NORTH CAROLINA REPORTS
VOL. 245

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1956
SPRING TERM, 1957

REPORTED BY
JOHN M. STRONG

RALEIGH
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PRINTERS TO THE SUPREME COURT
1957

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1956—SPRING TERM, 1957.

CHIEF JUSTICE:

J. WALLACE WINBORNE.

ASSOCIATE JUSTICES:

EMERY B. DENNY,
JEFF. D. JOHNSON, JR.,
R. HUNT PARKER,
WILLIAM H. BOBBITT,
CARLISLE W. HIGGINS,
WILLIAM B. RODMAN, JR.

EMERGENCY JUSTICES:

W. A. DEVIN,[1]
M. V. BARNHILL.

ATTORNEY-GENERAL:

GEORGE B. PATTON.

ASSISTANT ATTORNEYS-GENERAL:

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CLAUDE L. LOVE,
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DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

BERT M. MONTAGUE.

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[1]On recall for the Fall Term, 1956.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

FIRST DIVISION

Name	*District*	*Address*
CHESTER R. MORRIS	First	Coinjock.
MALCOLM C. PAUL	Second	Washington.
WILLIAM J. BUNDY	Third	Greenville.
HENRY L. STEVENS, JR.	Fourth	Warsaw.
CLIFTON L. MOORE	Fifth	Burgaw.
JOSEPH W. PARKER	Sixth	Windsor.
WALTER J. BONE	Seventh	Nashville.
J. PAUL FRIZZELLE	Eighth	Snow Hill.

SECOND DIVISION

HAMILTON H. HOBGOOD	Ninth	Louisburg.
WILLIAM Y. BICKETT	Tenth	Raleigh.
CLAWSON L. WILLIAMS	Eleventh	Sanford.
Q. K. NIMOCKS, JR.	Twelfth	Fayetteville.
RAYMOND B. MALLARD	Thirteenth	Tabor City.
C. W. HALL	Fourteenth	Durham.
LEO CARR	Fifteenth	Burlington.
MALCOLM B. SEAWELL	Sixteenth	Lumberton.

THIRD DIVISION

ALLEN H. GWYN	Seventeenth	Reidsville.
WALTER E. CRISSMAN	Eighteenth	High Point.
L. RICHARDSON PREYER	Eighteenth	Greensboro.
FRANK M. ARMSTRONG	Nineteenth	Troy.
F. DONALD PHILLIPS	Twentieth	Rockingham.
WALTER E. JOHNSTON, JR.	Twenty-First	Winston-Salem.
HUBERT E. OLIVE	Twenty-Second	Lexington.
J. A. ROUSSEAU	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

J. FRANK HUSKINS	Twenty-Fourth	Burnsville.
J. C. RUDISILL	Twenty-Fifth	Newton.
FRANCIS O. CLARKSON	Twenty-Sixth	Charlotte.
HUGH B. CAMPBELL	Twenty-Sixth	Charlotte.
P. C. FRONEBERGER	Twenty-Seventh	Gastonia.
ZEB V. NETTLES	Twenty-Eighth	Asheville.
J. WILL PLESS, JR.	Twenty-Ninth	Marion.
DAN K. MOORE	Thirtieth	Sylva.

SPECIAL JUDGES.

GEORGE M. FOUNTAIN	Tarboro.
W. A. LELAND MCKEITHEN	Pinehurst.
SUSIE SHARP	Reidsville.
J. B. CRAVEN, JR.	Morganton.

EMERGENCY JUDGES.

HENRY A. GRADY	New Bern.
FELIX E. ALLEY, SR.[1]	Waynesville.
H. HOYLE SINK	Greensboro.
W. H. S. BURGWYN	Woodland.

[1]Died 6 January, 1957.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
HUBERT E. MAY	Second	Nashville.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
ROBERT D. ROUSE, JR.	Fifth	Farmville.
WALTER T. BRITT	Sixth	Clinton.
LESTER V. CHALMERS, JR.	Seventh	Raleigh.
JOHN J. BURNEY, JR.	Eighth	Wilmington.
MAURICE E. BRASWELL	Ninth	Fayetteville.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

HARVEY A. LUPTON	Eleventh	Winston-Salem.
HORACE R. KORNEGAY	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
GRADY B. STOTT	Fourteenth	Gastonia.
ZEB. A. MORRIS	Fifteenth	Concord.
JAMES C. FARTHING	Sixteenth	Lenoir.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
C. O. RIDINGS	Eighteenth	Forest City.
ROBERT S. SWAIN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
CHARLES M. NEAVES	Twenty-first	Elkin.

SUPERIOR COURTS, SPRING TERM, 1957

FIRST DIVISION

FIRST DISTRICT
Judge Parker

Camden—Apr. 8.
Chowan—Apr. 1; Apr. 29†.
Currituck—Jan. 21†; Mar. 4.
Dare—Jan. 14†; May 27.
Gates—Mar. 25; May 20†.
Pasquotank—Jan. 7†; Feb. 11†; Feb. 18* (2); May 6‡ (2); June 3* (2); June 17†.
Perquimans—Jan. 28† (2); Apr. 15.

SECOND DISTRICT
Judge Bone

Beaufort—Jan. 21* (2); Feb. 18† (2); Mar. 11*; May 6† (2); June 10†; June 24.
Hyde—May 20.
Martin—Jan. 7† Mar. 18; Apr. 8† (2); May 27† (2); June 17.
Tyrrell—Feb. 4†; Apr. 22.
Washington—Jan. 14*; Feb. 11†; Apr. 1†; Apr. 29*.

THIRD DISTRICT
Judge Frizzelle

Carteret—Mar. 11†; Apr. 1; Apr. 29†; June 10 (2).
Craven—Jan. 7 (2); Feb. 4† (3); Apr. 8; May 6† (2); June 3.
Pamlico—Feb. 11 (A) (2).
Pitt—Jan. 21†; Jan. 28; Feb. 25† (2); Mar. 18 (2); Apr. 15† (2); May 20; May 27†; June 24†.

FOURTH DISTRICT
Judge Morris

Duplin—Jan. 21*; Feb. 11† (2); Mar. 11† (2); Apr. 1*; Apr. 22†.
Jones—Mar. 4; May 13†.
Onslow—Jan. 7 (2); Feb. 25; Mar. 25†; May 20 (2).
Sampson—Jan. 28 (2); Apr. 8† (2); Apr. 29*; May 6†; June 3† (2).

FIFTH DISTRICT
Judge Paul.

New Hanover—Jan. 14*; Jan. 21† (2); Feb. 11† (2); Feb. 25* (2); Mar. 11† (2); Apr. 8*; Apr. 15† (2); May 6† (2); May 20*; May 27† (2); June 10*; June 17† (2).
Pender—Jan. 7; Feb. 4†; Mar. 25; Apr 29†.

SIXTH DISTRICT
Judge Bundy

Bertie—Feb. 11 (2); May 13 (2).
Halifax—Jan. 28 (2); Mar. 4† (2); Apr 29; May 27† (2); June 10*.
Hertford—Feb. 25; Apr. 15 (2).
Northampton—Apr. 1 (2).

SEVENTH DISTRICT
Judge Stevens

Edgecombe—Jan. 21*; Feb. 25* (2); Mar. 25† (A) (2); Apr. 22*; June 3 (2).
Nash—Jan. 28* (2); Mar. 11† (2); Apr. 8† (2); May 20* (2).
Wilson—Jan. 7† (2); Feb. 11* (2); Mar. 11† (A) (2); Mar. 25* (2); May 6* (2); June 17† (2).

EIGHTH DISTRICT
Judge Moore

Greene—Jan. 7†; Feb. 25; Apr. 29.
Lenoir—Jan. 14*; Feb. 11† (2); Mar. 18 (2); Apr. 15† (2); May 20† (2); June 17* (2).
Wayne—Jan. 21*; Jan. 28† (2); Mar. 4† (2); Apr. 1* (2); May 6† (2); June 3† (2).

SECOND DIVISION

NINTH DISTRICT
Judge Hall

Franklin—Feb. 4*; Feb. 18† (2); Apr. 22† (2); May 13*.
Granville—Jan. 21; Apr. 8 (2).
Person—Feb. 11; Mar. 25† (2); May 27.
Vance—Jan. 14*; Mar. 4*; Mar. 18†; June 17*; June 24†.
Warren—Jan. 7*; Jan. 28†; Mar. 11†; May 6†; June 3*.

TENTH DISTRICT
Judge Carr

Wake—Jan. 7*; Jan. 7† (A) (2); Jan. 14† (2); Jan. 28*; Feb. 4† (A) (2); Feb. 11† (2); Feb. 25* (2); Mar. 11† (2); Mar. 25*; Mar. 25† (A) (2); Apr. 1† (2); Apr. 15† (2); Apr. 29*; May 6† (2); May 20† (2); June 3* (2); June 3† (A) (2); June 17† (2); June 24* (A).

ELEVENTH DISTRICT
Judge Seawell

Harnett—Jan. 7*; Jan. 14† (A) (2); Feb. 18† (2); Mar. 18*; Apr. 22† (2); May 20*; May 27†; June 10† (2).
Johnston—Jan. 7† (S); Jan. 14† (2); Feb. 11; Feb. 18 (A); Mar. 4† (2); Apr. 1† (2); Apr. 15*; May 6† (2); June 3; June 24*.
Lee—Jan. 28† (2); Mar. 25*; May 6† (A) (2); June 17† (A) (2).

TWELFTH DISTRICT
Judge Hobgood

Cumberland—Jan. 7* (2); Jan. 21† (2); Feb. 4* (2); Feb. 18† (2); Mar. 11* (2); Apr. 1† (2); Apr. 15* (2); May 6† (2); May 20* (2); June 3† (2); June 17* (2).
Hoke—Jan. 14 (S); Mar. 4; Apr. 29.

THIRTEENTH DISTRICT
Judge Bickett

Bladen—Feb. 18; Mar. 18†; Apr. 22; May 20†.
Brunswick—Jan. 21; Feb. 25†; Apr. 29†; May 13.
Columbus—Jan. 7† (2); Jan. 28* (2); Mar. 4† (2); May 6*; June 17.

FOURTEENTH DISTRICT
Judge Williams

Durham—Jan. 7*; Jan. 14† (2); Jan. 28*; Feb. 4† (2); Feb. 18* (2); Mar. 4† (2); Mar. 18*; Mar. 25* (2); Apr. 8† (2); Apr. 22*; Apr. 29† (2); May 13* (2); May 27† (2); June 10*; June 17* (2).

FIFTEENTH DISTRICT
Judge Nimocks

Alamance—Jan. 7† (2); Feb. 4† (2); Mar. 4* (2); Apr. 15† (2); May 6*; May 20† (2); June 10* (2).
Chatham—Jan. 28†; Feb. 18; Mar. 18†; May 13; June 17† (A).
Orange—Jan. 21†; Feb. 25*; Mar. 25†; Apr. 29*; June 24†.

SIXTEENTH DISTRICT
Judge Mallard

Robeson—Jan. 7† (2); Jan. 21* (2); Feb. 25† (2); Mar. 11*; Mar. 25† (2); Apr. 8* (2); Apr. 22†; May 6* (2); May 20† (2); June 10*; June 17†.
Scotland—Feb. 4†; Mar. 18; Apr. 29†.

THIRD DIVISION

SEVENTEENTH DISTRICT

Judge Johnston

Caswell—Mar. 4†; Mar. 25* (A).

Rockingham—Jan. 28* (2); Mar. 11*; Mar. 18†; Apr. 15† (2); May 20† (2); June 10* (2).

Stokes—Feb. 25*; Apr. 1*; Apr. 8†; June 24.

Surry—Jan. 7* (2); Feb. 11† (2); Mar. 25; Apr. 29* (2); June 3.

EIGHTEENTH DISTRICT

Schedule A—Judge Olive

Guil. Gr.—Jan. 7* (2); Jan. 21† (2); Feb. 4* (2); Feb. 25* (2); Apr. 15* (2); May 13* (2); June 10* (2).

Guil. H.P.—Feb. 18*; Mar. 11*: Mar. 18† (2); Apr. 1*; Apr. 29*; May 27*; June 3†.

Schedule B—Judge Rousseau

Guil. Gr.—Jan. 7† (2); Feb. 4† (2); Feb. 18†; Feb. 25† (2); Mar. 11† (2); Mar. 25*; Apr. 1† (2); Apr. 15† (2); Apr. 29† (2); May 27† (2); June 10† (2).

Guil. H.P.—Jan. 21*; Jan. 28†; May 13† (2).

NINETEENTH DISTRICT

Judge Gwyn

Cabarrus—Jan. 7 (2); Mar. 4† (2); Apr. 22 (2); June 10† (2).

Montgomery—Jan. 21*; May 20† (2).

Randolph—Jan. 28*; Feb. 4† (2); Apr. 1*; Apr. 8† (2); May 27† (A) (2); June 24*.

Rowan—Feb. 18 (2); Mar. 18† (2); May 6 (2).

TWENTIETH DISTRICT

Judge Preyer

Anson—Jan. 14*; Mar. 4†; Apr. 15 (2); June 10*; June 17†.

Moore—Jan. 21†; Jan. 28*; Mar. 11†; Apr. 29*; May 20†.

Richmond—Jan. 7*; Feb. 11†; Mar. 18‡ (2); Apr. 8*; May 27† (2).

Stanly—Feb. 4†; Apr. 1; May 13†.

Union—Feb. 18 (2); May 6.

TWENTY-FIRST DISTRICT

Judge Crissman

Forsyth—Jan. 7 (2); Jan. 21† (3); Feb. 4 (A) (2); Feb. 11† (3); Mar. 4 (2); Mar. 18† (3); Apr. 8 (2); Apr. 22† (2); May 6 (2); May 6† (A) (2); May 20† (3); June 10 (2); June 17† (A) (2).

TWENTY-SECOND DISTRICT

Judge Armstrong

Alexander—Mar. 11; Apr. 15.

Davidson—Jan. 28; Feb. 18† (2); Apr. 1† (2); Apr. 29; June 3† (2); June 24.

Davie—Jan. 21*; Mar. 4†; Apr. 22.

Iredell—Feb. 4 (2); Mar. 18†; May 20 (2).

TWENTY-THIRD DISTRICT

Judge Phillips

Alleghany—Jan. 28; Apr. 22.

Ashe—Apr. 1*; May 27†.

Wilkes—Jan. 14† (2); Feb. 18† (2); Mar. 11* (2); Apr. 29† (2); June 3 (2); June 17† (2).

Yadkin—Jan. 7; Feb. 4 (2); May 13.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT

Judge Nettles

Avery—Apr. 29 (2).

Madison—Feb. 4†; Feb. 25; Mar. 25† (2); May 27* (2); June 24†.

Mitchell—Apr. 8 (2).

Watauga—Jan. 21*; Apr. 22*; June 10† (2).

Yancey—Jan. 28†; Mar. 4 (2).

TWENTY-FIFTH DISTRICT

Judge Pless

Burke—Feb. 18; Mar. 11 (2); June 3 (2).

Caldwell—Jan. 21† (2); Feb. 25 (2); Mar. 25† (2); Apr. 22† (2); May 20 (2).

Catawba—Jan. 7† (2); Feb. 4 (2); Apr. 8 (2); June 17† (2).

TWENTY-SIXTH DISTRICT

Schedule A—Judge Moore

Mecklenburg—Jan. 7* (2); Jan. 21† (2); Feb. 4† (3); Feb. 25† (2); Mar. 11* (2); Mar. 25† (2); Apr. 8* (2); Apr. 22† (2); May 6† (2); May 20† (2); June 3† (2); June 17* (2).

Schedule B—Judge Huskins

Mecklenburg—Jan. 7† (2); Jan 21† (2); Feb. 4†; Feb. 11* (2); Feb. 25† (2); Mar. 11† (2); Mar. 25† (2); Apr. 8† (2); Apr. 22† (2); May 6* (2); May 20† (2); June 3† (2); June 17† (2).

Special Terms—Jan. 7† (2); Jan. 21† (2).

TWENTY-SEVENTH DISTRICT

Judge Rudisill

Cleveland—Jan. 28; Mar. 25† (2); Apr. 29 (2).

Gaston—Jan. 14† (S); Feb. 4† (2); Feb. 25* (2); Mar. 11† (2); Apr. 22*; May 27† (2); June 10*.

Lincoln—Jan. 14; Jan. 21†; May 13; May 20†.

TWENTY-EIGHTH DISTRICT

Judge Campbell

Buncombe—Jan. 7* (2); Jan. 14† (A); Jan. 21† (3); Feb. 11*; Feb. 11† (A) (2); Feb. 25† (3); Mar. 18*; Mar. 18† (A); Mar. 25† (3); Apr. 15* (2); Apr. 22† (A); Apr. 29† (3); May 20*; May 20† (A) (2); June 3† (3).

TWENTY-NINTH DISTRICT

Judge Clarkson

Henderson—Feb. 11 (2); Mar. 18† (2); May 6*; May 27† (2).

McDowell—Jan. 7*; Feb. 25† (2); Apr. 15*; June 10 (2).

Polk—Jan. 28; June 24.

Rutherford—Jan. 14†* (2); Mar. 11†*; Apr. 22†* (2); May 13*† (2).

Transylvania—Apr. 1 (2).

THIRTIETH DISTRICT

Judge Froneberger

Cherokee—Apr. 1 (2); June 24†.

Clay—Apr. 29.

Graham—Mar. 18 (2); June 3 (2).

Haywood—Jan. 7† (2); Feb. 4 (2); May 6† (2).

Jackson—Feb. 18 (2); May 20 (2); June 17†.

Macon—Apr. 15 (2).

Swain—Mar. 4 (2).

*Indicates criminal term.
†Indicates civil term.
No designation indicates mixed term.
(A) Indicates judge to be assigned.
‡Indicates jail and civil term.
(2) Indicates number of weeks of term; no number indicates one week term.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—DON GILLIAM, *Judge*, Tarboro.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—WILSON WARLICK, *Judge*, Newton.

EASTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Raleigh, Civil term, second Monday in March and September; criminal term, fourth Monday after the second Monday in March and September. A. HAND JAMES, Clerk, Raleigh.

Fayetteville, third Monday in March and September. MRS. LILA C. HON, Deputy Clerk, Fayetteville.

Elizabeth City, third Monday after the second Monday in March and September. LLOYD S. SAWYER, Deputy Clerk, Elizabeth City.

New Bern, fifth Monday after the second Monday in March and September. MRS. MATILDA H. TURNER, Deputy Clerk, New Bern.

Washington, sixth Monday after the second Monday in March and September. MRS. SALLIE B. EDWARDS, Deputy Clerk, Washington.

Wilson, eighth Monday after the second Monday in March and September. MRS. EVA L. YOUNG, Deputy Clerk, Wilson.

Wilmington, tenth Monday after the second Monday in March and tenth Monday after second Monday in September. J. DOUGLAS TAYLOR, Deputy Clerk, Wilmington.

OFFICERS

JULIAN T. GASKILL, U. S. Attorney, Raleigh, N. C.
SAMUEL A. HOWARD, Assistant U. S. Attorney, Raleigh, N. C.
IRVIN B. TUCKER, JR., Assistant U. S. Attorney, Raleigh, N. C.
LAWRENCE HARRIS, Assistant U. S. Attorney, Raleigh, N. C.
MISS JANE A. PARKER, Assistant U. S. Attorney, Raleigh, N. C.
B. RAY COHOON, United States Marshal, Raleigh.
A. HAND JAMES, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

Terms—District courts are held at the time and place as follows:

Durham, fourth Monday in September and fourth Monday in March. HERMAN A. SMITH, Clerk, Greensboro.

Greensboro, first Monday in June and December. HERMAN A. SMITH, Clerk; MYRTLE D. COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; MRS. RUTH R. MITCHELL, Deputy Clerk; MRS. RUTH STARR, Deputy Clerk. NELSON B. CASSTEVENS, Deputy Clerk.

Rockingham, second Monday in March and September. HERMAN A. SMITH, Clerk, Greensboro.

Salisbury, third Monday in April and October. HERMAN A. SMITH, Clerk, Greensboro.

Winston-Salem, first Monday in May and November. HERMAN A. SMITH, Clerk, Greensboro.

Wilkesboro, third Monday in May and November. HERMAN A. SMITH, Clerk, Greensboro; SUE LYON BUMGARNER, Deputy Clerk.

OFFICERS

EDWIN M. STANLEY, United States District Attorney, Greensboro.
LAFAYETTE WILLIAMS, Assistant U. S. District Attorney, Yadkinville.
ROBERT L. GAVIN, Assistant U. S. District Attorney, Sanford.
H. VERNON HART, Assistant U. S. District Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant U. S. District Attorney, Greensboro.
WM. B. SOMERS, United States Marshal, Greensboro.
HERMAN A. SMITH, Clerk U. S. District Court, Greensboro.

WESTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Asheville, second Monday in May and November. THOS. E. RHODES, Clerk; WILLIAM A. LYTLE, Chief Deputy Clerk; VERNE E. BARTLETT, Deputy Clerk; M. LOUISE MORISON, Deputy Clerk.

Charlotte, first Monday in April and October. ELVA MCKNIGHT, Deputy Clerk, Charlotte. GLENIS S. GAMM, Deputy Clerk.

Statesville, Third Monday in March and September. ANNIE ADERHOLDT, Deputy Clerk.

Shelby, third Monday in April and third Monday in October. THOS. E. RHODES, Clerk.

Bryson City, fourth Monday in May and November. THOS. E. RHODES, Clerk.

