

Supreme Court of North Carolina.

PARMELE

v.

EATON.

No. 593

July 9, 1954

Suit for specific performance of contract for sale of land. The Superior Court, New Hanover County, Clifton L. Moore, J., heard case without jury, and entered judgment directing that vendee accept vendor's tender of deed and comply with the terms of contract and defendant appealed. The Supreme Court, Johnson, J., held that the land in question when conveyed by State Board of Education to vendor's predecessors in title, was a part of a tract of marsh land in excess of 2,000 acres, and that no part of the land was covered by waters navigable in fact. Judgment affirmed.

Where land sought to be conveyed was only a small portion of marsh land involved in former decision that land was covered by navigable waters and not subject to grant by State Board of Education, and was purchased by vendor after passage of statute validating conveyance of such land by State Board of Education, vendor was not estopped from asserting and proving marketable title. Laws 1953, c. 966.

The tract of land in suit is located along the northern extension of Wrightsville Beach in New Hanover County. It is shown within the dotted lines on the accompanying exhibits. At low tide the land is completely exposed, but at high tide it is covered by tidal waters from Banks Channel, shown on aerial photograph, Exhibit B. The plaintiff claims title through mesne conveyances from (1) the State of North Carolina and (2) the State Board of Education of North Carolina. The locus in quo constitutes about one-third of the lands involved in the previous action entitled Resort Development Company v. Parmele, the appeal from which was heard and determined in this Court at the Spring Term, 1952, and is reported in **235 N.C. 689, 71 S.E.2d 474**. An examination of the statement of facts and opinion of the Court in that case will serve to point up material differences in the facts there agreed and those here developed and found.

The plaintiff, being under contract (dated November 1, 1953) to convey to the defendant the locus in quo, tendered deed sufficient in form to vest in defendant fee-simple title to the property. The defendant refused tender, alleging title offered to be defective on these grounds: (1) that the land is covered by navigable waters and therefore was not subject to grant by the State of North Carolina or to sale and conveyance by the State Board of Education; and (2) that the plaintiff is estopped by the decision of this Court in Resort Development Company v. Parmele, supra, to assert title to the property.

The trial court, after hearing the evidence offered by the parties, found facts, made conclusions of law, and entered judgment, the gist of which follows:

CONCLUSIONS OF LAW.

- '1. That the locus in quo is a part of a continuous area in excess of 2,000 acres of marsh land.
- '2. That no part of the locus in quo is or was covered at any state of the tide by waters which are navigable in fact.
- '3. That the plaintiff B. J. Parmele is neither estopped by the former judgment in Development Company v. Parmele nor by his conduct to prosecute this case.
- '4. That by virtue of the deeds from the State of North Carolina, the State Board of Education of North Carolina and Chapter 966 of the 1953 Session Laws of North Carolina, the plaintiff is vested with a good and marketable title to the locus in quo and can convey the same to the defendant herein.'

342 N.C. 287, 464 S.E.2d 674
N.C., 1995.
December 08, 1995 (Approx. 16 pages)

342 N.C. 287, 464 S.E.2d 674

Supreme Court of North Carolina.

Richard Barbee **GWATHMEY**, Jr., and wife, Gwendolyn Brown **Gwathmey**, Robert F. Cameron and wife, Elizabeth Beck Cameron, and Elizabeth Beck Cameron, Louise deR. Smith, Robert Y. Kelly and wife, Elsie W. Kelly, and in the Matter of Wachovia Bank of North Carolina, N.A., Edith R. Merrill and Barbara M. Walser, Trustees Under the Will of Leslie M. Merrill

v.

The **STATE** of North Carolina, acting through its agency, the DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, acting through its Secretary, William W. COBEY, Jr., and the Division of Marine Fisheries, acting through its Director, Dr. William T. Hogarth, and the Submerged Lands Program, acting through its Director, P.A. Wojciechowski.

No. 74PA94.
Dec. 8, 1995.

Owners of marshlands filed separate actions against state, seeking determination of quality of their titles to marshlands and other relief after state purported to reserve public trust rights in marshlands. After consolidation, the Superior Court, New Hanover County, [G.K. Butterfield](#), J., denied state's motion for summary judgment and James D. Llewellyn, J., entered judgment for owners after trial. State gave notice of appeal, and petition for discretionary review prior to determination by Court of Appeals was allowed. The Supreme Court, Mitchell, C.J., held that: (1) lunar tides test under English common law did not determine navigability for purposes of determining whether land under water was subject to public trust doctrine, abrogating [Hatfield](#), [29 N.C. 139](#), [Parmele](#), [235 N.C. 689](#), [71 S.E.2d 474](#); (2) if body of water in its natural condition could be navigated by watercraft, then it was navigable in fact and in law, and lands lying beneath it were thus subject to public trust doctrine; (3) no statute ever expressly granted State Board of Education (SBE) fee simple title to marshlands free of all public trust rights and, thus, SBE's sales of marshlands to owners' predecessors could not convey title free of public trust rights to extent that marshlands were covered by navigable waters; and (4) statute expressly reserving public trust rights in marshlands did not impose any public trust rights on marshlands not covered by navigable waters.

Judgment vacated and case remanded.

Supreme Court of North Carolina.

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On discretionary review pursuant to **N.C.G.S. § 7A-31**, prior to a determination by the Court of Appeals, of a judgment for the plaintiffs entered by Llewellyn, J., on 12 August 1993 in Superior Court, New Hanover County. Heard in the Supreme Court 11 January 1995.

Stephens, McGhee, Morgan, Lennon & O'Quinn by **Janet R. Coleman** and **Darren S. Hart**, Wilmington, for plaintiffs-appellees.

Michael F. Easley, Attorney General by **Daniel F. McLawhorn** and **J. Allen Jernigan**, Special Deputy Attorneys General, and **David W. Berry**, Associate Attorney General, for defendant-appellant.

Thompson & Godwin, L.L.P. by **Billy R. Godwin, Jr.**, Dunn, and by Robert Kerry Kehoe, counsel, Washington, DC, on behalf of Coastal States Organization, Inc., amicus curiae.

MITCHELL, Chief Justice.

The parties stipulated at trial that the lands claimed by each of the plaintiffs that comprise the subject of this litigation are marshlands located between the high and low water marks in the Middle Sound area of New Hanover County. Title to the lands in question was conveyed by the State Board of Education (SBE) to the original purchasers of the marshlands between 1926 and 1945. Each of the deeds from the SBE to the original purchasers purports to convey a tract of "marshland" in the "Middle Sound" area to the purchasers, their "heirs and assigns in fee simple forever."^{FN1} The parties stipulated that each of *291

(Cite as: 342 N.C. 287, *291, 464 S.E.2d 674, **676)

the plaintiffs could establish a chain of title linking their deeds to the source deeds from the SBE, with one exception.^{FN2}

FN1. The quoted language appears in each of the deeds except for the SBE deed to Paul Rogge through which the plaintiffs Cameron claim a portion of their land. The Rogge deed uses the word "land" instead of "marshland." That deed also has the words "heirs and assigns" and later states that Rogge receives the land "in fee simple." The other deeds use the language "heirs and assigns in fee simple forever," all in one sentence.

FN2. We deal with the status of plaintiff Louise deRosset Smith's chain of title below in our discussion of the relevant issue presented by this appeal.

In 1965, the General Assembly enacted **N.C.G.S. § 113-205**, which required individuals who claimed any part of the bed lying beneath navigable waters of any coastal county to register their claims with the Secretary of the Department of Natural Resources by 1 January 1970, or their claims would be null and void. The plaintiffs in this case, or their predecessors in interest, registered their claims in compliance with this statute. The parties stipulated that the plaintiffs' submerged lands claims, as originally filed, included both marshlands lying between the mean high and mean low water marks of Middle Sound and lands beyond the mean low water mark that lie beneath the open waters of Middle Sound or Howe Creek. In 1987, the Submerged Lands Program, which was established to assess the validity of the claims of title previously registered pursuant to **N.C.G.S. § 113-205**, came under the administration of the Division of Marine Fisheries. In assessing the plaintiffs' claims, the Division of Marine Fisheries issued resolution letters concluding that the plaintiffs had valid titles to the marshlands between the mean high and mean low water marks. However, pursuant to **N.C.G.S. § 146-20.1(b)**, the resolution letters purporting to validate the plaintiffs' titles to the marshlands were accompanied in each case by a purported reservation of public trust rights in those same marshlands. The plaintiffs responded by filing separate complaints against the State between 26 February 1991 and 31 May 1991, in Superior Court, New Hanover County, seeking a determination of the quality of their titles to the marshlands and other relief. The plaintiffs' actions were consolidated by consent of all the parties following filing of the State's answer.

The State made a motion in the Superior Court for summary judgment on the ground **677

(Cite as: 342 N.C. 287, *291, 464 S.E.2d 674, **677)

that waters covering the lands in question are subject to the ebb and flow of the tides and are, thus, navigable as a matter of law. The State argued that, as the waters are navigable in law, title to the land beneath those waters is governed by the public trust doctrine, and such land is not subject to fee simple ownership by the plaintiffs. Judge G.K. Butterfield, Jr., denied the motion in an order concluding that the test for determining navigability in law in North Carolina is “navigability in fact.”

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(Cite as: 342 N.C. 287, *292, 464 S.E.2d 674, **677)

This case then came on for trial without a jury in the Superior Court, New Hanover County, before Judge James D. Llewellyn. The trial court entered judgment for the plaintiffs on 12 August 1993.

The trial court found from substantial evidence before it that at low tide no boat of any size could navigate in the marshlands claimed by the plaintiffs, except in dredged channels. The trial court also found that “as to the marshlands claimed by Plaintiffs, at high tide the area covered by marsh grass is not navigable.” Based upon its findings, the trial court concluded as a matter of law that no part of the marshlands on Middle Sound within the boundaries of the plaintiffs' deeds is covered by waters navigable in fact; therefore, those lands are not covered by waters that are navigable in law. The trial court further found that the open waters of Howe Creek are navigable in fact based upon actual current and historical use and, therefore, concluded that those open waters are navigable as a matter of law. The trial court also concluded that no public trust rights existed in the marshlands claimed by the plaintiffs and that the SBE had conveyed fee simple title to those lands to the plaintiffs' predecessors in title without reservation of any public trust rights. However, the trial court concluded that as to the land lying beneath the open waters of Howe Creek, the SBE had conveyed title subject to public trust rights. The trial court further concluded that “the ‘Declaration of Final Resolution’ recorded by the Defendant is a cloud upon each Plaintiff's title and is ineffective as a recognition of any right, title or interest of the public in the marshlands.” The trial court then concluded that as the plaintiffs' marshlands were not beneath waters navigable in law, **N.C.G.S. § 146-20.1(b)** is “invalid as it purports to impress upon the marshlands owned by Plaintiffs public trust rights which did not exist in said lands at the time they were conveyed to Plaintiffs' predecessors in title.”

Based upon its findings and conclusions, the trial court ordered, adjudged, and decreed that the plaintiffs were owners in fee simple absolute without any reservation of public trust rights of the “certain tract of marshlands described” in each of their deeds. With regard to the claims of the plaintiffs Richard and Gwendolyn Gwathmey, however, the trial court adjudged and decreed that “those areas of deeded bottom lying beneath the open waters of Howe Creek and within the boundaries of Plaintiffs' [Gwathmey] deed are owned in fee simple subject to the public trust.”

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(Cite as: 342 N.C. 287, *293, 464 S.E.2d 674, **677)

The defendant State of North Carolina gave notice of appeal. On 7 April 1994, this Court allowed the defendant's petition for discretionary review prior to a determination by the Court of Appeals.

Before addressing the specific issues raised on this appeal, we will briefly discuss the public trust doctrine and the operation of the entry laws in North Carolina. A brief introductory review of these two areas of the law at this point will facilitate an understanding of the issues raised on this appeal.

This Court has long recognized that after the Revolutionary War, the State became the owner of lands beneath navigable waters but that the General Assembly has the power to dispose of such lands if it does so expressly by special grant. *E.g.*, ***Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 524, 44 S.E. 39, 41 (1903)**. However, “[l]ooming over any discussion of the ownership of estuarine marshes is the ‘public trust’ doctrine—a tool for judicial review of state action affecting State-owned submerged land underlying navigable waters, including estuarine marshland, and a concept embracing asserted inherent public rights in these lands and waters.” Monica Kivel Kalo & Joseph J. Kalo, **678



[3] The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: “ ‘If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.’ ” *Id.* at 608-09, 48 S.E. at 588 (quoting *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)). In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. For the foregoing reasons, the State's assignment of error is without merit.

In *State v. Twiford*, 136 N.C. 603, 48 S.E. 586, this Court said: “Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet.” *Id.* at 609, 48 S.E. at 588. To the extent that this statement in *Twiford* can be read expansively to indicate that the General Assembly does not have the power to convey lands underlying navigable waters in fee, it too was mere *obiter dictum*, unsupported by our laws or our Constitution, and is hereby expressly disapproved.

Young v. City of Asheville

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241 N.C. 618, 86 S.E.2d 408
N.C. 1955
March 23, 1955 (Approx. 8 pages)

Supreme Court of North Carolina.

O. F. YOUNG

v.

CITY OF ASHEVILLE, a municipal corporation, The Beaverdam Water and Sewer District, a Municipal Corporation, and John C. Vance, Coke Candler and George D. Young, County Commissioners, as Trustees of The Beaverdam Water and Sewer District.

No. 103

March 23, 1955

Lessee brought action against city and water and sewer district to recover damages for loss of vegetable crops because of pollution of creek, the waters of which lessee used to irrigate his crop. The Superior Court of Buncombe County, Dan K. Moore, J., entered judgment adverse to city and district, and they appealed. The Supreme Court, Parker, J., held that where lessee made no allegation in his complaint that he or his lessor was a riparian proprietor, no allegation nor proof that he or his lessor had acquired right to use waters of creek to irrigate his crops by prescription or adverse user, and introduced no proof that he or his lessor had authority and license from third party, as alleged riparian owner, and his successors in title, to use waters of creek for irrigation, lessee failed to show that he had right to have waters of creek flow with undiminished quantity and unimpaired quality, and that therefore lessee could not maintain action against city and district for damage to lessee's vegetable crop.

Judgment reversed.

Where lessee made no allegation in his complaint that he or his lessor was a riparian proprietor, no allegation nor proof that he or his lessor had acquired right to use waters of creek to irrigate his crops by prescription or adverse user, and introduced no proof that he or his lessor had authority and license from third party, as alleged riparian owner, and his successors in title, to use waters of creek for irrigation, lessee failed to show that he had right to have waters of creek flow with undiminished quantity and unimpaired quality, and therefore lessee could not maintain action against city and water and sewer district for damage to lessee's vegetable crop because of pollution of creek waters used by lessee in irrigating.

Pendergrast v. Aiken

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293 N.C. 201, 236 S.E.2d 787

N.C. 1977.

August 23, 1977 (Approx. 13 pages)

Upstream property owners brought action against adjoining downstream property owners seeking to recover for flood damage allegedly caused by nuisance on defendants' property. The Superior Court, Buncombe County, Harry C. Martin, J., entered judgment for defendants on verdict finding that defendants had created a nuisance but did not thereby cause damage to plaintiffs' property, and plaintiffs appealed. The Court of Appeals, [32 N.C.App. 89, 231 S.E.2d 183](#), upheld the judgment and plaintiffs appealed. The Supreme Court, Huskins, J., held that (1) with respect to surface water drainage, court would adopt rule that each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage; (2) trial court's juxtaposition of reasonable use and civil law concepts in charge placed contradictory instructions before the jury and was erroneous; (3) it was error to instruct jury that it might answer issue as to creation of nuisance "Yes" and issue as to damage "No," and (4) evidence did not support supplemental instruction that inadequate drainage from defendants' land rather than defendants' installation of inadequate culvert prior to filling in creek bed may have caused flooding of plaintiffs' land.

New trial.

71 N.H. 186, 51 A. 911
N.H. 1901.
December 23, 1901 (Approx. 3 pages)

Where a bill by a city alleges that defendants, being the owners of land adjoining a highway, across which and onto defendants' land surface waters naturally flowed, and that the city built culverts across the highway, conveying the water onto defendants' land in natural depressions, and defendants had placed earth on their land, stopping the flow of the water and damaging the highway, the city, being a coterminous owner, may maintain such bill, as it is entitled to the same relief with reference to surface waters as an individual landowner.

WALKER, J.

"The doctrines of reasonable necessity, reasonable care, and reasonable use prevail in this state in a liberal form, on a broad basis of general principle." [Haley v. Colcord, 59 N.H. 7, 8, 47 Am.Rep. 176.](#) In [Thompson v. Improvement Co., 54 N.H. 545, 551,](#) it is said: "Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations, necessary for the highest enjoyment of land by the entire community of proprietors." "Whatever may be the law in other jurisdictions, it must be regarded as settled in this state that the test is the reasonableness or unreasonableness of the business in question under all the circumstances. The owner may put his land or other property to any use not unlawful which, in view of his own interest and that of all persons affected by it, is a reasonable use. For the consequence to others of such a use he is not responsible. The question of reasonableness is a question of fact." [Ladd v. Brick Co., 68 N.H. 185, 186, 37 Atl. 1042.](#) "As a general rule, every person has the right to subject his property to such uses as will, in his judgment, best subserve his interests. This rule has its exceptions, however, for it is doubtless true that every one is bound to make a reasonable use of his own property so as to occasion no unnecessary damage to others; but what constitutes such a use cannot be precisely defined, and must depend upon the circumstances of each case." [Lane v. City of Concord, 70 N.H. 485, 488, 489, 49 Atl. 689.](#) These essential principles relating to the use and enjoyment of property are sometimes overlooked or treated as impracticable generalities by a literal application of the maxim, "Cujus est solum ejus est usque ad coelum" ([Shane v. Railroad Co., 71 Mo. 237, 244, 36 Am.Rep. 480,](#) and especially is this observable in cases involving the right to the use, management, and control of surface water. If the owner of land has absolute and unlimited dominion thereof, wholly independent and irrespective of his neighbors' enjoyment of their contiguous lands, he may with impunity wholly prevent the natural flow of surface water upon his land, and cause it to flow back upon the adjacent owner's land by means of an embankment or other obstruction erected upon the division line; and he would be entitled to thus inflict immense damage upon others' property, not because he might derive some advantage from the operation, or because it is a reasonably necessary method of developing and improving his land, but merely because the land is his. Upon this theory he "may make erections or excavations thereon to any extent whatever. Within his own limits, he can control not only the face of the earth, but everything under it and over it. Thereby the estate of another may be in various ways injuriously affected. Much loss and hardship, even, might grow out of it. But it is not a legal injury, and there is no legal remedy for it. He may erect structures upon his land as high as he pleases, without regard to its effect upon surface water, no matter how much others are disturbed by it." *Morrison v. Railroad Co.*, 67 Me. 353, 355. In [Gannon v. Hargadon, 10 Allen, 106, 109, 87 Am.Dec. 625,](#) it is said that the maxim above referred to "is a general rule, applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water *912

Cox v. State ex rel. Summers

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81 N.C.App. 612, 344 S.E.2d 808
N.C.App., 1986.
July 01, 1986 (Approx. 3 pages)

Developers of subdivision brought action to enjoin Department of Natural Resources and Community Development from enforcing Sedimentation Pollution Control Act against them with regard to roads in subdivision found to be experiencing accelerated erosion and off-site damage from sedimentation in violation of the Act. The Superior Court, Rockingham County, Melzer A. Morgan, Jr., J., reversed a decision of the Sedimentation Pollution Control Commission against the developers, and State appealed. The Court of Appeals, Cozort, J., held that: (1) regulation requiring that person conducting land-disturbing activity install and maintain erosion and sedimentation control measures applies irrespective of whether the land-disturbing activity occurred before or after effective date of regulation, and (2) developers who were owners in fee simple of the subdivision roads were "landowners" within meaning of regulation, and thus were responsible for erosion control with regard to the roads, notwithstanding their dedication of the roads to purchasers of the lots.
Reversed.

Hardy v. Fryer

194 N.C. 420, 139 S.E. 833
N.C. 1927.
October 26, 1927 (Approx. 2 pages)

The facts presenting the question of law involved are substantially as follows: On the 16th day of October, 1920, J. T. Harris sold to plaintiff Jesse W. Hardy and wife a lot of land for \$9,016.25, and executed and delivered a deed therefor. Contemporaneously therewith plaintiff Hardy and wife executed and delivered to the defendant Farmville Building & Loan Association a note for \$3,500, secured by a mortgage upon the property conveyed, and also at the same time executed and delivered to the vendor Harris five notes aggregating \$5,516.25, and securing same by a deed of trust. The deed from Harris, the vendor, to Hardy and wife, vendees, was immediately recorded. The mortgage from Hardy and wife to Harris, securing the said sum of \$5,516.25, was duly recorded on the 25th day of October, 1920, but the mortgage from Hardy and wife to the building and loan association was not recorded until the 8th day of February, 1923. Harris, the payee in the notes aggregating \$5,516.25, before maturity, transferred and delivered said notes to the Bank of Fountain, and the Bank of Fountain sold the notes to the defendant Fryer. The deed from Harris, the vendor, to Hardy and wife, vendees, dated October 16, 1920, contained the following language:

"Witnesseth, that in consideration of the sum of \$5,000, and the assumption of payment of certain mortgage due the building and loan association for \$3,500, receipt of which is hereby acknowledged," etc.

In the warranty clause of said deed the following language occurs:

"That the same is free and clear of all incumbrances except mortgage to the Farmville Building & Loan Association, which is hereby assumed by the party of the second part, which assumption is a part of the purchase price hereof."

The Bank of Fountain contends that, by reason of the fact that its mortgage securing indebtedness of \$5,516.25 was recorded prior to the recording of the \$3,500 mortgage to the building and loan association that its lien is superior to, and prior to, the \$3,500 mortgage of the building and loan association.

The building and loan association contends that, while its mortgage for \$3,500 was recorded subsequent to that held by the defendant bank and transferred to the defendant Fryer, yet the notice and reference in the deed from Harris, the vendor, to Hardy and wife, the vendees, was sufficient to preserve its lien.

The referee, upon the facts found by him, concluded, as a matter of law, that the language contained in the deed "comes within the rule laid down by the Supreme Court in several cases, and that, when Hardy assumed payment of the mortgage to the building and loan association for \$3,500, this assumption of payment passed along to all the persons dealing with the property thereafter."

The trial judge confirmed the report of the referee, and the defendants Bank of Fountain and Joe W. Fryer appealed.

***833**

(Cite as: 139 S.E. 833, *833)

Skinner, Cooper & Whedbee and Albion Dunn, all of Greenville, for appellants.
John Hill Paylor, of Farmville, for appellee Farmville Building & Loan Ass'n.

BROGDEN, J.

The question is this: Under what conditions will reference in a registered instrument to a prior incumbrance unregistered constitute a valid and enforceable lien by the holder of such prior unregistered incumbrance?

***834**

(Cite as: 139 S.E. 833, *834)

[1] The principles deducible from our decisions upon the subject of the sufficiency of the references necessary to impart vitality to a prior unregistered incumbrance may be stated as follows:

- (1) The creditor holding the prior unregistered incumbrance must be named and identified with certainty.
- (2) The property must be conveyed "subject to," or in subordination to, such prior incumbrance.
- (3) The amount of such prior incumbrance must be definitely stated.
- (4) The reference to the prior unregistered incumbrance must amount to a ratification and adoption thereof.

The theory out of which these principles grow is that the reference to the unregistered incumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject thereto. [Hinton v. Leigh, 102 N. C. 28, 8 S. E. 890;](#) [Ward v. Anderson, 111 N. C. 115, 15 S. E. 933;](#) [Brasfield v. Powell, 117 N. C. 141, 23 S. E. 106;](#) [Bank v. Vass, 130 N. C. 592, 41 S. E. 791;](#) [North State Piano Co. v. Spruill & Bro., 150 N. C. 168, 63 S. E. 723;](#) [Blacknall v. Hancock, 182 N. C. 369, 109 S. E. 72;](#) [Avery County Bank v. Smith, 186 N. C. 642, 120 S. E. 215;](#) [Hardy v. Abdallah, 192 N. C. 45, 133 S. E. 195.](#)

This civil action arose out of a dispute over certain property located in Mecklenburg County (the Property). The plaintiff, J. Russell Terry (Terry) filed this action against North Carolina National Bank (NCNB), Ashley Services, Inc. and Brothers Investment Company (Brothers) seeking a declaratory judgment that he holds title to the disputed property free and clear of Brother's asserted leasehold interest. NCNB and Ashley Services, Inc. are sublessees of Brothers. All claims against these sublessees were subsequently discontinued. Brothers filed counterclaims seeking a declaratory judgment that Terry's title to the Property is subject to Brothers' leasehold interest in the Property. Brothers also joined as third-party defendants, John Bass Brown, Jr. *et al.* who were successors in interest to Brothers' lessors and had conveyed the Property to Terry. In its action against the third-party defendants, Brothers sought a declaratory judgment that the third-party defendants held the Property subject to Brothers' leasehold interest in the Property and that title conveyed by the third-party defendants to Terry was subject to Brothers' leasehold interest.

The essential facts are:

Deed, executed by trustee of estate, to heirs as tenants in common, which referred to testator's lease agreement with lessee, was within chain of title of warranty deed purchased from heirs and sufficiently described unrecorded lease so that grantee of warranty deed took property subject to lease, notwithstanding fact that lease was not recorded at time of transfer by warranty deed and omission in deed to heirs that lease term was for more than three years. [G.S. § 47-18](#).

On 21 March 1963 Brothers, as lessee, entered into a lease agreement (the "Galloway Lease") with Carrie Marshall Galloway, as lessor whereby Brothers leased the Property for twenty years with an option to renew for an additional thirty years. Brothers began paying rent in 1963. On 10 November 1969 Brothers by written instrument subleased a portion of the Property to NCNB for a 15 year term with an option to renew for an additional 20 years. NCNB constructed a branch bank on the leased property and has been in possession since 1970. Brothers continued to pay rent to Carrie Marshall Galloway until her death on 8 November 1972. Under the terms of Carrie Marshall Galloway's will (the "Galloway will") the Property was devised in trust to North Carolina National Bank ("NCNB") and Gaston G. Galloway, as trustees. After Carrie Marshall Galloway's death, Brothers made all rental payments to NCNB and Gaston G. Galloway.

