may enter judgment upon special verdict provided it finds all essential facts. *S. v. Ellis*, 446.

50-10. Defendant waives right to trial by jury in divorce action for separation when he fails to file apt request therefor. *Becker v. Becker*, 685.

50-16. Wife may institute action in county in which they were living at time of husband's abandonment. *Robbins v. Robbins*, 749.
Superior Court has jurisdiction to award custody of child of marriage when no writ of *habeas corpus* has been filed. *Ibid.*

52-18. Statute curtails to a considerable degree the doctrine of *ultra vires*. *Piedmont Aviation v. Motor Lines*, 135.

55-24(a), 55-73(a), 55-73(c). Preincorporation agreement that promoters would use influence to elect each other to corporate office not void. *Wilson v. McClenny*, 121.

55-35. Directors owe duty of fidelity to corporation. *Wilson v. McClenny*, 122.

55-36(e). Alterations in deed of a corporation initialed by its president and redelivered by grantee is binding on the corporation. *Kerchel v. Mercer*, 243.

53-52, 55-36(e). Bank may not rely on authority of depositing agency to draw check on the account. *Nationwide Homes v. Trust Co.*, 79.

78-23. Officers and directors of corporation actively participating in activities of corporation in violation of Securities Law may be held criminally liable individually. *S. v. Franks*, 94.

78-3, 78-4. Security deputy may testify that security was not exempt from registration and that transaction in question was not exempt. *S. v. Franks*, 94.

93A-6. Charge of conduct constituting ground for revocation of real estate broker's license is predicate for action for malicious prosecution. *Carver v. Lykes*, 345.

97-2(5), 97-38. Salary of casual employee surreptitiously employed by truck driver to aid in unloading truck on interstate run must be computed on basis of wage actually paid and not minimum under Fair Labor Standards Act. *Lovett v. Mfg. Co.*, 288.

97-2(6). Injury to employee while swimming in pool at recreational inn at which he had attended sales meeting, held not to arise out of employment. *Perry v. Bakeries Co.*, 272.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

97-10.1. Superior Court properly dismisses action on findings disclosing original jurisdiction of Industrial Commission. *Burgess v. Gibbs*, 462.

105-198. Intangible taxes received by county are tax revenue. *Yokley v. Clark*, 218.

105-208. Foreclosure of tax liens for year in which tax payer named in the action was dead at time of attachment of the lien is void. *Collins v. Coleman & Co.*, 478.

105-422. Defendant may not avail himself of statute when he fails to plead it. *Iredell County v. Crawford*, 720.

108-23, 108-24, 108-47, 108-73.2. County must pay its part of matching funds for Social Security payments to Indians residing within its boundaries. *Board of Public Welfare, v. Comrs. of Swain*, 475..

110-40. Juvenile court has exclusive jurisdiction as to custody of child between manager of foster home and person with whom county superintendent of welfare has placed child for adoption. *In re Custody of Simpson*, 206.

114-110. Issue of *respondeat superior* held for jury in action against motel for motel manager's prosecution of guest for refusing to pay bill without deducting unwarranted charge. *Ross v. Dellinger*, 589.

116-1, 116-3, 116-4, 116-10, 116-11. Disciplinary authority of Trustees of University of North Carolina. *In re Carter*, 360.

136-10. State Board of Elections may go behind primary returns and determine nominee. *Ponder v. Joslin*, 496.

136-19, 40-16. Condemnation for highway governed by statute relating to eminent domain as near as may be. *Wescott v. Highway Comm.*, 522.

136-26, 136-18(5), 136-18(18). Commission's requirements with reference to signs of contractor are for protection of users of highway and do not confer upon the contractor special privileges in respect to right of way. *Mangum v. Gasperson*, 32.

136-67. Segment of old highway becoming neighborhood public road may be barricaded by Highway Commission at its intersection with limited access highway. *Snow v. Highway Comm.*, 169.

136-69. Access to navigable water is sufficient access for transportation of timber. *Taylor v. Paper Co.*, 452.

136-89.48, 136-89.53. Highway Commission has authority to eliminate grade crossing at intersection. *Snow v. Highway Comm.*, 169.

136-108. Statute does not apply to proceeding instituted prior to 1 July 1960. *Wescott v. Highway Comm.*, 522.

143-307. *Certiorari* lies to review order of Board of Trustees of University of North Carolina. *In re Carter*, 360.

143-307, 143-309. Only Superior Court of Wake County has jurisdiction to re-

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view order of County Board of Elections. *Ponder v. Joslin*, 496; *Payne v. Ramsey*, Appendix, 757.

153-87. Portion of county's debt incurred under statute exempting it from the limitation is not to be included in computing amount of debt reduction. *Peacock v. Scotland County*, 199.

153-266.17. County held entitled to enjoin violation of zoning regulation by property owner failing to follow procedure to present defense that ordinance was void. *Durham County v. Addison*, 280.

160-151, 160-162, 160-184, 14-4. Plaintiff held not to have shown danger of irreparable injury so as to be entitled to injunctive relief against enforcement of building code ordinance. *Walker v. Charlotte*, 697.

160-172. Municipalities have only such powers as are delegated to them. *Schloss v. Jamison*, 108.

160-200(9). Zoning ordinances may properly prohibit signs advertising goods or services not offered on premises. *Schloss v. Jamison*, 108.

160-397. Water and sewer receipts may not be treated as surplus funds until all expenses of water and sewer facilities are paid. *Yokley v. Clark*, 218.

160-456(q2). Findings held insufficient for judicial determination whether city could condemn easement for plaza over railroad. *Horton v. Redevelopment Comm.*, 306.

160-463(7). Municipality should be restrained from expending funds for urban redevelopment until it is shown that all constitutional and statutory requirements have been met. *Horton v. Redevelopment Comm.*, 306.

160-466. Statute merely provides alternate method for sale of bonds. *Horton v. Redevelopment Comm.*, 306.

160, Art. 34. City may not issue bonds for off-street parking until there is adjudication that purpose is a public purpose in that particular municipality. *Horton v. Redevelopment Comm.*, 306.

160-470. Requires observance of constitutional limitations and, therefore, is valid. *Horton v. Redevelopment Comm.*, 306.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, §§ 11, 13. Court may enter judgment on special verdict without a general verdict of guilty. *S. v. Ellis*, 446.

I, § 17. Statutory provisions for selection of jurors are constitutional. *S. v. Wilson*, 419.

Constitutional protection against deprivation of property applies to interest as well as principal. *McMillan v. Robeson County*, 413.

I, § 19. Where title is disputed in condemnation proceedings, respondent is entitled to determination by jury. *Wescott v. Highway Comm.*, 522.

II, § 29. Statute authorizing consolidation of school administrative units does not change boundaries by special act. *Peacock v. Scotland County*, 199.

IV, § 6. Disciplinary authority of Trustees of University of North Carolina. *In re Carter*, 360.

VII, § 6. Whether expenditures in connection with urban redevelopment are for necessary expense requiring vote. *Horton v. Redevelopment Comm.*, 306.

Contract for operation of public airport without submitting question to voters is void. *Yokley v. Clark*, 218.

IX, § 7. University must be a party when question of *escheats* arises. *McMillan v. Robeson County*, 413.

X, § 6. Subsequent marriage of grantee in deed conveying joint tenancy does not sever unity of title. *Vettori v. Fay*, 481.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

Fourteenth Amendment. Statutory provisions for selection of jurors are constitutional. *S. v. Wilson*, 419.