OFFICERS

JAMES M. BALEY, JR., United States Attorney, Asheville, N. C.
WILLIAM J. WAGGONER, Ass't U. S. Attorney, Charlotte, N. C.
ROY A. HARMON, United States Marshal, Asheville, N. C.
THOS. E. RHODES, Clerk, Asheville, N. C.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1956

GERTRESE V. HOLDEN v. GLEOLIA HAYES ROGERS HOLDEN.

(Filed 21 November, 1956.)

1. Appeal and Error § 19—

Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered.

2. Appeal and Error § 21—

Even in the absence of any exceptions or when no exceptions have been preserved, the appeal itself will be taken as an exception to the judgment, which presents the question whether error appears on the face of the record.

3. Judgments §§ 1, 4: Divorce and Alimony § 15½—Consent judgment for support entered in action for divorce a mensa may not be set aside except by consent.

A consent judgment, entered in a husband's action for divorce *a mensa*, providing for division of property, for the payment of a stipulated sum by the husband monthly for the use of the wife, and for the payment of a stipulated sum by the husband for the support of a minor child of the marriage, is merely a contract between the parties entered into with the sanction of the court, the court not having decreed that the husband should make the payments therein stipulated, and, except as to the support of the minor child, such judgment is final and terminates the action, and may not be set aside except by consent of the parties in the absence of a finding that its provision for the division of the property and for the wife's support were unfair to her or that her consent thereto was obtained by fraud or mutual mistake.

4. Judgments § 25—

The procedure to set aside a consent judgment for fraud or mutual mistake is by independent action.

5. Divorce and Alimony § 16: Contempt of Court § 2b—

A consent judgment for the payment of a stipulated sum monthly for the support of the wife and for division of the property entered prior to the 1955 amendment to G.S. 50-16 in the husband's action for divorce *a mensa*, in which the wife does not pray for a divorce *a mensa*, and in which no divorce *a mensa* is granted, cannot be more than a contract between the parties, and the husband cannot be punished as for contempt if he breaches such agreement. G.S. 5-8.

6. Divorce and Alimony § 15½—Where action for divorce a mensa is terminated by consent judgment for support, court may not enter further order for support.

Where, in a husband's action for divorce *a mensa*, the parties enter into a consent judgment providing that the parties should continue to live separate and apart and stipulating that the husband should pay a designated sum monthly for the support of his wife and a designated sum for the support of the minor child of the marriage, *held*, the consent judgment terminates the action in regard to the wife, and therefore in regard to support for the wife such judgment may not thereafter be modified by a judge of the Superior Court without the consent of the parties, nor may the court enter a judgment for the support of the wife in direct conflict therewith, since there is no action pending in which such judgment may be entered.

7. Divorce and Alimony §§ 12, 15—

Neither alimony *pendente lite* nor permanent alimony may be awarded unless there is an action pending in which verified pleadings have been filed and in which the wife has alleged facts at least sufficient to meet the requirements of the statute for divorce *a mensa et thoro*. G.S. 50-16.

8. Appeal and Error § 12—

An order directing the husband to pay stipulated sums monthly for the support of the wife may not be entered pending an appeal by the husband to a like order theretofore entered in the cause, nor may jurisdiction be conferred on the Superior Court pending the appeal by consent of the parties, and when such order is entered prior to the withdrawal of the appeal, the order is void.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Hobgood, J.*, at Chambers in Louisburg, North Carolina, on 14 April 1956. From FRANKLIN.

This action was instituted by the plaintiff on 23 December 1953 against the defendant for a divorce from bed and board.

The plaintiff and defendant were married in 1945. A son, Carroll Cecil Holden, was born of this marriage on 20 February 1946.

The defendant denied the pertinent allegations of the complaint and alleged in her further answer and for affirmative relief certain misconduct of the plaintiff. However, she did not ask for a divorce from bed and board, but for permanent alimony and support for herself and child; that certain property be awarded to her and that she be awarded permanent custody of the child born of the marriage.

At the April 1954 Criminal Term of the Superior Court of Franklin County the parties tendered to Judge Henry L. Stevens, Jr., holding the court, a consent judgment. The judgment recites that the matters and things in controversy have been amicably settled and agreed upon as hereinafter set forth:

"NOW THEREFORE, it is, by consent of the plaintiff and the defendant and their attorneys, ORDERED, ADJUDGED AND DECREED:

"1. That on October 2, 1953, the plaintiff Gertrese Van Holden and the defendant Gleolia Hayes Rogers Holden by mutual agreement and consent, separated from each other and have since that date continued to live separate and apart from each other, and it is their purpose, intent and desire to so continue to live separate and apart each from the other as fully and completely and in the same manner and to the same extent as though they had never been married.

"2. That the care, custody and tuition of Carroll Cecil Holden, minor son of the plaintiff and defendant, who was born on 20 February 1946 be, and the same is hereby, awarded to the defendant Gleolia Hayes Rogers Holden, subject to the further orders of this court.

"3. That the parties have agreed that the plaintiff shall pay into the office of the Clerk of the Superior Court of Franklin County monthly the sum of $50.00 for the support of the defendant Gleolia Hayes Rogers Holden so long as plaintiff and the defendant shall remain husband and wife, said payments to be made not later than the 15th day of each calendar month commencing with the 15th day of May 1954; that the parties have further agreed that the plaintiff shall pay to the office of the Clerk of the Superior Court of Franklin County monthly the sum of $50.00 for the support and maintenance of his minor child Carroll Cecil Holden, said payments to be made not later than the 15th day of each calendar month, commencing with the 15th day of May 1954, and are to be paid over by said Clerk to the defendant Gleolia Hayes Rogers Holden for the use, support and maintenance of said Carroll Cecil Holden, and subject to further orders of this court regarding the support of said child.

"4. That plaintiff and defendant have agreed upon a mutual division of the real and personal property belonging to them jointly, by which agreement the defendant shall receive, have and keep a washing machine, a living room suite, consisting of sofa, mirror and chair, and a

chest of drawers, which was a part of a bedroom suite, and that the plaintiff is to keep and retain the remaining articles of personal property now in his possession and described and referred to in the Writ of Claim and Delivery issued in this cause; and the bonds given by the plaintiff and the defendant in the Claim and Delivery in this cause are hereby dissolved and released.

"5. That all real property owned by the plaintiff and defendant as tenants by the entirety, including a tract or parcel of land on Pettigrew Street in the City of Raleigh, North Carolina, shall be sold under orders of the Clerk of the Superior Court of Wake County, North Carolina, in the manner provided by law for judicial sales for partition of real estate, and the net proceeds of said sale shall be paid one-half to the plaintiff and one-half to the defendant, except that from the plaintiff's one-half of said net proceeds there is to be, and shall be, deducted therefrom and paid to the defendant the sum of $421.75."

On 12 September 1955 the defendant caused an order and notice to be served on the plaintiff, notifying him to show cause, if any, why he should not be adjudged in contempt of court for failure to comply with the terms of the judgment entered on 13 April 1954. The notice also requested the plaintiff to show cause why the allowance for the support of the minor child and the alimony for the support of defendant should not be increased.

A hearing pursuant to the above notice and order was held on 1 October 1955. The court did not find the plaintiff in contempt, but ordered and decreed that "*pendente lite* the plaintiff, Gertrese Van Holden, be, and he is hereby ordered and required to pay to the Clerk of the Superior Court of Franklin County a monthly sum of $150.00 for eighteen months, beginning on the 15th day of October 1955, and, thereafter, a monthly sum of $100.00 on the 15th day of each succeeding month, all for the support and maintenance of the defendant, Gleolia Hayes Rogers Holden and Carroll Cecil Holden, the minor son of plaintiff and defendant, the said sum to be delivered by said Clerk of Superior Court to Gleolia Hayes Rogers Holden for the benefit and support of herself and the minor child, Carroll Cecil Holden, and pay to Charles P. Green and G. M. Beam the sum of $300.00 as a payment on their fees for legal services in this matter."

The plaintiff gave notice of appeal to the Supreme Court and docketed his appeal in said Court on 17 October 1955. Thereafter, while the case was pending in the Supreme Court, the parties hereto agreed that the judge holding the November-December 1955 Term of the Superior Court of Franklin County might hear the evidence, without a jury, find the facts and enter judgment in said cause. The judge purported to strike out the judgment entered by him on 1 October 1955 and proceeded

to award alimony in the sum of $700.00, payable in monthly installments of $75.00, beginning on 10 April 1956 through May, October, November and December 1956, and January, February, March and April 1957, and the balance of $25.00 on 10 May 1957, and counsel fees to defendant's counsel in the sum of $300.00, payable in four equal installments of $75.00 each, beginning with 10 December 1955 and each month thereafter through March 1956. The judgment further decreed that upon the payment of the monthly sums fixed therein, such payments would constitute a complete settlement of all obligations of the plaintiff to the defendant for her support or alimony, present, past, or prospective, including counsel fees allowed to defendant's counsel. This judgment was signed and filed on 1 December 1955. On the 5th day of December 1955, the parties filed a motion in the Supreme Court requesting permission to withdraw the appeal in this cause, which was still pending in said Court. The motion was allowed on 13 December 1955.

The defendant thereafter filed a petition and affidavit in the Superior Court of Franklin County on 23 March 1956, alleging that the plaintiff was in arrears in his payments in the sum of $275.00 under the terms of the judgment entered on 1 December 1955, and prayed the court that plaintiff be ordered to show cause, if any, why he should not be held in contempt of court for failure to comply with that order. Pursuant thereto, the Honorable Hamilton H. Hobgood, Resident Judge of the Ninth Judicial District, ordered the plaintiff to appear before him in Chambers on the 31st day of March 1956 (continued to 14 April 1956), at 10:00 a.m., at the courthouse in Louisburg, and show cause, if any, why he should not be adjudged in contempt of court for failure to comply with the terms of the judgment entered on 1 December 1955.

The plaintiff filed an answer to the petition, admitted he was in arrears in his payments in the sum of $275.00 and denied all other allegations therein. As a further answer, the plaintiff alleged that pursuant to the consent judgment entered by Judge Stevens in April 1954, he had released to the defendant his interest in over $3,000.00 in real estate and over $1,000.00 in personal property; that he had at all times provided adequately for the support and maintenance of his child, Carroll Cecil Holden, and had attempted to comply with all other judgments entered in this cause but had been prevented from doing so because of the excessive expense in defending himself in this litigation. He prayed the court that he not be held in contempt; and moved that the judgments entered on 1 October and 1 December 1955 be declared void and that they be set aside.

The court found as a fact that the plaintiff was not in arrears in his payments for the support of his child, but that he was in arrears in the sum of $300.00 in his payments on counsel fees and alimony to his wife;

and that he was financially able to make these payments. The court thereupon found the defendant in contempt of court for willful failure to comply with the order entered on 1 December 1955 and sentenced him to thirty days in jail or until he complies in full with the order entered on 1 December 1955, together with the costs of the hearing and the sum of $150.00 attorney fees to defendant's counsel for their legal services in this contempt hearing.

Plaintiff appeals, assigning error.

W. B. Nivens for plaintiff.

Gaither M. Beam and Charles P. Green for defendant.

DENNY, J. The appellant in his case on appeal undertakes to set out six assignments of error based on a like number of exceptions. However, the exceptions appear nowhere in the record except under the purported assignments of error. Such exceptions are worthless and will not be considered on appeal. Even so, in the absence of any exceptions, or when exceptions have not been preserved in accord with the requirements of our Rules, the appeal will be taken as an exception to the judgment. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. Consequently, as pointed out by the appellee, in view of the state of the record in this appeal, we are limited to the question whether or not error appears on the face of the record.

It is apparent the appellee has not taken into consideration the contents and effect of the consent judgment entered on 13 April 1954. That was a final judgment in every respect except as to the minor child. The question of the custody of the minor child and the sufficiency of the amount agreed upon for the support of such child were not final but made subject to the further orders of the court. The judgment merely sets out the payments agreed upon for the support of the defendant as well as those for the support and maintenance of the minor child, and the court did not decree that the payments should be made by the plaintiff. In this respect, the judgment constitutes nothing more than a contract between the parties. *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819. Therefore, as to the defendant, in the absence of a finding that the agreement incorporated in the judgment, providing for a division of the property and for her support, was unfair to her, or that her consent thereto was obtained by fraud or mutual mistake, such judgment cannot be set aside except by consent of the parties. *Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323; *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345; *Lee v. Rhodes,* 227 N.C. 240, 41 S.E. 2d 747; *King v. King,* 225 N.C. 639, 35 S.E. 2d 893.

It is a well settled principle of law in this jurisdiction that ordinarily a consent judgment cannot be modified or set aside without the consent

of the parties thereto, except for fraud or mutual mistake, and in order to vacate such order, an independent action must be instituted. *Spruill v. Nixon, supra; King v. King, supra; LaLonde v. Hubbard,* 202 N.C. 771, 164 S.E. 359; *Weaver v. Hampton,* 201 N.C. 798, 161 S.E. 480; *Bd. of Education v. Commissioners,* 192 N.C. 274, 134 S.E. 852; *Morris v. Patterson,* 180 N.C. 484, 105 S.E. 25.

In support of the conclusion we have reached with respect to the judgment entered 13 April 1954, we call attention to the fact that at the time such judgment was entered Judge Stevens had no power to enter a decree awarding permanent alimony in this cause. Prior to the enactment of Chapter 814, 1955 Session Laws, now codified as a part of G.S. 50-16, permanent alimony could not be granted in an action for divorce *a mensa* unless such divorce was granted.

In the case of *Silver v. Silver,* 220 N.C. 191, 16 S.E. 2d 834, this Court held that permanent alimony under C.S. 1665, now G.S. 50-14, could be allowed only upon a decree of divorce *a mensa* and that a decree allowing permanent alimony, when unsupported by a judgment for divorce *a mensa,* cannot be sustained.

The defendant in her answer to the complaint in this action did not pray the court for a divorce *a mensa* and none was granted. Therefore, it appears upon the face of the record that the judgment entered on 13 April 1954 is nothing more than a contract between the parties and is in full force and effect, and if breached the plaintiff is not punishable for contempt under G.S. 5-8. *Luther v. Luther, supra; Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118; *Brown v. Brown,* 224 N.C. 556, 31 S.E. 2d 529; *Davis v. Davis, supra.*

A careful examination of the record discloses that the motion which culminated in the judgment entered 1 October 1955 and the judgment entered 1 December 1955 only involved a request for alimony and counsel fees. Nowhere is it indicated or found that the plaintiff was at any time in arrears in his payments for the support of his child, as provided in the consent judgment. Furthermore, in the order signed on 14 April 1956, from which this appeal is taken, the Clerk of the Superior Court of Franklin County testified that the plaintiff was not in arrears in his allowance to his minor child, and the court so found.

We hold that all matters pertaining to the support of the defendant, Gleolia Hayes Rogers Holden, which were raised in the original pleadings in this cause, were settled by the consent judgment, and that they are *res judicata.* Therefore, the original action has not been pending since the entry of the consent judgment on 13 April 1954, for any purpose, except as to the custody and support of the minor child born of the marriage. Consequently, a judge of the Superior Court does not have the power to modify the consent judgment entered in this cause with respect to the support of the defendant without the consent of the

parties. They are remitted to their rights and liabilities under the contract. *Lentz v. Lentz,* 193 N.C. 742, 138 S.E. 12; *s. c.,* 194 N.C. 673, 140 S.E. 440; *Turner v. Turner,* 205 N.C. 198, 170 S.E. 646.

Brogden, J., concurring in the opinion of the Court involving a consent judgment in the case of *Brown v. Brown,* 205 N.C. 64, 169 S.E. 818, said: "Public policy recognizes the right of a wife to contract with her husband with reference to mutual property or with reference to separation agreements based upon mutual release of property rights. If the right of alimony and counsel fees is a property right, growing out of marriage, and the wife has the power to contract and does contract with reference thereto, with the approval and sanction of a court, then it would seem that a judge had no discretion in the matter. Discretion exists only when a matter is open for negotiation and not precluded by a provision of the law or a valid agreement of the parties. Consequently, I am of the opinion that the trial judge had neither the power nor the discretion to dip his hand into a pocket which was protected by a valid contract of a person under no disability and under the solemn sanction of the judgment of a court of competent jurisdiction."

In the case of *Bd. of Education v. Commissioners, supra,* a consent judgment was entered. Thereafter, a judgment was entered purporting to set aside the consent judgment without the consent of the parties to the action. This Court held the judgment vacating the consent judgment was ineffectual.

Likewise, in *Ellis v. Ellis,* 193 N.C. 216, 136 S.E. 350, this Court said: "A judgment or decree entered by consent is not a judgment or decree of the court, so much as the judgment or decree of the parties, entered upon its record with the sanction and permission of the court, and being the judgment of the parties which cannot be set aside or entered without their consent."

If the legal effect of a consent judgment is such that a judge of the Superior Court cannot modify it or set it aside without the consent of the parties, logic and reason support the view that a judge of the Superior Court is without power to enter an effective judgment in direct conflict therewith. Furthermore, since this action is no longer pending on the question of support, the purported judgments entered on 1 October 1955, 1 December 1955, and 14 April 1956 are supported neither by an action instituted and pending in the Superior Court of Franklin County nor by any pleadings filed therein.

We construe the provisions of G.S. 50-16, as amended, to require as a prerequisite to the awarding of alimony *pendente lite,* or permanent alimony, the pendency of an action in which verified pleadings have been filed and in which the wife has alleged facts at least sufficient to meet the requirements of the statute for divorce *a mensa et thoro. Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420; *Ipock v. Ipock,* 233 N.C. 387,

64 S.E. 2d 283; *Bateman v. Bateman,* 232 N.C. 659, 61 S.E. 2d 909; *McManus v. McManus,* 191 N.C. 740, 133 S.E. 9; *Price v. Price,* 188 N.C. 640, 125 S.E. 264.

The judgments complained of herein show upon the face of the record that they purport to rest upon the pleadings in an action that had been terminated by a consent judgment, which is *res judicata* as to the identical matters the defendant thereafter sought to relitigate.

Therefore, we hold that the judgment entered on 1 October 1955 was invalid and unenforceable. Furthermore, if the judge of the Superior Court had been clothed with power to enter such judgment, upon appeal therefrom to the Supreme Court the Superior Court was without jurisdiction to enter the purported judgment dated 1 December 1955, the appeal not having been withdrawn until 13 December 1955. *Shaver v. Shaver,* 244 N.C. 311, 93 S.E. 2d 615; *Harris v. Fairley,* 232 N.C. 555, 61 S.E. 2d 619; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496; *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Vaughan v. Vaughan,* 211 N.C. 354, 190 S.E. 492.

It is equally clear that the judgment entered on 1 December 1955 could not be upheld on this record had there been no appeal from the October judgment, since the matter sought to be adjudicated had been settled by a consent judgment which was and still is in full force and effect. Furthermore, parties cannot confer jurisdiction by consent upon the Superior Court while a permissible appeal from that court is pending in the Supreme Court.

Consequently, the purported judgments entered on 1 October 1955 and 1 December 1955 are ineffective and they are hereby set aside. It follows, therefore, that the order entered 14 April 1956, adjudging the plaintiff in contempt for failure to comply with the terms of the judgment entered 1 December 1955 and taxing him with the costs and counsel fees in such hearing, is likewise ineffectual and the same is reversed and set aside.

Reversed.

JOHNSON, J., not sitting.

STATE v. JOHN ROBINSON.

(Filed 21 November, 1956.)

1. Bastards § 1—

Under G.S. 49-2 each parent is made criminally liable for wilful failure or refusal to support his or her illegitimate child, and, the wilful failure to support being the offense, the crime cannot be committed before the child is born.

2. Same—

In proceedings under G.S. 49-2, *et seq.*, the paternity of an illegitimate child must be established beyond a reasonable doubt before conviction of a male defendant and the question of paternity may be determined even before the birth of the child in any court having criminal jurisdiction in excess of that of a justice of the peace. G.S. 49-5, G.S. 49-7.

3. Same—

Proceedings under G.S. 49-2, *et seq.*, can be instituted only by the mother of an illegitimate child, her personal representative or the superintendent of public welfare. G.S. 49-5.

4. Same: Courts § 18—

A Domestic Relations Court has jurisdiction to determine the question of paternity in a proceeding under G.S. 49-2, *et seq.* G.S. 7-103.

5. Bastards § 7—

In proceedings in a Domestic Relations Court upon an affidavit charging defendant with being the father of the unborn child of prosecutrix and failing to provide her with medical care and a warrant of arrest to answer the charge, the court found that defendant was the father of the child. *Held:* The fact that the offense of wilfully neglecting his illegitimate child had not been committed at the time the affidavit was filed, and the fact that the court exceeded its power in ordering defendant to make payments for the support of the child, do not vitiate the court's determination of the question of paternity.

6. Bastards § 3—

Where the question of paternity is judicially determined within three years after the birth of the illegitimate child, the defendant may thereafter be prosecuted for his wilful neglect and refusal to support the child. G.S. 49-4.

7. Criminal Law § 60b—

The fact that the sentence imposed is not justified by the verdict does not vacate the verdict.

8. Bastards § 6½—

In a prosecution for wilful failure of defendant to support his illegitimate child, a charge to the jury which does not instruct them that the failure to support must be wilful in order to constitute the offense, must be held for prejudicial error.

JOHNSON, J., not sitting.
HIGGINS, J., dissents.

APPEAL from *Bone, J.*, July A Criminal Term 1956, WAKE.