The terms of the Galloway will provided that the Property be held in trust until the death of Gaston G. Galloway. At his death, the Galloway will provided that the remaining property would vest in fee simple in the children of Nancy Brown Young and John Bass Brown, sister and brother of Carrie Marshall Galloway.

On 30 June 1974 when Gaston G. Galloway died, the remaindermen under the Galloway will were John Bass Brown, Jr., Mildred B. Montgomery, Sutherland M. Brown, Carrie M. Gilchrist, Dolph M. Young, Sadie Young Holland, Peter M.B. Young and William P. Young, (referred to collectively as the "Galloway heirs"). On 26 September 1974, NCNB, acting as executor and trustee under the Galloway will, executed a deed conveying the Property to the Galloway heirs as tenants in common (the NCNB deed"). The NCNB deed was recorded on 30 September 1974. The NCNB deed provided that "[t]he above described parcel is subject to the rights of tenants in possession pursuant to the terms of a Lease between Carrie Marshall Galloway and Brothers Investment Company dated March 21, 1963."

On 2 October 1974, NCNB by letter informed Brothers of the transfer of the Property to the Galloway heirs and instructed Brothers to make rent payments to Mildred B. Montgomery and Dolph M. Young. From November, 1974 through **471

_____ (Cite as: 77 N.C.App. 1, *3, 334 S.E.2d 469, **471) _____
October, 1982 Brothers made all rental payments as instructed in the NCNB letter.*4
_____ (Cite as: 77 N.C.App. 1, *4, 334 S.E.2d 469, **471) _____

The Gallaway lease gave Brothers the right to renew the lease for an additional 30 years provided written notice of the exercise of the right to renew was given at least one year before the end of the lease term. On 23 June 1980 Brothers mailed written notices of its exercise of the right to renew to two of the Gallaway heirs, Mildred B. Montgomery and Dolph M. Young.

On 25 August 1980 Brothers subleased by written sublease agreement a portion of the Property to S.M. Horton Car Wash Equipment Company for a term of twenty years beginning 1 December 1980. Thereafter, Horton constructed a car wash facility on the leased premises and on 24 December 1980 assigned its right under the sublease agreement by written instrument to Ashley Services, Inc.

In May 1982, Dolph M. Young, one of the Gallaway heirs contacted the plaintiff, Terry and offered to sell the Property for \$275,000.00 with attractive financing terms. Young explained to Terry that there was an unrecorded lease on the Property which was binding on the Gallaway heirs but would probably not be binding on Terry if he decided to buy the Property. Terry was furnished a copy of the Gallaway lease in June, 1982. He also requested that his attorneys review the NCNB deed.

By deed dated 26 July 1982 and recorded 24 September 1982 the Gallaway heirs conveyed their interest in the Property to Terry by warranty deed which expressly provided that it was not intended that the Property be conveyed subject to any leases or the rights of any parties who may be in possession. The Gallaway heirs accepted a down payment of \$6000.00 and a purchase money deed of trust in the principal amount of \$269,000.00. On 4 October 1982, Terry notified Brothers of his claim to the property and stated that he did not recognize the Gallaway lease or Brothers' claims of the right to possession.

On 5 October 1981 a memorandum of the NCNB sublease with Brothers was recorded. On 12 October 1982 the written assignment of the sublease between Horton Car Wash Equipment Company and Ashley Services, Inc. was recorded. Finally, on 9 November 1982 the original lease between Carrie Marshall Gallaway and Brothers was recorded.

The first issue to be decided here is whether the plaintiff holds the Property subject to the Gallaway lease. We hold that he does.

The plaintiff contends that he holds the Property free and clear of the Gallaway lease because at the time he acquired the Property the lease had not been recorded as required by the Conner Act. **G.S. 47-18. **472**

(Cite as: 77 N.C.App. 1, *5, 334 S.E.2d 469, **472) _____

The portion of the Act on which plaintiff relies provides:

(a) No ... (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies....



[1] The lease at the heart of this controversy was executed on 21 March 1963 with a lease term of 20 years plus a 30 year renewal *6

(Cite as: 77 N.C.App. 1, *6, 334 S.E.2d 469, **472) _____

option. It was not recorded until 9 November 1982. The Property was conveyed to the plaintiff on 26 July 1982 and the deed to plaintiff was recorded on 24 September 1982. Plaintiff properly insists that no notice however full and formal will supply the want of registration. **Collins v. Davis, 132 N.C. 106, 43 S.E. 579 (1903)**. This principle of notice by recordation only is strictly adhered to by our courts, **State Trust Co. v. Braznell, 227 N.C. 211, 41 S.E.2d 744 (1947)**, and the Conner Act would, on its face, give the plaintiff the right to eject Brothers, its lessee, and the sublessees.



[2] However, when a grantee accepts a conveyance of property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest. By accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it

and is estopped to deny the unrecorded instrument's validity. *State Trust Co. v. Braznell, supra*. This principle is not based on notice and does not operate as an "exception" to the pure-race theory of title in North Carolina. It derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. *Hardy v. Fryer, 194 N.C. 420, 139 S.E. 833 (1927)*.

Our Supreme Court in *Hardy v. Fryer, supra*, specifically addressed the effect of a reference in a recorded instrument to a prior unrecorded encumbrance and under what circumstances it constitutes a valid, enforceable lien by the holder of the prior unrecorded encumbrance. The court listed four requirements or conditions that must be met before a reference to a prior unrecorded encumbrance will constitute a valid lien. They are:

1. The creditor holding the prior unregistered encumbrance must be named and identified with certainty.
2. The property must be conveyed "subject to" or in subordination to such prior encumbrance.
3. The amount of such prior encumbrance must be definitely stated.

*7

- _____ (Cite as: 77 N.C.App. 1, *7, 334 S.E.2d 469, **472) _____
4. The reference to the prior unregistered encumbrance must amount to a ratification and adoption thereof.

Id. at 422, 139 S.E. at 834.

From the facts of this case two factual distinctions appear. First, the plaintiff's deed from the Gallaway heirs makes no mention of the prior unrecorded lease and contains none of the requirements as set out in *Hardy v. Fryer, supra*. Second, the unrecorded lease was not executed by plaintiff's grantors, the Gallaway heirs. The lease was executed by Carrie Marshall Gallaway, ancestor of the Gallaway heirs. However, we do not believe that these factual distinctions prevent the principles announced in *State Trust Co. v. Braznell, supra*, and *Hardy v. Fryer, supra*, from applying to this case.

Hardy v. Fryer, supra, involved a question of priority between two mortgages. A brief summary of the pertinent facts may prove helpful. In 1920 J.T. Harris sold certain property to the plaintiff, Hardy, and a deed was immediately recorded. At the time of sale, the plaintiff executed a mortgage to the defendant Farmville Building and Loan Association, but the mortgage was not recorded until three years later. The plaintiff also executed a mortgage in favor of Harris, the seller. This mortgage was recorded first. Harris then transferred the mortgage to Fountain Bank which in turn sold the notes to one **473

_____ (Cite as: 77 N.C.App. 1, *7, 334 S.E.2d 469, **473) _____

Fryer. The deed from Harris to Hardy contained the following reference:

That the [property] is free and clear of all encumbrances except mortgage to the Farmville Building and Loan Association, which is hereby assumed by the party of the second part, which assumption is part of the purchase price hereof.

Hardy v. Fryer, at 421, 139 S.E.2d at 833.



[3] Defendant Fountain Bank argued that it could not be bound by the reference in the deed because it was not a party to the deed and its mortgage contained no reference to the prior encumbrance. Our Supreme Court rejected this argument stating that since the reference occurred in a conveyance which was an essential part of defendant Fountain Bank's chain of title, the Bank was charged with full notice of the provisions contained in that deed. *Hardy v. Fryer, supra*. Accordingly, under North Carolina law, if there exists an expression of subordination to a prior unrecorded *8

_____ (Cite as: 77 N.C.App. 1, *8, 334 S.E.2d 469, **473) _____

encumbrance in an instrument within a subsequent grantee's chain of title that is sufficient under the requirements of *Hardy v. Fryer, supra*, then the subsequent grantee, by accepting his deed, ratifies the unrecorded

encumbrance and is estopped from asserting the invalidity of the encumbrance. *State Trust Co. v. Braznell, supra*.

Although *Hardy v. Fryer* involved a battle for priority between two mortgages and not a leasehold interest, we believe that the same principles should apply here. In order to decide if the lease, unrecorded at the time the property was transferred to the plaintiff, is valid and binding on the plaintiff under the rule of *Hardy v. Fryer*, we must answer two questions. Is the NCNB deed within the plaintiff's chain of title? If so, is the reference to the prior unrecorded lease contained in the NCNB deed sufficient under the *Hardy v. Fryer* four-part analysis to constitute a valid lien?

 [4] We hold that the NCNB deed is within plaintiff's chain of title. By Item IX, the Galloway will directed that the remainder of the real estate be placed in trust with NCNB and Gaston G. Galloway named as trustees. Item IX(a) of the Galloway will gave the trustees power to hold, manage, invest and re-invest the property. Item IX(b)(2) authorized the Trustees to sell the real property if a sale would be in the best interests of the estate. Item IX(c) provided that the trustees pay over to Gaston G. Galloway the net income from the rest and residue of the real estate for his lifetime, and

upon his death, said trust, as to such *remaining* property, shall terminate and the title to said property shall thereupon vest in fee simple, share and share alike, in the children of my sister, Nancy Brown Young, and my brother, John Bass Brown, then living and the issue of such as may then be dead, per stirpes. [Emphasis added.]

Given this language and the trustees' power to sell, a deed from the trustee was necessary to ascertain, for title examination purposes, what property existed for distribution to the surviving Galloway heirs and the identity of those surviving heirs.

At the death of Gaston Galloway the trust terminated. At that time, it was the duty of the surviving trustee, NCNB, to distribute*9

_____ (Cite as: 77 N.C.App. 1, *9, 334 S.E.2d 469, **473) _____
the remaining property held in trust to those heirs entitled to take. *First Citizens Bank and Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971)*. See Bogert, *The Law of Trusts and Trustees* Section 1010 (rev. 2d ed. 1983). A careful and prudent title examiner having the knowledge that the Galloway heirs took the Property either by the will of Carrie Marshall Galloway or by deed would discover the NCNB deed to the Galloway heirs executed 26 September 1974 and recorded 30 September 1974. An examination of the Galloway will would reveal the creation of the trust and the grant of power to the trustees to sell the real property. This information would lead the careful and prudent title examiner to check all out conveyances of NCNB as trustee. The NCNB deed would be discovered. Further, even if the examiner began his search instead with the grantee index in the name of the Galloway **474

_____ (Cite as: 77 N.C.App. 1, *9, 334 S.E.2d 469, **474) _____
heirs, the discovery of the NCNB deed would be inevitable.

Having determined that the NCNB deed is within plaintiff's chain of title, we must now decide whether the reference contained in the deed to the prior unrecorded lease satisfies the four-part analysis of *Hardy v. Fryer, supra*. We hold that the reference as set out in the NCNB deed sufficiently complies with the *Hardy v. Fryer* requirements. The pertinent language taken from the NCNB deed dated 26 September 1974 is as follows: "The above described parcel is subject to the rights of tenants in possession pursuant to the terms of a Lease between Carrie Marshall Galloway and Brothers Investment Company dated March 21, 1963."

In oral argument plaintiff's counsel candidly conceded that requirements one, two and four were met by the above quoted reference. Plaintiff's counsel argued that the third requirement of *Hardy v. Fryer* -that the amount of the prior encumbrance must be definitely stated-was not satisfied by the above quoted reference. Here we are dealing with a lease and not a mortgage as was the case in *Hardy v. Fryer, supra*. Plaintiff contends that the omission in the reference that the lease term was for more than three years constitutes a failure to meet this third requirement. We are not persuaded. The date the lease was executed is stated-21 March 1963. The NCNB deed was executed on 26

September 1974. By simple mathematical calculation it can be easily determined that the lease was for a term in excess of three years. We *10

_____ (Cite as: 77 N.C.App. 1, *10, 334 S.E.2d 469, **474) _____
do not find this omission fatal under the four-part analysis of *Hardy v. Fryer, supra*.

In summary, we find that the NCNB deed to the Gallaway heirs was within plaintiff's chain of title and that it sufficiently described the unrecorded lease as to bring it within the four part analysis of *Hardy v. Fryer*. Consequently, we hold that the plaintiff took the property subject to the unrecorded lease.

11

The next issue is whether the record supports the trial court's determination that the defendant Brothers validly exercised its option to renew. We hold that it does.



[5] The lease required that defendant Brothers give written notice of its intention to exercise the right to renew “not less than one (1) year prior to the end of the original term of [the] lease.” The lease's original term would have expired 31 December 1982. Brothers exercised its right to renew the lease on 23 June 1980 by mailing written notices to Mildred Montgomery and Dolph M. Young. These were the only two of the eight co-tenants that Brothers had dealt with since the execution of the NCNB deed in 1974. Plaintiff does not dispute that the notices were timely, however, he contends that the lease renewal was ineffective because notices were not mailed to all eight co-tenants. Plaintiff offers no support for this contention.

North Carolina courts have recognized that the acts of one co-tenant with relation to the common property may be presumed to have been done with authority and for the benefit of all co-tenants if there are circumstances on which to base that presumption. *Hinson v. Shugart, 224 N.C. 207, 29 S.E.2d 694 (1944)*; see J. Webster, Real Estate Law in North Carolina Section 113 n. 41 (P. Hetrick rev. ed. 1981). In 1974, shortly after the NCNB deed to the Gallaway heirs, Brothers was notified by letter from NCNB that all future rental checks were to be sent to Mildred Montgomery in the amount of \$171.42 and to Dolph Young in the amount of \$228.58. For the next eight years-up until the time the written notices were mailed-all rental checks were sent as instructed to those two individuals. We find that based on these facts, there are sufficient circumstances on which to base the presumption that the acts of the two co-tenants in accepting notice of the *11

_____ (Cite as: 77 N.C.App. 1, *11, 334 S.E.2d 469, **474) _____
renewal were done with the authority and for the benefit of all eight co-tenants.

**475

_____ (Cite as: 77 N.C.App. 1, *11, 334 S.E.2d 469, **475) _____

The remaining issues and assignments of error deal with defendant Brothers' protective appeal. Since we affirm the trial court's entry of summary judgment in favor of defendant Brothers, we need not address those issues.

Affirmed.

A purchaser at a grossly and manifestly inadequate price, is not such an one as, under the statute of 27 Eliz. ch. 4, sec. 2 (1 Rev. Stat. ch. 50, sec. 2) can avoid a previous voluntary conveyance; but to constitute a purchaser entitled to the benefit of that statute, the purchase must be *in good faith and for a fair price*; and this the Court should declare as a rule of law, and not leave it as a question of intent to be passed upon by the jury.

The Court will not enter into the question of the inadequacy of the consideration, as *per se* vitiating the sale, unless it be plain, and great, or gross, as it is commonly called. Prices may range between the extremes of what close men would call a good bargain on one hand, and a bad and even hard bargain on the other, and the law will not interfere. But when such a price is given, or pretended to be given, that every body who knows the estate, will exclaim at once, "why, he has got the land for nothing," as if only one tenth, or perhaps even one third part of the value were given, the law would be false to itself if it did not say, sternly and without qualification, to such a person, that he had not entitled himself to the grace and protection of the Statute.

This was an action of EJECTMENT for a tract of land, upon which was a valuable gold mine, tried at Lincoln, on the last circuit, before his honor Judge NASH.

Upon the trial, many points were raised, and the facts connected with them are fully stated in the record. But as the opinion of this Court turns upon one or two of those questions only, it will be useless to advert to any facts but those relative to the points on which the case is here decided.

Both parties claimed under one William Falls, who was seized in fee, and in 1818 conveyed in fee to John Dixon upon the consideration as stated in the deed, of \$500. At that time Falls was indebted to several persons, and he and Dixon, who were brothers-in-law, stated that the deed was made for the purpose of preventing Falls' creditors from selling the land, and of preserving it for Falls' family. On the part of the plaintiff, evidence was also given, that the consideration, or pretended consideration was \$500, as mentioned in the deed; but that it was divided into three instalments--one payable in five years, another in nine years, and the third in seventeen years. On the part of the plaintiff there was then given in evidence a deed from the same William Falls to the lessor of the plaintiff for the premises in fee, bearing date the 2nd day of March, 1836, purporting to be made in consideration of \$50; which sum was paid to said Falls, who then said that his reason for selling the land was, that he was poor and unable to go to law about it.

On the part of the defendant evidence was then given, that the creditors of Falls at the the date of his deed to Dixon, had been all since satisfied; and that, at the time of the contract between the lessor of the plaintiff and Falls and the execution of the deed in 1836, the premises were worth \$25,000. The action was brought shortly after the lessor of the plaintiff took his deed. On the part of the plaintiff it was contended, that the deed to Dixon was fraudulent and void, as against his lessor.

The protection accorded to a bona fide purchaser for value will not be given to a purchaser for a grossly inadequate consideration. He must have paid a fair consideration, though not necessarily the full value.

***1**

(Cite as: 1877 WL 2648, *1 (N.C.))

CIVIL ACTION, tried at Fall Term, 1876, of HARNETT Superior Court, before *Furches, J.*

This was a proceeding to sell land for assets commenced in the Probate Court of Moore County, and transferred to the Superior Court to try issues involving the title to the land. Upon affidavit of the defendant Caddell, the case was removed to the County of Harnett.

Worthy was appointed administrator of Morrison on the 13th of March, 1871, and after exhausting the personal estate in the payment of debts, filed a petition against the heirs-at-law of his intestate, (to which Caddell was made a party defendant) to sell the land in September following, in which it was alleged that the defendant Caddell claimed the land, under a pretended or fraudulent deed. This, the defendant denied; and alleged that he was the *bona fide* owner in fee of the 2,200 acre tract, and asked to be allowed to defend his title.

The plaintiff introduced one W. K. Nunnery, Dep. U. S. Marshal, who testified, that he sold the land in dispute, under execution against Morrison and others; that previous to the sale, he suggested to Morrison, that the other defendants in the execution had personal property; that Morrison said he did not wish to trouble them, but wanted his land sold and requested the witness to levy; that on the day of this conversation, "the defendant Caddell, at his own suggestion wrote the advertisements, stating that he wanted them written correctly, and that the land in dispute, 2,200 acres, was worth from three to four dollars per acre."

The defendant testified in his own behalf in reply, and among other things, stated, "that he did write the advertisements, but wrote them at the instance of Nunnery, Deputy Marshal."

There was other testimony relating to conversations between Morrison and others in the absence of defendant; and also evidence tending to show the intimate, confidential relations which existed between Morrison and the defendant.

The defendant became the purchaser at execution sale, in the sum of fifty dollars, and obtained a deed for the land, which the plaintiff contended passed no title. His Honor reserved his opinion touching the validity of the deed, and submitted the following issue to the jury; "Did the defendant purchase the lands in controversy in fraud of the creditors of John Morrison?" To which the jury responded: "Yes."

Upon the question of law reserved, the Court was of opinion with the plaintiff, and adjudged, that a writ of *procedendo* be issued to the Probate Judge of Moore County &c,

Rule for a new trial. Rule discharged. Judgment for the plaintiff, from which the defendant appealed.

Messrs. John Manning and Neill McKay for the plaintiff.

Messrs. T. C. Fuller, W. A. Guthrie and J. D. McIver for the defendant.

PEARSON, C J.

This is a proceeding to subject the land mentioned in the pleadings to the payment of the debts of one Morrison, a deceased debtor, on the ground that Morrison procured his land to be sold under *fi. fas* against him with an intent to defraud his creditors. The defendant faintly traverses the allegation of fraud on the part of Morrison, and takes the ground that he is a *bona fide* purchaser for valuable consideration.

***2**

_____ (Cite as: 1877 WL 2648, *2 (N.C.)) _____

Two issues are presented by the pleadings; 1. Did Morrison procure his land to be sold under execution, with an intent to defraud his creditors? 2. Is the defendant a *bona fide* purchaser for valuable consideration?

As a preliminary objection, the counsel of defendant took the position, that the proceeding does not come within the operation of the statute under which it is instituted, and relied upon *Rhem v. Tull*, 13 Ire. 57. That case does not apply. There, the debtor never had the title, and his fraud was in causing the vendor to convey to his two sons. So 13th Eliz. could not be made to fit the case; for if the deed was void as to creditors, the title was still in the vendor. Here, the debtor had the title, and if the conveyance to the defendant be void as to creditors, it leaves the title in the debtor.

After a long trial, and the introduction of much evidence, a part of which is set out in the statement of the case, ("the other evidence touching the *bona fides* of the sales is not stated, as there was no exception to it,") His Honor submitted the following issue to the jury: "Did the defendant purchase the land in controversy in fraud of the creditors of John Morrison?" which issue the jury find in favor of plaintiff.

This issue is in substance, the second issue referred to above--no notice is taken of the first issue--from which it is to be inferred, that the evidence was so convincing in regard to the fraudulent intent of Morrison, as to force the defendant to yield it.

That issue being yielded by the defendant, it follows that all of the testimony relevant to it, and not relevant to the second issue, or competent as against the defendant, ought to have been withdrawn also; for instance, all of the testimony of the conversations of Morrison, in the absence of the defendant. But that was not done, and the jury were no doubt influenced by this testimony, to the prejudice of the defendant. For this he has a right to complain, unless upon the other evidence, the case was dead against him as a matter of law, so that, the Court ought to have charged, that upon the other evidence, the verdict should be against the defendant.

Put out of consideration all of the evidence except what the witness, Nunnery swore; ??'defendant, at his own, (Caddell's) suggestion, wrote the advertisements of sale, stating that he wanted them written correctly, that the land contained 2,200 acres, and was worth from three to four dollars per acre," and the fact that defendant bought the land for \$50. We think upon this evidence, His Honor ought to have charged the jury, that assuming the fraudulent intent of Morrison, the defendant did not bring himself within the meaning of "a purchaser for valuable consideration," so as to escape from the taint of Morrison's fraud.

A donee, that is, one who takes without valuable consideration, must yield to the claims of creditors, on the idea, that the donor, being a debtor, was guilty of fraud, unless as provided by our statute, he retains property enough to pay his debts; and this, whether he knows of the fraudulent intent of the donor or not. But a purchaser for valuable consideration, is not required to yield to the claims of creditors, unless he had notice of the fraudulent intent of his vendor.

[Lassiter v. Davis, 64 N. C. 498.](#)

From the manner in which the case is before us, the defendant has a right to assume, that he is not fixed with notice of Morrison's fraudulent intent, and may rest upon his title. That is so, provided he is a purchaser for valuable consideration.

The leading case upon the subject "what is a valuable consideration," *Fullenwider v. Roberts*, 4 Dev. & Bat. 278, covered only the meaning of the words, "purchaser for valuable consideration," in the statute 27th Eliz., as to subsequent purchasers, but the discussion in the opinion is extended to 13th Eliz., as to creditors. From that fountain we may drink. By it we learn, that in order to protect himself against the claim of a prior donee, or of a creditor, the party assuming to be a purchaser for valuable consideration, must prove a fair consideration, not up to the full value, but a price paid which would not cause surprise, or make any one exclaim, "he got the land for nothing, there must have been some fraud or contrivance about it."

Suppose Morrison, with intent to defraud his creditors, had gone to Caddell and said, "you can have my land, (2,200 acres, worth say \$6,000,) for \$50," and defendant had said, "agreed, here is your money." Would any one say Caddell is a purchaser for valuable consideration? But in our case Morrison contrives it more cunningly. He procures a sale of his land to be made under execution, with an intent to defraud his creditors. That is admitted. And at the sale the defendant bids off the land, for not exceeding one-half of its value. Is he a purchaser for valuable consideration, within either 13th or 27th Elizabeth? We think not.

Suppose defendant, when he bid off the land for \$50, really did not know, or have reason to believe that it was all a contrivance of Morrison to defraud his creditors, when he was afterwards informed of the fact, could he with a good conscience hold on to his bargain, and by attempting to do so, does he not convict himself of participation in the fraud of Morrison?

After a perusal of this very complicated case, we are satisfied that justice has been done, and do not feel called on to disturb the verdict and judgment, for the error of His Honor in not withdrawing from the jury, testimony, which although competent and material upon the first issue, was incompetent, but not at all material upon the second issue.

No error. Judgment affirmed and modified by requiring plaintiff to pay back the \$50 paid by defendant.

PER CURIAM. Judgment affirmed.

Landowner brought action to recover in inverse condemnation for taking of flood easement. The Superior Court, Guilford County, McLelland, J., rendered judgment in favor of landowner and the Board of Transportation appealed. The Court of Appeals, [57 N.C.App. 392, 291 S.E.2d 844](#), affirmed, and discretionary review was granted. The Supreme Court, Mitchell, J., held that: (1) easement for flooding was taken by state agency; (2) landowner retained his right to compensation in light of prior consent judgment; and (3) an action was not barred by limitations.

Affirmed.

On 1 September 1974 there was a heavy rainfall in the Greensboro area including the watershed of South Buffalo Creek upstream from the La Mancha Apartments. The waters of the creek rose above the banks and flooded parts of the La Mancha Apartments causing extensive damages.

Prior to 1955, High Point Road was part of the State highway system. It was built on a raised roadbed constructed of soil with a culvert passing through the roadbed to allow the waters of South Buffalo Creek to pass through. When I-40 was constructed, an interchange between I-40 and High Point Road was built. That interchange was a partial cloverleaf with an access ramp (Ramp B) in the northwest quadrant of the intersection of I-40 and High Point Road. Ramp B was also constructed on a raised bed of soil containing culverts to permit the waters of South Buffalo Creek to pass through at a point where the ramp ***609**

_____ (Cite as: 308 N.C. 603, *609, 304 S.E.2d 164, **169) _____

crossed the creek. High Point Road was reconstructed over a raised roadbed with culverts to carry the waters of the creek through the point at which the raised soil roadbed crossed the creek.

James P. KAPERONIS and wife, Nancy G. Kaperonis

v.

NORTH CAROLINA STATE HIGHWAY COMMISSION.

No. 246

Dec. 11, 1963

Action to obtain compensation for alleged taking of 20 foot strip of land on side of boulevard. The Superior Court, Mecklenburg County, James MacRae, Special Judge, entered judgment adverse to plaintiffs and they appealed. The Supreme Court, Denny, C. J., held that evidence established that Highway Commission took possession of 50 foot right of way and kept it marked and maintained at all times from completion of project in 1928 until it began in 1962 to widen street resulting in plaintiffs' suit for taking of strip included in 50 foot right of way.

Affirmed.

Compensation need not precede or be made contemporaneous with taking, but amount of damages may be determined subsequent to taking.

Statute to effect that judge, upon motion and ten days' notice by either highway commission or owner shall determine any issue raised by pleadings other than issue of damages, including, if controverted, questions of necessary and proper parties, title to land, interest taken, and area taken is not unconstitutional on ground that it denies right to jury trial or due process. G.S. §§ 136-103 et seq., 136-106(c), 136-108; Const. art. 1, § 19; U.S.C.A.Const. Amendments. 5, 7, 14.

Map or plat referred to in deed becomes part of deed and need not be registered.

Where deeds of plaintiffs' predecessors incorporated by reference blueprint of survey and added that so much of property as lay within bounds of right of way of named boulevard was subject thereto, right of way of 50 feet as shown on plat was notice to grantees that highway commission claimed such 50 foot right of way across land conveyed and admission of blueprint of survey showing right of way of 50 feet was not improper, in suit to obtain compensation for alleged taking of 20 foot strip of land on side of boulevard. G.S. § 136-106(c).

Resolution or ordinance adopted in 1926 by State Highway Commission authorizing chairman to take all necessary steps to acquire 100 foot right of way, which would include portion for which plaintiffs sought to be compensated nearly 40 years later was admissible.

Evidence given by engineers and agents of State Highway Commission to effect that for many years commission had occupied and maintained 100 foot right of way within which boulevard was constructed and that right of way had been marked was admissible in proceeding to obtain compensation for alleged taking of 20 foot strip of land on side of boulevard within such 100 foot right of way.

Authenticity of signature of prior owner on release given with respect to taking of easement alongside boulevard was sufficiently established to render release admissible.

Any failure of Highway Commission to record deed of easement obtained many years prior to 1959 when statute became effective requiring State Highway Commission to record any deeds of easement would not prevent Commission from establishing title to right of way claimed. G.S. § 47-27.

Statute providing that Highway Commission shall pay court costs does not apply when it becomes apparent that there has been no taking of property from complaining landowner. G.S. § 136-119.

Evidence established that Highway Commission took possession of 50 foot right of way and kept it marked and maintained at all times from completion of project in 1928 until it began in 1962 to widen street resulting in plaintiffs suing for compensation for alleged taking of 20 foot strip included in 50 foot right of way. G.S. §§ 136-103 et seq., 136-108, 136-111.

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_____ (Cite as: 260 N.C. 587, 133 S.E.2d 464, **465) _____

*588

(Cite as: 260 N.C. 587, *588, 133 S.E.2d 464, **465)

This is an action instituted by the plaintiffs pursuant to the provisions of G.S. s 136-111 to obtain compensation for the alleged taking of a 20-foot strip of land on the south side of Wilkinson Boulevard which the plaintiffs allege they own in fee simple subject to certain encumbrances held by private parties thereon.

The plaintiffs further allege in their complaint that the defendant is the owner of a right of way not in excess of 30 feet from the center line of said Wilkinson Boulevard on the southerly side of said Boulevard and that the taking of an additional 20-foot strip has and will cause the plaintiffs substantial damage for which they have not been compensated.

Plaintiffs also allege that on or about 20 November 1961 they received a letter from the defendant which referred to 'Project 8.16567 Mecklenburg County' (a project which called for the construction of curb and gutter and paving the remaining portion of the right of way of 50 feet from the center of Wilkinson Boulevard in front of plaintiffs' premises or a major portion thereof).

The plaintiffs allege that G.S. s 136-108 is unconstitutional in that the statute purports to give the trial judge the authority to hear and determine any issues raised by the pleadings in an action brought pursuant to the provisions of Chapter 136, Article 9, of our General Statutes, governing condemnation proceedings by the State Highway Commission other than the issue of damages.

It was stipulated by the parties below that plaintiffs own a fee simple title to the premises involved subject to three deeds of trust not relevant to this action, all being subject to the legal effect of the language contained in plaintiffs' deed as well as in other deeds in their chain of title. The language referred to above follows the description of *589

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the plaintiffs' property by metes and bounds, to wit, 'and more particularly described and shown on a 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.'

The defendant in its answer alleges that it constructed State Highway Project 8.16567 in Mecklenburg County wholly within the previously acquired and existing 100-foot right of way easement belonging to the State Highway Commission.

The pertinent facts found by the court below are as follows: [Numbering ours.]

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'1. The blueprint of a survey of T. J. Orr, Registered Surveyor, of the property of T. Frank Estate dated March, 1948 shows a Right of Way or easement for Wilkinson Boulevard for 50 feet south of the center line of said Wilkinson Boulevard across the northern portion of the plaintiffs' land.

'2. Defendant's Exhibit 'B' is an authenticated copy of the blueprint of a survey of T. J. Orr, Registered Surveyor, of the property of T. Frank Estate dated March, 1948.

'3. The plaintiffs have on said tract of land a stucco building which is located approximately 49 feet south of the center line of Wilkinson Boulevard as shown on plaintiffs' Exhibit '4'. Said building was erected in approximately 1928 or 1929.

'4. The State Highway Commission duly adopted the following ordinance or resolution on October 27, 1926.

Resolved that in the judgment of the Commission it is necessary for the protection of the State Highway Commission and the safety of travel, that State Highway Projects #635, #650, Charlotte to Gastonia, and Project #542, Greensboro to High Point, have a right of way of one hundred feet, that is fifty feet from the center of the road with such additional right of way inside the curves as will provide for at least two hundred feet clear vision, the

Chairman of the State Highway Commission is authorized and empowered to take all necessary legal steps in the name of the Commission to acquire said right of way either by purchase, gift or condemnation.'

'5. The State Highway Commission completed Project 6503 on September 17, 1928. This project was for grading the entire length of Wilkinson Boulevard from the City Limits of Charlotte to the Catawba *590

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River. The project called for a right of way of 100 feet or 50 feet each side of the center line of Wilkinson Boulevard. The defendant's Exhibit 'H' are the plans and specifications and show the work done on said project.

'6. After the completion of Project 6503, the State Highway Commission placed wooden 4 x 4 posts, painted white, with the notation R/W along Wilkinson Boulevard on either side of the highway 50 feet from the center line of the highway. These posts extended approximately 2 feet out of the ground and were placed approximately every 1000 feet alternating from north to south of the highway (or 2000 feet apart on either side of the highway), and at all points of curves and points of tangents.

'7. A surveyor's 'hub' with a tack was placed on the land now owned by the plaintiffs, 50 feet from the center line of the highway.

'8. The State Highway Commission appropriated a 100 foot right of way for Wilkinson Boulevard from the City Limits of Charlotte to the Catawba River in September, 1928 by the construction of Project 6503.

'9. The lands of the plaintiffs were owned by Katie Frank from January 9, 1924 until her death on August 7, 1930.

'10. While Project 6503 was being constructed, T.Frank, husband of Katie Frank, operated a barbecue restaurant and had a wooden building located on the aforesaid land. The building occupied an area within 50 feet south of the center line of Project 6503. This building was removed in approximately 1928.

'11. Katie Frank's signature appears on defendant's Exhibit 'D' which is a release by T.Frank to the State Highway Commission for all damages on Project No. 6503 and bears the date March 5, 1929 [which release reads as follows: 'T. Frank. RELEASE OF CLAIM FOR DAMAGES. Project 6503, Mecklenburg County, North Carolina. I. T. Frank, of Rte. 4, Charlotte, N. C., in consideration of Eight Hundred **467

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and Fifty (\$850.00) Dollars, Warrant No. 60468, paid by the North Carolina State Highway Commission, hereby release and discharge the said Commission from all claims and demands which I have against it in law or in equity, arising out of any and all contracts, liabilities, acts, and omissions in the past or which may result from the present condition of things. Witness my hand and seal this 29th day of February, 1929. T. Frank (SEAL) Katie Frank'].

'12. Katie Frank had actual notice of the construction of Project 6503 in March, 1929.

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'13. In approximately 1930 through 1931, the State Highway Commission erected signs at the Charlotte City Limits and along Wilkinson Boulevard west to the Catawba River on either side of Wilkinson Boulevard at intervals of approximately 2 1/2 miles. Said signs were similar to defendant's Exhibit 'E' and bore the legend 'Notice--R/W of this highway 50 feet each side of the center line.' These signs have been maintained until the present time by the State Highway Commission.

'14. Mr. R. Brown was employed by the State Highway Commission from 1933 until 1957 as Maintenance Supervisor for Mecklenburg County. During the period of his employment, his department maintained the entire 100 foot right of way on Wilkinson Boulevard. Crews under his direction cut grass on the right of way, cleaned ditches and cleared all trees except shade trees in front of residences. On one occasion in 1950 Mr. Brown required the plaintiffs' predecessor in title, M. (sic) Kaperonis, to remove a curb or a low wall obstruction from the 50 foot right of way which had been erected on the property now owned by the plaintiffs. Mr. Brown observed the 4 x 4 right of way post in place 50 feet from the center line of Wilkinson Boulevard all along the Boulevard while he was maintaining Wilkinson Boulevard.

'15. On January 8, 1962, the State Highway Commission began Project 8.16567. This project was a widening of the paved portions of Wilkinson Boulevard adjacent to the plaintiffs' property from 36 feet to 85 feet, and placing curbing along the edge of the pavement. This project was completed October 17, 1962. * * *

The court below concluded as a matter of law that,

'1. The plaintiffs have record title to the aforesaid triangular tract of land subject to the right of way of the State Highway Commission for a highway of 50 feet as shown on the blueprint of survey of T. J. Orr dated March 1948, which survey is incorporated by reference in the deed under which plaintiffs claim title;

'2. The State Highway Commission entered and appropriated a 100 foot easement for Wilkinson Boulevard by Project 6503, which project was completed on September 17, 1928, and the right to compensation for the taking of any portion of the lands which the plaintiffs now own belonged to the then owner of the fee, Mrs. K. Frank. Said claim to compensation was not assigned to the plaintiffs by the various deeds conveying title to the fee to the plaintiffs. The plaintiffs have no claim for compensation for the taking of the 50 foot highway right of way in September, 1928;

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'3. Any claim for compensation for the taking of the 100 foot easement, 50 feet of which was across the land now owned by the plaintiffs, was barred by the applicable Statute of Limitations six months after the completion of Project 6503, which project was completed September 17, 1928;

'4. The defendant State Highway Commission did not take any property of the plaintiffs by the construction of its project 8.16567, and there is no issue of damages to submit to a jury;

'5. That North Carolina General Statutes 136-108 is constitutional and does not deprive the plaintiffs of their right to trial by jury as the same is guaranteed by the **468

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North Carolina and United States Constitution.

'NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED:

'1. That the blueprint of survey of the property of T. Frank Estate dated March, 1948 which has been introduced into evidence as defendant's Exhibit 'B' constitutes the filing of a plat in this action in accordance with G.S. 136-106(C).

'2. That the plaintiffs' motion that this matter be transferred and heard before a jury is denied.

'3. That this action be and is hereby dismissed on its merits.

'4. That the cost of this action be taxed against the plaintiffs.'

The plaintiffs appeal, assigning error.

Henderson, Henderson & Shuford; Lloyd F. Baucom, Charlotte, for plaintiff appellants.

T. W. Bruton, Atty. Gen., Harrison Lewis, Asst. Atty. Gen., Andrew McDaniel, Raleigh, Trial Atty., and J. Marshall Haywood; Bradley, Gebhardt, DeLaney & Millette, Charlotte, Associate Counsel for the Highway Commission.

DENNY, Chief Justice.

The appellants have set out 45 assignments of error in the record on appeal in this case. It is not practical to undertake to discuss them seriatim. We shall undertake, however, to discuss those questions raised which we deem necessary to a proper disposition of the appeal.

The appellants assign as error the ruling of the court below holding that G.S. s 136-108 is constitutional and that the plaintiffs were not entitled to a jury trial in the hearing below.

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The constitutionality of this statute is attacked on the ground that it authorizes the trial judge to hear and determine any issues raised by the pleadings in an action brought pursuant to the provisions of Chapter 136, Article 9, of our General Statutes governing the taking or condemnation of land by the State Highway Commission other than the issue of damages.

After a plat of the land alleged to have been taken has been filed as required by G.S. s 136-106(c), it is provided in G.S. s 136-108 as follows: ‘* * * (T)he judge, upon motion and ten (10) days' notice by either the Highway Commission or the owner, shall, either in or out of term, hear and determine any issue raised by the pleadings other than the issue of damages, including, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.’



[1] [2] Since the decision of this Court in the case of *Raleigh & G. Railroad v. Davis* (1837), 19 N.C. 451, it has been universally held in this jurisdiction that private property may be taken for a public purpose without the intervention of a jury. Furthermore, compensation need not precede or be made contemporaneous with the taking, but the amount of damages may be determined subsequent to the taking. Ruffin, C. J., speaking for the Court, said: ‘* * * (T)he case of *Smith v. Campbell*, 10 N.C. 590, is a decision that is not a controversy 'respecting property,' within the sense of the Bill of Rights. But the remaining words of the clause yet more clearly exclude this case from its operation. 'The ancient mode of trial by jury,' is the consecrated institution. This expression has a technical, peculiar, and well understood sense. It does not import that every legal controversy is to be submitted to and determined by a jury, but that the trial by jury shall remain as it anciently was. Causes may yet be determined on demurrer, and that being an issue of law is determined by the Court. Final judgment may also be taken on default, when the whole demand in certainty is thereby admitted; * * * These are all controversies respecting**469

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property in the same sense with the present, but they are none of them trials or cases for trials by jury. There is no trial of a cause, standing on demurrer or default. Trial refers to a dispute and issue of fact, and not to an issue of law, or inquisition of damages. * * *

‘The opinion of the Court is, that it was competent to (sic) the legislature to adopt the mode it did, for the assessment of the damages to the defendant.’

The law at time the above case was decided authorized the appointment of freeholders to assess the damages in a condemnation proceeding, but there was no right of appeal to the Superior Court for a *594

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hearing before a jury with respect to the amount of such damages. That right was not given to the landowner until the enactment of Chapter 148 of the Public Laws of 1893, now codified as G.S. s 40-20.

In *Nichols on Eminent Domain* (1950), 3rd Ed., Vol. I, section 4.105(1), at page 351, et seq., it is said: ‘Due process does not forbid a jury trial, nor does it require a jury trial. In any discussion of this problem consideration must be given to the effect of the Seventh Amendment of the Federal Constitution and its corresponding provisions in the several state Constitutions which preserve the common law right of trial by jury.

‘* * * It had become the practice in almost all of the original thirteen states at the time when their Constitutions were adopted to refer the question of damages from the construction of ways or drains or mill dams to a commission of viewers or appraisers, generally three or five in number. It is accordingly well settled that the assessment of damages in eminent domain proceedings by a judicial tribunal other than a jury constitutes due process of law, and consequently is not a violation of the Fifth Amendment when the taking is by the United States, or of the Fourteenth Amendment when the taking is by authority of a state.

‘The Seventh Amendment to the United States Constitution, in terms, protects the right to trial by jury in United States courts, but it merely 'preserves' the right of trial by jury in 'suits at common law.' Condemnation proceedings

are not suits at common law; moreover, if a right to trial by jury had been given by this amendment, it would have been created, not preserved, for in this class of cases it did not previously exist. Accordingly, it has been repeatedly held that when land is taken by authority of the United States, the damages may be ascertained by any impartial tribunal. Similarly, when condemnation proceedings brought under authority of a state statute are transferred to a United States court because of diversity of citizenship of the parties, a jury trial need not be had in the Federal court unless it was required in the state in which the proceedings originated.’ (Emphasis added.)

The foregoing authority, in footnote No. 26, page 357, states: ‘It is held in North Carolina that a proceeding to assess damages for the taking of land by eminent domain is not a controversy concerning property within the meaning of the Constitution of North Carolina. *Smith v. Campbell*, 3 Hawks (N.C.) 590; *Raleigh, etc. R. R. Co. v. Davis*, 2 Dev. and B. (N.C.) 451.’ (Emphasis added.)

Likewise, in 18 Am.Jur., Eminent Domain, section 337, page 979, it is said: ‘Trial by jury in eminent domain proceedings is not essential *595

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to due process of law. A state may authorize any just and reasonable method of determining the amount of compensation for land taken for the public use, without violating the Fourteenth Amendment or the similar provisions of the state Constitutions. Most of the state Constitutions contain some specific provision in regard to trial by jury, but none of them require jury trial in all justiciable controversies that may arise. The usual requirement is that the right to jury trial shall remain ‘inviolable,’ or the idea is expressed in some other phraseology, that no **470

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law shall be enacted cutting off trial by jury in such cases as it was customary to employ it when the Constitution was adopted. As it has always been customary in almost every state to have the damages in eminent domain cases determined by three or more appraisers or commissioners without the intervention of a jury at any stage of the proceedings, it is held in such states that there is no constitutional right of jury trial in eminent domain cases.’

In the case of *Madison County Ry. Co. v. Gahagan*, 161 N.C. 190, 76 S.E. 696, the plaintiff sought the condemnation of certain lands owned by the defendant for a right of way for railroad purposes. The defendant contended he had the right to have certain preliminary questions submitted to a jury and appealed to this Court from the denial thereof. In writing the opinion, this Court quoted with approval from the case of *Johnson City Southern R. Co. v. South & W. R. Co.*, 148 N.C. 59, 61 S.E. 683, as follows: ‘It is manifest that the pleadings, in this condition, do not raise ‘issues of fact,’ requiring the cause to be transferred to the civil issue docket, as required by section 529, Revisal (now G.S. s 1-174). These preliminary questions are to be decided by the clerk. If he finds against the petitioner upon them, he dismisses the proceeding, and, if so advised, the petitioner excepts and appeals to the Judge, who hears and decides the appeal. * * * By the statute (1893, ch. 148; Revisal, sec. 2588) [now G.S. s 40-20] it was provided that, in condemnation proceedings by any railroad or by any city or town, ‘any person interested in the land, or the city, town, railroad or other corporation, shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the Superior Court, in term, if upon the hearing of such appeal a jury trial be demanded.’ This limitation upon the right to demand trial by jury clearly excludes the idea that any such right is given in respect to the questions of fact to be decided preliminary to the question of damages. In *Durham v. Rigsbee*, 141 N.C. 128 [53 S.E. 531] the question presented upon this exception is discussed by Mr. Justice Brown. Referring to the allegation that the petitioner has been unable to acquire the title, and the reason therefor: ‘While this is a necessary allegation of the petition, it is not an issuable fact for the *596

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jury to determine. The judge was right in refusing to submit it to the jury. Since the act of 1893 (Revisal, sec. 2588) [now G.S. s 40-20] the defendants had a right to demand a jury trial upon the matter of compensation.’ (Emphasis added.) *Abernathy v. South & W. R. Co.*, 150 N.C. 97, 63 S.E. 180.

In the case of *In re Annexation Ordinances Nos. 866-870, City of Raleigh, Areas Nos. 1-5*, 253 N.C. 637, 117 S.E.2d 795, the petitioners contended that the Act pursuant to which the annexation ordinances were adopted was unconstitutional for that it denied to them the right of trial by jury in violation of Article I, Section 19, of the Constitution of North Carolina. This Court held: ‘* * * The procedure and requirements contained in the Act under consideration being solely a legislative matter, the right of trial by jury is not guaranteed, and the fact that the General Assembly did not see fit to provide for trial by jury in cases arising under the Act, does not render the Act unconstitutional.

'The right to a trial by jury, guaranteed under our Constitution, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted. The right to a trial by jury is not guaranteed in those cases where the right and the remedy have been created by statute since the adoption of the Constitution. Groves v. Ware, 182 N.C. 553, 109 S.E. 568; McInnish v. Board of Education, 187 N.C. 494, 122 S.E. 182; Hagler v. Mecklenburg Highway Commission, 200 N.C. 733, 158 S.E. 383; Unemployment Compensation Commission v. J. M. Willis [Barber & Beauty Shop], 219 N.C. 709, 15 S.E.2d 4; **471

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Belk's Department Store, Inc. v. Guilford County, 222 N.C. 441, 23 S.E.2d 897; Utilities Commission of North Carolina v. Great Southern Trucking Co., 223 N.C. 687, 28 S.E.2d 201. This contention of petitioners is without merit.'



[3] We concur in the ruling of the court below in holding that the challenged statute is constitutional. This assignment of error is overruled.

The appellants assign as error the admission in evidence of defendant's Exhibit 'B.' This exhibit was identified as a blueprint of a survey by T. J. Orr, Registered Surveyor, of the property of the T. Frank Estate, dated March 1948, and which shows a right of way of 50 feet south of the center of Wilkinson Boulevard across the northern portion of plaintiffs' land.

Mrs. T. J. Orr, a witness for the defendant, testified that she is the widow of the late T. J. Orr, who died in 1956 and who had been a Registered Surveyor engaged in the practice in Charlotte. That her husband had a system for filing the original drawings of surveys that he made. That she examined the files and found the original of such a drawing and that defendant's Exhibit 'B' is a print made from the original drawing which she found in her husband's file-- dated March *597

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1948. That she was a surveyor herself and had helped in her husband's office since 1934; that both of them worked together on the filing of his original drawings.

Bob Pharr, a witness for the plaintiffs, was admitted to be an expert land surveyor. He testified, on cross-examination, 'That in preparing surveys of Wilkinson Boulevard from time to time, the witness, when he has shown a right of way on Wilkinson Boulevard, showed a 50-foot right of way on each side of the center line; that he was not sure that he had seen the plat by T. J. Orr of the property of the T. Frank Estate. That defendant's Exhibit 'B' is a plat by T. J. Orr of the property of the T. Frank Estate. That defendant's Exhibit 'B' is a plat which fitted the description in the said deed. That said plat showed a highway right of way as 50 feet, going wouth from the center line of Wilkinson Boulevard. * * *'

Ray Rankin, a witness for the plaintiffs, was admitted to be an expert in title examination work. This witness testified, on cross-examination, that he had certified the plaintiffs' title to the Citizens Bank for a loan currently existing in favor of that bank. That in making his search, 'he found one survey by T. J. Orr, dated September 25, 1954, which in his opinion was a survey of the premises. That the Orr survey showed a 50-foot right of way as measured from a line down Wilkinson Boulevard. That the survey was among several papers in the title office which he used along with two or three, or maybe four other surveys, furnished him by the bank at the time it requested its title search. * * * That defendant's Exhibit 'B' is generally a plat of the property described in Deed Book 1313, Page 1 (this is the deed under which plaintiffs claim title to the premises involved), that it showed a right of way on Wilkinson Boulevard of 50 feet on the south side of the center line, and that it bore a notation 'property of T. Frank Estate.'

This witness further testified that in examining the title to the plaintiffs' property he relied in some degree on a survey made by Fred B. Davis, Registered Surveyor, dated 3 August 1960, and that the Davis survey also showed a right of way for Wilkinson Boulevard south of the center line in front of plaintiffs' property of 50 feet.



[4] A map or plat referred to in a deed becomes a part of the deed and need not be registered. *Collins v. Asheville Land Co.*, 128 N.C. 563, 39 S.E. 21. See also *Lantz v. Howell*, 181 N.C. 401, 107 S.E. 437.

In *Kelly v. King*, 225 N.C. 709, 36 S.E. 2d 220, it is said: 'It seems to have been established by numerous decisions of this Court that where lots are sold by reference to a recorded plat, the effect of reference to **472

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the plat is to incorporate it in the deed as a part of the description*598

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of the land conveyed. *Elizabeth City v. Commander*, 176 N.C. 26, 96 S.E. 736. As was said in *Collins v. [Asheville] Land Co.*, 128 N.C. 563, 39 S.E. 21, 22, 'a map or plat, referred to in a deed becomes a part of the deed as if it were written therein.' *Home Real Estate Loan & Ins. Co. v. [Town of] Carolina Beach*, 216 N.C. 778, 7 S.E.2d 13; *Pearson v. Allen*, 151 Mass. 79, 23 N.E. 731. 'Where a deed contains two descriptions, one by metes and bounds, and the other by lot and block according to a certain plat or map, the controlling descriptio is the lot according to the plan, rather than the one by metes and bounds. *Nash v. [Wilmington & W.] R. R. Co.*, 67 N.C. 413.' *Hayden v. Hayden*, 178 N.C. 259, 100 S.E. 515, 516, 130 A.L.R. 643, note.'



[5] Therefore, we hold that when the plaintiffs' predecessors in title conveyed the premises involved herein, described by metes and bounds, and for a more particular description incorporated in said deeds by reference the blueprint of the survey of T. J. Orr, as set out herein, and added that '(s)o much of said property as lies within the bounds of the right of way of Wilkinson Boulevard is subject thereto'; that the right of way of 50 feet as shown on said plat was notice to the grantees in said deeds that the State Highway Commission claimed said 50-foot right of way across the land conveyed. *Elizabeth City v. Commander*, 176 N.C. 26, 96 S.E. 736.

This assignment of error is overruled.