On 4 April, 1956, Myrtle Christmas made an affidavit charging that the defendant "did beget upon the body of Myrtle Christmas a child, Margaret Elaine, born 12-17-50 and did unlawfully and wilfully neglect and refuse to support said illegitimate child since July 27, 1953 . . ." Based on this affidavit a warrant issued and a hearing was had in the Domestic Relations Court on 25 May, 1956. The court found the defendant guilty and rendered judgment requiring him to pay $7 per week for the support of the child. The judgment contains this recital: "This Court found on 7 August, 1951, that this defendant was the father of Margaret Elaine, born 12-17-50." Defendant appealed from the judgment of the Domestic Relations Court to the Superior Court. The case was heard in the Superior Court on the warrant issued 4 April, 1956. The jury found defendant guilty. Judgment was thereupon entered sentencing defendant to six months in prison, suspended upon condition that defendant make stated payments for the support of the infant. Defendant appealed.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Taylor & Mitchell for defendant appellant.

RODMAN, J. Prosecuting witness testified that her child was born 17 December, 1950, and prosecutrix and defendant were never married. She further testified: "I had the defendant up; I signed a warrant for him myself, and we had the trial in August after the baby was born; he was supposed to pay me $7.00 a week until the baby became 18 years old; he paid that $7.00 for about two years and then he quit paying; I had him up again for nonsupport of the child; that was about two years ago. Judge Fountain told him he would have to pay $12.00 a week to catch up and he paid for a week or two or two weeks or three weeks and then he was out of town. I didn't have him up any more until back in this April." There was further evidence from prosecutrix of the gift of a $32 tricycle to the infant and payment of some small medical fees for the child. On cross-examination she said that the weekly payments of $7 came to her from the Domestic Relations Court and were made as commanded by the judgment rendered by that court on 7 August, 1951.

The defendant offered in evidence the records of the Domestic Relations Court consisting of: affidavit of Myrtle Christmas dated 13 December, 1950, stating "on or about the 12 day of April 1950, John

Robinson with force and arms, at and in the County aforesaid, did wilfully, maliciously, unlawfully beget upon the body Myrtle Christmas a child yet unborn and did fail to provide medical care for the said Myrtle Christmas against the Statute in such cases made and provided, against the peace and dignity of the State."

On the same day the court issued its order directed to the sheriff "to forthwith apprehend the said John Robinson and him have before J. L. Fountain, the Judge, in the Domestic Relations Court . . . on the 29 day of December, at 10:00, 1950, then and there to answer the above complaint and be dealt with according to law."

Defendant, on 20 December, 1950, executed bond with surety for his appearance at the term fixed.

On 7 August, 1951, the Domestic Relations Court entered a judgment which reads: "Upon the trial of this case the defendant is found guilty and is ordered and adjudged that the Court finds that this defendant is the father of this child born 12-17-50. Prayer for judgment continued for 2 years on condition that defendant pay into each week for the support of his illegitimate child $7.00. . . . This case retained for further orders of this Court."

In 1953 the defendant ceased to make the weekly payments called for in the August 1951 judgment. Upon motion of prosecutrix he was cited to appear before the Domestic Relations Court. On 23 July, 1953, this entry was made: "Prosecuting witness admits that this defendant gave her $8.00. Pay $12.00 each week until back payments in the amount of $87.00 is paid. First payment payable July 27, 1953. Pay capias cost today. No change in judgment."

Pursuant to this order defendant made one payment of $12. No other or further payments were made prior to the filing of the affidavit of April 1956 on which this prosecution is based.

Defendant offered no parol evidence. The court charged the jury: "Members of the Jury, this defendant, John Robinson, is being tried upon a charge of unlawfully neglecting and refusing to support and maintain his illegitimate child begotten upon the body of Myrtle Christmas, the name of the child being Margaret Elaine Christmas, born 12-17-50.

"Now, the court charges the jury that if you believe the evidence and find beyond a reasonable doubt the facts to be as all the evidence tends to show then you would return a verdict of guilty as charged; if you do not believe the evidence or do not find beyond a reasonable doubt the facts to be as all the evidence tends to show, then you would return a verdict of not guilty."

Defendant excepted and assigns the charge as error. He insists that the paternity of the child has not been established, that more than three years have elapsed since the birth of the child, and prosecution is now

barred. He further insists that a peremptory instruction cannot be given when it is necessary to find that an act was wilful.

The law imposes a duty on a parent to provide support for his child. This duty may, as to legitimate children, be enforced by civil action, *Green v. Green,* 210 N.C. 147, 185 S.E. 651; *Burke v. Turner,* 85 N.C. 500; *Walker v. Crowder,* 37 N.C. 478; and when a parent wilfully abandons and fails to support his legitimate offspring, he is guilty of a misdemeanor. G.S. 14-322.

The common law recognized no legal duty on the part of the father to provide for the support of an illegitimate child. He was said to be a *filius nullius,* the child of nobody. He had no rights against an asserted parent that could be enforced in court. *Allen v. Hunnicutt,* 230 N.C. 49, 52 S.E. 2d 18.

The provincial General Assembly of North Carolina, in 1741, by ch. XIV, undertook to deal with the paternity of bastards and the obligation of the father to provide support. The Act provided: "any two Justices of the Peace, upon their own knowledge, or Information made to them, that any single Woman within this County is big with Child, or delivered of a Child or Children, may cause such Woman to be brought before them, and examine her, upon Oath, concerning the Father; and if she shall refuse to declare the Father, she shall pay the Fines in this Act before mentioned, and give sufficient Security to keep such Child or Children from being chargeable to the Parish, or shall be committed to Prison, until she shall declare the same, or pay the Fine aforesaid, and give Security as aforesaid. But in Case such Woman shall, upon Oath, before said Justices, accuse any Man of being the Father of a Bastard Child or Children, begotten of her Body, such Person so accused shall be adjudged the reputed Father of such Child or Children, and stand Charged with the Maintenance of the same, as the County Court shall Order, and give Security to the Justices of said Court to perform said Order, and to indemnify the Parish where such Child or Children shall be born, free from Charges for his, or her, or their Maintenance, and may be committed to Prison until he find Securities for the same, if such Security is not by the Woman before given." Section XI of the Act provides that if the charge is made before the child is born that the cause might be continued until the birth of the child. XXIII State Records, p. 174.

The act of 1741, entitled "An Act for the better Observation and keeping of the Lord's Day, commonly called Sunday; and for the more effectual Supression of Vice and Immorality," made the oath of the woman conclusive evidence of the paternity of the child. Paternity having been established, the father could be imprisoned until he provided security to protect the community from the burden of supporting the child. In 1799 the statute was amended to provide that execution

might issue and the obligation to support might also be enforced by the sale of the property of the father.

The conclusive force given to the oath of the mother remained the law until 1814. Ch. VII of the laws of that year amended the Act of 1741. The preamble of the 1814 Act recites: "WHEREAS by the before recited act whenever a single woman shall upon oath before two Magistrates according to its provisions, accuse any man of being the father of her bastard child or children, such person so accused shall be adjudged the reputed father of such child or children and stand charged with the maintenance thereof: And whereas the said act by rendering the oath of the woman alone conclusive evidence of the fact, so far from operating as a suppression of vice and immorality, has a contrary effect:" It then provides that the man charged with the paternity of the child may traverse the allegation and have a trial of the issue of fact thus raised. Upon such trial the oath of the woman was made *prima facie* but not conclusive evidence. The Act further provided: "all examinations upon oath to accuse or charge any man of being the father of a bastard child shall be had and taken within three years next after the birth of said child, and not after." Provision was made for appeal on the question of paternity by this language: "the officer prosecuting in behalf of the county, shall, and he is hereby authorized to appeal to the Superior Court of Law in all cases where he shall think that justice has not been obtained in the trial of any issue."

The Act of 1741 as modified in 1799 and 1814, with slight modifications and changes in phraseology, was the law of North Carolina as it relates to bastards until 1933. Ch. 12, Rev. Stat.; ch. 12, Rev. Code; ch. 5, Code 1883; ch. 8, Revisal of 1905; ch. 6 of Con. Stat. of 1919.

Proceedings to compel a parent to provide support for his child were, under the Act of 1741, regarded, except for a short period, as being civil in nature, intended only to protect the community from the burden of supporting a child. *S. v. Roberts*, 32 N.C. 350; *S. v. Edwards*, 110 N.C. 511; *S. v. Liles*, 134 N.C. 735; *S. v. Mansfield*, 207 N.C. 233, 176 S.E. 761. This is the usual approach to the problem of providing support for illegitimate children. 7 Am. Jur. p. 680. The Legislature of 1933 changed the approach to the problem. Now the proceeding is criminal. It is now the wilful neglect or refusal of a parent to support his or her illegitimate child. Such failure is by the express language of the statute made a misdemeanor. P.L. 1933, ch. 228, G.S. 49-2; *S. v. Mansfield, supra; S. v. Cook*, 207 N.C. 261. No longer is the primary burden placed upon the father. Each parent is made responsible for his wilful failure to perform his duty. The crime cannot be committed before the child is born. *S. v. Thompson*, 233 N.C. 345, 64 S.E. 2d 157; *S. v. Ferguson*, 243 N.C. 766, 92 S.E. 2d 197. The begetting of the child is

not a crime. *S. v. Tyson*, 208 N.C. 231, 180 S.E. 85; *S. v. Dill*, 224 N.C. 57, 29 S.E. 2d 145; *S. v. Stiles*, 228 N.C. 137, 44 S.E. 2d 728.

To impose responsibility on one for the support of an illegitimate child, it must first be established that he is the father of the child. As noted, the Act of 1741 created a conclusive presumption from the oath of the mother. This was modified in 1814 to make a *prima facie* case by the affidavit or oath of the woman. There is now no presumption from the affidavit or testimony of the mother.

By express statutory language preliminary proceedings to determine the paternity of the child may be initiated and determined before the birth of the child. A continuance of the proceeding until after the birth of the child rests in the sound discretion of the trial court, G.S. 49-5; and when such continuance is granted, "the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next term of the court or a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child."

Proceedings under the statute may be instituted in the Superior Court or any court inferior to the Superior Court "except courts of justices of the peace and courts whose criminal jurisdiction does not exceed that of justices of the peace." G.S. 49-7. Thus it appears that the preliminary proceeding to determine paternity is to be tried in a court having criminal jurisdiction in excess of a justice of the peace. The court is expressly commanded to first determine the paternity of the child. G.S. 49-7. That fact cannot be established by mere preponderance of the evidence but must be established beyond a reasonable doubt. *S. v. Ellison*, 230 N.C. 59, 52 S.E. 2d 9; *S. v. Robinson*, 236 N.C. 408, 72 S.E. 2d 857; *S. v. Humphrey*, 236 N.C. 608, 73 S.E. 2d 479; *S. v. Chambers*, 238 N.C. 373, 78 S.E. 2d 209.

Proceedings under the Act can only be instituted by the mother or her personal representative or the superintendent of public welfare. G.S. 49-5. That provision is, of course, applicable both to preliminary proceedings authorized by the statute to determine paternity and to proceedings involving the completed crime.

Was there a judicial determination of the paternity of the child by the Domestic Relations Court in August 1951? Undoubtedly the Domestic Relations Court had jurisdiction to determine that question. G.S. 7-103. The mother filed an affidavit specifically charging the defendant with being the father of her unborn child. The fact that the affidavit also stated that the defendant had failed to provide medical care for affiant neither weakens nor strengthens the charge defendant was required to answer. Process duly issued from the court commanding defendant "to answer the above complaint and be dealt with according to law." Thereupon the defendant gave bond for his appear-

ance. He was properly before the court on a charge of which the court had authority to make due inquiry and find the facts. On the hearing the court found and adjudged "this defendant is the father of this child born 12-17-50." When the affidavit was filed and the warrant of arrest issued, defendant had not committed the statutory offense of wilfully neglecting his illegitimate child. *S. v. Thompson, supra; S. v. Ferguson, supra.* That crime had been committed when the cause was tried. The court was, however, without power to try the defendant for the crime, but lack of authority to pass on the guilt of the defendant because of the date of the complaint did not impair the authority of the court to proceed to determine the issue of paternity.

Because the court exceeded its power and ordered the defendant to make payments for the support of the child does not vitiate and destroy that which the court had the power and authority to do, *i.e.*, to find the facts as to paternity. Such finding was in effect a jury verdict. A sentence imposed not justified by a verdict does not vacate the verdict. *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151; *S. v. Malpass,* 226 N.C. 403, 38 S.E. 2d 156; *S. v. Austin,* 241 N.C. 548, 85 S.E. 2d 924; *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684. Defendant had the right to appeal the finding that he was the father of the child. G.S. 49-7. He elected not to do so, preferring to make the payments directed by the court. The paternity of the child has been judicially declared within three years of its birth, and hence defendant may be prosecuted and convicted if he has wilfully neglected and refused to support his child. G.S. 49-4.

The court charged the jury that the defendant was on trial for unlawfully neglecting and refusing to support and maintain his illegitimate child. He made no attempt to define the unlawful failure to support. He nowhere told the jury that the failure to support must be wilful. This oversight of the judge can be understood because the battle in the lower court turned on the effect to be given to the judgment of the Domestic Relations Court rendered in August 1951. Nevertheless the oversight must be held for prejudicial error. Defendant cannot be convicted unless he wilfully neglects to support his child. *S. v. Cook, supra; S. v. Mansfield, supra; S. v. Stiles, supra; S. v. Vanderlip,* 225 N.C. 610, 35 S.E. 2d 885; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333; *S. v. Coppedge,* 244 N.C. 590; *S. v. Gibson, post,* 71.

New trial.

JOHNSON, J., not sitting.

HIGGINS, J., dissents.

A. S. BUMGARDNER v. BARNEY LEE GROOVER AND WIFE, MARY LEE GROOVER, AND MRS. MARIETTA GRANT.

(Filed 21 November, 1956.)

1. Pleadings § 15—

The sufficiency of a further answer and defense and cross-action may be tested by demurrer. G.S. 1-141.

2. Bills and Notes § 3—

A pre-existing debt, or a release or waiver of a legal right, or a forbearance to exercise a legal right, is sufficient consideration to support a note.

3. Same—

While neither a debt due by a father and mother nor the fact of the relationship is sufficient consideration to support the execution of a note by the daughter, forbearance to exercise a legal right against the parents is sufficient consideration.

4. Bills and Notes § 29—Allegations that note sued on was executed for money borrowed to pay installment due on another note executed to plaintiff held no defense.

This action was instituted by an endorser before delivery, who had paid the note to the payee, against a husband and wife and daughter who had executed the note. The answers alleged that the husband and wife had executed a mortgage note in a much larger sum to plaintiff, that they were in arrears on the mortgage note, and that the note sued on was executed for money borrowed to pay a delinquent installment on the mortgage note. *Held:* Forbearance of foreclosure on the mortgage note was sufficient consideration for the execution of the note sued on, both in regard to the husband and wife and to the daughter, and therefore plaintiff's demurrer to the further answer setting up want of consideration was properly sustained.

5. Same—Agreement to reconvey in satisfaction of mortgage note held no defense in action on another note for money borrowed to pay installment on mortgage note.

This action was instituted by an endorser before delivery, who had paid the note to the payee, against husband and wife and daughter who had executed the note. The answers alleged that the husband and wife had purchased land from plaintiff, giving a purchase money note therefor under an agreement that if they could not pay the mortgage note they would reconvey the land in satisfaction, and that the note sued on was given for money borrowed to pay a delinquent installment on the mortgage note. Defendants, husband and wife, further alleged that they were willing to reconvey and sought recovery of sums theretofore paid on the mortgage note. *Held:* The alleged parol agreement to reconvey related to the mortgage note and not the note in suit, and further the agreement does not provide that money paid on the mortgage note should be refunded upon reconveyance, but only for cancellation upon reconveyance of the mortgage note as then

partially paid, and therefore the allegations of the answers constitute no defense and were properly stricken upon motion.

JOHNSON, J., not sitting.

APPEAL by defendants from *Campbell, J.*, February "A" Civil Term 1956 of MECKLENBURG.

Civil action to recover amount paid on a promissory note by plaintiff under his liability as endorser thereon.

The allegations of the complaint are in substance as follows: On 8 January 1953 the defendants executed a promissory note under seal in the amount of $1,484.62 payable to the Union National Bank of Charlotte. The note recites that for value received the defendants promise to pay the bank $1,484.62, with interest after maturity, in consecutive monthly installments beginning on 26 January 1953—14 installments being for $100.00 and the last one for $84.62—: failure to pay any installment when due shall, at the option of the payee or assignee, render the whole note immediately due. Plaintiff endorsed this note on behalf of the defendants to enable them to obtain the sum of $1,484.62 from the bank. The makers of the note made five consecutive payments of $100.00 each on the note, and thereafter defaulted in five consecutive payments. After such defaults the bank declared the remainder due on the note, to-wit, $984.62, due and payable, and after demand for the payment of this amount from the makers, and their refusal to pay, gave notice of such demand and default to the plaintiff endorser. On 12 November 1953 the plaintiff as endorser paid the bank $984.62, and is now the holder of the note. He made demand upon the defendants for payment to him on the note of $984.62, and upon their refusal to pay, he instituted this action, and prays judgment against them for that amount with interest.

This is a summary of the joint answer of defendants: They admit their execution of the note to the bank, and that plaintiff endorsed the same, but allege that plaintiff, endorsed the note to obtain the money for himself, and that it was without any consideration to them. They admit that one of the defendants Barney Lee Groover made five payments of $100.00 each on the note, and thereafter the defendants made no further payments on the note, and that on 12 November 1953 the balance due and payable on the note was $984.62. They admit that plaintiff on 12 November 1953 paid the bank on the note $984.62 by virtue of his liability as endorser thereon. They admit that plaintiff made demand on the defendants Barney Lee Groover and wife Mary H. Groover to pay him $984.62.

The defendants as a first further answer and defense, and as a cause of action for affirmative relief allege in substance as follows: On 1 July 1952 plaintiff and the defendants Barney Lee Groover and wife Mary

H. Groover entered into an agreement, part of which was in writing and part oral, and pursuant to the agreement plaintiff conveyed to them a farm for the price of $15,000.00, and these two defendants executed and delivered to plaintiff their note for $15,000.00 secured by a deed of trust on the farm. This note was payable $1,000.00 a year, with 5% interest, beginning on 1 January 1953 and including 1959, and $2,000.00 on 1 January 1960. On 1 January 1953 these two defendants were unable to make the $1,000.00 payment due. Shortly thereafter plaintiff induced these two defendants and their daughter the defendant Marietta Grant to execute to the Union National Bank of Charlotte the note described in the complaint, which plaintiff endorsed. Plaintiff received the entire amount loaned by the bank on the note, and defendants received nothing, and as to them the note is without consideration. The note executed to the bank represents part of the identical money represented by the note for $15,000.00, which bears 5% interest, and if plaintiff can recover on the note set forth in his complaint he will be recovering on a note for money included in the $15,000.00 note, and interest of 6% on part of the same money represented by the $15,000.00 note. The defendant Marietta Grant had no connection with the purchase of the farm. The note sued upon is void, and plaintiff is not entitled to recover thereon. Wherefore, the defendant Barney Lee Groover prays for a recovery from plaintiff of the amount of $500.00 he paid on the note, with interest.

The defendants as a second further answer and defense allege in substance: The purchase of the farm for $15,000.00, as set forth in their first further answer and defense. That according to the contract of purchase the defendants Barney Lee Groover and wife were to make improvements on the farm, and put the land, which had not been cultivated for 7 years, in a state of cultivation, so that if these two defendants had to give up the farm, the plaintiff would lose nothing. That these two defendants have made improvements on the land of the value of $1,500.00. That at the time of purchase, it was agreed by plaintiff and these two defendants that if they could not keep up the payments on their purchase money note, they would re-convey the farm to plaintiff, who would mark the note paid and satisfied, and surrender it to them. These two defendants have not been able to keep up the payments, and now are ready and able to re-convey the farm to plaintiff "upon the cancellation and surrender to them of all notes which they have executed, and which are now held by the plaintiff." That by reason of their agreement the note sued upon in this action and all other obligations of these two defendants to plaintiff have been settled, and plaintiff is estopped to maintain this action.

Plaintiff demurred to the first further answer and defense and cause of action for affirmative relief of the defendants on the ground that it

does not constitute a counter-claim and defense, and does not state a cause of action for affirmative relief, in that the two defendants admit they owed plaintiff $1,000.00 on 1 January 1953, that the defendants admit they executed a note to the Union National Bank of Charlotte for the payment of this amount, and subsequently paid $500.00 on their note to the bank, and they have no legal right to recover the $500.00 they paid the bank.

Plaintiff made a motion that the entire second further answer and defense be stricken from the answer for that it is entirely immaterial, irrelevant and incompetent and that plaintiff would be prejudiced and damaged, if it were permitted to remain in the answer.

Plaintiff made a second motion to strike the second further answer and defense on the ground that it alleges no defense to plaintiff's action as it is an attempt to vary or modify a written agreement by verbal evidence, and on the further ground that the purported oral agreement relating to the sale of real estate is not valid because not in writing: that evidence in support of the allegations would be incompetent and prejudicial.

The court entered an order sustaining the demurrer, and allowing the motions to strike.

At the trial the plaintiff offered evidence: the defendants none. The jury found for its verdict that the plaintiff was entitled to recover of the defendants $984.62 with interest from 12 November 1953.

From judgment upon the verdict the defendants except and appeal.

B. Kermit Caldwell for Plaintiff, Appellee.

J. C. Sedberry for Defendants, Appellants.

PARKER, J. With the exception of formal assignments of error, the defendants have only two assignments of error: one, to that part of the order sustaining the demurrer to the first further answer and defense and cause of action for affirmative relief, and two, to that portion of the order allowing the motion to strike from the answer the entire second further answer and defense.

This is not an action based on the $15,000.00 note executed and delivered to plaintiff by the defendants Barney Lee Groover and wife, Mary Lee Groover, as a purchase money note for a farm, and secured by a deed of trust on the property. This is an action to recover from the defendants $984.62 which the plaintiff paid the Union National Bank of Charlotte by reason of his liability as an endorser on defendants' sealed note for $1,484.62, which the defendants admit they executed and delivered to the bank with the plaintiff as an endorser thereon, and which note the plaintiff now holds.

In essence the allegations of defendants' first answer and defense, and cause of action for affirmative relief are these: The Union National Bank of Charlotte loaned the defendants $1,484.62 on their note under seal for that amount, endorsed by plaintiff, which sum was paid to plaintiff as a payment on the $1,000.00 installment past due on the purchase money note of $15,000.00 of Barney Lee Groover and wife, Mary Lee Groover, and of the accrued interest on this note, that Barney Lee Groover paid the bank $500.00 on this note, that the defendants defaulted in the payment of the remainder due on their note held by the bank, that the plaintiff by virtue of his liability as endorser on their note held by the bank paid the remainder due on the note, to-wit, $984.62, and is now the holder of the note, that their note executed and delivered to the bank is null and void, becaused based on no consideration as to them, and that plaintiff is entitled to recover nothing on the note transferred to him by the bank, and Barney Lee Groover is entitled to recover from plaintiff the $500.00 he paid the bank on the note. In this part of their answer the defendants allege the note they executed and delivered to the bank "represents part of the identical money represented by the said note and deed of trust for $15,000.00."

Whether the allegations of defendants' first answer and defense, and cause of action for affirmative relief are sufficient can be tested by a demurrer. G.S. 1-141; *Jenkins v. Fields*, 240 N.C. 776, 83 S.E. 2d 908.

Accepting these allegations as true, this is the situation presented. The defendants make no contention that the purchase money note for $15,000.00 is not based upon an adequate legal consideration. They admit that the $1,000.00 installment payment due on this note 1 January 1953 was past due, when they executed and delivered their sealed note to the bank, and it is manifest from the allegations that this note was used by them to obtain money to pay this past due installment, which installment payment Barney Lee Groover and his wife justly and lawfully owed, and for which payment they are entitled to credit on their $15,000.00 note. It seems that the rest of the money secured from the bank was used to pay accrued interest on the $15,000.00 note, and they are entitled to credit for that payment. It also seems plain that the payment was made by the defendants to prevent a foreclosure of the deed of trust, and to permit Barney Lee Groover and wife to retain possession of the farm, because it nowhere appears in the Record that the deed of trust on the farm has been foreclosed, or that Barney Lee Groover and wife are not in possession of the farm. Certainly by accepting payment of this past due installment plaintiff waived and surrendered his right to foreclose the deed of trust by reason of the non-payment of the $1,000.00 installment due 1 January 1953 on the $15,000.00 note, and to proceed to judgment on the note, and the amount

he received is a proper credit for the makers of the $15,000.00 note on the note.

G.S. 25-30 (Negotiable Instruments) reads in part: "An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." "And it is well settled that a pre-existing, valid and enforceable indebtedness or liability of a contracting party constitutes a sufficient consideration to support his undertaking on a bill or note. Consequently, it is generally held that a bill or note given for practically any kind of pre-existing debt or liability of the maker or drawer is supported by a consideration. . . ." 10 C.J.S., Bills and Notes, p. 604.

Undoubtedly, the release or waiver of a legal right, or a forbearance to exercise a legal right, is a sufficient consideration to support a note made on account of it. *Searcy v. Hammett,* 202 N.C. 42, 161 S.E. 733; *Exum v. Lynch,* 188 N.C. 392, 125 S.E. 15; *Lowe v. Weatherley,* 20 N.C. 355; 10 C.J.S., Bills and Notes, p. 618.

So far as Barney Lee Groover and wife, Mary Lee Groover, are concerned their sealed note to the bank, according to the allegations of their first further answer and defense and cause for affirmative relief, was based upon a valid consideration, and Barney Lee Groover is not entitled to recover from plaintiff the $500.00 he paid to the bank. As to them the demurrer was properly sustained.

Mrs. Marietta Grant, daughter of the other two defendants, says that she was not a party to the purchase of the farm, did not sign the $15,000.00 purchase money note, and that there was no consideration so far as she was concerned in respect to the note she executed with her parents and delivered to the bank. In 10 C.J.S., Bills and Notes, pp. 619 and 620, it is written: "It is well settled that the discharge, release, or forbearance of a right or claim against a third person, at the instance or request of the obligor, is sufficient consideration to support the latter's undertaking on a bill or note. A bill or note given in payment or extinguishment of a debt or liability of a person other than the maker is supported by consideration, although the debtor is wholly without means, or although the maker mistakenly believed that he was in turn indebted to the debtor. It is apparent, therefore, that if a bill or note of a relative or spouse of a debtor has been taken in discharge or payment of the indebtedness, or has induced a forbearance thereon, the instrument is supported by consideration, although, as already noted, neither the debt itself, see *supra* sec. 150 d, nor the interest or affection attendant on the relationship involved, see *supra* sec. 148, would of itself have been sufficient to sustain the undertaking."

In *Bank v. Harrington,* 205 N.C. 244, 170 S.E. 916, it was held that the cancellation and surrender of deceased husband's notes to widow constituted a sufficient consideration for widow's notes. The Court

said: "In the instant case the plaintiff had surrendered the notes of the deceased husband, and thereby discharged his estate from liability for said notes. 8 C.J., 219. This was a sufficient consideration for the notes sued on in these actions."

In *Searcy v. Hammett, supra,* the second headnote in our Reports correctly states: "Where the creditor of a corporation accepts its notes endorsed by its stockholders and directors in settlement of the debt he extends the maturity of the debt and gives up his right to reduce the debt to judgment until after the maturity of the notes, and the endorsement of such notes by a stockholder and president of the corporation is supported by a legal consideration, and he is liable thereon . . ."

Accepting as true the allegations of the defendants' first further answer and defense, when the plaintiff received the proceeds from the bank of the note executed by Mrs. Marietta Grant and her parents it constituted a payment of the $1,000.00 installment past due on her parents' $15,000.00 note, and plaintiff waived and surrendered his legal right to foreclose the deed of trust on the farm by their failure to pay this installment when due, and his legal right to proceed to judgment on the $15,000.00 note, and such payment and such forbearance is a sufficient consideration for the note executed and delivered by Mrs. Grant and her parents, as to them and as to her. Accepting the allegations of the first further answer and defense as true, it alleged no defense for Mrs. Grant and her parents, and no ground for affirmative relief, and as to Mrs. Grant and her parents the demurrer was correctly sustained.

The essence of defendants' second further answer and defense is this: That contemporaneously with the execution of the purchase money note for $15,000.00, secured by deed of trust upon the farm conveyed to the makers of the note, the plaintiff, the seller, agreed with Barney Lee Groover and wife, the makers of the note, that if they could not keep up the payments on the $15,000.00 note as provided, they could re-convey the farm to plaintiff, and plaintiff would mark the note and deed of trust "paid and satisfied" and surrender them to the makers. That they have not been able to keep up the payments, and are ready and willing, as they have been at all times, to convey the farm to plaintiff upon the cancellation of and surrender to them of all notes of theirs held by plaintiff, and that by reason of this oral agreement the note sued on, and all other obligations of theirs, have been settled, and plaintiff is estopped to maintain this action.

According to these allegations the parol agreement was to cancel the $15,000.00 note and the deed of trust securing it under certain conditions. No such agreement is alleged as to the note for $1,484.62, or any other note. The alleged parol agreement does not provide that any money paid to plaintiff on the $15,000.00 note by Barney Lee Groover and wife, Mary Lee Groover, shall be repaid to them by plaintiff, if they

could not keep up the payments on the note, and re-conveyed the farm to plaintiff. Therefore, if a payment has been made on the note by the defendants, the cancellation according to the alleged oral agreement would be of the $15,000.00 note partially paid and the deed of trust securing it. That is manifest, because under such circumstances it would no longer be a note for the payment of $15,000.00. There is no allegation that defendants offered before or at the time the $1,484.62 note was executed by them to re-convey the farm to plaintiff, and demanded the cancellation of the $15,000.00 note and deed of trust, though they allege they have always been ready to do so. However, their acts in executing the $1,484.62 note and payment of $500.00 on it do not show a willingness to re-convey the farm at that time. There is no allegation that Barney Lee Groover and wife are not now in possession of the farm.

If the plaintiff brings an action to foreclose the deed of trust, or if Barney Lee Groover and wife bring an action to cancel the note and deed of trust, then the question as to whether the alleged parol agreement, if there was one, runs counter to the terms of the written instruments, and all other attendant questions, can be presented for decision. See *Coral Gables, Inc. v. Ayres,* 208 N.C. 426, 181 S.E. 263; *Stanback v. Haywood,* 209 N.C. 798, 184 S.E. 831.

Accepting the allegations of the second further answer and defense as true, it alleges no defense to plaintiff's cause of action in the instant case. The alleged parol agreement does not cover the $1,484.62 note. These allegations are clearly irrelevant, and the facts which these allegations relate were incompetent in evidence in this action. The court properly struck this second further answer and defense from the answer, upon plaintiff's motions. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660.

No error.

JOHNSON, J., not sitting.

IN THE MATTER OF GUY A. GIBBONS, JR.

(Filed 21 November, 1956.)

1. Infants § 22—

In determining the right to custody of an infant, the paramount consideration, to which all other factors must yield, is the welfare and best interest of the child.

2. Appeal and Error § 49—

The findings of fact of the trial court are conclusive when supported by competent evidence received in a properly constituted hearing.

3. Constitutional Law § 20—

Parties have the fundamental right to be present in court when evidence is offered and to an opportunity to rebut it, and when parol evidence is offered, to cross-examine the witnesses.

4. Evidence § 22—

While the court has power to confine cross-examination to its proper scope and proper limits, it may not entirely deny a party the right to cross-examine the witnesses of his adversary.

5. Infants § 22—

In a proceeding to determine the right of custody of a minor child, the action of the court in conferring with witnesses in his chambers in the absence of one of the parties deprives such party of a constitutional right, vitiating the decree awarding custody.

JOHNSON, J., not sitting.

APPEAL by petitioner from *Hobgood, J.*, March Civil Term 1956, WAKE.

This action was instituted in the Domestic Relations Court of Wake County in October 1954 by petition of Richard Bright, hereinafter referred to as petitioner. The petition asserted that Guy A. Gibbons, Jr., an infant under sixteen years, was a neglected child under such improper or insufficient control as to endanger the health and general welfare of the infant. It also asserted that the custody of the infant was in controversy. Guy A. Gibbons, Sr., hereinafter referred to as respondent, denied the allegations of the petition. From a judgment adverse to petitioner an appeal was taken to the Superior Court of Wake County. The cause was heard at the March Term 1956 on affidavits and oral testimony submitted by petitioner and respondent. The court made findings of fact and conclusions of law based on the facts found and awarded custody of the child to respondent. Petitioner excepted to the findings of fact and the conclusions of law based thereon. From the judgment awarding custody of the child to respondent, petitioner appealed.

J. L. Emanuel, Hill Yarborough, and Robert L. Emanuel for petitioner appellant.

Manning & Fulton for respondent appellee.

RODMAN, J. Guy A. Gibbons, Jr., was born 26 April, 1947. Adoption proceedings were initiated by Guy A. Gibbons, Sr., and wife, Rebecca

Gibbons, on 23 February, 1948, and final order of adoption was entered 30 April, 1949. In June 1949 Rebecca Gibbons died. Following her death, the child was taken to Miss Ruth Lindley, who lived at Guilford College. Miss Lindley, a sister of Mrs. Gibbons, was a school teacher. She was unable to care for the child after the school opened in September. Hence the child was returned to the respondent in Raleigh. He placed the child in the home of Mrs. Ralph Turner, who operated a boarding home for children. When the child had been at the boarding home about two weeks, Mrs. Turner notified respondent that she could not continue to keep the child, whereupon she was directed to find a suitable home for the child. Pursuant to this direction, Mrs. Turner placed the infant with the petitioner, Richard Bright, in September 1949. The infant remained in the home of petitioner and his wife, except for short visits to respondent, until 1 August, 1954. On that date, respondent and another man went to New Hope Baptist Church while Sunday School was in session and forcibly took Guy Gibbons, Jr., from the Sunday School where he had been sent by the petitioner and his wife. For this, respondent was indicted and convicted of disturbing religious worship.

Respondent made small contributions to the support of the infant in 1949, 1950, and 1951. No contributions were made thereafter while he was in the custody of petitioner.

In September 1952 respondent married Harriet Scott, a lady of excellent character. Respondent and his wife live in Raleigh. Mrs. Gibbons is regularly employed with the probation office of the Federal Government.

The court found that the petitioner and his wife are both of excellent character. Petitioner is employed as a professor in the Chemical Engineering Department of North Carolina State College and has been so employed for many years. Petitioner and his wife are active in church, educational, and community life of their community, own their own home, have no children of their own, and plan, upon their death, to leave their home to Guy A. Gibbons, Jr. The court further found:

"That the home life of Guy A. Gibbons, Jr. while he lived with Mr. and Mrs. Bright was happy and cheerful and the said Mr. and Mrs. Bright took particular pains to see that he appeared neat, clean, and saw to it that he was given proper medical attention at all times."

"That Guy A. Gibbons, Sr. is not a man of bad character. He owns his own home and he is the owner of and engaged in the business of operating a service station and a small nursery on U. S. Highway No. 1 about seven miles north of Raleigh and near the Millbrook community."

"That from the time of the death of his first wife, Rebecca L. Gibbons, in 1949, until a few months ago the said Guy A. Gibbons, Sr. was addicted to the excessive use of alcohol to such an extent that he fre-

quently became intoxicated and he became a member of Alcoholics Anonymous."

Then follows a finding that respondent was convicted of a misdemeanor relating to the operation of an automobile in each of the years 1950, 1951, and 1952. "That except as hereinabove set forth said Guy A. Gibbons, Sr. has been a law-abiding citizen, has attended church regularly, engaged continuously in business in Wake County, North Carolina for several years and does not appear to have any vices except an addiction to excessive use of alcohol."

The court made these additional findings, each of which was excepted to by petitioner:

"That during the time the said child has lived with Mr. and Mrs. Gibbons, Sr. since August 1, 1954, he has progressed normally in his physical development, in his school grades, and in his aptitudes; however, the child appears to be uncertain as to what his proper attitude should be as between the petitioner and the respondent, due to their conflict of interest in seeking complete custody and control of said child and said child freely admits his desire to live with Mr. and Mrs. Richard Bright due to the fact that they furnished more clothes for him, provided him with more toys and playground equipment, AND DO NOT PUNISH HIM WHEN HE MISBEHAVES; WHEREAS, ON THE CONTRARY, THE GIBBONS DO PUNISH HIM WHEN HE MISBEHAVES. (EMPHASIS by Hamilton H. Hobgood)."

"That this Court has held three conferences in chambers with Guy A. Gibbons, Jr. without either Mr. or Mrs. Bright or Mr. or Mrs. Guy A. Gibbons, Sr. being present, this being done with the view of obtaining full knowledge of the child's problems and attachment with reference to the petitioner and the respondent.

"That the respondent Guy A. Gibbons, Sr. and his wife, Harriet Scott Gibbons, are fit, suitable and proper persons to have the care, custody and control of Guy A. Gibbons, Jr., the adopted child of Guy A. Gibbons, Sr.; and the Court further finds as a fact that Guy A. Gibbons, Sr. has a comfortable home and finds, further, that Guy A. Gibbons, Sr. and his wife, Harriet S. Gibbons are giving said minor child, Guy A. Gibbons, Jr., proper instruction and supervision to the extent as to promote a wholesome and proper development of said minor child and to instill in him social, moral and religious principles and at the same time properly control his conduct in his daily activities so that he may develop as a normal child and be better prepared to meet the normal problems with which he will be faced upon reaching adulthood; and the Court further finds as a fact that Guy A. Gibbons, Sr. and his wife, Harriet S. Gibbons, are giving said child such care as to promote his best welfare, interest and development."

The crucial question in this case, as in all cases involving the custody of an infant, is: What, in fact, is for the best interest of the child? *Schenck, J.*, in *Tyner v. Tyner*, 206 N.C. 776, 175 S.E. 144, said: "In determining the custody of children, their welfare is the paramount consideration. Even parental love must yield to the claims of another, if, after due judicial investigation, it is found that the best interest of the children is subserved thereby."

Denny, J., in *Gafford v. Phelps*, 235 N.C. 218, 69 S.E. 2d 313, said: "The welfare of the child should be the paramount consideration which guides the court in making an award of custody."

Johnson, J., speaking with reference to the custody of children, said in *Griffith v. Griffith*, 240 N.C. 271, 81 S.E. 2d 918: "In such case we apprehend the true rule to be that the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental, and moral faculties. All other factors, including visitorial rights of the other applicant, will be deferred or subordinated to these considerations . . ."

Probably no more difficult task devolves upon a Superior Court Judge than to find the correct answer to the question raised when he is called upon to determine who shall have the custody and control of a little child. Nearly always any decision he makes will produce heartaches. The one denied the right to custody is certain to inquire of himself, "Where, how, and why did I fail to convince the court of my great love and affection for the child? Does not the evidence which the court has heard demonstrate that the party given the custody is not because of habits and character a fit and proper person to rear the child?"

The findings of fact made by the trial judge, like a jury verdict, conclude the parties and are binding on us when supported by competent evidence received at a properly constituted hearing. *Reid v. Johnston*, 241 N.C. 201, 85 S.E. 2d 114; *Radio Station v. Eitel-McCullough*, 232 N.C. 287, 59 S.E. 2d 779; *Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 2d 133; *Gafford v. Phelps, supra.*

The asserted errors are presented by exceptions 15, 6, and 16. The record states exception 15 thus: "On March 22, 1956, in Wake County Superior Court, a hearing was held in the above entitled cause, and following the oral testimony of Guy A. Gibbons, Sr., and Richard Bright, His Honor Hamilton H. Hobgood, Judge Presiding, in open court directed the Sheriff of Wake County to subpoena Rev. J. W. Page, pastor of Fairmont Methodist Church of Raleigh, N. C., and Dr. Owen Herring, pastor of New Hope Baptist Church of Wake County, to appear in open court and give testimony in this case. That the hearing which was scheduled for March 29, 1956, was not held. That thereafter Judge Hobgood did confer with said Rev. J. W. Page and Dr. Owen

Herring in a single conference in his chambers in Wake Superior Court with no one being present except said Rev. J. W. Page, Dr. Owen Herring and Judge Hobgood. To the foregoing action of His Honor, petitioner excepted; and this constitutes petitioner's EXCEPTION No. 15."

Exception 6 is to the finding of fact that the court held three conferences with the infant Guy A. Gibbons, Jr., without any of the parties being present; and exception 16 is to the refusal of the court to permit petitioner to examine the infant in open court.

The basic and fundamental law of the land requires that parties litigant be given an opportunity to be present in court when evidence is offered in order that they may know what evidence has been offered and that they may have an opportunity to rebut the evidence with the opportunity, when parol evidence is offered, to cross-examine the witnesses. *Barnhill, J.* (later *C. J.*), speaking in *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777, said: "In a judicial proceeding the determinative facts upon which the rights of the parties must be made to rest must be found from admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and *evidence offered in open court after all the parties have been given full opportunity to be heard.*" (Emphasis supplied.) To like effect see *In re Custody of Gupton,* 238 N.C. 303, 77 S.E. 2d 716; *S. v. Gordon,* 225 N.C. 241, 34 S.E. 2d 414; *In re Estate of Edwards,* 234 N.C. 202, 66 S.E. 2d 675; *Townsend v. Coach Co.,* 231 N.C. 81, 56 S.E. 2d 39; *S. v. Armstrong,* 232 N.C. 727, 62 S.E. 2d 50; *S. v. Stone,* 226 N.C. 97, 36 S.E. 2d 704; *Bank v. Motor Co.,* 216 N.C. 432, 5 S.E. 2d 318.

The power of the court to confine cross-examination to its proper scope and within proper limits is undoubted. *Crouse v. Vernon,* 232 N.C. 24, 59 S.E. 2d 185; *S. v. Stone, supra; S. v. Tola,* 222 N.C. 406, 23 S.E. 2d 321.

The court committed error in receiving testimony from witnesses without affording petitioner an opportunity to be present and know what evidence was offered.

The fact that the conclusions of law were based on findings of fact made without an opportunity to petitioner to be present when the evidence was offered vitiates the judgment. There is

Error.

JOHNSON, J., not sitting.

PHYLLIS LEE MORRIS, INDIVIDUALLY AND AS ADMINISTRATRIX WITH THE WILL ANNEXED OF RICHARD MORRIS v. RICHARD LEE MORRIS, AN INFANT, AND J. HARVEY LUCK, GUARDIAN AD LITEM FOR THE INFANT, RICHARD LEE MORRIS.

(Filed 21 November, 1956.)

1. Wills § 16—

A will is wholly ineffectual as an instrument of title unless the will is probated and made a matter of record in accordance with the applicable statutes.

2. Wills § 15a—

While the Superior Court has no initial probate jurisdiction, this being in the exclusive original jurisdiction of the clerk of the Superior Court, G.S. 2-16, G.S. 28-1, G.S. 31-12, *et seq.*, when the issue of *devisavit vel non* is raised and the matter is transferred to the civil issue docket, the Superior Court in term has jurisdiction of the question of probate as well as the issue of *devisavit vel non*. G.S. 1-276.

3. Same—

A holographic will must be probated upon the testimony of at least three witnesses that they believe the will to be written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will, is in the handwriting of the person whose will it purports to be, and a probate which shows on its face that the handwriting of the deceased was proven by only two witnesses renders the paper writing ineffectual to pass title. G.S. 31-39.