[6] The plaintiffs further assign as error the admission in evidence of the resolution or ordinance adopted by the State Highway Commission on 27 October 1926, authorizing the Chairman of the State Highway Commission to take all necessary legal steps in the name of the Commission to acquire a 100-foot right of way for Projects 635 and 650, from Charlotte to Gastonia; and the plaintiffs further assign as error the admission of any and all evidence tending to show that the State Highway Commission let contracts for the construction of what is now known as Wilkinson Boulevard, as Project 6503, and that the Commission took possession of the right of way as hereinabove set out, showing said right of way to be 100 feet, 50 feet from the center of the Boulevard to the north and south thereof, and has had possession thereof and maintained said right of way since the completion of said Boulevard in 1928.

A copy of the purported resolution or ordinance adopted by the State Highway Commission on 27 October 1926, authorizing a 100-foot right of way for what is now Wilkinson Boulevard between Charlotte and Gastonia, was certified by the Secretary to the Highway Commission as a true and correct copy of said resolution, as recorded in the minutes of the State Highway Commission on the above date.

We hold that the admission in evidence of this resolution was proper.



[7] *599

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We likewise hold that the evidence given by various engineers and agents of the State Highway Commission, to the effect that since 1928 the State Highway Commission has occupied and maintained a 100-foot right of way within which the Wilkinson Boulevard was constructed and that said right of way has been marked in the manner hereinabove set out, was admissible. These assignments of error are overruled.



[8] The appellants further assign as error the admission in evidence of a duly authenticated photostatic copy of the release executed by T. Frank and Katie Frank on 5 March 1929, defendant's Exhibit 'D.' It appears that the genuineness of the signature of Katie Frank, which appears on the release, was challenged by the plaintiffs but proven by admissible evidence. An identification technician for **473

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the Mecklenburg County Police, 'an expert as found by the court,' testified that the signature of Katie Frank on the release and her signature on her last will and testament, which was defendant's Exhibit 'C,' were, in the opinion of the witness, made by one and the same person.

G.S. s 8-40 provides that handwriting may be proved by comparison with other writing proved to the satisfaction of the judge to be genuine. In re Will of Gatling, 234 N.C. 561, 68 S.E.2d 301; Newton v. Newton, 182 N.C. 54, 108 S.E. 336.

This assignment of error is also overruled.

It is conceded by all parties to this action that the Old Dowd Road had a right of way of 60 feet, 30 feet from the center of said road. This 60-foot right of way lies wholly within the 100-foot right of way within which Wilkinson Boulevard was constructed adjacent to the property of the plaintiffs. The width of the right of way on the Old Dowd Road is further confirmed in the case of Long v. Melton, 218 N.C. 94, 10 S.E.2d 699, where the controversy involved was one of ingress and egress to and from Wilkinson Boulevard over a portion of the right of way of the Old Dowd Road, not included in the right of way of the Wilkinson Boulevard. The Court said: 'The New Wilkinson Boulevard is 100 feet wide and paved 40 feet in the center. * * * The 60-foot right-of-way of the Old Dowd Road over-laps for some distance on the 100-foot right-of-way of the New Wilkinson Boulevard.'

If the defendant never obtained any additional right of way from the Franks in 1928, when Project 6503 was constructed, why did T. Frank remove his barbecue lodge from the 20-foot strip of land now in controversy? Moreover, why did the State Highway Commission pay \$850.00 for the release executed on 5 March 1929 by the Franks? Certainly, the State Highway Commission in 1928 had no right to require the removal of T. Frank's barbecue lodge if it was not located within *600

(Cite as: 260 N.C. 587, *600, 133 S.E.2d 464, **473)

the right of way claimed and established in connection with the construction of Project 6503--the Wilkinson Boulevard.

Furthermore, if T. Frank and his wife, Katie Frank, or either of them, had instituted an action to recover additional damages in connection with the alleged taking of the additional 20-foot right of way across the Frank's property in addition to the 30-foot right of way on the Old Dowd Road, such action could not have been maintained unless instituted within six months after the completion of Project 6503, the construction of Wilkinson Boulevard. Chapter 160 of the Public Laws of 1923, now codified, as amended, as G.S. s 136-19. Moreover, if such an action had been brought after the Franks signed the release set out hereinabove, such release could have been pleaded in bar of the right to recover any further compensation. Laughter v. North Carolina State Highway & Public Works Commission, 238 N.C. 512, 78 S.E.2d 252.



[9] The appellants argue that the defendant has not established title to the right of way claimed because it has no deed of easement duly recorded. Be that as it may, it will be noted that Chapter 1244 of the Session Laws of 1959, amending G.S. s 47-27, reads as follows: 'From and after July 1, 1959 the provisions of this section shall apply to require the State Highway Commission to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements.'

It further appears from the evidence that in the construction of Project 8.16567, begun on 8 January 1962 and completed on 17 October 1962, that the paving, as well as the curb and gutter, was constructed wholly **474

(Cite as: 260 N.C. 587, *600, 133 S.E.2d 464, **474)

within the 100-foot right of way of the Wilkinson Boulevard.



[10] The appellants further assign as error the action of the court below in taxing the plaintiffs with the costs in this action. They contend that G.S. s 136-119 requires that the costs be taxed against the State Highway Commission. We do not concede that the provisions of G.S. s 136-119 apply when it becomes apparent that there has been no taking of property from the complaining landowner.



[11] We think the evidence adduced in the trial below clearly shows that the defendant took possession of a 50-foot right of way across the land now owned by the plaintiffs and that it has continuously asserted its right thereto and kept said right of way duly marked and has maintained it at all times since the completion of Project 6503 in 1928, except the plaintiffs or one of their predecessors in title constructed a Perma-Stone veneer over the stucco wall on the northern edge of plaintiffs' barbecue lodge building which encroaches on the 50-foot *601

(Cite as: 260 N.C. 587, *601, 133 S.E.2d 464, **474)

right of way approximately nine inches, and further constructed a sign and marquee which overhang a walkway located within 50 feet of the center of Wilkinson Boulevard. However, the existence of these encroachments are insufficient to establish the plaintiffs' contention that the defendant never claimed a 50-foot right of way across their property until 20 November 1961, when it notified these plaintiffs to remove the aforesaid encroachments from said 50-foot right of way.

In our opinion, the remaining assignments of error present no prejudicial error that would warrant another hearing. The facts found by the court below are supported by competent evidence, and the facts found are sufficient to support the conclusions of law reached by the trial judge. Therefore, the judgment of the court below is, in all respects,

Affirmed.

N.C. 1963
KAPERONIS V. NORTH CAROLINA STATE HIGHWAY COM'N
260 N.C. 587, 133 S.E.2d 464

Court of Appeals of North Carolina.
DEPARTMENT OF TRANSPORTATION, Plaintiff,
v.

Frank O. AUTEN, et al., Defendants.

No. 9124SC678.

June 16, 1992.

Department of Transportation filed complaints and declarations of taking and notice of deposit in highway construction project to widen highway, and purchasers of parcels of land denied claim. The Watauga Superior Court, [Charles C. Lamm, Jr., J.](#), determined that Department had valid claim, and purchasers appealed. The Court of Appeals, [Eagles, J.](#), held that statute does not require Department to record deeds of easements or other agreements conveying interests in land executed prior to July 1, 1959.

Affirmed.

Statute providing that, starting on July 1st, 1959, Department of Transportation must record any deeds of easement in same manner and to same extent that other individuals or corporations are required to record easements, does not require Department to record deeds of easements or other agreements conveying interests in land executed prior to July 1, 1959. [G.S. § 47-27.](#)

****300**

(Cite as: 106 N.C.App. 489, 417 S.E.2d 299, **300)

***489**

(Cite as: 106 N.C.App. 489, *489, 417 S.E.2d 299, **300)

On 18 February 1955 the State Highway and Public Works Commission, now the Department of Transportation (DOT), purchased a 100 foot right of way across lot 34 in Watauga County from Maurice Waddell, Sr. and Richard R. Pierce in preparation for the construction of N.C. Highway 105. On 29 September 1955 the Highway Commission purchased a 100 foot right of way across lots 31 and 32 from D.O. and Margaret N. Fugate. Neither right of way agreement was recorded.

In the late summer or early fall of 1986 Frank Auten, Dale Ward, Frank W. Petersilie, II, and John Winkler, Jr. agreed to form the 105 Ventures partnership. The partnership was created to purchase parcels of land along N.C. Highway 105 and combine them for development and resale. Wayne Smith agreed to help 105 Ventures finance the purchase in exchange for a one-half undivided interest in the properties. In the fall of 1986 Mr. Ward and Mr. Winkler, acting as trustees for the partnership, each acquired a parcel of land. One parcel consisted of lots 31 and 32; the other consisted of lot 34. Deeds for both parcels were recorded in November 1986.

***490**

(Cite as: 106 N.C.App. 489, *490, 417 S.E.2d 299, **300)

On 18 July 1989 the DOT filed Complaints and Declarations of Taking and Notice of Deposit in a highway construction project to widen N.C. Highway 105. The defendants filed answers and denied plaintiff's claim to the 100 foot right of way. After an evidentiary hearing the trial court held that DOT had a valid 100 foot right of way. Defendants appeal.

Atty. Gen. Lacy H. Thornburg by Asst. Atty. Gen. [J. Bruce McKinney](#), Asheville, for plaintiff-appellee. Miller and Moseley by [Allen C. Moseley](#), Boone, for defendant-appellant.

[EAGLES](#), Judge.

Appellants argue, *inter alia*, that the trial court erred by holding that the DOT had a valid right of way across lots 31, 32 and 34. Specifically, appellant challenges the trial court's holding that prior to 1 July 1959 the DOT was not required to record right of way agreements. We agree with the trial court and affirm.

This case is controlled by [Kaperonis v. North Carolina State Highway Commission, 260 N.C. 587, 133 S.E.2d 464 \(1963\)](#). In [Kaperonis](#), the Highway Commission obtained a 100 foot right of way in 1928 for the purpose of constructing Wilkinson Boulevard. Apparently, that right of way was not recorded. In 1962 the Highway Commission began and completed a project to widen the paved portions of Wilkinson Boulevard. The new construction was wholly within the 100 foot unrecorded right of way acquired in 1928. The adjacent landowners,

however, claimed that the Highway Commission did not have title to the land because the prior right of way had not been recorded. Chief Justice Denny rejected this argument and wrote:

The appellants argue that the defendant has not established title to the right of way claimed because it has no deed of easement duly recorded. Be that as it may, it will be noted that Chapter 1244 of the Session Laws of 1959, amending [G.S. 47-27](#), reads as follows: “From and after July 1, 1959 the provisions of this section shall apply to require the State Highway Commission to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, ***491**

(Cite as: 106 N.C.App. 489, *491, 417 S.E.2d 299, **300)

in the same manner and to the same extent that individuals, firms or corporations are required to record such easements.”

****301**

(Cite as: 106 N.C.App. 489, *491, 417 S.E.2d 299, **301)

Id. at 600, 133 S.E.2d at 473. With the exception of a later amendment changing “State Highway Commission” to “Department of Transportation,” the portion of [G.S. 47-27](#) quoted above has remained unchanged. We read *Kaperonis* to hold that [G.S. 47-27](#) does not require the DOT to record deeds of easement or other agreements conveying interests in land executed prior to 1 July 1959.

We note that the appellant cites [Highway Commission v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 \(1967\)](#) and [Highway Commission v. Wortman, 4 N.C.App. 546, 167 S.E.2d 462 \(1969\)](#) in support of his argument that no North Carolina court has addressed the issue of whether [G.S. 47-27](#) required the DOT to record prior to 1 July 1959. Both cases expressly declined to address the issue raised here and were decided on other grounds.

We do not reach appellant's remaining assignments.

Affirmed.

ARNOLD and WELLS, JJ., concur.

N.C.App., 1992.

Department of Transp. v. Auten

106 N.C.App. 489, 417 S.E.2d 299

Court of Appeals of North Carolina.
DEPARTMENT OF TRANSPORTATION, Plaintiff,
v.

Rowe F. BOLLINGER and wife, Anita L. Bollinger, Defendants.

No. COA95-207.

Feb. 20, 1996.

State Department of Transportation (DOT) brought condemnation proceeding to take grantees' property under power of eminent domain, pursuant to right-of-way agreement signed by grantors, who were parents of a grantee. The Superior Court, Catawba County, Loto Greenlee Caviness, J., found valid right of way. Grantees appealed. The Court of Appeals, Arnold, C.J., held that: (1) grantees were not prejudiced by trial court's refusal to treat DOT's introduction of right-of-way agreement as amendment to the pleadings, and (2) copy of right-of-way agreement was properly authenticated.

Affirmed.

Motion to amend pleadings to conform to evidence is addressed to discretion of trial court and is not reviewable on appeal absent a showing of abuse of discretion. Rules Civ.Proc., Rule 15(b), G.S. § 1A-1.

Formal amendment to pleadings is needed only when evidence is objected to at trial as not within scope of pleadings. Rules Civ.Proc., Rule 15(b), G.S. § 1A-1.

Grantees who obtained title to real property by warranty deed subject to state highway right of way were not entitled to amend answer to complaint of state Department of Transportation (DOT) in condemnation action when state introduced into evidence its right-of-way agreement with grantors, as evidence was within scope of pleadings, which made reference to right-of-way agreement and right of way in description of property and thus put grantees on notice that DOT was relying on agreement and deed reserving right of way to support its legal theory, and grantees were allowed to present evidence on issue of validity of grantors' signatures and did not request continuance based on surprise or lack of knowledge of contested item of evidence. G.S. § 136-103(5); Rules Civ.Proc., Rule 15(b), G.S. § 1A-1.

Any inconsistency in testimony between plaintiff's witnesses and defendant's witnesses is matter to be resolved by trial court in its findings of fact.

Court's findings of fact will not be reversed unless based only on incompetent evidence.

When conclusions are supported by findings which are based on competent evidence, they will not be disturbed on appeal.

Photostat copy of right-of-way agreement from grantors of property to state Department of Transportation (DOT), admitted into evidence at condemnation hearing, was properly authenticated where it was certified by manager of right-of-way branch of DOT to be true and correct copy of agreement and custodian of minutes of Board of Transportation certified that manager of right-of-way branch had responsibility of care and custody of files.

**796

(Cite as: 121 N.C.App. 606, 468 S.E.2d 796, **796)

*607

(Cite as: 121 N.C.App. 606, *607, 468 S.E.2d 796, **796)

Appeal by defendants from order entered 13 September 1994 by Judge Loto Greenlee **797

(Cite as: 121 N.C.App. 606, *607, 468 S.E.2d 796, **797)

Caviness in Catawba County Superior Court. Heard in the Court of Appeals 15 November 1995.

In 1949, the State Highway and Public Works Commission, now the Department of Transportation, "DOT," acquired a right of way in Catawba County for construction of Highway U.S. 321 between Newton and Conover. This project affected the property of Elsie Price Bollinger and husband, C.A. Bollinger, who executed a Right of Way Agreement with the State Highway Commission. This agreement was not recorded in the Catawba County

Registry but remained on file in the records of the Right Of Way Branch of the DOT, Raleigh, North Carolina. Elsie Price Bollinger, and husband C.A. Bollinger, conveyed the property to their son, the defendant, by warranty deed. The warranty deed subjected the conveyed property “to a State highway right of way 75 feet in depth, extending from the Northeast to the Southeast corner.” The DOT initiated a condemnation action to take defendants' property under the power of eminent domain, as it had the right to take possession of that property pursuant to a Right of Way Agreement signed by defendants' parents. After an evidentiary *608

_____ (Cite as: 121 N.C.App. 606, *608, 468 S.E.2d 796, **797) _____
hearing, the trial court found that the DOT had a valid 75 foot right of way. Defendants appeal.

Department of Transportation, Attorney General Michael F. Easley, by Assistant Attorney General, J. Bruce McKinney, for plaintiff appellee.
Sigmon, Clark, Mackie & Hutton, P.A., by Warren A. Hutton, Hickory, for defendant appellant.

ARNOLD, Chief Judge.

The defendants first argue that plaintiff attempted to amend its complaint by introducing into evidence the Right of Way Agreement and that defendants should have been afforded the opportunity to amend their answer in order to plead the defenses of failure of consideration, fraud and forgery. We disagree.

N.C.Gen.Stat. § 136-103(5) (1993) mandates that a complaint filed in a DOT condemnation action shall contain or have attached, “A statement as to such liens or other encumbrances as the Department of Transportation is informed and believes are encumbrances upon said real estate and can by reasonable diligence be ascertained.” Plaintiff attached two documents to its complaint. The first included a list of liens and encumbrances. The third encumbrance recited on the list was, “Right of Way Agreement to Department of Transportation (formerly State Highway Commission) as recorded in Deed Book 583 at Page 316 of the Catawba County Registry.” The second document, “A Description of Property Affected,” had the following language within the description of Tract # 1: “The above tract of land on the East is subject to State Highway right of way 75 feet in depth extending from the Northeast to the Southeast corner.”

[1]  [2]  N.C.R.Civ.P. 15b (1990) provides:

Amendments to conform to the evidence.-When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow *609

_____ (Cite as: 121 N.C.App. 606, *609, 468 S.E.2d 796, **797) _____
the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. (emphasis added)

A motion to amend is addressed to the discretion of the trial court and is not reviewable**798

_____ (Cite as: 121 N.C.App. 606, *609, 468 S.E.2d 796, **798) _____
on appeal absent a showing of abuse of discretion. Henry v. Deen, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). “A formal amendment to the pleadings is needed only when evidence is objected to at trial as not within the scope of the pleadings.” Taylor v. Gillespie, 66 N.C.App. 302, 305, 311 S.E.2d 362, 364 (1984).

[3]  The evidence defendants object to is within the scope of the pleadings. Plaintiff’s pleadings make reference to the Right of Way Agreement, and the pleadings make reference to the right of way in the description of the property. Defendants were put on notice that plaintiff was relying on a Right of Way Agreement and on a deed that reserved such a right of way to support its legal theory. At the hearing, the trial court allowed the defendants to present evidence on the issue of the validity of the signatures of Elsie and C.A. Bollinger on the Right of Way

Agreement. The Judge observed the demeanor of the witnesses and examined the signatures in question. Based on this evidence, the court found that there was no fraud or forgery. At no time during the hearing did they request a continuance of the hearing based on surprise or lack of knowledge of the contested item of evidence. Defendants have failed to show how they have been prejudiced by the trial court's failure to treat plaintiff's introduction of the Right of Way Agreement as an amendment to the pleadings.

Defendants next assign error to the admission of the Right of Way Agreement because plaintiff did not properly authenticate it. The contested item of evidence consists of a certification and a photostat copy of the Right of Way Agreement. The certification is signed by the manager of the Right Of Way Branch of the DOT, who certifies that the Right of Way Agreement is in fact a photostat copy of a Right of Way agreement, from defendants' parents, to the DOT. The certification is also signed by the custodian of the minutes of the Board of Transportation, who certifies that the manager has the responsibilities of care and custody of files of the Right of Way Branch.

Defendants argue that the document was not maintained in the location*610

(Cite as: 121 N.C.App. 606, *610, 468 S.E.2d 796, **798)

where items of that nature are normally kept; that they presented opinion evidence showing that the signatures on the Right of Way Agreement were not those of the defendants' parents; that plaintiff presented no evidence to counter this; and therefore the Agreement has not been properly authenticated.



[4] [5] [6] “Any inconsistency in the testimony between plaintiff’s witnesses, defendant’s witness ... [is] a matter to be resolved by the trial court in its findings of fact.” *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 319, 182 S.E.2d 373, 377 (1971). The court’s findings of fact will not be reversed unless based only on incompetent evidence. *Id.* at 320, 182 S.E.2d at 377. When the conclusions are supported by the findings, which are based on competent evidence, they will not be disturbed on appeal. *State v. Mandina*, 91 N.C.App. 686, 696, 373 S.E.2d 155, 161 (1988). Further, N.C.R.Evid. 901(a) (1992) provides, “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C.R.Evid. 901(b)(7) (1992) provides:

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

Public Records or Reports-Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

Also, the North Carolina Supreme Court has held that a copy of a purported resolution authorizing a right of way, which was certified by the Secretary to the Highway Commission to be a true and correct copy of the resolution, was properly authenticated and admitted into evidence. *Kaperonis v. Highway Commission*, 260 N.C. 587, 598-599, 133 S.E.2d 464, 472-473 (1963).

**799

(Cite as: 121 N.C.App. 606, *610, 468 S.E.2d 796, **799)



[7] In the instant case the Right of Way Agreement was accompanied by certification signed by the Manager of the Right of Way Branch of the DOT in Raleigh, North Carolina. The custodian of the minutes of the Board of Transportation certified that the Manager of the Right of Way Branch has the responsibility of care and custody of files of the Right of Way Branch. The defendants put on evidence to show that *611

(Cite as: 121 N.C.App. 606, *611, 468 S.E.2d 796, **799)

the signatures on the Right of Way Agreement were forged. As the finder of fact, the trial judge had the opportunity to observe the demeanor of the witnesses and determine their credibility. He found that the Agreement was an authenticated copy of the Right of Way Agreement. Because the trial judge had competent evidence upon which to base his finding, we affirm the trial court's finding.

Affirmed.

EAGLES and MARTIN, JOHN C., JJ., concur.

N.C.App.,1996.
Department of Transp. v. Bollinger
121 N.C.App. 606, 468 S.E.2d 796

**Supreme Court of North Carolina.
DEPARTMENT OF TRANSPORTATION**

v.

**Charles Edward HUMPHRIES and wife, Loretta Humphries; W.J. Allran, III, Trustee;
NationsBank of North Carolina (formerly NCNB of North Carolina).**

No. 232PA97.

March 6, 1998.

North Carolina Department of Transportation (DOT) brought condemnation action against landowners, claiming existing 75-foot-of-centerline right-of-way over their property by virtue of right-of-way agreement executed by landowners' predecessors in interest but never recorded. Landowners filed answer to complaint denying validity of DOT's claim. The Superior Court, Gaston County, Patti, J., entered judgment awarding DOT 75-foot-of-centerline right-of-way. Landowners appealed. The Supreme Court, [Orr, J.](#), overruling [Department of Transportation v. Auten, 106 N.C.App. 489, 417 S.E.2d 299](#), held that even before 1 July 1959 amendment specifying that DOT was to record deeds of easement in same manner and to same extent that individuals, firms, or corporations were required to record such easements, DOT was required to record easements in that manner.

Reversed and remanded.

Even before 1 July 1959 amendment specifying that Department of Transportation (DOT) was to record deeds of easement in same manner and to same extent that individuals, firms, or corporations were required to record such easements, DOT was required to record easements in that manner; thus, 75-foot-of-centerline right-of-way set forth in DOT's agreement with landowners' predecessors in interest, which was never recorded, was void as to landowners, who were bona fide purchasers for value, and whose chain of title reflected property line 30 feet from highway's centerline; overruling [Department of Transp. v. Auten, 106 N.C.App. 489, 417 S.E.2d 299, G.S. § 47-27](#).

Under North Carolina's "pure race" recordation statutes, purchaser for value who records first is protected, regardless of whether he has notice of prior unrecorded conveyance, and irrespective of whether he is prior or subsequent purchaser. [G.S. § 47-27](#).

Purpose of North Carolina's "pure race" recordation statutes is to provide certainty in real estate transactions, for benefit of purchasers and lenders. [G.S. § 47-27](#).

***563**

(Cite as: 496 S.E.2d 563, *563)

On discretionary review pursuant to [N.C.G.S. § 7A-31](#), prior to a determination by the Court of Appeals, of an order entered on 7 February 1997 by Patti, J., in Superior Court, Gaston County, granting plaintiff a right-of-way over defendant Humphries' property. Heard in the Supreme Court 19 November 1997.

Michael F. Easley, Attorney General by [J. Bruce McKinney](#), Assistant Attorney General, for plaintiff-appellee. Long, Parker & Warren, P.A. by [Robert B. Long, Jr.](#), and [Kimberly A. Lyda](#), Asheville, for defendant-appellants Charles and Loretta Humphries.

[ORR](#), Justice.

This case arises out of a condemnation action instituted by plaintiff, North Carolina Department of Transportation (DOT), against defendants Charles and Loretta Humphries on 8 May 1995 as part of DOT's project to widen North Carolina Highway 150. DOT is claiming an existing right-of-way, seventy-five feet from the centerline of the highway, pursuant to an unrecorded right-of-way agreement.

Although defendants own three tracts of land along Highway 150, the only portion of defendants' property at issue in the present case is tract 2. Defendants purchased tract 2 ***564**

(Cite as: 496 S.E.2d 563, *564)

on 22 July 1969 and were bona fide purchasers for value. According to the description of the property contained in the chain of title, the tract 2 property line in question is located approximately thirty feet from the centerline of N.C. Highway 150 and runs with the western edge of the right-of-way for U.S. Highway 150. Defendants contend that under [N.C.G.S. § 47-27](#), DOT was required to record the right-of-way agreement in order to prevail over a bona fide

purchaser for value. We agree.

In 1951-1952, the State Highway and Public Works Commission, now the DOT, acquired a right-of-way in Gaston County for the construction of N.C. Highway 150. The right-of-way agreement, which DOT relies on, was obtained by DOT on 20 March 1952 from one of defendants' predecessors in title, James and Mary Black. The right-of-way agreement between DOT and the Blacks was never recorded in the Gaston County Register of Deeds Office, but was kept on file in the office of the right-of-way branch of the Department of Transportation in Raleigh, North Carolina. None of the deeds in defendants' chain of title to tract 2 refer to the right-of-way agreement between the Blacks and DOT, and nothing in the record references the right-of-way agreement.

In the present case, the trial court made a finding of fact that DOT “did not maintain any of the area on defendants' property beyond 30 feet from the centerline of N.C. 150.” In fact, the trial court noted that defendants have placed improvements within the claimed right-of-way without any objection by DOT. The nearest sign which references the claimed right-of-way is located more than one-eighth of a mile, but less than one-fourth of a mile, from the tract 2 property. This sign states, “NOTICE-RIGHT-OF-WAY OF THIS HIGHWAY INDICATED BY MARKERS. ALL ENCROACHMENTS PROHIBITED. S.H. & P.W.C.” However, the sign does not include the width of any claimed right-of-way. Finally, the seventy-five-foot right-of-way claimed by DOT is within approximately one foot of defendants' home.