4. Wills § 16—

While an order of probate in common form is conclusive until set aside in a direct proceeding and may not be collaterally attacked, when the record of probate of a holographic will shows on its face that the handwriting of the deceased was proven by only two witnesses, this rule does not apply, since G.S. 31-19 is applicable only to a decree of probate regular on its face.

5. Declaratory Judgment Act § 2—

A proceeding under the Declaratory Judgment Act for a declaration as to how the estate of deceased passed by his purported will must be dismissed when the record of probate of the instrument discloses on its face that the paper writing had not been proven as required by statute, since in such instance the question of title to property under the paper writing is moot, and a moot question is not within the scope of the Declaratory Judgment Act.

JOHNSON, J., not sitting.

APPEAL by defendant J. Harvey Luck, guardian *ad litem* for the infant, Richard Lee Morris, from *Fountain, Special Judge*, July Term 1956 of RANDOLPH.

Proceeding under the Declaratory Judgment Act (G.S. 1-253 *et seq.*) for construction of a paper writing purporting to be a holographic will of Richard Morris, deceased, and a declaration as to how the real and personal estate of the late Richard Morris passed by his purported will as between Phyllis Lee Morris, his widow, and Richard Lee Morris, an infant, his only son.

This is the decree of probate:

"NORTH CAROLINA — IN THE SUPERIOR COURT
RANDOLPH COUNTY

A paper writing, without subscribing witnesses, purporting to be the last will and testament of Richard Morris, deceased, is exhibited for probate in open court by Phyllis Lee Morris, and it is thereupon proved by the oath and examination of Phyllis Lee Morris that the said will was lodged in the hands of her for safekeeping of the said Richard Morris after his death.

"And it is further proved by the oath and examination of three competent and credible witnesses, to wit, Bob S. Morris, H. L. Griffin, and , that they are acquainted with the handwriting of the said Richard Morris, having often see (*sic*) him write, and verily believe that the name of the said Richard Morris, subscribed to the said will, and the said will itself, and every part thereof, is in the handwriting of the said Richard Morris.

"And it is further proved by the evidence of the three last mentioned witnesses, that the said handwriting is generally known to the acquaintances of the said Richard Morris.

Severally sworn and subscribed,
this 23 day of January, 1956, — BOB S. MORRIS
before me. — H. L. GRIFFIN

JOSEPHINE G. HARPER, Asst.
Clerk of the Superior Court.

"It is therefore considered and adjudged by the Court that the said paper writing and every part thereof is the last will and testament of the said Richard Morris and the same is ordered to be recorded and filed.

This 23 day of January, 1956.
JOSEPHINE G. HARPER, Ass't.
Clerk of the Superior Court.

Dec. 30, 1954

Being of sound mind I hereby bequeath to my wife Phyllis Lee Morris all of property both real and personal to provide for my son Richard Lee Morris and herself.

Richard Morris
Dec. 30, 1954

In Witness of the above:
I, Bartley T. Garvey attest the signature to be of Mr. Richard Morris whom I know personally."

Judge Fountain rendered a declaratory judgment adjudicating how the estate passed under the purported will.

To the judgment entered the guardian *ad litem* excepts and appeals.

J. Harvey Luck, in propria persona, as guardian ad litem for Richard Lee Morris, Appellant.

Archie L. Smith and Hammond & Walker for Appellee.

PARKER, J. G.S. 31-39 provides "No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county . . ."

A will is wholly ineffectual as an instrument of title unless the will is probated and made a matter of record in accordance with the applicable statutes of our State. *Osborne v. Leak,* 89 N.C. 433; *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532; *Cartwright v. Jones,* 215 N.C. 108, 1 S.E. 2d 359; *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; *Anderson v. Atkinson,* 234 N.C. 271, 66 S.E. 2d 886; *Vandiford v. Vandiford,* 241 N.C. 42, 84 S.E. 2d 278. See also *Eckland v. Jankowski,* 407 Ill. 263, 95 N.E. 2d 342, 22 A.L.R. 2d 1102.

"The testamentary disposition of property is governed by statute. In order that a paper writing, so designed, may effectuate this purpose it must have been executed and proven in strict compliance with the statutory requirements. G.S. 31-3, 31-18." *In re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488.

The statutes of North Carolina confer upon the Clerk of the Superior Court exclusive and original jurisdiction of proceedings for the probate of wills. G.S. 2-16, 28-1, and 31-12 to 31-27 inclusive; *McCormick v. Jernigan,* 110 N.C. 406, 14 S.E. 971; *Brissie v. Craig, supra.* Under the statutes governing probate matters, the Superior Court, as a mere court of law and equity, has no jurisdiction to determine an issue whether a disputed writing is the last will of a deceased person in an ordinary civil action. *Brissie v. Craig, supra.* However, when an issue of *de-*

visavit vel non is raised, that necessitates the transfer of the cause to the civil issue docket for trial by jury, where the Superior Court in term has jurisdiction to determine the whole matter in controversy as well as the issue of *devisavit vel non*. G.S. 1-276; *In re Will of Wood*, 240 N.C. 134, 81 S.E. 2d 127.

If the paper writing here purporting to be a will is a will, it is a holographic will. G.S. 31-18.2 sets forth the manner of probate of a holographic will and reads: "MANNER OF PROBATE OF HOLOGRAPHIC WILL.—A holographic will may be probated only in the following manner: (1) Upon the testimony of at least three competent witnesses that they believe that the will is written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will is in the handwriting of the person whose will it purports to be; and (2) Upon the testimony of one witness who may, but need not be, one of the witnesses referred to in paragraph (1) of this section to a statement of facts showing that the will was found after the testator's death as required by G.S. 31-3.4."

The probate of the paper writing here is fatally defective on its face because it states that it was probated upon the testimony of only two competent witnesses, when G.S. 31-18.2 requires the testimony of at least three competent witnesses that they believe that the will is written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will is in the handwriting of the person whose will it purports to be. Therefore, the probate shows on its face that the paper writing in the instant case has never been validly proven and probated as a holographic will, and is therefore ineffective to pass real or personal property, G.S. 31-39.

Cartwright v. Jones, supra, was a controversy without action submitted upon an agreed statement of facts to determine whether the plaintiff was able to convey a good and indefeasible fee simple title to the land in question. On the hearing the title offered was properly made to depend upon the effectiveness of an attempted change in a portion of Item III of a joint will executed by the plaintiff and her late husband, H. Cartwright. This item stated "it is our mutual will and desire, that whatever property which belonged to both or either of us and which may be in existence at the death of the survivor of us, shall be divided and distributed after the death of the survivor of us as follows: . . . (c) The home place to go to our son Melick Cartwright in fee simple (As I have sold the home place I want Melick have the store house in place of the one I sold. Hilery Cartwright)." According to the agreed facts, the plaintiff, Cornelia Cartwright, owned in fee simple "the store house" property referred to in said Item III prior to and at the time of the execution of the joint will; the words in parenthesis were inserted

in the joint will in pencil by Hilery Cartwright after the execution thereof by him and his wife, the plaintiff, and without her knowledge or consent. The joint will, with the exception of the pencil insertion in parenthesis, was typewritten and was proven and ordered to probate on the oath and examination of two subscribing witnesses: the pencil insertions in parenthesis were proven and ordered to probate as a codicil to the typewritten will on the oath and examination of three witnesses. The decree of probate is set forth in the opinion and fails to show on its face that the purported holographic codicil was found among the valuable papers and effects of the deceased, or had been lodged in the hands of any person for safe keeping. The court in its opinion set forth the statute then in force C.S. 4144(2) in respect to the probate of holographic wills, and the statute C.S. 4131 in respect to the formal execution of wills, and said: "The words inserted in the joint will in pencil were not in it at the time of its execution, but were inserted sometime thereafter without the knowledge or consent of the plaintiff. Such words have never been properly or validly proven and probated as the will of anyone, since it does not appear on oath of any of the witnesses or other credible person that such purported holograph codicil was found among the valuable papers and effects of the decedent or was lodged in the hands of any person for safe-keeping. The insertion of these words under the circumstances was ineffective to pass title to the lands of the plaintiff." The lower court held that the deed tendered by the plaintiff Cornelia Cartwright was sufficient to convey a full and complete legal title to the lands in question, and this Court affirmed the judgment below.

Leatherwood v. Boyd, 60 N.C. 123, was an ejectment case. The lessor of the plaintiff adduced his title regularly to John Leatherwood, whose will conveying the same to her, was offered in evidence, but objected to for the want of a due probate. The evidence was admitted, and defendant excepted. The court held the admission of the evidence error requiring a *venire de novo*, and said in its opinion: "We are of opinion that the probate of the will of John Leatherwood was not sufficient according to the certificate, and it was, consequently, error to permit the will to be read in evidence. Had the certificate stopped after these words, 'The last will and testament of John Leatherwood was duly proved in common form by the oath of Rufus A. Edmonston, one of the subscribing witnesses thereto,' it would have been sufficient in this view of the question (*Marshall v. Fisher*, 46 N.C. 111; *Beckwith v. Lamb*, 35 N.C. 400; *University v. Blount*, 4 N.C. 13), on the ground that every court, where the subject-matter is within its jurisdiction, is presumed to have done all that is necessary to give force and effect to its proceedings, unless there is something on the face of the proceeding to show to the contrary; for the presumption is that the court knew how to take

the probate of a will, and saw that it was properly done. But if there be anything on the face of the proceeding to show the contrary, that will rebut the presumption. . . . So it appears on the face of this proceeding that the probate was defective in this: the witness did not state that he subscribed the will, as a witness, in the presence of the testator, which is an essential requisite in the due execution of a will to pass land. The omission of this fact, where particulars are entered into, rebuts the presumption that would otherwise have been made under the maxim *omnia presumuntur rite esse acta;* consequently the probate as it now appears must be held to be defective."

G.S. 31-19 states: "Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal." The words of this statute have been given effect by numerous decisions of the Court, and a will probated and recorded in accord with applicable statutes may not be collaterally attacked, and constitutes a muniment of title. *In re Will of Puett, supra,* where the cases are cited. However, it would seem that this statute is restricted to a decree of probate regular on its face, and does not apply where on the face of the decree of probate it affirmatively shows that the will was not probated as required by mandatory applicable statutes for the probate of wills, as here, and when, as here, G.S. 31-39 provides "No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county . . ." *Cartwright v. Jones, supra; Leatherwood v. Boyd, supra.* See also: *Blacksher Co. v. Northrop,* 176 Ala. 190, 57 So. 743, 42 L.R.A. (N.S.) 454 with annotation; 57 Am. Jur., Wills, sec. 942; Page on Wills, Third Lifetime Ed., Vol. 2, p. 340. In the case of *In re Will of Puett, supra,* the Court said, speaking in reference to the formal execution and probate of wills: "When executed, proven and recorded in manner and form as prescribed, it (a will) is given conclusive legal effect as the last will and testament of the decedent, subject only to be vacated on appeal or declared void by a court of competent jurisdiction in a proceeding instituted for that purpose."

We have a number of cases in respect to the probate and registration of deeds. The second headnote in our Reports in *Howell v. Ray,* 92 N.C. 510, reads: "Where in such cases, (the probate and registration of deeds) the evidence upon which the probate judge acted in ordering the registration is set out in full, and it appears that such evidence was insufficient, the registration is void." In *McClure v. Crow,* 196 N.C. 657, 660, 146 S.E. 713, it is said: "The registration of a deed on a probate which is apparently regular is *prima facie* evidence of its due execution, citing authority. It is otherwise when the probate upon its face is fatally defective." In *Horton v. Hagler,* 8 N.C. 48, this Court said: "But when the certificate enters into detail, and goes on to show

in what manner the deed has been proved, the inquiry into the legality of the proof is open to the court."

While the decree of the probate court declares the paper writing in question to be the last will of Richard Morris, and admitted it to probate, the testimony upon which the decree of probate was based, which is set forth in detail, shows upon its face that the paper writing here has never been properly or validly proven and probated according to our applicable statutes as the holographic will of Richard Morris. To hold otherwise would be to nullify, or, in effect, amend or repeal our applicable statutes. It would be making something out of nothing. The decree of probate in question on its face bespeaks its own impotency. Therefore, the question as to how the real or personal estate of the late Richard Morris passed by this paper writing is a moot question, and a moot question is not within the scope of our Declaratory Judgment Act. *Poore v. Poore, supra.*

If the paper writing here was properly executed, and if it is duly proved and allowed in the probate court of Randolph County so as to be effectual to pass real or personal estate, the questions sought to be determined in the instant proceeding can properly be adjudicated under our Declaratory Judgment Act.

The judgment below is ordered vacated. The present proceeding is not within the terms of our Declaratory Judgment Act.

Proceeding dismissed.

JOHNSON, J., not sitting.

PANSY G. FUTRELLE, ADMINISTRATRIX OF THE ESTATE OF EGBERT A. FUTRELLE, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 November, 1956.)

1. Master and Servant § 25c—

In order to be subject to the Federal Employers' Liability Act, an employee need not be at the precise moment of the injury engaged in interstate rather than intrastate commerce, and where the conductor on a run starts with cars destined for interstate as well as for intrastate commerce, the fact that at the time of his injury his train was composed solely of cars for intrastate shipment does not preclude the application of the Federal Act.

2. Master and Servant § 28—

Nonsuit for contributory negligence of the employee is not permissible under the Federal Employers' Liability Act, since under the Act contribu-

tory negligence does not bar recovery, but is to be considered only in diminution of damages.

3. Master and Servant § 26—Evidence held insufficient to show negligence of railroad employer in action under Federal Employers' Liability Act.

Evidence tending to show that defendant's engine was pushing freight cars in switching operations, so that its headlight and oscillating light were obstructed by a boxcar immediately in front of the engine, is insufficient to be submitted to the jury on the question of negligence of the carrier in causing the death of the conductor of the train, presumably hit by the front freight car in the course of his duties relating to the switching operation, when the evidence further shows that the place where the conductor was killed was in a well lighted area, that he was standing on the opposite side of the train from the side on which he knew the signals with respect to the movement of the train would be made, and that the switching operations were being performed in the usual and customary manner theretofore followed in this particular yard and in accordance with the express instructions given to the crew by the conductor.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Stevens, J.*, April Term, 1956, of NEW HANOVER.

This is a civil action instituted on 9 November 1951, pursuant to the provisions of the Federal Employers' Liability Act, to recover for the alleged wrongful death of Egbert A. Futrelle on 21 November 1950. Pansy G. Futrelle, his childless wife and sole dependent relation, is the duly qualified and acting administratrix of his estate.

Plaintiff's intestate had been an employee of the defendant for 39 years. He had been a conductor for 24 years prior to his death at approximately 12:07 a.m. on 21 November 1950. He was 61 years of age.

On 20 November 1950, conductor Futrelle and his regular crew, consisting of V. C. McIntyre, engineer, J. P. Tucker, Jr., brakeman, R. N. Walters, flagman, and R. H. Perkins, fireman, left Sanford, North Carolina, about 6:00 p.m. with defendant's train No. 228 for Fayetteville and Wilmington, North Carolina. In the train as originally constituted in Sanford there were five cars which were destined for movement outside of the State of North Carolina. All of these cars were set out of the train at Fayetteville or between Sanford and Fayetteville. None of the cars in the train which left Fayetteville, or which were in the train at the time of the death of plaintiff's intestate or which were in the train when it arrived in Wilmington, were destined for movement outside of the State of North Carolina.

The scene of conductor Futrelle's death was within the yards of the Becker County Sand and Gravel Company, hereinafter called Becker. These yards are located about four miles west of Vander, North Caro-

lina, on the Becker lead which turns off of the main line at Vander, which is about ten miles south of Fayetteville. There is a pass track about one mile east of the approximate center of the Becker yards and is approximately 1,000 feet northeast of Highway No. 53. It is about 1,000 feet from the loading chute in the Becker yards to the dead end of the track on what is referred to in the evidence as the "hill." The elevation of the track where it ends on the "hill" is some 15 feet higher than it is at the loading chute.

On the night in question the train was left on the Becker lead between the Vander turn-off and the pass track. The entire crew went to the Becker yards with just the engine. A boxcar was picked up at the concrete house and coupling made to the loaded gondola cars on the loading or western track. The shipping instructions were picked up from the Becker office by conductor Futrelle and flagman Walters, and the cars marked "East" or "West." Conductor Futrelle then instructed flagman Walters and brakeman Tucker to take the loaded cars out to the pass track, bring back the empties there and couple them with 12 other empty cars standing on the by-pass or eastern track; and according to the testimony of J. P. Tucker, Jr., conductor Futrelle said "he would walk back up on the hill where we spot the cars, and line up the switches and check the cars, and would be there when we came back. We have to give the initials and numbers of all the cars in the plant for the dispatcher and the agent each night." Likewise, flagman Walters testified that conductor Futrelle told him he would be on the "hill"; and told him to complete the coupling of the empties with the other 12 cars. The crew took the loaded cars out to the pass track and left conductor Futrelle to go up on the "hill," which was the last time any of the crew saw him alive. The crew then coupled the engine to 27 cars (the concrete boxcar, another car, and 25 empty cars) and started back into the Becker yards. The engine was pushing in a forward direction. The engine headlight and the oscillating light were burning. Signals were blown at the highway crossings. Flagman Walters was standing inside the front end of a gondola car, which was the leading car, away from the engine, and was giving his signals with a fusee. He was making the movement and was the lookout. Brakeman Tucker was riding on a hopper or gondola car about midway the cut of 27 cars.

Engineer McIntyre and fireman Perkins were in the engine cab. Signals were relayed by light from the flagman through the brakeman to the fireman on the left side of the engine, who relayed the signals to the engineer on the right side of the engine. Signals were of necessity passed on the left or fireman's side because the track made a rather sharp turn to the left. Conductor Futrelle was familiar with the yard and knew that the signals had to be made from the fireman's side.

Flagman Walters signaled for a stop and the train stopped 15 to 20 feet short of the 12 empty cars. Flagman Walters signaled for a forward movement and the coupling was made. After the coupling was made the only movement made by the 12 cars was the slack running out and in of the 12 cars, which would be about six feet in the 12 cars. Flagman Walters then began checking the couplings and air hoses on the 12 cars towards the south. After checking ten couplings, when he got between the tenth and eleventh cars, from the one to which the train had coupled (second and third from the south end), he found the body of conductor Futrelle. The body was lying on the rail on the engineer's side, the opposite side of the track from where the signals were passed. This point was approximately 40 feet north of the loading chute and was well lighted from the lights on the chute and the ground was level with no holes or obstructions. The conductor's lantern was lying at his feet between the rails and under the couplings of the car and was still burning.

At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit which was allowed, and the plaintiff appeals, assigning error.

Aaron Goldberg and George Rountree, Jr., for appellant.
Poisson, Campbell & Marshall and L. J. Poisson, Jr., for appellee.

DENNY, J. We do not understand that in order for an employee of a railroad to be entitled to the benefits of the Federal Employers' Liability Act such employee at the precise moment of the injury must have been engaged in interstate rather than in intrastate commerce. U.S.C.A. 45, section 51, as amended in 1939; *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798; *Agostino v. Pennsylvania R. Co.*, D.C.N.Y. 1943, 50 F. Supp. 726; *Albright v. Pennsylvania R. Co.*, 183 Md. 421, 37 A. 2d 870, *certiorari* denied 323 U.S. 735, 89 L. Ed. 589; *Scarborough v. Pennsylvania R. Co.*, 154 Pa. Super. 129, 35 A. 2d 603.

The 1939 amendment to section 51 of U.S.C.A. 45 added the following paragraph: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

In *Robinson v. Pennsylvania R. Co., supra,* the Court held that a railroad carpenter who was injured while repairing a highway bridge over the defendant's railroad which carried interstate rail movements, the employee's work so directly or closely and substantially affected interstate commerce as to bring him within the coverage of the Federal

Employers' Liability Act, although the bridge was intrastate in character.

In the case of *Albright v. Pennsylvania R. Co., supra,* Clayton L. Albright was employed by the railroad as a special policeman whose duty it was to guard and examine cars in the yard of its terminal in Baltimore and to ascertain whether the seals had been broken on the cars. If he found a seal broken, it was his duty to apply another seal to the car in order to safeguard the lading, and generally to see that no theft was committed. While engaged in guarding interstate as well as intrastate shipments, he sustained an injury that resulted in his death. The Court held that under the provisions of the 1939 amendment to section 51 of the U.S.C.A. 45, the right to recover for his injury and death was limited to the Federal Employers' Liability Act.

The evidence on the present record shows that between Sanford and Fayetteville on this particular run, conductor Futrelle and his crew had handled five cars destined for interstate movement. Consequently, we hold that part of the duties of conductor Futrelle required him to engage in the furtherance of interstate commerce, and whatever rights his personal representative may have, if any, against the defendant railroad are subject to the provisions of the Federal Employers' Liability Act.

In determining whether or not the court below committed error in granting the defendant's motion for judgment as of nonsuit, we are not concerned with the question of contributory negligence. Under the provisions of the Federal Employers' Liability Act, U.S.C.A. 45, section 53, contributory negligence is not a bar to recovery, but, in the event of a recovery, the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. *Graham v. Atlantic Coast Line R. Co.,* 240 N.C. 338, 82 S.E. 2d 346; *Cobia v. Atlantic Coast Line R. Co.,* 188 N.C. 487, 125 S.E. 18; *Davis v. Southern R. Co.,* 175 N.C. 648, 96 S.E. 41.

Therefore, the sole question before us is whether or not the plaintiff's evidence is sufficient to go to the jury on the question of actionable negligence on the part of the defendant. *Wilkerson v. McCarthy,* 336 U.S. 53, 93 L. Ed. 497; *Eckenrode v. Pennsylvania R. Co.,* C.C.A. Pa. 1947, 164 F. 2d 996, affirmed 335 U.S. 329, 93 L. Ed. 41.

The plaintiff argues and contends that in pushing 27 cars towards the 12 standing empties to which the train was to be coupled, with a cement box car immediately in front of the engine, obscuring the headlights, was in conflict with I.C.C. Rule 231 (a) through (f), especially section (e) thereof, and, without regard to any other acts of negligence, is sufficient to take the case to the jury, citing *Tiller v. Atlantic Coast Line R. Co.,* 323 U.S. 574, 89 L. Ed. 465.

Section (e) of I.C.C. Rule 231 reads as follows: "Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in section (a), to see a dark object such as there described (as large as a man of average size standing erect) for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

In the last cited case, the defendant had failed to have a light attached to the rear of its engine (in which direction it was being operated at the time of the accident), as required by the rules, and the Court said: "The deceased met his death on a dark night, and the diffused rays of a strong headlight even though directly obscured from the front, might easily have spread themselves so that one standing within three car-lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of the cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard."

In the present case the headlight was on, and an oscillating light. Moreover, the movement of the train was being made in accord with the express instructions of the plaintiff's intestate and at a time when he had said he would be up on the "hill." The place where conductor Futrelle was killed was some 40 feet north of the loading chute, in a well lighted area, on the opposite side of the train from where he knew the signals with respect to the movement of the train would be given. The cars which conductor Futrelle said he was going to check and where he would be when his crew came back to couple with the 12 empty cars on the by-pass track, were located near the south end of the track which was approximately 1,000 feet south of the loading chute.

The plaintiff's evidence, in our opinion, supports the view that the members of the train crew of the defendant at the time of the death of plaintiff's intestate were performing their duties in the usual and customary manner theretofore followed in the Becker yard and according to the express instructions given to them by conductor Futrelle. Hence, we hold that the evidence is insufficient to establish actionable negligence on the part of the defendant.

The ruling of the court below is

Affirmed.

JOHNSON, J., not sitting.

STATE v. PAUL STONE.

(Filed 21 November, 1956.)

1. Criminal Law § 17b—

A plea of guilty is equivalent to a conviction.

2. Criminal Law § 17c—

A plea of *nolo contendere* authorizes the court in that particular case to pronounce judgment as though there had been a conviction by verdict or plea of guilty, but a plea of *nolo contendere* cannot be used against the defendant as an admission of guilt in a subsequent civil or criminal action.

3. Criminal Law § 62h—

An indictment must charge that the offense is a second or subsequent offense within the meaning of the statute prescribing a higher penalty in case of repeated convictions in order for a defendant to be subject to the higher penalty. G.S. 15-147.

4. Same—

A transcript of a duly certified record of a prior conviction and proof of the identity of defendant as the person therein convicted is sufficient to be submitted to the jury for the purpose of imposing a higher penalty for repeated offenses under provision of statutes. G.S. 15-147.

5. Same: Automobiles § 75—

A plea of *nolo contendere* in a prosecution for driving while under the influence of intoxicating liquor may not be made the basis for a higher penalty in a subsequent prosecution. G.S. 20-179.

6. Same—

Where an indictment for driving a motor vehicle while under the influence of intoxicating liquor charges that defendant had theretofore been twice convicted for like offenses, but the proof discloses that defendant had entered a plea of *nolo contendere* in one of the prior instances, the court should not submit such instance to the jury, and the court's action in admitting evidence thereof must be held prejudicial since it may have influenced the jury and also the court in fixing punishment.

7. Automobiles § 72—

Where the State's evidence is amply sufficient to be submitted to the jury on the question of defendant's guilt of operating an automobile on the highways of the State while under the influence of intoxicating liquor, and is also sufficient as to defendant's prior conviction for a like offense, the fact that the evidence is insufficient as to a second prior conviction alleged in the indictment, does not justify nonsuit, since the entire case does not stand or fall upon whether the State had established beyond a reasonable doubt that the defendant was convicted on each and all the prior occasions alleged in the warrant or indictment.

8. Criminal Law § 62h—

In a prosecution under indictment charging prior offenses as a basis for a higher penalty, the court should submit the question of defendant's guilt

of the offense charged, and then whether they further find that defendant had theretofore been convicted of one or more of the alleged prior violations of the applicable statute.

JOHNSON, J., not sitting.

APPEAL by defendant from *Hobgood, J.*, July-August, 1956, Criminal Term, of LEE.

Criminal prosecution on bill of indictment charging that defendant on 13 July, 1956, "did unlawfully and willfully drive a motor vehicle upon the public highways within the County and State aforesaid while then and there being under the influence of intoxicating liquor or narcotic drugs, same being his third offense he having been *convicted* thereof in the County Criminal Court of Lee County, N. C., at Sanford, N. C., on the 10th day of January, 1950, and in the County Criminal Court of Lee County, N. C., at Sanford, N. C., on the 10th day of April, 1956, . . ." (Italics added.)

The only evidence was that offered by the State.

There was evidence tending to show that defendant, about 8:30 a.m. 13 July, 1956, was driving an automobile along the right side of McIver Street in Sanford, N. C.; that he pulled across to his left, coming to a stop "more or less diagonally," two feet or more from the curbing; that the parking zone at this point was parallel with the curbing; that in so driving and stopping he attracted the attention of police officers; that, after so stopping, defendant got out of the car and went towards the sidewalk, stumbling on the curb; that defendant staggered when he walked; that defendant gave out "a very strong odor of whiskey"; and that, in the opinion of each of two police officers who observed his driving and who made the arrest, defendant was under the influence of intoxicating liquor.

Over objection by defendant, the State offered in evidence records of the Lee County Court tending to show these facts:

1. On 10 January, 1950, one Paul Stone entered a plea of *nolo contendere* to a charge of "drunk driving" and judgment was pronounced thereon.

2. On 10 April, 1956, one Paul Stone entered a plea of guilty to a charge of "drunken driving" and judgment was pronounced thereon.

The jury returned a verdict of "Guilty as charged." Thereupon, the court pronounced judgment imposing a road sentence of six months. Defendant excepted and appealed, assigning errors.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Pittman & Staton and Lowry M. Betts for defendant, appellant.

BOBBITT, J. The court instructed the jury that if they found from the evidence beyond a reasonable doubt that the defendant was guilty of operating a motor vehicle upon said public street on 13 July, 1956, while under the influence of intoxicating liquor, and further that this was defendant's *third* offense, their verdict would be "Guilty as charged"; but if they failed to so find from the evidence beyond a reasonable doubt their verdict would be "Not Guilty." No other verdict was permissible under the instructions.

G.S. 20-138 provides: "It shall be unlawful and punishable, as provided in sec. 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within the State."

G.S. 20-179 prescribes the punishments, respectively, upon *conviction* of a first, second and third (or subsequent) violation of G.S. 20-138.

A plea of guilty is "equivalent to a conviction." *Harrell v. Scheidt, Comr. of Motor Vehicles,* 243 N.C. 735, 92 S.E. 2d 182, and cases cited.

Defendant, by proper exceptive assignments of error, presents this question: Did the record of the plea of *nolo contendere* to the charge of "drunk driving" in Lee County Court on 10 January, 1950, show a "conviction of the same offense" within the meaning of G.S. 20-179?

In a criminal prosecution, if the State, by leave of the court, elects to accept the defendant's plea of *nolo contendere,* the court's authority to pronounce judgment in that particular case is the same as if there had been conviction by verdict or plea of guilty; but this plea of *nolo contendere* cannot be used against the defendant "as an admission in an action in the nature of a civil action, or as an admission in any other criminal action." *Winesett v. Scheidt, Comr. of Motor Vehicles,* 239 N.C. 190, 79 S.E. 2d 501, and cases cited. Also, see *Fox v. Scheidt, Comr. of Motor Vehicles,* 241 N.C. 31, 84 S.E. 2d 259.

In conformity with G.S. 15-147, it is well established that "where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty." *S. v. Miller,* 237 N.C. 427, 75 S.E. 2d 242, and cases cited; *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203.

G.S. 15-147 provides, in part, that "a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction." In this connection, it is noted that the State introduced records relating to Paul Stone. Absent an admission, it would seem necessary that the State offer evidence that *the* Paul Stone then on trial was the identical person referred to in said records. Since no assignment of error raises

the question, we need not determine whether an admission that this defendant is *the* Paul Stone referred to in said records may be implied from the circumstances disclosed by the record on this appeal.

Here the indictment charged the violation of G.S. 20-138 on 13 July, 1956, and defendant's conviction for violation thereof on two prior occasions. Evidence showing each *alleged* prior *conviction* was competent. Moreover, the jury had to determine that he had been convicted of a second or third violation thereof before judgment could be pronounced on the basis of such second or third convictions. *S. v. Cole, supra.*

Conviction by verdict or plea of guilty of a violation of G.S. 20-138 on the alleged prior occasion(s) is required before the court is authorized under G.S. 20-179 to pronounce judgment for a second *conviction* or a third or subsequent *conviction*. A plea of *nolo contendere* in the prior case is not the equivalent of a plea of guilty as a basis for the pronouncement of judgment under G.S. 20-179. Hence, the plea of *nolo contendere* on 10 January, 1950, could not be made the basis of a verdict that defendant's violation of G.S. 20-138 on 13 July, 1956, was his third violation thereof within the meaning of G.S. 20-179.

Even so, the motion for judgment of nonsuit was properly overruled.

The evidence, considered in the light most favorable to the State, was sufficient to warrant a finding by the jury that on 13 July, 1956, defendant was operating a motor vehicle on McIver Street in Sanford while under the influence of intoxicating liquor. Moreover, assuming defendant is the Paul Stone referred to therein, the record of the plea of guilty entered 10 April, 1956, was sufficient to support a finding that defendant was then "convicted" of a separate violation of G.S. 20-138.

In such case, upon trial on said bill of indictment, should the court have submitted the question of the guilt or innocence of defendant in respect of the violation of G.S. 20-138 on 13 July, 1956, and in respect of the previous conviction on 10 April, 1956? The answer is, "Yes."

We need not determine whether in a strict sense a violation of G.S. 20-138 on 13 July, 1956, without a further finding in respect of prior convictions, should be deemed a less degree of the crime charged in said bill of indictment within the meaning of G.S. 15-170. Apart from G.S. 15-170, sound reason impels the conclusion that where the warrant or bill of indictment includes *additional* allegations, which, if proven, vest in the court different authority as to the minimum punishment to be imposed upon conviction, it is for the jury, under proper instructions, to determine upon competent evidence which of such additional allegations, if any, have been established.

If the State fails in its proof as to one or more of the alleged prior convictions, this fact does not defeat the entire prosecution and require a verdict of not guilty. Rather, the court before submitting the case

will eliminate the allegations in the warrant or indictment of which there is *no* competent evidence; and the jury, in returning their verdict, will eliminate the allegations which are not established by the evidence beyond a reasonable doubt. In short, the verdict should spell out, first, whether the jury find the defendant guilty of the violation of G.S. 20-138 charged in the warrant or indictment, and if so, whether they further find that he was convicted of one or more of the alleged prior violations thereof. The entire case does not stand or fall upon whether the State has established beyond a reasonable doubt that the defendant was convicted on each and all of the prior occasions alleged in the warrant or indictment.

Since the evidence was sufficient to establish defendant's guilt in respect of a violation of G.S. 20-138 on 13 July, 1956, the judgment pronounced was authorized by G.S. 20-179, whether this was defendant's first, second or third violation thereof; for the difference in the punishment prescribed by G.S. 20-179 for a second or subsequent violation of G.S. 20-138 concerns only the *minimum* punishment to be imposed. Even so, these facts confront us: first, the court below may have been influenced in pronouncing judgment by the jury's verdict purporting to establish defendant's present conviction as his third conviction; and second, the admission in evidence of the record of the plea of *nolo contendere* entered 10 January, 1950, was prejudicial error. Since it did not support the allegation as to a prior *conviction* on 10 January, 1950, evidence offered initially by the State tending to show that defendant had been previously charged with an unrelated prior criminal offense and of the disposition thereof under plea of *nolo contendere* was incompetent. *S. v. McClain,* 240 N.C. 171, 81 S.E. 2d 364, and cases cited.

We are not now concerned with the effect of the plea of *nolo contendere* entered 10 January, 1950, in relation to the authority of the Commissioner of Motor Vehicles to revoke the defendant's operator's license. *Fox v. Scheidt, Comr. of Motor Vehicles, supra; Mintz v. Scheidt, Comr. of Motor Vehicles,* 241 N.C. 268, 84 S.E. 2d 882; *Harrell v. Scheidt, Comr. of Motor Vehicles, supra.*

For the errors indicated, a new trial is awarded.

New trial.

JOHNSON, J., not sitting.

STATE v. LAWRENCE ALLEN DORSETT.

(Filed 21 November, 1956.)

1. Kidnapping § 2: Robbery § 3—

Evidence in this case as to the identity of defendant as the person who, from the back of the car, pointed a pistol at the prosecuting witness, who was driving the vehicle, forcing the witness to drive to a designated place and to leave the car in the possession of defendant, who thereafter took a bag of money from the vehicle, *is held* sufficient to be submitted to the jury both on the charge of kidnapping and of robbery with firearms. G.S. 14-39, G.S. 14-87.

2. Criminal Law § 32d—

Where the State fails to introduce evidence of the breeding, training or proven qualities of a dog used by a witness in trailing defendant, but the court excludes all testimony as to the activities of the dog, and instructs the jury not to consider the testimony of the witness that he was running with a bloodhound, but that they might consider the testimony that the man found had with him a bag similar to the bag with the stolen money, etc., exception to the statement of the witness that he had a bloodhound with him on the day in question cannot be sustained.

JOHNSON, J., not sitting.

APPEAL by defendant from *Olive, J.*, at April 1956 Term, of CATAWBA.

Criminal prosecution upon two bills of indictments, Numbers 94 and 95, charging defendant with the crimes of kidnapping and of robbery with firearms, respectively,—consolidated for trial upon motion by defendant.

Defendant pleaded not guilty.

Upon the trial in Superior Court the State offered evidence taken in the light most favorable to the State, tending to show substantially the following narrative as summarized in brief of the Attorney General:

The evidence for the State discloses that on the early morning of the 7th of October, 1954, Jacob E. Baker, Manager of the Dixie Home Grocery Store in Hickory, went to the bank and secured approximately $2,700.00 to be used at the store that day for the purposes of making change and carrying on other business. He left the bank, went out to his car, and placed the money in a cloth bag on the seat beside him. As he drove down the street, he heard a noise in the back of the car. As he looked back, he noticed the whole back seat was being pushed forward toward him and a gun was being pointed in his face. He could not recognize the holder of the gun, but he was instructed by the person in the back seat to push the rear-view mirror up as far as it would go and to drive down the Taylorsville Road out of town. Under the instructions of the voice from the rear seat, Baker drove on several streets

of the town and finally crossed the Catawba River into Caldwell County. During all this time, a running conversation was carried on between Baker and the person in the rear of his car. He was cautioned not to try to signal to anyone, to drive slow, and to act like nothing was happening. He continued to drive the car for several miles on various roads in Caldwell County, and, when they reached the village of Double Shoals, Baker was ordered to stop the car, leave the motor running, get out, and leave the bag of money on the seat. He jumped out of the car, ran behind an old house, and, in a short time, called the police officers. While driving out of Hickory and down the road into Caldwell County, Baker managed to extract the folding money from the bag and kick it under the front seat with his feet. At no time did he actually see the person in the back seat of the car. However, when the man was finally arrested and charged with the crime, Baker very definitely identified the voice of the person arrested as the voice of the person who was in the back seat of his car and who had kidnapped and robbed him. Baker testified: ". . . I had not seen Mr. Dorsett when I heard his voice and it had been some 15 months since then that I heard him again. I still say, to the best of my belief it is the same voice; I had never been under such an ordeal. I did not say positively—absolutely but to the best of my knowledge, and I do not think I shall ever forget it . . . but I am sure it is the same voice." The next time Baker saw his automobile was at the Police Station in Hickory. The cross bars from the trunk to the back seat had been torn out to the extent that there was an opening from the trunk into the back seat of Baker's car. When the car was found by officers, the money which Baker had kicked under the front seat was intact. The bag containing the change was not in the car. As a result of Baker's call to the police, a search was made for Baker's car and for his assailant. One Marvin McGuire, a prisoner at the Taylorsville Prison Camp, was called to help in the search. He testified that he took a bloodhound, which he customarily used in chasing escaped prisoners, to the place where Baker's car was found and, from there, a trail was followed across two mountains. An objection by defendant's counsel to the use of bloodhound evidence was sustained, and the witness was instructed to simply tell where he went. As he went over the mountain and down into the valley, he came across a house and got a drink of water. He then resumed his search. Here again, an objection by counsel for the defendant to bloodhound evidence was sustained. McGuire testified that, as he resumed his search, he came upon the defendant lying on the ground eating some jelly. McGuire grabbed a shotgun which was lying there beside the defendant. Also on the ground beside the defendant was a money bag. As McGuire was questioning the defendant about the gun and money bag, the defendant pulled out a pistol and disarmed McGuire. The defendant then

ordered McGuire to take the money bag on his shoulder and proceed as instructed. As they started off, the dog started barking and the defendant ordered McGuire to kill the dog. McGuire refused to do so, and the defendant took a knife and stabbed the dog between the two front legs—killing it. After the defendant killed the dog, he marched McGuire for about 45 minutes until they came to a ravine. Here McGuire grabbed the gun of the defendant and threw him over into the ravine. He threw the money bag into another ravine nearby and ran for help. McGuire went with officers back to the ravine the next morning and found the money bag. He gave a description of the defendant to officers, and, after looking at a lot of pictures presented to him, he finally identified one as that of the defendant. As a result of the identification by McGuire, officers discovered that he had been living in Hickory in an apartment owned by a Mrs. Newell, but were advised that he had left town. As a result of information furnished officers by the F. B. I., the defendant was found to be living in Fayetteville. He was arrested and brought to Hickory where he was confronted by McGuire who definitely identified the defendant as the man he had found in the woods with the gun and the money bag. Upon being identified by McGuire as the man who killed his dog, the defendant did not deny it. A short time later, upon advice of counsel, the defendant did deny that he was the man involved.

Defendant, reserving exception to the denial of his motions made when the State first rested its case for judgment as of nonsuit as to each count in each bill, offered evidence tending to support his plea of not guilty.

Then the State offered evidence in rebuttal.

At the close of all the evidence defendant renewed his motions for judgment as of nonsuit, to the denial of which he excepted.

Verdict: Guilty as charged in both cases.

Judgment in each case: That defendant be confined in the State Prison at Raleigh for a period of not less than five nor more than eight years,—the two sentences to run concurrently.

Defendant excepted thereto, and appeals to Supreme Court and assigns error.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

George D. Hovey and Nance, Barrington & Collier for Defendant Appellant.

WINBORNE, C. J. The record and case on appeal show twenty-four assignments of error, in none of which, after careful consideration, is prejudicial error made to appear.

Assignments 14 and 16 based upon exceptions of like number are directed to denial of defendant's motions aptly made for judgment as of nonsuit. However, taking the evidence offered upon the trial in Superior Court, as summarized hereinbefore, in the light most favorable to the State, it is abundantly sufficient to take the case to the jury and to support the verdict returned by the jury on which judgments were rendered. Even counsel for defendant, while contending in their brief that the evidence offered by the State amounted to no more than a scintilla, say: "True it was a scintilla from which an inference of guilt might possibly be inferred . . ."

In this connection, the statute relating to kidnapping, G.S. 14-39, provides, in pertinent part, that "it shall be unlawful for any person . . . to kidnap . . . any human being . . . " And the word "kidnap" as defined by Webster, means "To carry (anyone) away by unlawful force or by fraud, and against his will, or to seize and detain him for the purpose of so carrying him away." See *S. v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497.

And the statute relating to robbery with firearms, G.S. 14-87, declares in pertinent part that "Any person or persons who, having in his possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . shall be guilty of a felony . . ."

By means of several assignments of error appellant undertakes to show prejudicial error in respect to the bloodhound which the witness McGuire had with him on the day of the alleged crime, when he found defendant with bag of money. However, a perusal of the case on appeal reveals that the trial judge sustained objections to evidence as to activities of the dog, and the record fails to show that defendant made request, at the time, for any special instruction. But the record does show that in the charge to the jury the court, at request of counsel for defendant, gave this special instruction:

"2. I further charge you that when you come to consider the testimony of the witness, Marvin McGuire, you may not consider the evidence indicated by the use of a bloodhound. This, under the law, does not connect the defendant with the crime. There has been no evidence as to the breeding, training, or proven qualities of the so-called bloodhound. The State has introduced evidence that the man found in the woods eating jelly had with him a bag similar to the bag which contained the stolen money; this you may consider along with the fact that the amount of money it contained was approximately the same as the amount contained in the bag which was stolen, but you may not give any more credit to the testimony of Marvin McGuire because he

said he was running with a bloodhound than had he stated or testified he was running with a foxhound."

And it is noted here that some assignments of error fail to show the basis for exception, and hence are not in compliance with the Rules of this Court. Nevertheless error is not made to appear. Indeed the case was fairly submitted to the jury upon a charge free from error.

In the trial below, we find

No error.

JOHNSON, J., not sitting.

DOROTHY V. GILREATH, ADMINISTRATRIX OF THE ESTATE OF FRANK GILREATH, JR., DECEASED, v. JERRY SILVERMAN.

(Filed 21 November, 1956.)