In the present case, DOT instituted a condemnation action against defendants on 8 May 1995 claiming an existing seventy-five-foot-of-centerline right-of-way over their property. Defendants then filed an answer to the complaint denying the validity of the right-of-way claimed by DOT. On 7 February 1997, the trial court entered an order granting DOT “a right of way across defendants' subject tract 75 feet in width from the centerline of N.C. 150.” In its order, the trial court concluded that “by virtue of [N.C.G.S. § 47-27](#), DOT was not required to record the March 20, 1952 Right-of-Way Agreement.”



[1] The issue presented to us by this appeal is whether the trial court erred in concluding that DOT had a valid seventy-five-foot-of-centerline right-of-way, as set forth in the right-of-way agreement executed by defendants' predecessors in interest but never recorded. DOT contends that the Court of Appeals' holding in [Department of Transp. v. Auten](#), 106 N.C.App. 489, 417 S.E.2d 299 (1992), and this Court's holding in [Kaperonis v. N.C. State Highway Comm'n](#), 260 N.C. 587, 133 S.E.2d 464 (1963), control the outcome in the present case.

In [Auten](#), the defendant challenged the trial court's ruling that prior to 1 July 1959, the DOT was not required to record right-of-way agreements. The defendant claimed that the Highway Commission did not have title to the land because the prior right-of-way had not been recorded. [Auten](#), 106 N.C.App. at 490, 417 S.E.2d at 300. In a brief opinion, the Court of Appeals concluded, “We read [Kaperonis](#) to hold that [G.S. 47-27](#) does not require the DOT to record deeds of easement or other agreements conveying interests in land executed prior to 1 July 1959.” [Id.](#) at 491, 417 S.E.2d at 301.

However, this statement by the Court of Appeals misconstrues our holding in [Kaperonis](#). In [Kaperonis](#), we held that the State Highway Commission had a one-hundred-foot right-of-way arising out of an easement held by the State since 1929. [Kaperonis](#), 260 N.C. at 600, 133 S.E.2d at 474. The right-of-way instrument itself was never recorded; however, the landowners had record notice of the right-of-way by virtue of a survey of the property which had been incorporated into a deed in the chain of title. This Court held

***565**

(Cite as: 496 S.E.2d 563, *565)

that when the plaintiffs' predecessors in title conveyed the premises involved herein, described by metes and bounds, and for a more particular description incorporated in said deeds by reference [to] the blueprint of the survey of T.J. Orr, as set out herein, and added that “(s)o much of said property as lies within the bounds of the right of way of Wilkenson Boulevard is subject thereto”; that the right of way of 50 feet as shown on said plat was notice to the grantees in said deeds that the State Highway Commission claimed said 50-foot right of way across the land conveyed.

[Id. at 598, 133 S.E.2d at 472](#). Thus, although we held that the defendant had a valid right-of-way, we did not rely on [N.C.G.S. § 47-27](#). Instead, we focused on the fact that the plaintiffs had notice of the claimed right-of-way.

Further, in [Browning v. N.C. State Highway Comm'n, 263 N.C. 130, 139 S.E.2d 227 \(1964\)](#), this Court limited the holding in [Kaperonis](#) to its particular circumstances. In discussing [Kaperonis](#), this Court stated:

The facts in this case are substantially different from those in the case of [Kaperonis v. Highway Commission, 260 N.C. 587, 133 S.E.2d 464](#). In that case, the deed conveying the property from the predecessors in title to Kaperonis referred to a certain plat which showed an existing 50-foot right of way across the property conveyed, and the plat was made a part of the description. Moreover, the plat was introduced in evidence and identified as the plat referred to and incorporated in the deed. Furthermore, the predecessors in title to Kaperonis had signed a release of claim for damages in consideration of \$850.00 paid to them by the Highway Commission, which release was signed upon completion of the project involved in 1929. In our opinion, the evidence in the [Kaperonis](#) case was sufficient to have established a right of way by prescription, had the Commission not theretofore purchased the right of way from his predecessors in title.

[Browning, 263 N.C. at 134-35, 139 S.E.2d at 230](#). Thus, although the [Kaperonis](#) Court referenced the 1959 amendment to [N.C.G.S. § 47-27](#), the [Browning](#) Court clarified that it was not the basis for the holding in [Kaperonis](#).

In fact, further proof that this Court has not yet addressed the issue of whether [N.C.G.S. § 47-27](#) applied to DOT prior to the 1 July 1959 amendment can be found in [N.C. State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 \(1967\)](#), which was decided four years after [Kaperonis](#). In [Nuckles](#), we dismissed the State Highway Commission's appeal, including the issue of whether an unrecorded right-of-way agreement executed in 1946 was valid against a bona fide purchaser for value. [Id. at 15, 155 S.E.2d at 784](#). In dismissing the appeal, Justice Sharp stated for the Court:

The dismissal of plaintiff's appeal also makes it unnecessary to decide (1) whether [G.S. 47-27](#) applied to the State Highway Commission prior to its 1 July 1959 amendment, or (2)-if it did-what the effect of Exhibit 9 would have been had it been recorded. [G.S. 47-27](#) makes deeds and conveyances of easements and rights-of-way invalid as to creditors and purchasers for value prior to recordation. The amendment involved makes this section expressly applicable to the Highway Commission. The first question was debated in the briefs. Plaintiff contends that before 1 July 1959 it was not required to register any deed or agreement for a right-of-way or easement. Defendants contend that, by the amendment, the legislature merely made explicit that which was already implicit in the statute and was attempting to force the Highway Commission to comply with the registration laws.... Plaintiff cites [Browning v. Highway Commission, \[263 N.C. 130, 139 S.E.2d 227\]](#); [Kaperonis v. Highway Commission, \[260 N.C. 587, 133 S.E.2d 464\]](#); [Yancey v. \[North Carolina State\] Highway Commission, 222 N.C. 106, 22 S.E.2d 256 \[\(1942\) \]](#). Defendants cite, *inter alia*, [Williams v. \[North Carolina State\] Board of Education, 266 N.C. 761, 147 S.E.2d 381 \[\(1966\) \]](#); [Best v. Utley, 189 N.C. 356, 127 S.E. 337 \[\(1925\) \]](#); [Collins v. Davis, 132 N.C. 106, 43 S.E. 579 \[\(1903\) \]](#). Suffice it to say, no decision determinative of the question has been called to our attention.

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(Cite as: 496 S.E.2d 563, *566)

[Nuckles, 271 N.C. at 15-16, 155 S.E.2d at 784-85](#). Accordingly, we overrule the Court of Appeals' decision in [Auten](#) to the extent that it holds that [N.C.G.S. § 47-27](#) does not require DOT to record deeds of easement or other agreements conveying interests in land executed prior to 1 July 1959 in order to be valid against bona fide purchasers for value. Whether [N.C.G.S. § 47-27](#) applied to the State Highway Commission prior to the 1 July 1959 amendment is an issue of first impression for this Court.



[2] The statutory scheme for recordation of real estate transactions in North Carolina, which is now generally known as the Conner Act, was originally enacted in 1885. 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 17-1, at 699 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 4th ed.1994). Unlike the laws of most states, North Carolina's recordation statutes are characterized as “pure race” statutes. The effect of a “pure race” statute is to protect any purchaser for value who records first, whether or not he has notice of a prior

unrecorded conveyance and whether he is a prior or subsequent purchaser. *Id.* § 17-2, at 700. As stated in *Webster's*, “[i]f a conveyance is not recorded, it is considered void as against prior or subsequent purchasers of the same property for value who record first.” *Id.* § 17-2, at 703.



[3] The purpose of these laws is to provide certainty in real estate transactions, for the benefit of purchasers and lenders. As this Court has previously stated:

The examiner of a real estate title by his search of the records seeks to determine if the grantors in the chain of title were seized of a marketable title, free of all taxes, liens or encumbrances, at the time such grantor made or intends to make the conveyance. In making such examination he is entitled to rely with safety upon an examination of the records and act upon the assurances against all persons claiming under the grantor that what did not appear did not exist.

Hughes v. N.C. State Highway Comm'n, 275 N.C. 121, 130-31, 165 S.E.2d 321, 327 (1969).

The statute in question here, codified now as N.C.G.S. § 47-27, was enacted in 1917 and provided, in pertinent part:

[A]ll persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall ... record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated.

Gregory's Revisal Biennial 1917 of N.C. § 986A, at 984, para. 1. The statute then set out the specific process for proper recordation of the instruments held by persons, firms, or corporations. The statute also specifically enumerated the classes of instruments and conveyances which were not required to be registered:

- (1) It shall not apply to any deed or instrument executed prior to January first, one thousand nine hundred and ten.
- (2) It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this act.
- (3) It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.
- (4) It shall not apply to local telephone companies, operating exclusively within the State, or to agreements about alley-ways.

Id. para. 2. While this statute set out the procedures for recording “any deed or agreement for rights of way and easements of any character whatsoever,” as well as the penalty for noncompliance, it did not address the effect that nonrecordation would have against bona fide purchasers for value.

In 1943, the General Assembly amended the statute. The most significant aspect of the amendment required *all* easements, deeds, and right-of-way agreements to be recorded in order to have effect against bona fide purchasers for valuable consideration. The final paragraph of N.C.G.S. § 47-27, added in 1943, provided as follows:

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(Cite as: 496 S.E.2d 563, *567)

No deed, agreement for right of way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.

N.C.G.S. § 47-27, para. 4 (1943). It therefore appears that the General Assembly intended N.C.G.S. § 47-27 to operate under the same theory as the Conner Act-as a “pure race” statute. As noted above, a “pure race” statute protects any purchaser for value who records first, regardless of notice. Thus, the effect of the 1943 amendment was to require that any “deed, agreement for right of way, or easement of any character” be registered before it could be

valid against a bona fide purchaser for value.

It is also important to note that the 1943 amendment did not change the exceptions previously listed in the original statute. With regard to statutory construction, this Court has stated that “the exclusion of a particular circumstance from a statute's general operation is evidence of legislative intent not to exempt other particular circumstances not expressly excluded.” *Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 344-45, 389 S.E.2d 35, 39 (1990), *disapproved of on other grounds by Empire Power Co. v. N.C. Dept. of Environment, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 768 (1994). Pursuant to the principles of statutory construction, had the General Assembly intended to make unrecorded DOT right-of-way agreements valid against bona fide purchasers for value, it would have expressly exempted such agreements.

In 1959, the General Assembly again modified [N.C.G.S. § 47-27](#) by adding the following additional paragraph:

From and after July 1, 1959 the provisions of this section shall apply to require the State Highway Commission to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements.

N.C.G.S. § 47-27, para. 5 (Supp.1965). This amendment speaks solely to the process by which DOT is required to record. Apparently, the General Assembly realized that under the 1943 statute, it was not clear how DOT was to record the instruments. The 1943 statute provided the process by which “persons, firms, or corporations” were required to record, but did not refer to DOT. The above amendment specifically provides that after 1 July 1959, DOT is required to record “any deeds of easement, or any other agreements granting or conveying an interest in land ... *in the same manner and to the same extent* that individuals, firms or corporations are required to record such easements.” *Id.* (emphasis added). This language in the 1959 amendment obviously refers back to the first paragraph of [N.C.G.S. § 47-27](#), which provides the procedure for registration that is required of “persons, firms, or corporations.”

However, this amendment does not change in any way the validity of DOT right-of-way agreements executed prior to 1 July 1959 as to purchasers for valuable consideration. In the present case, the parties have stipulated that defendants were bona fide purchasers for value. Thus, in order for a right-of-way agreement to be valid against them, the 1943 amendment requires that it be recorded. Accordingly, the unrecorded right-of-way agreement in the present case does not entitle DOT to the claimed right-of-way.

In concluding that DOT right-of-way agreements were required to be recorded in order to prevail over a bona fide purchaser for value prior to the 1959 amendment, we are upholding the stated purpose of our recordation statutes and the established principles of statutory construction. Interpreting [N.C.G.S. § 47-27](#) to grant validity to an unrecorded right-of-way, not excepted by the statute, against a bona fide purchaser for value would create precisely the confusion and inequities in land ownership that the Conner Act was intended to protect against. As a “pure race” state, North Carolina focuses on recordation, above and beyond anything else. If the General Assembly had intended for DOT to be exempt from filing, it could have included it in the exclusions listed in the statute.

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(Cite as: 496 S.E.2d 563, *568)

In enacting the 1959 amendment, it appears that the General Assembly merely sought to clarify the process by which DOT was required to record. In the present case, we hold that [N.C.G.S. § 47-27](#) applied to DOT prior to the 1959 amendment. Accordingly, we reverse the order of the Superior Court granting DOT “a right of way across defendants' subject tract 75 feet in width from the centerline of N.C. 150.” This case is remanded to Superior Court, Gaston County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

N.C., 1998.

Department of Transp. v. Humphries
496 S.E.2d 563

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On motion for discretionary review of a decision of the Court of Appeals, [42 N.C.App. 202, 256 S.E.2d 299 \(1979\)](#), affirming a condemnation award entered by McLelland, Judge, at the 10 April 1978 Session of Superior Court, Wake County.

Plaintiff instituted this condemnation proceeding against approximately .87 of an acre of defendants' land in 1974. The land was needed to pave soil-and-gravel State Secondary Road 1831, known as the Old Creedmoor Road, in northern Wake County. Prior to trial, the parties stipulated the only issue to be determined was the amount of compensation plaintiff owed defendants for the taking.

At trial, defendants introduced testimony tending to show that the value of their land after the taking diminished in an amount ranging from \$45,000.00 to \$54,300.00. Defendants and their witnesses stated that this diminution was primarily due to the periodic flooding of some 15 acres of land and resulting inaccessibility to a further 25 acres caused by plaintiff's elevation of the level of the roadbed and placement of certain culverts and ditches.

Plaintiff's evidence sharply conflicted with defendants' and tended to show that after the taking and paving, the value of defendants' land was enhanced, not diminished. Plaintiff's witness Frank Gordon, an expert real estate appraiser, testified that he had made a comparison between defendants' land value before the taking and sales of similar properties in that general neighborhood along paved roads. Based on this study of similar properties, it was his opinion that the fair market value of the land prior to the taking was \$280,150.00, and after the taking was \$386,925.00, a gain in value of some \$106,775.00. In his opinion, the property benefited as a result of the paving.

This witness further testified that according to a 1970 Wake County Soil Survey, approximately 15 acres of the tract were classified as alluvial, which is in essence soil subject to flooding. This survey was conducted four years prior to the institution of this suit.

In his charge to the jury, the judge instructed on the measure of damages to apply but gave no instruction as to the law of benefits in condemnation actions. He did, however, include ***478**

_____ (Cite as: 299 N.C. 476, *478, 263 S.E.2d 565, **567) _____

in the jury charge that plaintiff contended the defendants' land value was enhanced by the taking. The jury returned a verdict of \$25,000.00 for the defendants.

On appeal to the Court of Appeals, the plaintiff challenged the sufficiency of the jury charge and argued that an instruction on benefits should have been given. The Court of Appeals upheld the jury charge, stating that the instruction was sufficient, first, because evidence as to any benefit was too speculative and hypothetical to warrant an instruction, and second, even so, the instruction was adequate on the issue of benefits when construed as a whole.

This Court allowed motion for discretionary review on 6 November 1979.

Atty. Gen. Rufus L. Edmisten by Sp. Deputy Atty. Gen. James B. Richmond, Raleigh, for the plaintiff-appellant.

William P. Few, Hatch, Little, Bunn, Jones, Few & Berry, Raleigh, for defendant-appellee.

CARLTON, Justice.

At issue in this condemnation case is the sufficiency of a jury charge which did not include an instruction on general or special benefits where plaintiff's evidence tended to show such benefits existed. We hold that the jury charge was inadequate and therefore reverse the Court of Appeals.

 [1] It is well settled in this State that where only a portion of a tract of land is appropriated by the Board of Transportation for highway purposes,

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_____ (Cite as: 299 N.C. 476, *478, 263 S.E.2d 565, **568) _____

the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway. (Emphasis in original.)

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_____ (Cite as: 299 N.C. 476, *479, 263 S.E.2d 565, **568) _____

[Kirkman v. State Highway Commission, 257 N.C. 428, 432-33, 126 S.E.2d 107, 111 \(1962\)](#); [Proctor v. State Highway and Public Works Commission, 230 N.C. 687, 691, 55 S.E.2d 479, 482 \(1949\)](#).

 [2]  [3] General benefits are defined as " 'those which arise from the fulfillment of the public object which justified the taking . . . (and) are those which result(ed) from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment.' " [Kirkman, supra at 434, 126 S.E.2d at 112](#), quoting [Templeton v. State Highway Commission, 254 N.C. 337, 118 S.E.2d 918 \(1961\)](#). Special benefits are defined as " 'those which arise from the peculiar relation of the land in question to the public improvement.' " [Kirkman v. Highway Commission, supra at 433, 126 S.E.2d at 112](#), quoting [Templeton v. Highway Commission, supra](#).

DEPARTMENT OF TRANSPORTATION Plaintiff, v. JOE C. ROWE and wife, SHARON B. ROWE; HOWARD L. PRUITT, JR., And wife, GEORGIA PRUITT; ROBERT W. ADAMS, Trustee; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY and husband, KENNETH H. ABERNETHY; MARTHA BOWMAN CAUDILL and husband, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC. (formerly Appalachian Poster Advertising Company, Inc.), Lessee; and FLORENCE BOWMAN BOLICK Defendants

No. COA97-1470

(Filed 20 June 2000)

1. Eminent Domain--condemnation for highways--size of taking--no common plan or scheme--no unity of use

The trial court erred in finding that tracts C and D were part of the area affected by the condemnation proceeding for highway purposes involving tracts A and B because: (1) the tracts were not being held for development under a common plan or scheme, and the best and highest use of tracts C and D remained economic development after the taking; and (2) no unity of use exists since defendants' use and enjoyment of tracts C and D were not related to their use of tracts A and B, nor related to or affected by the area taken.

2. Eminent Domain--condemnation for highways--just compensation-- fair market value of remainder tract--setoff with general benefits--unconstitutional

Although the "special benefits" rule under N.C.G.S. § 136-112(1) is constitutionally sound, the provision allowing the fair market value of the remainder tract of land to be setoff with any "general benefits" resulting from the utilization of the part taken for highway purposes violates the constitutional requirement of providing just compensation in condemnation proceedings because: (1) the general provision charges the property owner with a cost for those benefits that the public also enjoys without being subjected to any similar charge; and (2) the property owner is subjected to an involuntary taking of his property while also being subjected to the injustice of receiving an amount less than what he has actually lost.

3. Eminent Domain--condemnation for highways--equal protection--general benefits--unconstitutional statute

Since there is no compelling governmental interest to allow property owners who have part of a tract of land condemned for highway purposes to be denied just compensation received by other property owners also subjected to condemnation proceedings, N.C.G.S. § 136-112(1) violates the equal protection clause because: (1) a property owner will receive just compensation if the taking is imposed under N.C.G.S. § 40A-64, even though the same property owner is not entitled to just compensation if the imposed taking is under N.C.G.S. § 136-112(1) since the condemnor in the latter statute is the Department of Transportation; and (2) a property owner who has a whole tract of land condemned under N.C.G.S. § 136-112(2) receives just compensation, while a property owner who has only a part of a tract condemned for highway purposes does not receive just compensation since subsection 2 of that statute does not require a consideration of the general benefits resulting from the condemnation.

Judge HORTON dissenting in part.

Appeal by defendants from judgment entered by Judge J. Marlene Hyatt on 17 June 1997 in Superior Court, Catawba County and orders entered by Judge James L. Baker, Jr., on 8 May 1997 and 16 May 1997 in Superior Court, Catawba County. Heard in Court of Appeals 27 August 1998. On 20 October 1998, the Court of Appeals issued a unanimous decision, 131 N.C. App. 206, 505 S.E.2d 911 (1998), holding in pertinent part that defendants Rowe and Pruitt did not file a timely appeal of preliminary orders entered by Judge Baker following a

hearing under N.C. Gen. Stat. § 136-108, but finding error in the admission of evidence which required a new trial in the case. Under N.C. Gen. Stat. § 7A-31 (1999), the Supreme Court granted discretionary review of this Court's decision on the issue of timeliness of the appeal by defendants Rowe and Pruitt from the interlocutory orders entered on 8 May 1997 and 16 May 1997, and held that "the interlocutory orders entered did not affect a substantial right of defendants and that defendants were not required to immediately appeal the trial court's orders." The case was remanded to this Court for a determination of the issues raised by the appeal from the interlocutory orders.

Attorney General Michael F. Easley, by Assistant Attorney General J. Bruce McKinney, for plaintiff-appellee.

Lewis & Daggett, P.A., by Michael J. Lewis; and Bell, Davis & Pitt, PA, by Stephen M. Russell, for defendants-appellants.

WYNN, Judge.

On 26 June 1995, the North Carolina Department of Transportation brought a declaration of taking action in Superior Court, Catawba County condemning 11.411 acres of the 18.123 acres of land belonging to Joe C. Rowe and his wife, Sharon B. Rowe, and Howard L. Pruitt, Jr., and his wife, Georgia M. Pruitt. However, because the Department of Transportation concluded that the benefits to the defendants' remaining 6.712 acres of property outweighed any loss to the defendants due to the taking, it did not make a deposit of estimated compensation for the 11.411 acres of taken property.

The defendants answered alleging that the "special or general benefits" provision of the condemnation statute, N.C. Gen. Stat. § 136-112(1) (1999), denied them equal protection in violation of the North Carolina and United States Constitutions. The defendants also challenged the Department of Transportation's claim that all of the defendants' remaining tracts of land should be considered in comparing the benefits of the taking to the defendants' resulting loss.

The trial court conducted a pretrial hearing under N.C. Gen. Stat. § 136-108 to settle issues other than the amount of damages. The evidence showed that after the taking the defendants were left with four small tracts of land identified as tracts A, B, C, and D, totaling 6.712 acres. Before the taking, tract A connected to the easternmost part of the property taken by the Department of Transportation and tract B connected at the westernmost part of the taken property. A 70 foot strip of land owned by the City of Hickory separated tract B from tracts C and D. A 60 foot strip of land owned by the City of Hickory separated tracts C and D from each other. The evidence showed that

the City of Hickory intended to construct streets on the 60 and 70 foot strips; but, no streets had been constructed on the strips as of the date of the taking.

The trial court determined that the defendants' four remaining tracts had "physical unity" with the condemned property and were therefore, affected by the taking. The trial court also rejected the defendants' claim that the condemnation statute, N.C.G.S. § 136-112(1), was unconstitutional.

Following the preliminary hearing, the matter of just compensation was tried before a jury in the Superior Court, Catawba County. At trial, the trial court instructed the jury that it could consider any special and general benefits to the defendants' property which was not taken, including tracts C and D. The jury returned a verdict concluding that the defendants were not entitled to any compensation for the involuntary taking of their 11.411 acres because the increased value of the remaining four tracts offset the loss of the taken property.

From the trial court's judgment consistent with the jury's verdict, the defendants appeal contending that: (I) the trial court erred in including tracts C and D in the area affected, thereby treating all of the defendants' property as a "unified tract" and (II) N.C.G.S. § 136-112(1), which allows a deduction from just compensation for "special or general benefits" resulting from the taking, is unconstitutional on its face and as applied to these defendants.

I. AREA AFFECTED BY THE TAKING

[1] The defendants first contend that the trial court erred in including tracts C and D in the area affected by the condemnation proceeding. In support, they argue that tracts C and D have neither physical unity nor unity of use with the land taken by the Department of Transportation.

In most cases, the landowner is the party who seeks to add additional property to the area affected by a condemnation taking of his property in an attempt to increase his damages. *See e.g., City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 451 S.E.2d 358 (1994). But in this case, it is the condemning authority--the Department of Transportation--which seeks to: (1) include tracts C and D in the area affected by the taking and (2) show that tracts C and D are benefitted by the taking to the extent that the Department of Transportation may avoid paying the landowner defendants any compensation whatsoever for the condemned 11.411 acres.

The determination of whether there is a unity of lands in a condemnation proceeding must be based on the facts of each case. The factors which are usually emphasized in such a determination include "unity of ownership, physical unity and unity of use." *Barnes v. North Carolina State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E.2d

219, 224-25 (1959). Although unity of use is given great weight, the tracts claimed as a single tract "must be owned by the same party or parties." *Id.* at 384, 109 S.E.2d at 225.

In this case, the parties stipulated that there was unity of ownership as to all tracts, including tracts C and D. The parties also agreed that a strip of land owned by the City of Hickory separates tracts C and D and that another strip of land owned by the City of Hickory separates tracts C and B.

In general, parcels of land must be contiguous to constitute a single tract for the purpose of determining severance damages and benefits. *Id.* "Contiguous" means "[t]ouching at a point or along a boundary." Black's Law Dictionary, p. 315 (7th Ed. 1999). "But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit." *Barnes*, 250 N.C. at 385, 109 S.E.2d at 225.

It is generally held that parcels of land separated by an established city street, in the use by the public, are separate and independent as a matter of law. "When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law . . . (but) If the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated. 'Nichols on Eminent Domain (3rd Edition), sec. 14.31(1), Vol. 4, pp. 437-8. Lots separated by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines and undeveloped streets and alleys and streets are not sufficient alone to destroy the unity of land. 'If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actually devoted, as so divided, to wholly different uses, they are to be considered wholly contiguous and so as a single parcel or tract.' 6 A.L.R.2d 1200, sec. 2.

Barnes, 250 N.C. at 385, 109 S.E.2d at 225 (citations omitted).

In this case, the defendants did not retain any interest in the strips of land deeded to the City of Hickory for streets, thereby tending to support a finding that there was no physical unity between tracts C and D and the tracts identified as A and B. Even assuming there was physical unity between the aforementioned tracts, lands will not normally be considered to constitute a single tract for the purpose of determining severance damages and benefits unless there is unity of use.

In *Barnes*, our Supreme Court set out the common law test for unity of use holding that:

'there must be a connection or relation of adaption, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonable and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used.' The unifying use must be a present use. A mere intended use cannot be given effect.

Id. at 385, 109 S.E.2d at 224 (citation omitted).

Applying this rule in *City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 281 S.E.2d 667 (1981), *disc. review denied*, 304 N.C. 724, 288 S.E.2d 808 (1982), our Court held that all of the tracts making up a family owned cattle farm was property affected by the taking of a portion of the property although the farm was divided by two roads and a railway. This Court found "that with a single exception the property was devoted to the single use of cattle farming." *Id.* at 524-25, 281 S.E.2d at 672. But our Court in *Tickle* did exclude one of the parcels from the area affected because that parcel was not used for farming. *See id.* at 527, 281 S.E.2d at 674.

Our General Assembly codified the *Barnes* rule in 1981 providing that "all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract." N.C. Gen. Stat. § 40A-67 (emphasis added); *see also Department of Transportation v. Nelson Co.*, 127 N.C. App. 365, 368, 489 S.E.2d 449, 451 (1997) (holding that a partially completed office park being constructed as part of a master development plan met the unity of use requirement). It follows that where the uses of the tracts in question are independent of the portion which is taken rather than a part of the integrated economic unit, the tracts cannot be included as part of the area affected by the taking. *See North Carolina Department of Transportation v. Kaplan*, 80 N.C. App. 401, 343 S.E.2d 182 (holding that two tracts were not unified because on the date of the taking neither tract was necessary to the "use and enjoyment" of the other tract), *disc. review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982).

At the time of the taking in this case, the landowners held the four remaining tracts for commercial development. However, the tracts were not being held for "development under a common plan or scheme," as in *Yarbrough*, and the best and highest use of tracts C and D remained economic development after the taking. Because the defendants' use and enjoyment of tracts C and D were not related to their use of tracts A and B, nor related to or affected by the area taken, no unity of use exists in this case. We, therefore, conclude that the trial court erred in finding that tracts C and D were part of the area affected by the taking.

II. CONSTITUTIONALITY OF N.C.G.S § 136-112(1)

The defendants next challenge the constitutionality of the provision allowing the fair market value of the remainder tract of land to be setoff with any "special or general benefits resulting from the utilization of the part taken for highway purposes" under N.C.G.S. § 136-112(1). They contend that allowing a setoff for "general benefits" resulting from the taking violates the property owners' rights to: (A) just compensation and (B) equal protection by depriving them of the just compensation received by other property owners also subjected to condemnation proceedings. We address each argument separately.

A. JUST COMPENSATION

"The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state." *State v. Core Banks Club Properties, Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 389 (1969). But this "right of eminent domain lies dormant in the State until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise." *Id.* That right, however, "is limited by the constitutional requirements of due process and payment of just compensation for property condemned." *Id.* at 334, 167 S.E.2d at 388.

Under N.C. Gen. Stat. § 136-18 (1999), our General Assembly delegated to the Department of Transportation the right to condemn private property for the establishment and maintenance of public highways. N.C.G.S. § 136-112 sets out the method for determining "just compensation" for owners of property condemned for highway purposes. Under that statute, the method used to determine just compensation when only a part of a tract of land is taken for the construction of highways is

the difference between the fair market value of the entire tract immediately prior to the taking and the fair market value of the remainder immediately after the taking with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1). The statutory term “special benefits” refers to those benefits which arise from the peculiar relation of the land in question to the public improvement, while the term “general benefits” refers to those benefits which accrue to the public at large by reason of increased community property resulting from the project. *See Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 112 (1962), *Department of Transportation v. McDarris*, 62 N.C. App. 55, 302 S.E.2d 277 (1983).

Although the General Assembly may enact a statute to determine the amount of just compensation to be given to landowners of condemned property, a statutory provision that transgresses the authority vested in the legislature by the Constitution empowers the judiciary to declare the act unconstitutional. *See Glenn v. Board of Education of Mitchell County, et. al*, 210 N.C. 525, 187 S.E. 781 (1936) (stating that “[i]t is well settled in this state that the courts have the power, and it is their duty, in proper cases to declare an act of the General Assembly unconstitutional; but it must be plainly and clearly the case”); *Wilson v. High Point*, 238 N.C. 14, 23, 76 S.E.2d 546, 552 (1953)(holding that the courts have a duty when it is clear a statute transgresses the authority vested in the legislature by the Constitution to declare the act unconstitutional).

Indeed, our Supreme Court has addressed many issues arising from the language of N.C.G.S. § 136-112(1). *See Kirkman*, 257 N.C. at 432, 126 S.E.2d at 111; *North Carolina State Highway Comm’n v. Black*, 239 N.C. 198, 79 S.E.2d 778 (1954); *Robinson v. State Highway Commission*, 249 N.C. 120, 105 S.E.2d 287 (1958); *Williams v. State Highway Comm’n*, 252 N.C. 514, 114 S.E.2d 340 (1960); *Templeton v. State Highway Comm’n*, 254 N.C. 337, 118 S.E.2d 918 (1961). But our Supreme Court has never addressed the issue presented in this appeal--whether the provision allowing *special* and *general* benefits to setoff the fair market value of the remaining part of a tract of land under N.C.G.S. § 136-112(1) violates the constitutional requirement of providing just compensation in condemnation proceedings. Since the parties now bring this issue of first impression to this Court, we begin our consideration of this issue by looking at the just compensation methods employed by other jurisdictions to guide us in our determination.

1. RULES IN OTHER JURISDICTIONS ON THE USE OF SPECIAL AND GENERAL BENEFITS IN CALCULATING JUST COMPENSATION

The general rule in partial takings cases is that “special benefits” may be used to setoff damages to the remaining property, but not to offset the compensation due for the property taken. *See* 3 Nichols on Eminent

Domain, § 8A.03, pp. 8A-46. In fact, jurisdictions¹ following the general rule have held that "a statute which authorizes the payment of any sum that is less than the market value of the land actually taken is unconstitutional." *See id.* at pp. 8A-48.

For instance, in *City of Orofino v. Swayne*, 504 P.2d 398 (Idaho 1972), the Idaho Supreme Court held that under Idaho's eminent domain statute, benefits which may accrue to the property remaining from a taking may not be considered, except as a setoff against the damages that have accrued to the remaining property as a result of the taking. The Idaho Court recognized that the tendency has been away from the rule that special benefits can be setoff from the entire compensation. Instead, the Idaho Court reasoned that the development of the rule that the land taken, at least, must be paid for in money without consideration of benefits to the remaining land is,

‘undoubtedly explained by the fact that the propensity of many American communities to be over-sanguine in regard to the beneficial results of projected public improvements had resulted in the taking of much valuable private property for which the owner never received any compensation other than anticipated benefits which never accrued.’

Id. at 401 (quoting 3 Nichols on Eminent Domain (Rev. 3d. ed.) § 8.6206(1) p. 97).

Likewise, in *Chiesa v. New York*, 43 A.D.2d 359 (N.Y. App. Div. 1974), the New York Appellate Court held that it would be unconstitutional to allow any benefits to the claimant's remaining lands from the State's appropriation of a portion of the claimant's property to be used as an offset against the award for direct damages for the property taken. In reaching this holding, the New York Court determined that the "application of a rule permitting a setoff against direct damages for enhancement to the remainder would be an unconstitutionally discriminate exercise of taxing power in favor of a neighboring owner who suffers no loss of land, but benefits by the public improvement which led to the taking." *Id.* at 360. The New York Court found that just compensation

¹ *City of Orofino v. Swayne*, 504 P.2d 398 (Idaho 1972) *Chiesa v. State*, 43 A.D.2d 359, 360-61 (N.Y. 1974); *William Natural Gas Co. v. Perkins*, 952 P.2d 483 (Okla. 1997) (holding that in a partial taking case in which condemnor is taking only part of condemnee's property, an increase in the value of remaining property may be offset against any injury to the remaining property, but an increase in the value of the remaining property may not be offset against the value of property that was taken); *State Dep't of Highways v. Stegemann*, 269 So.2d 480 (La. 1972) (holding that a landowner is entitled to demand at least the fair market value of the property taken in money from an expropriating authority, even though he may be damaged to a lesser extent by the taking); *State Highway Comm'n v. Hooper*, 488 P.2d 421 (Or. 1971) (holding that special benefits to the remainder as a result of a partial taking may be used only to reduce any damages claimed to the remainder and cannot be used to reduce the fair market value of the land actually taken); *State v. Carpenter*, 89 S.W.2d 979 (Tex. Comm'n App. 1936) (holding that where a portion of land is taken by condemnation damages to the remainder can be offset by benefits allowed by the law).

means fair and adequate monetary compensation for land actually taken, regardless of any benefits which may be conferred upon the remainder due to the direct taking. . . .

Id.

Notwithstanding the general rule, the United States Supreme Court, along with a number of other jurisdictions, has held that in partial takings cases setting off the value of the remaining part of the land with “special benefits” resulting from the purpose for which a portion of the tract of land was taken does not violate a property owner’s right to just compensation.² According to the Supreme Court, “[j]ust compensation means a compensation that would be just in regard to the public, as well as in regard to the individual.” *Bauman v. Ross*, 167 U.S. 548, 574, 42 L. Ed. 270, 283 (1897). Moreover, the “just compensation required by the constitution to be made to the [property] owner is to be measured by the loss caused to him by the appropriation.” *Id.* Therefore, the property owner “is entitled to receive the value of what he has been deprived of, and no more.” *Id.*

Consequently, when part of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.

Id.

In contrast to the general rule’s application to “special benefits”, most jurisdictions³ hold that “general benefits” may not be used to setoff damages "because the owner whose land is taken would be placed in a worse position than his neighbor whose estate lies outside the path of improvement and who shares in the increased value without any pecuniary loss." Nichols, § 8A.03, pp. at 8A-47.

² See *Bauman v. Ross*, 167 U.S. 548, 42 L. Ed. 270 (1897); *Lazenby v. Arkansas State Highway Comm’n*, 331 S.W.2d 705 (Ark. 1960) (holding that when the taking is by a municipal corporation, special benefits may be setoff, even from the value of the land taken); *State v. Midkiff*, 516 P.2d 1250 (Haw. 1973) (holding that in non-highway taking cases, special benefits may be setoff against the value of the part taken and severance damages); *Collins v. State Highway Comm’n*, 66 P.2d 409 (An. 1973) (holding that when a municipal corporation acquires property for a highway purpose, special benefits may be setoff from the value of the land taken and damages); *State v. Ward*, 252 P.2d 279 (Wa. 1953) (holding that when the taking is by a state or municipal corporation, benefits may be setoff from the value of the property taken and damages).

³ See e.g., *Phoenix Title & Trust Co. v. State of Arizona ex rel. Herman*, 425 P.2d 434 (Ariz. 1967); *Lazenby v. Arkansas State Highway Comm’n*, 331 S.W.2d 705 (Ark. 1960); *Denver Joint Stock Land Bank v. Board of County Com’rs of Elbert County*, 98 P.2d 283 (Colo. 1940); *Schwartz v. City of New London*, 120 A.2d 84 (Conn. Com. Pl. 1955); *Acierno v. State of Delaware*, 643 A.2d 1328 (Del. Supr. 1994); *City of Wichita v. May’s Co. Inc.*, 510 P.2d 184 (Kan. 1973); *Louisiana Power & Light Co. v. Lasseigne*, 240 So.2d 707 (La. 1970); *Amory v. Commonwealth*, 72 N.E.2d 549 (Mass. 1947); *State Highway Comm’n v. Vorhof-Duenke Co.*, 366 S.W.2d 329 (Mo. 1963); *Frank v. State, Dep’t of Roads*, 129 N.W.2d 522 (Neb. 1964); *State Highway Comm’n v. Bailey*, 319 P.2d 906 (Or. 1957); *State v. Davis*, 140 S.W.2d 861 (Tex. Civ. App. 1940), *disapproved by State v. Meyer*, 403 S.W.2d 366 (Tex. 1966); *State Highway Comm’n v. Rollins*, 471 P.2d 324 (Wyo. 1970).

Arguably the setoff of general benefits denies the condemnee the constitutional guarantee of just compensation since he is singled out and deprived of a share in the increased prosperity of his fellow citizens merely because the public happens to want a portion of his land. The condemnee pays in taxation for his share of general benefits, just as other members of the public, and therefore is entitled to receive his fair portion of general advantages brought about by a public improvement.

However, the United States Supreme Court left the determination as to whether using *general* benefits as a setoff deprives a property owner of just compensation to the states. In fact, the Court stated that:

we are unable to say that [the property owner] suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits--enhancement in market value--flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

McCoy v. Union Elevated R. Co., 247 U.S. 354, 366, 62 L. Ed. 1156, 1164 (1918); see *McRea v. Marion County*, 133 So. 278, 279 (Ala. 1931) (stating that “the United States Supreme Court leaves the question to the states, with assurance that, if the Constitution and laws of the state permit a deduction of general benefits, it will not violate the Fifth and Fourteenth Amendments to the United States Constitution”).

Accordingly, some states⁴ do not follow the majority rule; rather, these states allow both *special* and *general* benefits to setoff either the severance damages or the value of the land of the property taken. See Nichols, § 8A.03, pp. at 8A-47.

2. THE EFFECT OF NORTH CAROLINA'S USE OF SPECIAL AND GENERAL BENEFITS IN CALCULATING JUST COMPENSATION

⁴ See e.g., *State ex rel. State Highway Comm'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 417 P.2d 68 (N.M. 1966) (holding that the benefit of construction of a highway which enhances the value of a remainder of a tract of land is to be included in the determination of the value of the land after the taking); *Smith v. City of Greenville*, 92 S.E.2d 639 (S.C. 1956) (holding that the benefits to the residue of a landowner's land from the construction of a street should be applied against the value of the land actually taken).

In North Carolina, N.C.G.S. § 136-112(1) permits both *special* and *general* benefits to setoff the value of the land taken for highway purposes. Most recently, this Court in *Department of Transportation v. Mahaffey*, 2000 WL 390133 ___ N.C. App. ___, 528 S.E.2d 381 (2000) in construing *Bauman*, 167 U.S. at 574, 42 L. Ed. 2d at 283, stated that:

[a]s we are unable to discern any material difference before the *Bauman* court and section 136-112, we hold section 136-112 does not violate the federal Due Process Clause.

Mahaffey, ___ N.C. App. at ___.

In *Bauman*, the United States Supreme Court upheld a federal statute which provided that in estimating damages for the taking of any land, the jury should take into consideration the benefit to the owner by enhancing the value of the remainder of his land. *Bauman*, 167 U.S. at 548, 42 L. Ed. 2d at 270. The statute in *Bauman*--unlike N.C.G.S. § 136-112(1)--also provided for an assessment of one-half the cost of any improvement upon the adjacent property and directed that, in case any sum had been deducted for benefits from the award for land taken, allowance for the deduction should be made in determining the amount of the assessment. *Id.*

The United States Supreme Court limited its decision in *Bauman* by its later pronouncement in *McCoy*, 247 U.S. at 354, 62 L. Ed. at 1156. In *McCoy*, the Supreme Court held that states have the discretion of determining whether using *general* benefits as a setoff deprives a property owner of just compensation. *McCoy*, 247 U.S. at 354, 62 L. Ed. at 1156. Thus, since we only addressed the applicability of *Bauman* in *Mahaffey*, we left undetermined the question of whether using *general* benefits as a setoff constitutes just compensation.

And, we again reiterate the holding of *Mahaffey* that the “special benefits” rule of N.C.G.S. § 136-112(1) is constitutionally sound. In comparing that provision with the various methods employed by other jurisdictions in calculating just compensation, we find that our statutory rule allowing “special benefits” to affect the value of the remaining tract of land does not violate the constitutional requirement of providing just compensation in condemnation proceedings. Indeed, since any resulting “special benefits” are uniquely enjoyed by the property condemned, assessing a cost through a setoff, is constitutionally permissible and has been consistently approved by the United States Supreme Court, along with a number of other jurisdictions.⁵ See *Kirkman*, 257 N.C. at 433, 126 S.E.2d at 112.

⁵ See note 2, *supra*.

Moreover, given the legislature's discretion in determining just compensation, without a clear indication that a different result must exist, the legislature's enactment of the statute's provision for "special benefits" must be upheld. *See Glenn*, 210 N.C. at 525, 187 S.E. at 781; *Wilson*, 238 N.C. at 23, 76 S.E.2d at 552. And for a different result to be reached, such a determination would have to be made by our legislature, not this Court. *See id.*

[2] However, we reach a different conclusion as to our "general benefits" rule under N.C.G.S. § 136-112(1) which allows the *general* benefits to affect the value of the remaining property. Since "general benefits" are those benefits which accrue to the general public as a result of the condemnation of certain property for public purposes, that provision of the statute charges the property owner with a cost for those benefits that the public also enjoys without being subjected to any similar charge. *See McDarris*, 62 N.C. App. at 55, 302 S.E.2d at 277. In effect, the property owner is subjected to an involuntary taking of his property while also being subjected to the injustice of receiving an amount less than what he has actually lost. *See Nichols*, § 8A.03, pp. at 8A-49 ("Forcing the condemnee not only to give up a portion of his land, but also to receive nothing for it places a disproportionate share of the cost of the public improvement on his shoulders."). He is placed in a position where he is being required to carry the undue burden of paying an additional cost not paid by the public merely because his property has been taken for public purposes.

To emphasize the undue burden placed upon a property owner subjected to the provisions of N.C.G.S. § 136-112(1), consider the following hypothetical case: Farmer Jones owns 20 acres of land with a fair market value of \$50,000.00. Through eminent domain, the government condemns 15 acres of Farmer Jones' property for highway purposes. In computing just compensation under N.C.G.S. § 136-112(1), the government determines that the value of the surrounding property and the remaining 5 acres has so greatly increased in value as a result of the new highway that Farmer Jones should get nothing for the 15 acres that it took from him. Farmer Jones' sacrifice of 15 acres of his land for the surrounding land owner and the public illustrates how a pure economic analysis can fail to import fairness and due process in condemnation damage determination. It further shows that the "cost and benefit" result of computing just compensation under N.C.G.S. § 136-112(1) fails to consider the private involuntary taking of land for public good. Should the government decide who will get the *full* benefit of his land at the *expense* of others? Surely the results under our statute suggest that had the government taken another landowner's land, then Farmer Jones would have enjoyed the increased valuation of his entire 20 acre tract.

Likewise, in this case, the Department of Transportation condemned 11.411 acres of the defendants' 18.123 acres of property. In return, the defendants received no compensation for their taken property because the accrued benefits resulting from the roadway caused the fair market value of the remaining 6.712 acres to equal or exceed the fair market of the whole tract of land before the taking.

In essence, by allowing general benefits to setoff the fair market value of the remaining land, the statute allows a compensation which is unjust to the condemnee while providing a windfall to the public. We agree with the rule in most jurisdictions that a statute, such as N.C.G.S. § 136-112(1), allowing *general* benefits to be used as a setoff is unconstitutional.⁶ Accordingly, we hold that the provision regarding *general* benefits under N.C.G.S. § 136-112(1) violates, on its face and as applied to the defendants in this case, the constitutional requirement of providing just compensation in condemnation proceedings.

B. EQUAL PROTECTION

[3] Alternatively, the defendants contend that N.C.G.S. § 136-112(1) violates the equal protection rights of the property owners who have part of a tract of land condemned for highway purposes because they are denied the just compensation received by other property owners also subjected to condemnation proceedings. We agree.

In addressing a claim that the Equal Protection Clause has been violated, the courts employ a two-tiered analysis. *See In re Consolidated Appeals of Certain Timber Companies from the Denial of Use Value Assessment and Taxation by Certain Counties*, 98 N.C. App. 412, 419, 391 S.E.2d 503, 507 (1990).

The upper tier is employed

[w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right . . . or when a governmental classification distinguishes between persons in terms of any right, upon some 'suspect' basis

Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (citations omitted). This tier, calling for strict scrutiny, "requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest." *Id.*

⁶ See note 3, *supra*.

The lower tier is employed "[w]hen an equal protection claim does not involve a 'suspect class' or a fundamental right" *Id.* "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest." *Id.*

In the present case, the defendants support their equal protection claim by comparing the method of determining just compensation under subsection (1) of N.C.G.S. § 136-112 with the methods of determining just compensation when: (1) part of a tract of land is condemned under Chapter 40A of the General Statutes and (2) a whole tract of land is condemned for highway purposes under subsection (2) of N.C.G.S. § 136-112.

Because just compensation--the basis of the classification in the present case--is a fundamental right protected under both the federal and state constitutions, we employ strict scrutiny in analyzing the defendants' equal protection claim. *See* U.S. Const. amend. V; N.C. Const. Art. I § 19.

As stated, N.C.G.S. § 136-112(1)'s provision allowing the general benefits to be used as a setoff violates the property owners' rights to just compensation for the property taking. However, a similar setoff is not imposed upon a property owner subjected to a taking under N.C. Gen. Stat. § 40A-64(b). In fact, this statute provides that for partial takings cases, the method for determining just compensation is

the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

N.C.G.S. § 40A-64(b) (1999).

Therefore, a property owner will receive just compensation if the taking is imposed under N.C.G.S. § 40A-64(b), even though the same property owner is not entitled to compensation which is just if the imposed taking is under N.C.G.S. § 136-112(1). Both statutes involve partial takings cases with the difference being who is the condemnor. Under the former statute, the condemnor is an entity other than the Department of Transportation, while the Department of Transportation is the condemnor under the later statute.

Hence the classification between N.C.G.S. § 40A-64(b) and N.C.G.S. § 136-112(1) is based on whether the taking is for highway purposes. Because there is no compelling governmental interest to support this classification, we must find that a property owner's equal protection rights are violated by allowing such a classification to exist.

Also, we find that a property owner's equal protection rights are violated by the distinction in the compensation method under subsection (1) of N.C.G.S. § 136-112 and the compensation method under subsection (2) of N.C.G.S. § 136-112. Subsection (2) of the statute, like N.C.G.S. § 40A-64(b), does not require a

consideration of the general benefits resulting from the condemnation. In particular, N.C.G.S. § 136-112(2) provides that:

[w]here the entire tract is taken the measure of damages for said taking shall be the fair market value of the property at the time of taking.

N.C.G.S. § 136-112(2).

Thus, a property owner who has a whole tract of land condemned for highway purposes under N.C.G.S. § 136-112(2) receives just compensation, while a property owner who has only a part of a tract of land condemned for highway purposes does not receive just compensation. The result of the classification is that a property owner who has only a part of a tract of land condemned for highway purposes, as oppose to a whole tract of land condemned for the same purpose, is being penalized for not having his whole tract condemned. No compelling governmental interest exists to support such a penalty. Therefore, the provision allowing *general* benefits to be used as a setoff under N.C.G.S. § 136-112(1) violates, on its face and as applied to the defendants in this case, the constitutional requirements of equal protection under the law.

Finding N.C.G.S. § 136-112(1) to be violative of both the constitutional requirement of just compensation and the constitutional requirement of equal protection, we hold that the trial court erred in concluding "that the defendants . . . failed to present sufficient evidence to support the constitutional issues raised and the relief requested." For the reasons set out in our prior opinion filed herein, and because of the errors stated herein, there must be a

New trial.

Judge HUNTER concurs.

Judge HORTON dissents in part in a separate opinion.

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HORTON, Judge, dissenting in part.

I concur in that portion of the majority opinion which holds that the trial court erred in finding that tracts C and D were part of the area affected by the taking of defendants' property. I respectfully dissent, however, from that portion of the majority opinion holding that N.C. Gen. Stat. § 136-112(1) violates "both the constitutional requirement of just compensation and the constitutional requirement of equal protection . . ."

With regards to the constitutionality of N.C. Gen. Stat. § 136-112(1), most of the arguments now advanced by the defendants were not made in the trial court and are not properly before us on this appeal. *See State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). In their "Answer, Motions and Counterclaim," defendants allege as a First Defense "[t]hat N.C. Gen. Stat. § 136-112(1), insofar as it provides that the measure of damage be determined 'with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes,'" denies the defendants just compensation in violation of Article I, Section 19, of the North Carolina Constitution ("law of the land" provision); Amendment V to the United States Constitution ("just compensation" provision); and Amendment XIV to the United States Constitution ("equal protection" and "due process of law" provisions).

At a pretrial hearing pursuant to N.C. Gen. Stat. § 136-108, the defendants argued there were two bases for their constitutional challenge to N.C. Gen. Stat. § 136-112(1). Defendants first made an equal protection argument, contending that just compensation for a partial taking of property is calculated under two different statutory schemes: one for property owners whose lands were condemned by the Department of Transportation (DOT) pursuant to the provisions of Chapter 136, and the other for property owners whose lands were condemned by private and local public condemnors pursuant to the provisions of Chapter 40A of the General Statutes. In determining the issue of damages under the provisions of N.C. Gen. Stat. § 136-112(1), the finder of fact is to consider "general and special benefits" to the portion of the lands not taken, while under N.C. Gen. Stat. § 40A-64(b) no such consideration is mandated. Defendants argued to the trial court that since the measure of compensation was different depending on the identity of the condemning authority, landowners whose property was condemned were treated differently and thus deprived of equal protection. Defendants also stated prior to their argument on this point that their "constitutional attack on the benefits portion of Chapter 136 . . . is based very simply on this premise . . ." (Emphasis added.)

The second argument made by defendants was that DOT acted arbitrarily and capriciously in failing to offer any compensation to defendants, treating these defendants in a different manner than other nearby landowners -- such as Martin Marietta -- who had been paid compensation by DOT. That contention was properly overruled by the trial court due to an absence of evidence of arbitrariness or caprice by DOT, and is not before us at this time.

Further, two of defendants' Assignments of Error relate to the constitutional question raised by defendants.

They are:

3. The Trial Court's denial of Defendants' constitutional defenses on the grounds that G.S. 136-12(1) [sic] violates the equal protection provisions of the United States and North Carolina Constitutions.
4. The Trial Court's allowing the Jury to consider the benefit to Defendants' property in making its determination as to damages recoverable by the Defendants for the taking in that this violated Defendants' rights to equal protection under the United States and North Carolina Constitutions.