1. Boating § 2—

Evidence of the negligent operation of a motor boat causing a passenger to be thrown therefrom and drowned, *held* sufficient, when considered in the light most favorable to plaintiff, to take the issue to the jury.

2. Negligence § 19c—

When there is conflict in the evidence as to the pertinent facts bearing on the issue of contributory negligence, nonsuit on that ground is error.

3. Trial § 22c—

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury and not the court.

4. Boating § 2: Automobiles § 50—

The doctrine of joint enterprise does not apply as to the liability between the operator of a vehicle and a passenger, but applies only in regard to third persons not parties to the enterprise.

5. Boating § 2: Negligence § 10½—

The doctrine of assumption of risk is not available as a defense when there is no contractual relationship between the parties.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Froneberger, J.*, April Term, 1956, of BUNCOMBE.

This is a civil action instituted on 6 June 1955 to recover damages for the alleged wrongful death of Frank Gilreath, Jr., on 5 March 1955. Dorothy V. Gilreath is the duly appointed and acting administratrix of the estate of Frank Gilreath, Jr., deceased.

Plaintiff's intestate, Frank Gilreath, Jr., came to his death by drowning in Lake Lure on Saturday, 5 March 1955, about 5:00 p.m., after falling from a motor boat occupied at said time by the defendant Jerry Silverman, Howard Wolfe, and the deceased. The three men had on the previous Wednesday been together at the place where Wolfe and Gilreath were employed. Both Wolfe and Gilreath were mechanics. Wolfe suggested to the defendant Silverman that they get Silverman's boat tuned up for the season. Silverman agreed to go the next Saturday afternoon, at Wolfe's time off. Gilreath, who was present at the time of the conversation, voluntarily requested to be permitted to go along. It was agreed.

The next Saturday afternoon Wolfe drove his own car to Lake Lure and Silverman took Gilreath. The men worked on the boat. After getting it in shape to run, they proceeded to operate the boat for the purpose of testing it.

According to Wolfe's testimony at the trial, in making the test, Silverman was back in the motor compartment at the rear of the boat, adjusting the timing or distributor, and he, Wolfe, was operating the boat, running at maximum speed. Silverman was moving the distributor while he was reading the instrument panel to get the highest reading on the instrument while the boat was in operation as they were going down the lake. They had completed that mission. At the time of the accident, the boat was being operated by Wolfe at a speed of approximately 30 miles per hour; the lake was choppy, there was quite a bit of wind, white caps were breaking. The boat in the choppy water had been bumping along, a little rough, "like running over a crosstie with an automobile." According to this witness, after the testing had been completed, Gilreath and Silverman sat down on the back of the seat in which Wolfe was sitting. The back of the seat was about 10 inches wide; Gilreath next to Wolfe and Silverman on the outside. Wolfe saw a boat come out some two or three hundred yards down the lake. The boat operated by Wolfe was near the center of the lake. The wind was blowing toward them. "I was still concentrating on the instrument . . . and on the very last glance I looked up, the boat, . . . going up in the front it is a little hard to see directly over the front—I in turn saw some waves, pretty rough to me, coming rolling—of course we were going slightly parallel to it, so I, in turn, made a right turn to hit the wave crossways instead of lengthwise, instead of alongside . . . in the process of our turn to head onto (*sic*) the wave straight along, . . . we hit the wave on the right side of the boat, and it, in turn, . . . gave a couple of bounces and off they both went, just that quick, so I stopped the boat as quick as I could, turned completely around to the scene, and that is it, right there, is the way I know it. I have been on the lake

propelling a boat practically every season for the past ten or twelve years. I have been working with motors since 1930."

This witness was asked the following questions: "Mr. Wolfe, based on your approximately ten seasons of driving motor boats on Lake Lure, which you have described to his Honor and the jury, and based on your many years of experience with motors, and based on the condition of the waves on Lake Lure, and the winds as you have testified to on March 5, 1955, in the afternoon, do you have an opinion satisfactory to yourself as to whether or not the rate of speed you have described, and the condition of the lake at that time, was safe driving at that speed?" The attorney examining the witness tried to get the witness to say whether or not he had an opinion as to whether or not the speed he was making was safe under the conditions then existing. Finally, he asked the witness the following questions: "Then you do have an opinion, do you?" The witness replied, "Yes, I would, in that particular spot it would be rough, and reckless, yes, sir." Q: "At the time of the fatal accident?" A: "Right at that moment it would be."

Mr. Fred Crowe, coroner of Rutherford County, testified that pursuant to information received by him he went to Lake Lure on 5 March 1955; that he had occasion to talk with Silverman and Wolfe. Silverman stated he was the owner of the boat in which he, Wolfe and Gilreath were passengers on Lake Lure; that the boat in which they were riding was driven by a 115 horsepower motor. "That they were going at a high rate of speed on the lake at the time this accident happened; that the late Mr. Gilreath was sitting up in the boat towards the back and that when the boat lunged forward Mr. Gilreath toppled from the boat along with Mr. Silverman and that Mr. Wolfe, the driver of the boat, went up the lake a short distance, turned around and Mr. Silverman caught on to the side of the boat, and in the meantime Mr. Gilreath had disappeared from the surface of the water." This witness further testified that Wolfe stated, in the presence of Silverman, that the boat was being driven at a high rate of speed at the time of the accident, and that Wolfe also stated, in the presence of Silverman, that he was operating the boat at the direction of Silverman.

At the close of plaintiff's evidence, the defendant made a motion for judgment as of nonsuit. Motion was allowed and the plaintiff appeals, assigning error.

James S. Howell and William J. Cocke for plaintiff.
Harkins, Van Winkle, Walton & Buck for defendant.

DENNY, J. A careful consideration of the evidence adduced in the trial below leads us to the conclusion that it is sufficient, when considered in the light most favorable to the plaintiff, as it must be on a

motion for nonsuit, to take the case to the jury. *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727; *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377. Nor will nonsuit be allowed on the grounds of contributory negligence where there is a conflict of evidence, as there is in the instant case, as to the pertinent facts bearing on that issue. *Levy v. Aluminum Co.,* 232 N.C. 158, 59 S.E. 2d 632; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Hayes v. Telegraph Co.,* 211 N.C. 192, 189 S.E. 499.

"Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court." *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793, and cited cases.

We refrain from a discussion of the evidence so as not to prejudice either party on the further hearing. We do point out, however, that the allegations in the defendant's further answer and defense, in which the defendant pleads that the plaintiff's intestate together with Howard Wolfe and the defendant were at the time complained of engaged in a joint enterprise and, therefore, any negligence with respect to the operation of the boat is in law imputed to plaintiff's intestate and constitutes a bar to any recovery in the action, are not well founded.

In Am. Jur., Negligence, section 238, page 925, it is said: "The doctrine of joint enterprise whereby the negligence of one member of the enterprise is imputable to others, resting as it does upon the relationship of agency of one for the other, does not apply in actions between members of the joint enterprise and does not, therefore, prevent one member of the enterprise from holding another liable for personal injuries inflicted by the latter's negligence in the prosecution of the enterprise. In other words, the doctrine of common or joint enterprise as a defense is applicable only as regards third persons and not parties to the enterprise." *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190.

The appellee also alleges that the plaintiff's intestate assumed the risk and hazard which brought about his death and argues that such assumption of risk and his contributory negligence constitute a bar to any recovery in this action.

The doctrine of assumption of risk is not available as a defense where there is no contractual relationship between the parties. *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398; *Broughton v. Oil Co.,* 201 N.C. 282, 159 S.E. 321.

The judgment of the court below is

Reversed.

JOHNSON, J., not sitting.

MRS. PAULINE B. SLOAN, ADMINISTRATRIX OF THE ESTATE OF LAWRENCE SLOAN, v. JOE H. GLENN, JR., JAMES K. GLENN, MRS. CORINNA J. BENNETT, LOUISE G. GLENN, VERA E. BENNETT, PARTNERS, DOING BUSINESS UNDER THE PARTNERSHIP NAME OF QUALITY OIL TRANSPORT, AND CLAUDE DEAN LEWIS.

(Filed 21 November, 1956.)

1. Automobiles § 41d—

Evidence of defendant driver's negligence in attempting to pass a vehicle traveling in the same direction in an area of special hazard from a ditch-digging operation on the side of the highway, which area was protected by warning signs of "One-Way Road," "Slow," "Men Working," *held* sufficient to sustain the court's denial of defendants' motion for judgment of nonsuit and to the court's refusal to give peremptory instructions in an action to recover for the death of the driver of the preceding vehicle resulting when defendant driver collided therewith.

2. Same: Automobiles § 14—Attempt to pass vehicle traveling in same direction in area of special hazard held not negligence per se under circumstances.

The evidence disclosed that the accident in suit occurred at an area on the highway along which a ditchdigging machine, proceeding east, was in operation on the south side, piling dirt some 12 to 18 inches on the 22 foot wide hard surface, that the area was protected by warning signs of "One-Way Road," "Slow," "Men Working," that there was room in the area for traffic to meet and pass and that it had been doing so except immediately near the machines, and that no one was directing traffic at the area. The evidence further tended to show that defendant driver, in a tractor-trailer, was following a backfiller tractor used in the work, both traveling west, that east of the ditchdigging machine, as defendant driver attempted to pass, the operator of the backfiller turned left, and that both vehicles proceeded diagonally across the south lane and the tractor-trailer struck the backfiller at or near the edge of the south pavement, knocking the driver of the backfiller therefrom to his death. Defendant's evidence was to the effect that he blew his horn to pass, and that the operator of the backfiller turned to his right, and then sharply to the left into defendant's path of travel. *Held:* The warning signs were sufficient to put motorists on notice that they were approaching an area of special hazard, making the question of negligence of defendant driver in attempting to pass one for the jury, G.S. 20-150, but not being sufficient under the circumstances to justify instructions to the effect that the act of defendant driver in attempting to pass was negligence in itself.

JOHNSON, J., not sitting.

APPEAL by defendants from *Phillips, J.*, 23 April, 1956, Term, of FORSYTH.

Action to recover damages for the alleged wrongful death of Lawrence Sloan.

Plaintiff alleges that Sloan's death was caused by the negligence of defendant Lewis. Lewis' codefendants, partners trading as Quality

Oil Transport, admit responsibility for Lewis' negligence, if any, under the doctrine of *respondeat superior*.

The court submitted issues as to negligence, contributory negligence and damages. The jury, answering all issues in favor of plaintiff, awarded damages in the amount of $25,000.00.

There was evidence tending to show the facts narrated below.

Highway #421 (Greensboro-Winston-Salem), at the point of collision, runs east-west. The paved portion was 22 feet wide. A line marked the center. On each side of the pavement there is a dirt shoulder 5 feet or more in width.

G. C. Crouch Construction Company, under contract with the State Highway and Public Works Commission, was engaged in laying a pipe line from the Kernersville water system to Pilgrim College, some 2,000 feet. This work started in Kernersville and was proceeding east along the south shoulder of Highway #421. Under subcontract, the M & W Motor Company, referred to as McLean, dug the ditch; and, after Crouch's men had laid and connected the pipe, "backfilled" the ditch. Murdock, the foreman, and Sloan were McLean's only employees on the job.

Murdock operated a Jeep and attached ditchdigger. The boom, "with claw-like bits that rotate," brought the dirt up under the Jeep; and an auger pushed the dirt from under the Jeep to the north side thereof. The ditch, 24-30 inches deep, was about 2½ feet south of the paved portion of Highway #421. As a result of this operation, a pile of dirt 12-24 inches high was thrown some 12 to 18 inches onto the south side of the pavement. The ditchdigging machine had dual wheels. The inside (left) wheel cleared the pavement. The outer (left) wheel ran on the pavement.

Sloan operated what was referred to as a backfiller tractor. This was an ordinary small farm tractor with a blade attached to and across the front to push the dirt back into the ditch. This blade was wider than the front wheels, extending out approximately 2 feet on each side.

Prior to 25 September, 1952, the ditch had been dug and the pipe laid for a distance of approximately 1,500 feet east from the Kernersville city limits. The ditch, all but 125 feet, had been backfilled. On 25 September, 1952, prior to and at the time of the collision, Murdock was operating the ditchdigger.

Fox, Crouch's superintendent, obtained signs from the State Highway and Public Works Commission. These signs were yellow with black lettering, approximately 5 feet wide and 3 feet high. Fox placed three signs, "ONE-WAY ROAD"—"SLOW"—"MEN WORKING," on each side of the area of the ditchdigging, etc., operations. Those facing eastbound traffic (south lane) were set up on the pavement. Those facing westbound traffic (north lane) were set up just north of the pavement. The

"ONE-WAY ROAD" sign facing traffic proceeding westwardly was approximately 400 feet east of the point of collision. The "ONE-WAY ROAD" sign facing traffic proceeding eastwardly was approximately 500 feet west of the point of collision.

Sloan, operating the backfiller tractor, and Lewis, operating a tractor-tanker (trailer) combination about 40-45 feet long and loaded with 5,175 gallons of kerosene oil, were proceeding westwardly in the right (north) lane of Highway #421, Sloan in front of Lewis. Both were east of the ditchdigging equipment, hence east of where the dirt was piled along the pavement. Sloan looked back at the tractor-tanker, and thereafter pulled to his left onto the south lane of the highway. Lewis, who had pulled to his left for the purpose of passing Sloan, cut farther to his left. Both vehicles proceeded diagonally across the south lane, the tractor-tanker striking the backfiller truck at or near the south edge of the pavement and knocking it against the front of the Jeep-ditch-digger. The impact knocked Sloan off the seat of the backfiller tractor. He fell under the tractor-tanker and was crushed by the right rear wheels thereof, dying instantly.

The foregoing will suffice to point up the basis of decision.

In charging the jury, the court gave these instructions:

". . . and the Court further charges you that a motorist traveling west had no right to pass a vehicle going in the same direction at the place of this accident, because it was a one-way travel road, and the signs so designated it, and if the defendants' driver attempted to pass the vehicle being driven by the plaintiff's intestate at the place he testified he did intend to pass it and attempted to pass, that would be negligence on his part, and if such negligence on his part was the proximate cause of the injury and death of plaintiff's intestate, the plaintiff would be entitled to have you answer the first issue, 'Yes.' "

Again: ". . . and the Court charges you, as a matter of law, that the defendants' driver did not have a right to pass any vehicle from the rear in this restricted area, but it was his duty to stay in the righthand lane at all times until he got out of the restricted area."

Exceptions No. 39 and No. 43 are to these portions of the charge.

Judgment for plaintiff, in accordance with the verdict, was signed and entered. Defendants excepted and appealed, assigning errors.

C. H. Dearman and Womble, Carlyle, Sandridge & Rice for plaintiff, appellee.

Deal, Hutchins & Minor for defendants, appellants.

BOBBITT, J. The evidence was sufficient, when considered in the light most favorable to plaintiff, to require submission of the case to the jury. Moreover, the evidence, when so considered, did not warrant the

special peremptory instruction requested by defendants, relating to the contributory negligence issue. Hence, the assignments of error directed to the denial of defendants' motion for judgment of nonsuit and to the refusal of the court to give the peremptory instruction requested by defendants are overruled. Since a new trial is awarded for reasons stated below, we refrain from discussing in detail the permissible inferences that may be drawn from the evidence presently before us. *Caudle v. R. R.*, 242 N.C. 466, 88 S.E. 2d 138, and cases cited.

Defendants' assignments of error, based on exceptions No. 39 and No. 43, are well taken.

Work in progress related solely to the ditchdigging, pipe-laying and backfilling operations. No person in this immediate area or within the 900 feet between the "ONE-WAY ROAD" signs undertook to direct traffic.

Admittedly, Lewis attempted to pass Sloan.

A witness for plaintiff testified: "Traffic there was going east and west all the time. Vehicles would meet and pass each other. At times when this work was in progress they would have to stop, but the traffic was moving. There was plenty of room for traffic to meet and pass each other, except immediately up near the machines, where they were working."

When Lewis started to pass, Sloan was proceeding westwardly in his right (north) lane. He was not then engaged in backfilling the ditch.

Lewis testified, in substance, as follows: No traffic was behind him or meeting him. He blew his horn as he approached the backfiller tractor. When he did so, Sloan, who was seated on the backfiller tractor and in plain view, turned his head and looked back at Lewis. When the vehicles were 50-75 feet apart, Sloan pulled over to his right as if he was going to pull out on the right (north) shoulder, the right wheels of the backfiller tractor going 2-2½ feet off the right (north) edge of the pavement. Then he (Lewis), in attempting to pass, began to pull out to his left, blew his horn again and "just eased up on him." At that time, Sloan suddenly cut across to his left in the path of the tractor-tanker. He (Lewis), in an effort to avoid a collision, then cut farther to his left; and the collision occurred at or near the left (south) edge of the pavement. Sloan gave no signal and did not otherwise indicate that he intended to make a left turn.

Statutory limitations on the privilege of overtaking and passing another vehicle proceeding in the same direction are prescribed by G.S. 20-150. No statutory provision prescribes the legal effect to be given the signs placed on or near the highway by Fox. Under the circumstances disclosed by the evidence, the signs warned motorists that they were approaching an area involving special hazards.

The presence of the warning signs, the ditchdigger, the dirt piled along the highway, and the backfiller tractor, were circumstances tend-

ing to put Lewis on notice that he was approaching and had entered a zone of special hazard; and these circumstances were for consideration by the jury in determining whether Lewis, in pulling out to his left in an attempt to pass the backfiller tractor, failed to use due care, *i.e.*, care commensurate with such circumstances. Too, they were for consideration by the jury in determining whether Sloan was contributorily negligent. *Kellogg v. Thomas,* 244 N.C. 722, 94 S.E. 2d 903. But the instructions to the effect that the mere fact that Lewis attempted to pass Sloan constituted negligence as a matter of law were not warranted by the evidence. These instructions, when related to the evidence, were tantamount to a peremptory instruction on the negligence issue. Since such erroneous instructions were obviously prejudicial, defendants are entitled to a new trial.

Questions posed by other assignments of error may not arise when the cause is tried again.

New trial.

JOHNSON, J., not sitting.

DAVID LANGLEY v. GEORGE TAYLOR, CHAIRMAN, AND TOMMIE SPARROW AND J. L. LANCASTER, MEMBERS COMPRISING THE BEAUFORT COUNTY A. B. C. BOARD ON JUNE 15, 1956.

(Filed 21 November, 1956.)

1. Public Officers § 8—

Even if it be conceded that the duty rests upon members of a county alcoholic beverage control board to require a person employed by the board as an enforcement officer to give bond, G.S. 128-9, the individual members of the board cannot be held liable to a person assaulted by such enforcement officer for failure to require him to give the bond, since the duty to require bond is purely ministerial and a public officer is not individually liable for negligent breach of a ministerial duty which is of a public nature unless the statute creating the office or imposing the duty makes provision for such liability. "Ministerial" defined.

2. Same—

In the absence of statute expressly imposing such liability, a public officer cannot be held liable for the neglect of duty of the governmental body of which he is a member if he acts in good faith.

JOHNSON, J., not sitting.

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

LANGLEY *v.* TAYLOR.

APPEAL by plaintiff from *Grady, E. J.*, at February Term 1956, Civil Term of BEAUFORT.

Civil action to recover damages for the alleged negligent failure of the defendants to require William A. Patrick, an ABC enforcement officer, to give bond as prescribed by G.S. 128-9.

Plaintiff herein instituted an action in 1952 against William A. Patrick, National Surety Corporation, George Taylor, Chairman, and Tommie Sparrow and J. L. Lancaster, members comprising the Beaufort County Alcoholic Beverage Control Board to recover damages for an alleged assault and battery upon him by defendant Patrick, who was employed by the Beaufort County Board as an enforcement officer, and had been sent to Pitt County by his superiors, as permitted by G.S. 18-45(o) to assist officers of that county in raiding an illicit liquor still. This case was disposed of upon plaintiff's appeal at the Fall Term 1953 of this Court. See *Langley v. Patrick*, 238 N.C. 250, 77 S.E. 2d 656. There in Superior Court at the close of plaintiff's evidence, judgment of involuntary nonsuit was entered in favor of all defendants except William A. Patrick. And as to Patrick the jury returned a verdict in favor of plaintiff in sum of $2,000, in accordance with which judgment was entered.

In the opinion filed it is recited that "the plaintiff concedes in this Court that the judgment as of nonsuit was properly entered as to the Beaufort County ABC Board." Indeed, reference to brief of plaintiff, appellant there, last paragraph, it appears that the individual members of the Board were included in the concession as to the correctness of the ruling of the trial court. However, plaintiff insisted there that the Court erred in dismissing the case as to the defendant National Surety Corporation. This Court held that the bond in suit there is not conditioned "for the faithful performance" of the duties of enforcement officer Patrick as a peace officer as required by G.S. 128-9,—that at most it is a contract of indemnity.

Thereafter the present action, captioned as hereinabove set forth, was instituted by plaintiff on 9 October, 1953, on the theory that the individual members of the Alcoholic Beverage Control Board of Beaufort County were negligent in failing to require William A. Patrick to give bond as prescribed by G.S. 128-9 as proximate result of which plaintiff has sustained loss.

Upon the trial in Superior Court, when plaintiff had rested his case, motion of defendants for judgment as of nonsuit was allowed, and from judgment entered in accordance therewith, plaintiff appeals to Supreme Court and assigns error.

John A. Wilkinson and LeRoy Scott for Plaintiff Appellant.
Rodman & Rodman for Defendant Appellees.

WINBORNE, C. J. In the light of the concessions made by plaintiff on the former appeal, 238 N.C. 250, 77 S.E. 2d 656, it would seem that if the present action be considered an action against the Alcoholic Beverage Control Board of Beaufort County it may not be maintained by plaintiff; and if it be considered an action against the individuals comprising the Board, it may not be maintained.