Even according a generous interpretation to the Assignments of Error, it is obvious that defendants have not preserved and brought forward a constitutional challenge based on a due process argument. Further, a unanimous panel of this Court has recently squarely rejected such an argument in *Dept. of Transportation v. Mahaffey*, ___ N.C. App. ___, 528 S.E.2d 381 (2000) ("[S]ection 136-112 does not violate the federal Due Process Clause. It, therefore, follows our state constitution 'law of the land' clause is not violated.")

At most, then, defendants have brought forward (1) the equal protection argument they advanced below centering on the different measures of damages for landowners whose property is taken under Chapter 136 and those whose property is taken under Chapter 40A; and (2) an argument that the trial court erred in allowing the jury to consider the "special and general benefits" to defendants' property in determining damages. Thus, much of the majority opinion deals with questions of constitutional law which are not properly before us, and declares section 136-112(1) unconstitutional based on theories not advanced before the trial court. "[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

II.

The constitutional issue which is properly before us is whether the equal protection provisions of the Constitutions of the United States and the State of North Carolina are violated by the different damages schemes found in sections 136-112(1) and 40A-64(b).

A sovereign state has the inherent power to take the property of its citizens for public use. The exercise of that power is limited, however, by constitutional guarantees of due process and payment of "just compensation" for the property taken. *State v. Club Properties*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969). In Chapter 136 of our General Statutes, our General Assembly confers the right of eminent domain on DOT, and sets out the method

for determining just compensation for the property taken. N.C. Gen. Stat. § 136-103, *et seq.* Where an entire tract is taken, the measure of damages is "the fair market value of the property at the time of taking." N.C. Gen. Stat. § 136-112(2)(1999). Where only a portion of a tract is taken, as in the case before us,

the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, *with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.*

N.C. Gen. Stat. § 136-112(1) (1999) (emphasis added). The burden of proof on the existence and amount of such special or general benefits is on DOT. *Board of Transportation v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980). Defendants here contend that allowing the jury to consider the benefits to the remainder of their property affected by the taking violates their right to equal protection under the law. Defendants stress that where property is condemned by a private condemnor or a local public condemnor pursuant to the provisions of Chapter 40A of the General Statutes, a different method of determining damages is mandated. N.C. Gen. Stat. § 40A-64(b) provides that

[i]f there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

Our Supreme Court set out in *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980), the traditional two-tiered "scheme of analysis when an equal protection claim is made." *Id.* at 10, 269 S.E.2d at 149. First,

[w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.

Id. at 11, 269 S.E.2d at 149 (citations omitted). I do not find evidence here that the defendants are members of a class which is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." *Id.* Nor do I find an infringement of the defendants' constitutionally guaranteed right to just compensation for property taken for a public purpose. "Just compensation" is not defined in either our Constitution or that of the

United States, but is left to the sound discretion of state legislatures. Our General Assembly has set out in N.C. Gen. Stat. § 136-112 the method for determining just compensation where property is taken by DOT.

Moving then to the second tier of the analysis, the question becomes whether N.C. Gen. Stat. § 136-112 bears a rational relationship to a legitimate governmental purpose. "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest." *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

Clearly, the construction and maintenance of a statewide system of roads is a legitimate public purpose. In the course of development of roads throughout the state, it is inevitable that some privately held property must be taken for public purposes. Our General Assembly has granted the power of eminent domain to DOT. N.C. Gen. Stat. § 136-18 (1999). In the interest of fairness and in satisfaction of constitutional guarantees that just compensation be paid to a citizen whose property is taken for public purposes, the General Assembly has set out in N.C. Gen. Stat. § 136-112 the measure of damages for such taking. All citizens whose property is taken by DOT have their damages measured by the same standard. I find here no evidence that defendants have been treated in a different manner than other members of the class of persons affected by condemnation of a part of their property for highway purposes. After careful consideration of defendants' arguments and contentions, I cannot find any evidence of a violation of their constitutional rights to equal protection, and find support for my opinion in the prior decisions of our Supreme Court.

It has long been settled in North Carolina that it is within the power of the General Assembly to provide that, when only a portion of the landowner's property is taken in a condemnation action, the trier of fact is to consider both special and general benefits to the remainder of the landowner's property in determining the amount of just compensation to be paid him. *Miller v. Asheville*, 112 N.C. 759, 16 S.E. 762 (1893); *Wade v. Highway Com.*, 188 N.C. 210, 124 S.E. 193 (1924); *Elks v. Comrs.*, 179 N.C. 241, 102 S.E. 414 (1920); *Bailey v. Highway Commission*, 214 N.C. 278, 199 S.E. 25 (1938).

In *Miller*, our Supreme Court upheld the validity of an Act of our General Assembly providing that both general and special benefits must be considered in assessing landowners' damages arising from a condemnation of a portion of their property by the City of Asheville. "The Legislature, in conferring upon the corporation [City of Asheville] the exercise of the right of eminent domain, can *in its discretion* require all the benefits or a specified part

of them, or forbid any of them to be assessed as offsets against the damages." *Miller*, 112 N.C. at 768, 16 S.E. at 764 (emphasis added). Where the legislature made no such provision, however, the "old" rule applied, and only special damages could be deducted. In *R.R. v. Platt Land*, 133 N.C. 266, 45 S.E. 589 (1903), after tracing the history of the rule, Justice Connor stated that "*in the absence of any express language to the contrary*, only special benefits can be deducted from the compensation or damages assessed against the corporation [Southport, Wilmington and Durham Railroad Company]." *Id.* at 274, 45 S.E. at 592.

In *Elks*, Chief Justice Clark, who authored the opinion in *Miller*, again cited the holding of the Supreme Court in *Miller* that the legislature could "authorize the deduction of general as well as special benefits from the damages assessed, but holding that if the statute does not so provide, only the special benefits will be deducted." *Elks*, 179 N.C. at 247, 102 S.E. at 417.

In 1923, the General Assembly amended the statutes setting out the measure of damages in condemnations brought by the State Highway Commission, to provide that both "general and special benefits shall be assessed as off-sets against damages" Public Laws 1923, Chapter 160, sec. 6. Our Supreme Court, citing *Miller* with approval, upheld the validity of the change and its application to pending litigation in *Wade*, 188 N.C. 210, 124 S.E. 193. The Supreme Court remanded *Wade* to the trial court for a new trial on damages because the trial court only charged the jury to consider the special benefits accruing to the landowner, and did not include the general benefits to the landowner's remaining property. *Id.* Again, in *Bailey v. Highway Commission*, the Supreme Court remanded for a new trial because the trial court did not charge the jury to consider the general benefits to the landowner's remaining property as an offset against the amount of compensation. 214 N.C. 278, 279, 199 S.E. 25, 26 (1938). *See also Kirkman v. Highway Commission*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962), and the cases cited therein.

Thus, it appears that for more than a century, our Supreme Court has upheld the doctrine of *Miller v. Asheville* and the power of the General Assembly to provide that damages in a condemnation case may be offset by special benefits, general benefits, or both special and general benefits. In the exercise of its discretion, the General Assembly has provided for a different measure of damages where property is taken by private condemnors and local public condemnors under the provisions of Chapter 40A. N.C. Gen. Stat. § 40A-64(b). By contrast, where property is taken by DOT, as here, the jury is to take into account both special and general benefits in determining the issue

of damages. N.C. Gen. Stat. § 136-112(1). I do not believe that any equal protection violation arises because of the distinction between the measure of damages in the two statutes. As Chief Justice Clark explained in *Elks*:

The distinction seems to be that where the improvement is for private emolument, as a railroad or water power, or the like, being only a *quasi*-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but *where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages, after deducting all benefits, either special or general.*

Elks, 179 N.C. at 245, 102 S.E. at 416-17 (emphasis added).

I am aware that our sister states have enacted a wide variety of statutory schemes with regard to the measure of damages in condemnation cases, and that many of them do not provide for an offset for special and general benefits against property which remains after a taking. *See* 3 Nichols on Eminent Domain, § 8A.03, pp. 8A-26 to 8A-29. However, as our Supreme Court has consistently held, that decision is for our legislature, not for this Court. "All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right." *Miller*, 112 N.C. at 768, 16 S.E. at 764.

A statute is presumed to be constitutional, so one who challenges its constitutionality has the burden of establishing it. *State v. Johnson*, 124 N.C. App. 462, 474, 478 S.E.2d 16, 23 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997). I agree with the trial court, which concluded after a hearing "that the defendants have failed to present sufficient evidence to support the constitutional issues raised and the relief requested."

III.

In their fourth Assignment of Error, defendants argue that the trial court erred in allowing the jury to consider the benefits to their property in determining damages. Although I find no constitutional infirmity in our statutory scheme for measuring damages in a Chapter 136 condemnation action, I also note that defendants did not object to the jury charge of the trial court relating to calculation of damages. Prior to submission of the case to the jury, the trial court held a charge conference and explained to counsel that it would be using section 835.12 of the Pattern Jury Instructions, "which is the eminent domain, partial taking by the DOT and I will include the benefit

portion of that charge." Defendants did not object to the use of the pattern instruction, and asked only that the trial court use section 101.25 on expert witnesses, and section 101.30, dealing with interested witnesses.

The trial court then charged the jury, among other things, that in determining defendants' damages it might consider "any general or special benefits resulting from the utilization of the part [of the property] taken for public use." After completion of the charge, the trial court asked counsel in the absence of the jury whether they had objections, changes, additions, or deletions to the charge. Counsel for the defendants answered that they did not. It appears that defendants cannot now assign error to any portion of the jury charge, particularly to those portions in which the trial court instructed the jury on the measure of damages. N.C.R. App. P. 10(2).

While I agree that the defendants are entitled to a new trial for reasons set out in our prior opinion in this case, and in Section I of the majority opinion, I dissent from that portion of the majority opinion which would declare N.C. Gen. Stat. § 136-112(1) unconstitutional for reasons not properly before us. In any event, we are not justified in declaring invalid this enactment of our legislature, its unconstitutionality not being "plainly and clearly the case." *Glenn v. Board of Education of Mitchell County, et. al.*, 210 N.C. 525, 187 S.E. 781 (1936).

Footnote: 1

City of Or ofino v. Swayne, 504 P.2d 398 (Idaho 1972) *Chiesa v. State*, 43 A.D.2d 359, 360-61 (N.Y. 1974); *William Natural Gas Co. v. Perkins*, 952 P.2d 483 (Okla. 1997) (holding that in a partial taking case in which condemnor is taking only part of condemnee's property, an increase in the value of remaining property may be offset against any injury to the remaining property, but an increase in the value of the remaining property may not be offset against the value of property that was taken); *State Dep't of Highways v. Stegemann*, 269 So.2d 480 (La. 1972) (holding that a landowner is entitled to demand at least the fair market value of the property taken in money from an expropriating authority, even though he may be damaged to a lesser extent by the taking); *State Highway Comm'n v. Hooper*, 488 P.2d 421 (Or. 1971) (holding that special benefits to the remainder as a result of a partial taking may be used only to reduce any damages claimed to the remainder and cannot be used to reduce the fair market value of the land actually taken); *State v. Carpenter*, 89 S.W.2d 979 (Tex. Comm'n App. 1936) (holding that where a portion of land is taken by condemnation damages to the remainder can be offset by benefits allowed by the law).

Footnote: 2

&nb sp; See *Bauman v. Ross*, 167 U.S. 548, 42 L. Ed. 270 (1897); *Lazenby v. Arkansas State Highway Comm'n*, 331 S.W.2d 705 (Ark. 1960) (holding that when the taking is by a municipal corporation, special benefits may be setoff, even from the value of the land taken); *State v. Midkiff*, 516 P.2d 1250 (Haw. 1973)(holding that in non-highway taking cases, special benefits may be setoff against the value of the part taken and severance damages); *Collins v. State Highway Comm'n*, 66 P.2d 409 (An. 1973) (holding that when a municipal corporation acquires property for a highway purpose, special benefits may be setoff from the value of the land taken and damages); *State v. Ward*, 252 P.2d 279 (Wa. 1953) (holding that when the taking is by a state or municipal corporation, benefits may be setoff from the value of the property taken and damages).

Footnote: 3

; See e.g., *Phoenix Title & Trust Co. v. State of Arizona ex rel. Herman*, 425 P.2d 434 (Ariz. 1967); *Lazenby v. Arkansas State Highway Comm'n*, 331 S.W.2d 705 (Ark. 1960); *Denver Joint Stock Land Bank v. Board of County Com'rs of Elbert County*, 98 P.2d 283 (Colo. 1940); *Schwartz v. City of New London*, 120 A.2d 84 (Conn. Com. Pl. 1955); *Acierno v. State of Delaware*, 643 A.2d 1328 (Del. Supr. 1994); *City of Wichita v. May's Co. Inc.*, 510 P.2d 184 (Kan. 1973); *Louisiana Power & Light Co. v. Lasseigne*, 240 So.2d 707 (La. 1970); *Amory v. Commonwealth*, 72 N.E.2d 549 (Mass. 1947); *State Highway Comm'n v. Vorhof-Duenke Co.*, 366 S.W.2d 329 (Mo. 1963); *Frank v. State, Dep't of Roads*, 129 N.W.2d 522 (Neb. 1964); *State Highway Comm'n v. Bailey*, 319 P.2d 906 (Or. 1957); *State v. Davis*, 140 S.W.2d 861 (Tex. Civ. App. 1940), disapproved by *State v. Meyer*, 403 S.W.2d 366 (Tex. 1966); *State Highway Comm'n v. Rollins*, 471 P.2d 324 (Wyo. 1970).

Footnote: 4

See e.g., *State ex rel. State Highway Comm'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 417 P.2d 68 (N.M. 1966) (holding that the benefit of construction of a highway which enhances the value of a remainder of a tract of land is to be included in the determination of the value of the land after the taking); *Smith v. City of Greenville*, 92 S.E.2d 639 (S.C. 1956) (holding that the benefits to the residue of a landowner's land from the construction of a street should be applied against the value of the land actually taken).

[Footnote: 5](#)

& nbsp; *See note 2, supra.*

[Footnote: 6](#)

See note 3, supra.

Long v. City of Charlotte

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306 N.C. 187, 293 S.E.2d 101

N.C., 1982.

July 13, 1982 (Approx. 17 pages)

Landowners near airport sued city upon complaint alleging, inter alia, trespass and nuisance. The Superior Court, Mecklenburg County, Frank W. Snepp, J., dismissed trespass and nuisance claims and struck allegations of punitive damages. The Supreme Court allowed landowners' petition for discretionary review prior to determination of the Court of Appeals. The Supreme Court, Meyer, J., held that: (1) inverse condemnation was sole remedy by which landowners could recover for personal injuries and for property damage resulting from direct overflights; (2) allegations of physical distress and mental anguish were properly stricken as independent elements of damage, though they could have properly remained in complaint in inverse condemnation count to show cause and extent of diminution and value of the property but, in any event, there was no prejudice from striking such allegations because of admissibility of such matters to prove allegations of diminution and fair market value of property in inverse condemnation count; (3) generally, no punitive damages are allowed against municipal corporation unless expressly authorized by statute; and (4) procedure to be used by Department of Transportation, commonly known as "Quick-take" procedure, did not furnish exclusive remedy available to landowners, in view of statute providing that city may in its discretion use "Quick-take" procedure and statutes clearly contemplating landowner recourse to common-law inverse condemnation action where there has been uncompensated taking by municipality.

Affirmed.

250 N.C. 378; BARNES v. NORTH CAROLINA STATE HIGHWAY COMMISSION; S.E.2d

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MARY L. BARNES AND HUSBAND, J. T. BARNES, JR.; VIRGINIA L. IRVIN AND HUSBAND, GEORGE L. IRVIN, JR.; BARBARA L. HANES AND HUSBAND, FRANK B. HANES, AND WACHOVIA BANK AND TRUST COMPANY, TRUSTEE UNDER THE WILL OF NANCY L. LASATER, PETITIONERS, v. NORTH CAROLINA STATE HIGHWAY COMMISSION, RESPONDENT.

[Cite as BARNES v. NORTH CAROLINA STATE HIGHWAY COMMISSION, 250 N.C. 378]

(Filed June 12, 1959.)

1. Eminent Domain § 5 –

Just compensation for the taking of a part of a tract of land is to be measured by the difference between the fair market value of the property as a whole immediately before and the fair market value of the remainder immediately after the appropriation, and in arriving at this difference consideration must be given to the value of the land taken considered as an integral part of the entire tract, and to the general and special benefits accruing to the landowner with respect to the land not taken.

2. Same –

Separate and independent parcels of land belonging to the same landowner may not be considered in assessing damages to lands not taken or in offsetting benefits resulting thereto.

3. Same –

Whether two or more parcels of land of the same landowner constitute a single tract or separate and independent tracts for the purpose of assessing damages to lands not taken and the offsetting of special benefits, is one of law for the court, although where there is doubt as to the predicate facts the court may submit issues to the jury under, proper instructions.

4. Same –

Whether several parcels of land of the same landowner constitute but a single tract for the purpose of assessing damages to lands not taken and the offsetting of special benefits is to be determined according to the facts in each case upon the basis of unity of ownership, physical unity and unity of use. It is not required for unity of ownership that a party have the same quantity or quality of estate in all parts of the tract. Unity of use is often applied as controlling although it is limited to present use, and possible future uses may not be considered upon this question.

5. Same – Both parcels of petitioners' land held properly considered as a single tract for purposes of assessing special benefits.

Petitioners' land was divided by an easement conveyed for and used as a private paved road, but the tract was a physical unity acquired at one time, and at the time of the taking consisted of open fields and woodland, with most of each parcel being zoned for residential purposes and only the southern portion of one of the parcels being zoned for commercial purposes. Held: Both parcels were properly considered as a single tract in assessing damages to the land not taken and in offsetting special benefits resulting thereto from the taking of a part of

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the northern parcel for highway purposes, and the difference in zoning relates to future uses and ought not to be considered on this question.

6. Same –

The fair market value of land as the basis for compensation is to be ascertained by assuming the existence of a buyer who is ready, able and willing to buy, but under no necessity to do so.

7. Same -

The fair market value of land within the rule of ascertainment of compensation is not limited to its value for the use to which the land was put at the time of the taking, but all capabilities of the land and its adaptability to other uses should be considered to the extent that such possible uses affect its then market value.

8. Eminent Domain § 6 -

Petitioners' land consisted of fields and woodland situated within the limits of a municipality and surrounded by high-type residential properties and business areas. Held: The fair market value of the land is not limited to its value as undeveloped land, and petitioners were entitled to show that the land was suitable and available for division into lots for business and residential purposes as a prospective use affecting its market value.

9. Same -

Even though the adaptability of undeveloped land to use for residential and business purposes is so feasible as to affect its present market value, and it is competent for witnesses to testify as to its present market value taking into consideration such prospective uses, it is not competent for the jury to consider such undeveloped tract as though a subdivision thereon were an accomplished fact, and witnesses may not testify as to its speculative value based on the aggregate value of all possible lots less the cost of development.

10. Same -

Even though the adaptability of undeveloped land to use for residential and business purposes is so feasible as to affect its present market value, a map of the property showing the land divided into lots is not competent as substantive evidence but is competent solely for the purpose of illustrating and explaining the testimony of the witnesses as to the adaptability of the land to such uses.

11. Evidence § 22 -

Ordinarily maps of the locus in quo are competent in evidence solely for the purpose of explaining or illustrating the testimony of the witnesses.

12. Appeal and Error § 59 -

The Language of an opinion of the Supreme Court must be read in connection with the facts in the case in which the language is used.

13. Eminent Domain § 6 -

It would seem that the reasonable probability that petitioners' land

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not taken would be rezoned is competent on the question of special benefits thereto resulting from the taking of a part of petitioners' property for highway purposes.

14. Appeal and Error § 41 -

Appellants waive their objection to the admission of testimony when other witnesses are permitted to testify to the same import without objection.

15. Eminent Domain § 6 -

Whether the price paid in a voluntary sale of nearby property is competent in ascertaining the fair market value of land taken in eminent domain proceedings depends upon whether the two tracts are sufficiently similar for the value of one to be relevant in ascertaining the value of the other, which is a question to be determined in the sound discretion of the trial judge upon the voir dire, and exclusion of such evidence in this case is upheld, it appearing that the two tracts were markedly dissimilar in nature, condition and zoning classification.

16. Evidence § 58 -

The right to cross-examine a witness upon every phase of his examination in chief is an absolute right and not a privilege.

17. Eminent Domain § 6 -

An expert who has testified in condemnation proceedings as to the value of the petitioners' land may be cross-examined with respect to the sales prices of nearby property to test his knowledge of values and for the purpose of impeachment, but such cross-examination must be controlled and confined within the rules of competency, relevancy and materiality, and testimony of the witness' appraisal of a dissimilar contiguous tract, while competent to impeach the witness' testimony, is incompetent for the purpose of establishing the value of the tract condemned.

18. Same - Appellants held not prejudiced by limitation of cross-examination of expert as to appraisals of other tracts in the neighborhood.

The action of the trial court in sustaining an objection to a question asked an expert witness on cross-examination whether he had not appraised another parcel of land in the vicinity for a stipulated price will not be held for error when the two tracts are so dissimilar that the value of one is not competent and relevant in establishing the value of the other and appellants are given opportunity to cross-examine the witness in regard to the basis of his separate appraisals, it being apparent that appellants, under the guise of cross-examination, were attempting to get before the jury the specific amount of the appraisal of the other tract for the purpose of inducing a more liberal award.

APPEAL by petitioners from Gambill, J., November 17, 1958, Civil Term of FORSYTH.

On 25 June, 1956, the respondent, North Carolina State Highway

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Commission, in exercise of its right of eminent domain took a portion of petitioners' lands for a right of way for highway purposes. The right of way was taken in connection with respondent's project of relocating and improving U. S. Highways Nos. 158 and 421 in and through the city of Winston-Salem. It is a part of what is known as the East-West Expressway which will be designated as a part of Interstate Highway No. 40 and U. S. Highways Nos. 158 and 421. In so far as said right of way relates to this action, it will be hereinafter referred to as Expressway. It is 260 feet wide, but is wider at its intersection with Knollwood Street in order to accommodate access ramps at this location. The highway constructed thereon is a four-lane highway, with two lanes for travel proceeding in each direction. It is a limited-access highway.

The lands of the petitioners involved in this proceeding contained 46.86 acres before the taking. All of it files within the municipal limits of the city of Winston-Salem. Respondent took 12.19 acres for said Expressway. All petitioners' land at the time of the taking was undeveloped and consisted of open fields and woodlands. Its boundaries are irregular. A branch or creek runs from west to east through the property. About three-fourths of the area is north of the creek. The land slopes downwardly from the north to the creek and the grade is upward from the creek to the southern boundaries. At the time of the taking Knollwood Street was the only city street that traversed the property. It runs north and south and approximately through the middle of the land and intersects South Stratford Road south of the property. A paved road, twenty feet wide, makes out from Knollwood Street just south of the creek and runs eastwardly to the Thruway Shopping Center, which lies immediately east of petitioners' land. This road is in a 40-foot easement of right of way which was conveyed by petitioners' predecessors in title. This road will be hereinafter referred to as the Easement. Knollwood Street and the Easement divided the land into three tracts. The portion lying west of Knollwood Street contained 15.92 acres, and will be hereinafter referred to as tract No. 1. The area lying east of Knollwood Street and north of the Easement contained 24.22 acres, and will be referred to as tract No. 2. The part situated east of Knollwood street and south of the Easement contained 6.72 acres, and will be referred to as tract No. 3.

The Expressway crosses petitioners' property in an east-west direction, runs parallel to the creek and is a short distance north of the creek. The Expressway runs under Knollwood Street at the intersection, and the interchange ramps at this intersection are the

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only means of access to the expressway from petitioners' land.

Along its northern and western boundaries petitioners' property abuts excellent residential subdivisions and developments. This is also true as to the eastern boundary north of the Expressway. Below the Expressway on the east and along the southern boundaries is a fast-growing business area, especially along South Stratford Road. Petitioners' land has a frontage of 468 feet on South Stratford Road. At the time of the taking all petitioners' property was zoned under the City Ordinance as a "Residence A-1" district (single-family dwellings), except: (1) along South Stratford Road for a depth of 200 feet it was zoned "Business B" (retail trade, general business and outlying shopping areas), and (2) along the western boundary and south of the Expressway it was zoned "Residence A-2" (single-family and multi-family dwellings).

Additional facts necessary to a decision are set out in the opinion.

A petition was filed by the owners for the purpose of obtaining compensation for the 12.19 acres taken by respondent and for recovery of alleged damages to the property not taken. Respondent filed answer and requested that alleged benefits, general and special, to the lands not taken be assessed as offsets. On 30 July, 1958, the Clerk of Superior Court appointed commissioners to determine the damages due the petitioners. The commissioners filed their report 1 August, 1958, and assessed the sum of \$132,500.00 with interest thereon from the date of taking. The Clerk entered judgment in accordance with the report. The petitioners and the respondent excepted to the report of the commissioners and to the judgment and appealed to the Superior Court.

The cause was tried in Superior Court before Judge Gambill and a jury. The jury awarded damages in the sum of \$53,000.00 with interest from the date of taking. From judgment in conformity with the verdict petitioners appealed and assigned error.

Vaughn, Hudson, Ferrell & Carter, R. M. Stockton, Jr. and Norwood Robinson for petitioners, appellants.

Attorney General Seawell, Assistant Attorney General Wooten, H. Horton Rountree, and Womble, Carlyle, Sandridge & Rice for respondent, appellee.

MOORE, J.

The appellants made thirty-five assignments of error in the record on this appeal. Decision in this case requires discussion of the following questions of law raised by the assignments of error. (1) Appellants' original petition did not include tract No. 3, the

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6.72 acres lying east of Knollwood Street and south of the Easement. Respondent moved before the Clerk to have this portion of the land included in the proceeding. The Clerk denied the motion and respondent excepted. The motion was heard in Superior Court preliminary to the trial. The judge made an order adding tract No. 3 to the proceeding and adjudging, in effect, that the whole property, 46.86 acres, "is properly to be included for consideration in the assessment of damages and offsetting general and special benefits, if any . . ."

Appellants contend that the Expressway crosses no part of tract No. 3, that it is separated from tract No. 2 by the Easement, that a portion of it is zoned for business while the other tracts are zoned for residences, and that the inclusion thereof was prejudicial to them. On the other hand, appellee contends that tracts 2 and 3 are logically a single tract crossed only by a private easement, that the portion immediately south of the Easement has the same zoning classification as tract No. 2, that the portion zoned for business is only a small area of about 2 acres abutting on South Stratford Road, and that a fair assessment of damages and benefits requires that the entire tract be considered.

It must be assumed that the respondent desired the inclusion of tract No. 3 because it proposed to offer evidence that this portion was benefited by the Expressway. It is evident that petitioners desired it excluded for the reason that, in their opinion, they could show no substantial damage to this area by construction of the Expressway.

Where a portion of a tract of land is taken for highway purposes, the 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 of the portion thereof. In arriving at this difference consideration must be given to the general and special benefits accruing to the landowners with respect to the land not taken. That difference includes everything which affects the value of the property taken in relation to the *entire* property affected. *Gallimore v. Highway Commission*, [241 N.C. 350](#), 354, 85 S.E. 2d 392.

The question is: Was the 6.72 acres, tract No. 3, such an affected part of the whole tract as to require its inclusion in order to determine what was just compensation?

"It is well settled that when the whole or a part of a particular tract of land is taken for the public use, the owner of such land is not entitled to compensation for injury to other separate and independent parcels belonging to him which results from the taking." Nichols on Eminent Domain (3rd Edition), sec. 14.3, p. 426; *Sharp*

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v. *United States*, 191 U. S. 341, 48 L Ed. 211, 24 S. Ct. 114, aff'g. 50 C.C.A. 597, 112 F. 893, 57 L.R.A. 932. The North Carolina statute provides that "in all instances (where a portion of a tract of land is taken for highway purposes) the general and special benefits shall be assessed as offsets against damages." (Parentheses ours) G.S. 136-19. It follows that, when the State takes a part or all of a tract of land for highway purposes, it is not entitled to offset against damages the benefits to other separate and independent parcel or parcels belonging to the landowner whose land was taken.

Ordinarily the question, whether two or more parcels of land constitute one tract for the purpose of assessing damages for injury to the portion not taken or offsetting benefits against damages, is one of law for the court. However, where the doubt is factual, depending upon conflicting evidence, the court may submit issues to the jury under proper instructions. Anno: 6 A.L.R. 2d 1207. and cases there cited.

In the instant case the facts are not in dispute.

There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis.

The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. But where there are tenants in common, one or more of the tenants must own some interest and estate in the entire tract. *Tyson v. Highway Commission*, [249 N.C. 732](#), 107 S.E. 2d 630. Under some circumstances the fact that the land is acquired in a single transaction will strengthen the claim of unity. But the fact that the land was acquired in small parcels at different times does not necessarily render the parcels separate and independent. However, there must be a substantial unity of ownership. Different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater damages. *Light Co. v. Moss*, [220 N.C. 200](#), 207, 17 S.E. 2d 10.

The general rule is that parcels of land must be contiguous in order to constitute them a single tract for severance damages and benefits.

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But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit. It is generally held that parcels of land separated by an established city street, in use by the public, are separate and independent as a matter of law. *Todd v. Railroad Co.*, 78 Ill. 530 (1875); *Wellington v. Railroad Co.* (Mass. 1895), 41 N.E. 652. "When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law . . . (but) If the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated." Nichols on Eminent Domain (3rd Edition), sec. 14.31(1), Vol. 4, pp. 437-8. Lots separated by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines, and undeveloped streets and alleys are not sufficient alone to destroy the unity of land. "If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actually devoted, as so divided, to wholly different uses, they are to be considered actually contiguous and so as a single parcel or tract." 6 A.L.R. 2d 1200, sec. 2.

As indicated above, the factor most often applied and controlling in determining whether land is a single tract is unity of use. Regardless of contiguity and unity of ownership, ordinarily lands will not be considered a single tract unless there is unity of use. It has been said that "there must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used." *Peck v. Railway Co.* (1887), 36 Minn. 343, 31 N.W. 217. The unifying use must be a *present* use. A mere intended use cannot be given effect. If the uses of two or more sections of land are different and inconsistent, no claim of unity can be maintained. But the mere possibility of adaptability to different uses will not render segments of land separate and independent. If a map of a proposed subdivision is made and the lots shown thereon are actually a compact body of land, used and occupied as an entirety, they are to be treated as one tract notwithstanding the division into imaginary lots. It has been held that where suburban lots acquired under separate titles are divided by an established highway, they will be considered as one tract where the owner

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uses them together for tillage and cultivation in connection with his residence on one of them. *Welch v. Railway Co.* (1890), 27 Wis. 108. ". . . (I)f a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment, or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or even if the two tracts are separated by a highway, railroad, or canal." 18 Am. Jur., Eminent Domain, sec. 270, p. 910.

For a full discussion, exhaustive annotation and citations of authority with respect to the principles of law set out in the four preceding paragraphs, see 6 A.L.R. 2d 1200-1214, and Nichols on Eminent Domain (3rd Edition), sections 14.3, 14.31 and 14.4, Vol. 4, pp. 426-445.

In the instant case, we are of the opinion, and so hold, that the court was correct in including the 6.72-acre segment, tract No. 3, in the petition for consideration in the assessment of damages and off-setting benefits. There was unity of ownership and it was so stipulated. It was also stipulated that petitioners acquired the 46.86 acres in a single transaction. There was physical unity of tracts 2 and 3. It was divided only by a private easement of right of way, the fee to which was retained subject to the use of the right of way. No actual present use was being made of the tracts at the time of the taking. The petitioners were holding the land for possible future sale for subdivision or for future sale of lots. The tracts constituted a reasonably compact area of the same type of land. Both segments were reasonably necessary and related to the proper and best use by the owner of the land taken. The contention of appellants with respect to zoning takes into consideration possible future use and ought not to be regarded on this point under pertinent rules of law. Yet, it should be observed that the land immediately to the south of the easement was given the same "residence" classification as the land to the north of the easement. The portion zoned for business is at the extreme south end of tract No. 3 and constitutes less than one-third of its area.

The law will not permit a condemnor or a condemnee to "pick and choose" segments of a tract of land, logically to be considered as a unit, so as to include parts favorable to his claim or exclude parts unfavorable.

(2) After the taking of the land for the Expressway, petitioners caused a civil engineer to make two maps of the 46.86 acres. One map shows a residential subdivision containing streets and 86 building lots. This map does not show the Expressway and is made with-

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out reference thereto. The other map shows the Expressway, streets and 62 lots. The area fronting on South Stratford Road and which had been zoned for business is shown on both maps but is not subdivided. This area contains slightly more than 2 acres. The property itself was not actually subdivided on the ground.

These maps were identified at the trial and petitioners offered them in evidence as substantive evidence of practical residential subdivisions in conformity with those adjoining the property and to show that the land was capable of being subdivided into residential lots. Upon objection the court refused to admit the maps as substantive evidence. Petitioners excepted. An expert realtor later testified that petitioners' property, immediately before and immediately after the taking, was capable of and adaptable to practical residential subdivision of a high type. The court then admitted the maps in evidence to illustrate and explain the testimony of the witness.

During the course of the trial petitioners sought to elicit from certain of their witnesses testimony as to the value of the property before and after the taking based on the number of lots and the value per lot, less estimated cost of subdividing and developing. Upon objection this testimony was excluded. Petitioners excepted.

When a governmental agency takes or appropriates private property for public use, the law imposes upon it a correlative duty to make just compensation to the owner of the property appropriated. *Sale v. Highway Commission*, [242 N.C. 612](#), 617, 89 S.E. 2d 290. When the property is appropriated by the State Highway Commission for highway purposes, the measure of damages is the difference between the fair market value of the entire tract of land immediately before the taking and the fair market value of what is left immediately after the taking. *Proctor v. Highway Commission*, [230 N.C. 687](#), 691, 55 S.E. 2d 479. "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted - that is to say, what is it worth from its availability for valuable uses?" *Power Co. v. Power Co.*, [186 N.C. 179](#), 183-4, 119 S.E. 213, quoting from *Boom Co. v. Patterson*, 98 U. S. 403. The jury should take into consideration, in arriving at the fair market value of the land taken, all the capabilities of the property, and all the uses to which it could have been applied or for which it was adapted, which affected its value in the market at the time of the taking and not merely the

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condition it was in and the use to which it was then applied by the owner. But compensation should not exceed just compensation, and value should not exceed fair market value. The application of the concept of fair market value does not depend upon the actual availability of one or more prospective purchasers, but assumes the existence of a buyer who is ready, able and willing to buy but under no necessity to do so. *Gallimore v. Highway Commission, supra.*

But the fair market value of the lands of petitioners immediately before the taking was not a speculative value based on an imaginary subdivision and sales in lots to many purchasers. It was the fair market value of the lands as a whole in its then state according to the purpose or purposes for which it was then best adapted and in accordance with its best and highest capabilities.

Petitioners' lands at the time of the taking consisted of fields and woodlands. They are situated within the city limits of Winston-Salem and surrounded by high-type residential properties and valuable business areas. It would be manifestly unfair to appraise them merely as agricultural lands and forests. In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Light Co. v. Moss, supra* (220 N.C. at p. 205), and cases cited. "The particular use to which the land is applied at the time of the taking is not the test of its value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *R. R. v. Armfield, 167 N.C. 464, 466, 83 S.E. 809, quoting from Pierce on Railroads, p. 217.*

But the value to be placed on land taken under the right of eminent domain must not be speculative or based on imaginary situations. The uncontradicted testimony in the instant case is that the best and highest capabilities of petitioners' land was for subdivision into lots, a small part for business, the greater part for residences. "It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it is used as a farm or is covered with brush and boulders. The measure of compensation is not, however, the aggregate of the prices of the lots into which the tract could be best divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all of the lots are disposed of

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cannot be ignored and is too uncertain and conjectural to be computed." Nichols on Eminent Domain (3rd Edition), Vol. 4, section 12.3142 (1), pp. 107-109. It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. The cost factor is too speculative. See Law of Eminent Domain - Lewis (3rd Edition), Vol. 2, section 707, p. 1236; 18 Am. Jur., Eminent Domain, sec. 347, p. 991; 29 C.J.S., Eminent Domain, sec. 160, pp. 1027-8; *Land Co. v. Traction Co.*, [162 N.C. 503](#), 506, 78 S.E. 299; *Philadelphia v. United States*, 53 F. Supp. 492 (1943); *City of Los Angeles v. Hughes* (Cal. 1927), 262 P. 737, 738; *Investment Co. v. McIntosh County* (N.D. 1950), 45 N.W. 2d 417; *Public Service Co. v. Development Co.* (W. Va. 1926), 132 S.E. 380.

In *Ayden v. Lancaster*, [197 N.C. 556](#), 150 S.E. 40, a civil engineer was permitted to testify that 90 to 100 cemetery lots could be included in a plot of 1 1/5 acres. He did not testify to the value per lot. This Court held that the testimony was competent since it was "merely a simple question of arithmetic" and "some evidence to indicate, no doubt, the damage to respondent's other land in having constantly so many new graves dug contingent to it." The Court further stated "The witness indicated the method of subdivision, but did not put any value on the land. He described the way the subdivision could be made and stated the facts. We can see no objection to this testimony." In some jurisdictions condemnation for cemetery purposes seems to furnish an exception to the majority rule stated in the preceding paragraph. *St. Agnes Cemetery v. State of New York* (N. Y. 1957), 143 N.E. 2d 377, 380.

In estimating the fair market value of land before and after the appropriation of a portion thereof for public use, all the capabilities of the property, and all the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered. In short, everything which affects the value of the property taken in relation to the entire property affected must be considered, for compensation must be full and complete. But all the factors affecting value must be considered only with respect to their effect upon the fair market value of the property, as of the time immediately before and immediately after the taking in the then state of the property taken as a whole. *Gallimore v. Highway Commission*, *supra*, and cases

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there cited. The Court in *Land Co. v. Traction Co.*, *supra*, (162 N.C. 503) paraphrasing the opinion in *R. R. v. Stocker*, 128 Pa. 233, said: "(I)t was held that the jury could not value a track upon the theory of what it might bring when platted and divided up into building lots; but they could inquire what a present purchaser would be willing to pay for it in its present condition, and not what a speculator might be able to realize out of a resale in the future." To the same effect is *Light Co. v. Moss supra*, (220 N.C. 200) where it is said at p. 208: "(T)he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as a measure of value but to the full extent that such prospect or demand for such use affected the market value at the time respondents were deprived of their (property)." (Parentheses ours). "The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use." Nichols on Eminent Domain (3rd Edition), Vol. 4, section 12.3142 (1), p. 109.

It is manifest that the court was correct in excluding testimony as to value of the land based on supposed subdivisions and the sale of lots at an estimated price per lot after deducting an estimated cost per lot for development. Such a method of valuation is too speculative and remote. The question is: What was the fair market value of the property as a whole in its then state for future subdivision?

"Any evidence which aids the jury in fixing a fair market value of the land, and its diminution by the burden put upon it, is relevant . . ." *Abernathy v. R. R.*, [150 N.C. 97](#), 109, 63 S.E. 180; *Gallimore v. Highway Commission*, *supra*, at page 354. Testimony that the condition, location and surroundings of the land rendered it available for high-type subdivision, and that it was physically capable of practical subdivision in relation to its surroundings, was properly admitted. Such evidence having been adduced, the court properly ruled that the maps showing subdivisions were relevant and competent to illustrate and explain the testimony as to the possibility and manner of subdividing. "A witness may use a map . . . to illustrate his testimony and make it more intelligible to the court and jury . . . The North Carolina Court has often said that materials of this sort are not evidence, or are not substantive evidence, and that they can be used only to 'illustrate' or 'explain' the testimony of a witness." North Carolina Evidence: Stansbury, sec. 34, pp. 50-53. Stansbury points out that there has been a trend toward a relaxation of the rule and the admission of maps and similar materials as substantive evidence. But it is well to bear in mind "that the language of (Court)

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opinions must be read in connection with the facts of the case in which the language, was used." *Light Co. v. Moss, supra*, at page 209. The area at the crest of a lofty mountain or in an inaccessible swamp might well be subdivided on paper, but the value of such a map in revealing truth to a jury would be less than nothing. It is only against the background of pertinent testimony, refined by proper cross-examination, that maps such as the ones offered in this case can be of value in revealing truth.

The court properly excluded the maps as substantive evidence.

As stated above, they were properly admitted to illustrate and explain the pertinent testimony. The petitioners had the full benefit of the maps upon those phases of the case to which they properly pertained.

(3) Over the objection of the petitioners, witnesses for the respondent were permitted to testify that there was a reasonable probability that a part of petitioners' land would be rezoned by the City and changed from "residence" to "business" property in the near future. One witness testified that "all petitions for rezoning that have been made in this area had been allowed by the planning board."

On this question, the court instructed the jury as follows: "In arriving at your verdict as to the fair market value of the property you may take into consideration the reasonable probability of a change of the zoning ordinance in the near future and the influence that that circumstance might have on the value of the land."

Our Court has never passed upon this question directly, but in *Power Co. v. Power Co., supra*, (186 N.C. at p. 183), it is said: ". . . (T)he measure of compensation to be awarded the owner (in a condemnation proceeding) is the fair market value, taking into consideration any and all uses or purposes to which the property is reasonably adapted and might, with reasonable probability, be applied." (Parentheses ours). To the same effect is *Light Co. v. Clark*, [243 N.C. 577](#), 580, 91 S.E. 2d 569.

The weight of authority in other jurisdictions is well declared as follows: "As stated in *Beverly Hills v. Anger* (1932), 127 Cal. App. 223, 15 P. 2d 867, a zoning ordinance restricting the use of property is proper evidence for determining the market value of land being condemned, for the reason that in determining the market value of realty, all circumstances and conditions which become either an advantage or a detriment to the property should be considered. . . . (I)f the land taken is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a reasonable probability of a

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change in the near future in the zoning ordinance or other restriction, then the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing the present market value. However, if the possible change in a zoning ordinance restricting the use of the property condemned is purely speculative, such possibility is not to be considered." Anno: 173 A.L.R. 265, 266.

The principle is well stated in *Board of Education v. 13 Acres of Land* (Del. 1957), 131 A. 2d 180, in the seventh headnote: "In ascertaining market value in an eminent domain proceeding reasonable probability of a rezoning of the condemned property, to permit the highest and best use, may be considered in determining such market value." To the same effect are: *U. S. v. Meadow Brook Club* (C.C.A. 2d, 1958), 259 F. 2d 41; *U. S. v. 29.28 Acres of Land* (D. C. N. J. 1958), 162 F. Supp. 502; *Roads Commission v. Warringer* (Md. 1957), 128 A. 2d 248; *Bergeman v. Roads Commission* (Md. 1958), 146 A. 2d 48; *State v. Gorga* (N. J. 1957), 138 A. 2d 833; *State v. Williams* (Mo. 1956), 289 S.W. 2d 64; *City of Austin v. Cannizzo* (Tex. 1954), 267 S.W. 2d 808; *School District v. Flodine* (Cal. 1957), 314 P. 2d 581; *People v. Dunn* (Cal. 1956), 297 P. 2d 964; *City of Menlo Park v. Artino* (Cal. 1957), 311 P. 2d 135; *City of Beverly Hills v. Anger* (Cal. 1930), 294 P. 476; *In Re: Garden City* (N.Y. 1956), 167 N. Y. Supp. 2d 166; *Board of Commissioners v. Tallahassee B & T Co.* (Fla. 1958), 100 S. 2d 67.

But an expert witness, after testifying to the reasonable probability of rezoning, may not give an opinion as to the worth of the property for business. He may only consider the influence of the probability on value in giving his opinion of the worth of the property. *School District v. Stewart* (Cal. 1947), 185 P. 2d 585.

In the instant case several of petitioners' witnesses on cross-examination testified without objection that they had taken into consideration the reasonable probability of rezoning in placing a value on the property. So, in any event, the objections were waived. *Price v. Gray*, [246 N.C. 162](#), 165, 97 S.E. 2d 844, and cases there cited.

(4) Prior to or about the time of the taking of petitioners' property for the Expressway, respondent bought a 13.2-acre right of way immediately adjoining petitioners' property to the east and paid therefor the sum of \$300,000.00. Counsel for petitioners, on direct examination, asked their witness: "I'll ask you if you know that approximately 13 acres of land were sold . . . abutting on the east side of this property right here, on or about April 10, 1956, for \$300,000.00?" Upon objection the witness was not permitted to answer. He would have responded in the affirmative had he been per-

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mitted to answer. In the absence of the jury the court heard the contentions of counsel with respect to the 13.2-acre tract and the competency of the evidence sought to be elicited.

Later in the trial an expert realtor, who was testifying for the respondent and who had previously made an appraisal for the owners of the 13.2-acre tract, was asked on cross-examination by counsel for petitioners the following question: "Now, Mr. Minish, you yourself appraised approximately 13 acres of property directly east of this property and abutting on this property for \$300,000.00 didn't you?" Objection to the question was sustained. If permitted to answer the witness would have testified: "I was the agent for the owner of the property facing both sides of Stratford Road . . . and the 13.2-acres was appraised at \$300,000.00 by me."

In the absence of the jury the court heard evidence and contentions of counsel with respect to the 13.2-acres. The evidence tended to show the following facts. The portion of petitioners' property taken for the Expressway was all zoned for residences. A small portion of the 13.2-acre tract was zoned for residential purposes, the remainder for business and commercial purposes. The 13.2-acre tract included 1027 feet of frontage on both sides of South Stratford Road; one side was zoned for business, the other for commercial purposes. Comparatively the witness had appraised the business and residential property on the 13.2 acres higher than on petitioners' land, on a foot front and acreage basis.

Counsel for petitioners stated that the question on cross-examination was for the purpose of impeaching the witness, and that they did not desire to show that respondent bought the 13.2-acre tract or what the respondent paid for it. He further stated: "All we want to do is ask him the total amount, and let him break it down."

The court ruled that the 13.2 acres and petitioners' lands were not comparable tracts and that the witness would not be permitted to testify to the total appraised value placed by the witness on the 13.2 acres, but that the witness might testify to the comparative values per acre of residential property and the comparative values per foot front of business property he had placed on the 13.2-acre tract and petitioners' property, respectively, and give his reasons therefor.

Upon return of the jury to the courtroom the witness was cross-examined briefly concerning the 13.2-acre tract. The gist of the testimony elicited was that he appraised the residential property of the 13.2-acre tract at "considerably more than \$3000.00" per acre.

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He had previously testified that he appraised the residential property of petitioners' lands at \$3000.00 per acre.

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 the instant case the court was correct in excluding evidence on direct examination of the sale of the 13.2 acres of land adjacent to petitioners' land. The lands were markedly dissimilar in nature, condition, and zoning classification, and the court's ruling will not be disturbed.

"One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. . . . (C)ross-examination may be made to serve three general purposes: (1) To elicit further details of the story related on direct examination, in the hope of presenting a complete picture which will be less unfavorable to the cross-examiner's case; (2) to bring out new and different facts relevant to the whole case; (3) to impeach the witness, or cast doubt upon his credibility." North Carolina Evidence (Stansbury), pp. 54, 56, 57. "The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination-in-chief, is an absolute right and not a mere privilege." *Milling Co. v. Highway Commission*, [190 N.C. 692](#), 696, 130 S.E. 724.

The majority rule is that an expert witness may be questioned on cross-examination with respect to the sales prices of nearby property to test his knowledge of values and for the purpose of impeachment, but not for the purpose of fixing value. This is especially true if the witness used such sales as a basis for his appraisal of the property taken, or if he had actually appraised the property sold. Nichols on Eminent Domain (3rd Edition), Vol. 4, section

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12.311(3), p. 40; Orgel on Valuation under Eminent Domain (2d Edition), Vol. 1, section 145, p. 612-3; *Railway Co. v. Southern Pacific Co.* (Cal. 1936), 57 P. 2d 575; *Stone v. Railroad Co.* (Pa. 1917), 101 A. 813; *Cline v. Gas & Electric Co.* (Kan. 1957), 318 P. 2d 1000; *Steck v. City of Wichita* (Kan. 1956) 295 P. 2d 1068; *City of Beverly Hills v. Anger* (Cal. 1932), 15 P. 2d 867; *State v. Peek* (Utah, 1953), 265 P. 2d 630; *Utility District v. Kieffer* (Cal. 1929), 278 P. 476; *Felin v. City of Philadelphia* (Pa. 1946), 47 A. 2d 227; *Parrish v. State* (Tex. 1958), 310 S.W. 2d 709; *Pennsylvania Co. v. City of Philadelphia* (Pa. 1920), 112 A. 76.

The North Carolina Court has not decided the point directly. There is an indication that this Court does not rigidly follow the majority rule. In *Highway Commission v. Privett*, [246 N.C. 501](#), 506, 99 S.E. 2d 61, a witness was asked on cross-examination if he knew the values of any other property in the area or the prices at which such properties had been sold, and he answered in the negative. *Bobbitt, J.*, speaking for the Court said: "The testimony so elicited was relevant solely to the credibility of the witness, and the weight, if any, to be given to his testimony. Let it be noted that none of the questions undertook to elicit testimony as to the valuations or sales prices of other properties, the questions being directed to whether the witness *had opinions or knowledge* with reference thereto." It would seem that utmost freedom of cross-examination with reference to sales and sales prices in the vicinity should be accorded the landowner, subject to the right and duty of the presiding judge to exercise his sound discretion in controlling the nature and scope of the cross-examination in the interest of justice and in confining the testimony within the rules of competency, relevancy and materiality.

It is not competent to cross-examine with reference to the sale price of a parcel of land where the price was fixed by a compromise judgment. *Power & Light Co. v. Sloan*, [227 N.C. 151](#), 154, 41 S.E. 2d 361. "The price paid in settlement of condemnation proceedings or the sum paid by the condemner for similar land, even if proceedings have not been begun, is not admissible. Such payments are in the nature of compromise, to avoid the expense and uncertainty of litigation, and are not fair indications of market value; . . . A sale otherwise competent is not necessarily inadmissible because the condemner was the purchaser, if it does not appear that the sale was in connection with or in anticipation of condemnation proceedings." 18 Am. Jur., Eminent Domain, Sec. 352, p. 996. Cross-examination as to prices paid by condemnor for other tracts for the same project is improper. *U. S. v. Foster* (C.C.A. 8th. 1942), 131 F. 2d 3.

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In the instant case counsel for petitioners disclaimed any intention to cross-examine with respect to the sale of the 13.2-acre tract to respondent or the price paid therefor by respondent. Indeed the question on cross-examination of the witness Minish was whether he had appraised the tract for \$300,000.00.

It has been held that where the witness appraised the adjacent land, he shall be required on cross-examination to state what he appraised it for, but that no reference should be made to a sale thereof to condemnor or to the price paid by condemnor. *U. S. v. Foster, supra*.

The Court might well have permitted the witness to answer the question. But it does not appear to us that the failure to do so was prejudicial to the petitioners. Because of the dissimilarity of the tracts, testimony adduced thereby was incompetent on the question of value. The total appraisal value placed on the land by the witness would not of itself have impeached the witness or have shown lack of knowledge of values in the vicinity. It was apparent upon examination of the witness on the *voir dire* that he had appraised the business and residential property in the 13.2-acre tract on a front foot and acreage basis at a higher value than petitioners' land. The court ruled that he might be fully cross-examined as to these matters. Petitioners did not avail themselves of this opportunity. The conclusion is inevitable that petitioners desired only to get the \$300,000.00 figure before the jury to induce thereby a liberal award. This within itself would violate the applicable rule of evidence, since such evidence under the circumstances cannot be considered on the question of value. *Ziegler v. Sypher* (Mich. 1944), 16 N.W. 2d 676.

We have carefully examined and considered the other assignments of error and the contentions of appellants with respect thereto. Prejudicial error has not been made to appear. *In Re Gamble*, [244 N.C. 149](#), 156, 93 S.E. 2d 66.