Be that as it may, the principle applied in case of *Town of Old Fort v. Harmon,* 219 N.C. 241, 13 S.E. 2d 423, clearly indicates that there is no civil liability on the part of the individual members of the Alcoholic Beverage Control Board of Beaufort County, for failing to require William A. Patrick to give a bond as prescribed in G.S. 128-9, even if it be conceded that such duty rested upon them.

In the *Old Fort case* the action was against Harmon and the individual members of the Board of Aldermen of the Town. He, Harmon, had been appointed waterworks superintendent and tax collector. And it was alleged, *inter alia,* that the individuals constituting the Board of Aldermen were negligent in not requiring him to be bonded as provided by statute and the charter of the plaintiff. It is there declared that it is a recognized principle in this State that "in case of duties plainly ministerial in character the individual liability of public officer for negligent breach thereof does not attach where the duties are of a public nature, imposed entirely for public benefit, unless the statute creating the office or imposing the duties makes provision for such liability," citing *Hudson v. McArthur,* 152 N.C. 445, 67 S.E. 995; *Hipp v. Ferrall,* 173 N.C. 167, 91 S.E. 831.

In this connection the Alcoholic Beverage Control Act of 1937, Article 3 of Chapter 18 of General Statutes, G.S. 18-41, creates a county board of alcoholic control to consist of a chairman and two other members in each county which may be permitted to engage in the sale of alcoholic beverages. And in G.S. 18-45(o) it is provided in pertinent part that "the said county boards shall each have the following powers and duties," *inter alia,* "(o) To expend for law enforcement a sum not less than five per cent nor more than ten per cent of the total profits . . . and in the expenditure of said funds shall employ one or more persons to be appointed by and directly responsible to the respective county boards. The persons so appointed shall, after taking the oath prescribed by law for peace officers, have the same powers and authorities within their respective counties as other peace officers . . . Any law enforcement officer appointed by such county boards and any other peace officer is hereby authorized, upon request of the sheriff or other lawful officer in any other county, to go into such other county and assist in suppressing a violation of the prohibition law therein, and while so acting shall have such powers as a peace officer as are granted

to him in his own county and be entitled to all the protection provided for said officer while acting in his own county."

G.S. 128-9 provides that "the State of North Carolina shall require every peace officer employed by the State, elected or appointed, to give a bond with good surety payable to the State of North Carolina, in a sum not less than one thousand dollars ($1,000.00) and not more than two thousand five hundred dollars ($2,500.00), conditioned as well for the faithful discharge of his or her duty as such peace officer as for his diligently endeavoring to faithfully collect and pay over all sums of money received . . ."

And it is provided in G.S. 109-2 that "every person or officer of whom an official bond is required, who presumes to discharge any duty of his office before executing such bond in the manner prescribed by law, is liable to a forfeiture of five hundred dollars to the use of the State for each attempt so to exercise his duty."

Moreover, the Alcoholic Beverage Control Act of 1937 imposes no express duty upon the county boards of alcoholic beverage control or upon the individuals comprising such boards in respect to the provisions of G.S. 128-9. The provisions of G.S. 109-2 would seem to place the responsibility upon the officer of whom the bond is required. Hence it is contended by appellee, and properly so, that no duty rests upon the individuals comprising the county boards of alcoholic control in respect to requiring law enforcement officers appointed by them to give bonds as required by G.S. 128-9. But if there were such duty, it would be a plain ministerial duty, of a public nature imposed entirely for public benefit, for the neglect of which individual liability of members comprising the county boards would not attach, since the statute creating the office and imposing the duty makes no provision for such liability. *Old Fort v. Harmon, supra.*

Manifestly the individuals comprising the Alcoholic Beverage Control Board of Beaufort County were public officers, and if it be that duty devolved upon them to require Patrick, as law enforcement officer, to give bond as required by G.S. 128-9, the act of so doing was plainly ministerial in character. A ministerial act is "one which a person performs in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." Black's Law Dictionary, 3rd Ed. Indeed "a ministerial duty, the performance of which may in proper cases be required of a public officer by judicial proceedings, is one in respect to which nothing is left to discretion; it is a simple, definite duty arising under circumstances admitted or proved to exist and imposed by law." Black's Law Dictionary.

Finally, in the absence of statute expressly imposing such liability, a public officer who is a member of a corporate or governmental body on

which a duty rests cannot be held liable for the neglect of duty of that body if he acts in good faith. 67 C.J.S. 418. And the case on appeal fails to disclose evidence that the individual members of the Alcoholic Beverage Control Board of Beaufort County did not act in good faith. In truth the evidence tends to show that they did act in good faith.

Hence the judgment as of nonsuit will be, and it is

Affirmed.

JOHNSON, J., not sitting.

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

ANNA B. THRUSH v. W. E. THRUSH, INDIVIDUALLY, AND W. E. THRUSH, TRADING AND DOING BUSINESS AS THRUSH ENTERPRISES, AND H. B. MEISELMAN AND WIFE, CLAIRE MEISELMAN, AND F. B. GRAHAM, TRUSTEE.

(Filed 21 November, 1956.)

Appeal and Error § 33—

The court considered verified pleadings in making its findings of fact, but the complaint was not included in the record on appeal upon exceptions to the findings. *Held:* The appeal must be dismissed under the mandatory rule that the pleadings, issues and judgment shall be a part of the transcript in all cases and that memoranda of pleadings may not be substituted even by consent of counsel. Rules of Practice in the Supreme Court Nos. 19 and 20.

JOHNSON, J., not sitting.

APPEAL by defendants from *Moore (Clifton L.), J.*, in Chambers, 14 April, 1956, NEW HANOVER Superior Court.

Civil action to set aside a deed of separation executed on 19 December, 1953, by W. E. Thrush and Anna B. Thrush, then husband and wife. The agreement required the defendant to pay to the plaintiff the sum of $20,000 as a full property settlement. The defendant executed a note payable in quarterly installments over a period of four years, and secured the payment by deed of trust to Thomas L. Rhodes, Trustee, on certain described lands.

The plaintiff brought this action on 3 June, 1954, in which she alleged the execution of the deed of separation was procured by coercion and duress and she asked that it be set aside. Before the defendant filed answer, the parties entered into a consent judgment before the clerk superior court in which it was adjudged (1) that the deed of trust and

the note "be, and the same are canceled and of noneffect"; (2) that the defendant within 90 days pay to the plaintiff the sum of $23,000 in full settlement of all claims; (3) that the judgment shall be inoperative unless the payment be made within the specified time. The judgment was signed by the clerk, by the parties and by their attorneys.

Before the expiration of the 90-day period the defendant filed a motion in the cause, supported by affidavit, stating he had tendered $23,000 to the plaintiff but that she failed and refused to surrender the note and deed of trust, and he prayed that he be permitted to pay the amount into court and that $20,000 of the amount be retained by the clerk until the plaintiff surrendered the note. The plaintiff replied to the motion, stating the note had been lost, mislaid or stolen, and that she had not assigned or transferred it. After hearing, participated in by both parties, Judge Frizzelle ordered the defendant to pay the full sum into court, that the clerk pay $3,000 to the plaintiff and her attorney and retain $20,000 until the plaintiff either surrendered the note or executed a good and sufficient bond to indemnify against loss in the event the note was found to be held by an innocent purchaser. The plaintiff accepted the $3,000 but failed to produce either the note or the bond. However, she procured the payment on an *ex parte* order of the sum of $7,500 from the clerk and returned $4,000 of that amount when the order was rescinded.

On 16 May, 1955, relying upon the cancellation of the deed of trust in the consent judgment, H. B. Meiselman and wife, Claire Meiselman, purchased from W. E. Thrush the land in question and accepted and recorded his deed thereto. They in turn executed a deed of trust to F. B. Graham, Trustee, pledging the land as security for a loan of $50,000 from Wilmington Savings and Trust Company. On 29 March, 1956, H. B. and Claire Meiselman and Graham, Trustee, were permitted to intervene in the cause.

On 14 April, 1956, upon plaintiff's motion, Judge Moore held a hearing and after considering "affidavits, motions, minutes, deeds, records, exhibits, and *all verified pleadings*," made findings of fact and stated his conclusions of law covering approximately 10 pages of the record. Based upon the findings and conclusions, Judge Moore ordered (1) that the clerk pay over to the plaintiff the $16,500 in his hands upon condition that Rhodes, Trustee, "shall have cancelled the deed of trust dated December 19, 1953"; (2) "the defendant at his own expense" shall obtain a surety for the plaintiff on an indemnity bond against loss on account of unproduced note, and upon his failure to do so for 60 days payment shall be made to the plaintiff; (3) in case of appeal, proceedings shall be stayed pending decision; (4) if the lost note shall be presented to the defendant or to the clerk, all proceedings shall be suspended until further orders.

The defendant Thrush requested specific findings of fact which the court denied, and he excepted to specific findings which the court made. All defendants excepted to the order and appealed, assigning errors.

Elkins & Calder,
By: Robert E. Calder, for plaintiff, appellee.
J. H. Ferguson, for defendant W. E. Thrush, appellant.
Marsden Bellamy, George Rountree, Jr., for defendant interveners, appellants.

HIGGINS, J. Rule No. 19 of the Rules of Practice in the Supreme Court provides that pleadings, issues and judgment shall be a part of the transcript in all cases. Rule 20 provides that memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel. The record in this case does not contain the complaint. The trial judge took its contents into account in his findings of fact. Exceptions were duly taken both to the court's findings and to its refusal to make requested findings. On review here, therefore, this Court, in the absence of the complaint, cannot have before it all the evidence upon which the court based its findings. The absence of the complaint from the record makes it necessary to dismiss the appeal. This procedure has been uniform since *Allen v. Hammond,* 122 N.C. 754, 30 S.E. 16. The decisions of this Court following the *Hammond case* are collected and analyzed in *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; and since that decision the rule has been observed in *Gardner v. Moose,* 200 N.C. 88, 156 S.E. 243; *Lipe v. Stanly County,* 200 N.C. 92, 156 S.E. 243; *Riggan v. Harrison,* 203 N.C. 191, 165 S.E. 358; *Armstrong v. Service Stores,* 203 N.C. 231, 165 S.E. 680; *Parks v. Seagraves,* 203 N.C. 647, 166 S.E. 747; *Payne v. Brown,* 205 N.C. 785, 172 S.E. 348; *S. v. Lumber Co.,* 207 N.C. 47, 175 S.E. 713; *Goodman v. Goodman,* 208 N.C. 416, 181 S.E. 328; *Abernethy v. Trust Co.,* 211 N.C. 450, 190 S.E. 735; *Washington County v. Land Co.,* 222 N.C. 637, 24 S.E. 2d 338; *Ericson v. Ericson,* 226 N.C. 474, 38 S.E. 2d 517; *Campbell v. Campbell,* 226 N.C. 653, 39 S.E. 2d 812; *Macon v. Murray,* 240 N.C. 116, 81 S.E. 2d 126; *Griffin v. Barnes,* 242 N.C. 306, 87 S.E. 2d 560.

The foregoing citation of authority is intended to emphasize the uniform holding that compliance with the rule is mandatory.

In dismissing the appeal this Court does not affirm the order entered by Judge Moore on 14 April, 1956, but leaves it as if no appeal had been taken. Whether the findings of fact and conclusions of law are supported by the evidence, and whether that order modifies, changes or overrules Judge Frizzelle's prior order, are questions not decided on this appeal.

Appeal dismissed.

JOHNSON, J., not sitting.

JOHN GATLING, PETITIONER, v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 21 November, 1956.)

Eminent Domain § 17—

Where, in condemnation proceedings, the record discloses that no notice was given of the final meeting of the appraisers at which the assessment of damages was made, and that such meeting was not at a time and place fixed by court, the record sustains the findings of the court that the filing of exceptions by the landowner the twenty-first day after the filing of the report was timely, G.S. 40-17, G.S. 40-19, since, in the absence of notice, it may not be held that the filing of exceptions by the landowner was not timely. Further, the judge of Superior Court had discretionary power to allow the exceptions to be filed *nunc pro tunc*. Appeal from the order allowing the exceptions to be filed and remanding the cause to the clerk would seem to be premature.

JOHNSON, J., not sitting.

APPEAL by respondent from *Hobgood, J.*, at February 1956 Regular Civil Term, of WAKE.

Special proceeding in the nature of condemnation proceeding instituted 20 December, 1948, for the assessment of compensation to petitioner for land, described in the petition, taken by respondent for State highway purposes, heard at February 1956 Regular Civil Term of Wake County Superior Court, upon motion of petitioner filed 10 February, 1956, to vacate judgment of Clerk of Superior Court to end that hearing be had on petitioner's exceptions to the commissioners' report.

Upon such hearing the court found these facts: (1) "That the commissioners appointed in this condemnation proceeding conducted a hearing on the 4th day of March, 1949, at which time evidence was heard;" (2) "that the commissioners appointed herein filed their said report in the office of the Clerk of the Superior Court for Wake County on the 10th day of March, 1949, without giving notice of such filing to the petitioner herein; and that judgment was entered in said cause on the 6th day of April, 1949, by the Clerk of Superior Court of Wake County . . . stating that more than twenty (20) days had elapsed since the filing of the commissioners' report, and that none of the parties had filed exceptions thereto;" and (3) "that exceptions to the commissioners' report were filed on the 31st day of March, 1949, after petitioner had learned of the filing of said commissioners' report; and

that the Clerk of the Court's judgment rendered as aforesaid, is irregular, for the reason that the filing of exceptions by the petitioner herein was timely." And thereupon the court "ordered, adjudged and decreed that the judgment of the Clerk of the Superior Court heretofore entered in this cause be vacated and declared null and void," and "that this cause be remanded to the Clerk of the Superior Court of Wake County for further action by said Clerk upon the exceptions to the commissioners' report filed herein."

The respondent excepted to the signing of the foregoing judgment, and appeals to Supreme Court and assigns error.

Armistead J. Maupin for Petitioner Appellee.
R. Brookes Peters, General Counsel, for Respondent Appellant.

WINBORNE, C. J. Appellant challenges in the main the finding of fact that petitioner's exceptions to the commissioners' report were timely filed. The findings of fact by the Judge, if supported by any competent evidence, are binding on appeal. Hence the question arises as to whether there is evidence to support the finding that the petitioner's exceptions were filed on time. Appellee contends, and we hold properly so, that the record in the case provides data from which the facts found may be inferred. Indeed the Judge had the discretionary power to allow the exceptions to be filed *nunc pro tunc*. *R. R. v. King*, 125 N.C. 454, 34 S.E. 541.

In this connection it may be noted: The statute, G.S. 40-16, provides that the court shall fix the time and place for the first meeting of the commissioners. And the statute, G.S. 40-17, declares that whenever the commissioners meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. It is also provided that after the hearing and the testimony is closed, they shall ascertain and determine the compensation which ought justly to be made, and "report the same to the court within ten days." And it is provided, G.S. 40-19, that within twenty days after filing the report any person interested in the land may file exceptions to the report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the Supreme Court. Indeed the court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper.

In the light of these statutory provisions, reference to the record in hand discloses: (1) That the Clerk of Superior Court, in the order appointing commissioners, fixed 2 o'clock p.m. on 3rd day of February,

1949, as the time for their first meeting; (2) that on 19 February, 1949, the Clerk entered and filed an order substituting one of the commissioners and directed them to meet at 2 o'clock p.m. on Friday, 25 February, 1949, to take oaths and begin the performance of their duties; (3) that on 25 February, 1949, the Clerk entered and filed an order substituting another of the commissioners to serve with the other two,—but the order contained no reference to time or place; and (4) that on 10 March, 1949, the commissioners filed their report, dated 9 March, 1949, in which it is stated that they met on 25 February, 1949, and thereafter met on 4 March, 1949, and heard such evidence as the parties desired to offer, and, after full consideration, "we do assess the damages,"—thus clearly indicating a meeting on 9 March, 1949. There is nothing in the record to show that notice of a meeting on that date was given to the parties or their attorney, or that the previous meeting had been adjourned to take place at that time. And the record shows that the exceptions were filed on 31 March, 1949, the twenty-first day after the report was filed.

Indeed, as stated by *Ervin, J.*, writing for the Court in *Collins v. Highway Comm.*, 237 N.C. 277, 74 S.E. 2d 709, "the law does not require parties to abandon their ordinary callings and 'dance continuous or perpetual attendance' on a court simply because they are served with original process in a judicial proceeding pending in it." If notice of the meeting, at which the report was signed, had been given to the parties, petitioner would have known of it. Hence in absence of notice it may not be held that petitioner failed to file his exceptions within twenty days after the report was filed. In any event, the order of the Judge was permissible under the statute G.S. 40-19.

It is pertinent to note that this appeal may be premature. *R. R. v. King, supra.* But be that as it may, for reasons stated the judgment below is

Affirmed.

JOHNSON, J., not sitting.

GEORGE HERBERT SCOTT v. THOMAS W. LEE, T/A LEE'S CASH GROCERY.

(Filed 21 November, 1956.)

Automobiles § 54f—

Where the evidence tends to show that at the time of the collision between plaintiff's car and a truck, the truck was actually owned by one

defendant and was being driven at the time by his employee, although the registered title was in the name of a stranger to the action, proof of ownership takes the issue of *respondeat superior* to the jury as to the defendant employer, G.S. 20-71.1(a), and the granting of nonsuit was error.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Mallard, J.*, March Civil Term 1956 of WAKE.

Civil action for damages brought on the principle of *respondeat superior.*

The evidence tends to show these facts: About 5:00 or 6:00 p.m. on 5 July 1954 plaintiff was driving his automobile about 15 miles an hour West on East Lenoir Street in the city of Raleigh, and on his right side of the street, when his automobile was struck violently in the rear by a 1938 Ford truck driven by Sam Walker. In the collision plaintiff received personal injuries, and his automobile was damaged.

On this day Walker was employed by the defendant as a truck driver, and also drove the truck from the defendant's store taking feed to defendant's farm about 5:00 or 6:00 o'clock. The same day Jim O'Neill saw Walker, who was about drunk, come out of the defendant's store, and drive the truck off going out Martin Street. That night policemen came to O'Neill's house, and asked him if he owned the truck. He told them it was in his name, but belonged to the defendant, and that Walker was driving it that day. O'Neill went with the officers to Walker's house, and found him drunk hiding under the bed.

The truck involved in the collision with plaintiff's automobile was registered in the name of Jim O'Neill, a person who can neither read nor write, who was an employee of defendant until 4 or 5 months prior to 5 July 1954. Some months prior to that date a man came to the defendant's store to sell him this truck. Defendant couldn't leave his store, and said to O'Neill: "Jim, run up there to the license department and put it in your name." O'Neill went there with the man selling the truck, and the truck was registered in O'Neill's name. O'Neill never had an operator's license, never drove the truck, never paid a nickel for it, and never owned it. After the collision O'Neill asked defendant three times to take this truck out of his name, and defendant said he didn't have time. Defendant tried to get the truck after the collision from the place where it was stored, and O'Neill told the police not to let him have it until he got it out of his name. Later defendant called O'Neill to his store, and sent a man with him to a Justice of the Peace's office, where it was said the truck was changed out of O'Neill's name. Since the collision the truck has been seen in defendant's parking lot on Martin Street, where he keeps his trucks.

At the close of plaintiff's evidence, the court allowed the defendant's motion for judgment of nonsuit.

From the judgment entered, plaintiff appeals.

Bunn & Bunn for Plaintiff, Appellant.

No counsel for Defendant, Appellee.

PER CURIAM. Viewing the evidence in the light most favorable to the plaintiff, it tends to show that plaintiff was injured and his automobile damaged by the actionable negligence of Sam Walker, an employee of the defendant, in the operation of a Ford truck owned in fact by the defendant, though the naked legal title of the truck was registered in the name of Jim O'Neill at the defendant's request. G.S. 20-71.1(a) provides "in all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be *prima facie* evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose." Therefore, the evidence, by virtue of the statute, suffices to carry the case to the jury on the question of the legal responsibility of the defendant on the doctrine of *respondeat superior* for the operation of the Ford truck on the occasion of the injury to plaintiff and damage to his automobile. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309; *Caughron v. Walker,* 243 N.C. 153, 90 S.E. 2d 305.

Plaintiff aptly says in his brief: "Plaintiff does not contend that the only inference which can be drawn from the evidence shows the defendant to be the owner of said Ford truck, but to the contrary the plaintiff realizes the evidence and reasonable inferences to be drawn therefrom are in conflict, and therefore the trial judge usurped the province of the jury by refusing to allow them to pass on the issues."

The judgment of nonsuit below is

Reversed.

JOHNSON, J., not sitting.

STATE v. N. W. GIBSON.

(Filed 21 November, 1956.)

Parent and Child § 12: Criminal Law § 52b—

In a prosecution of a father for abandonment and for nonsupport of his minor child, a peremptory instruction for the State is prejudicial error in depriving the defendant of his right to have the jury consider the essential element of wilfulness.

JOHNSON, J., not sitting.

APPEAL by defendant from *Crissman, J.*, April Term, 1956, of CABARRUS.

Criminal prosecution tried in the Cabarrus County Domestic Relations Court upon a warrant charging that in said County the defendant "on or about the 20th day of December 1955, did unlawfully, wilfully and maliciously abandon, fail and refuse to provide adequate support for his minor child, Lawrence Edward Gibson, age one month old, and the said defendant, N. W. Gibson, still refuses to provide adequate support for said minor child, . . ."

A plea of not guilty was entered. Defendant found guilty and sentence pronounced. He appealed to the Superior Court, where he was tried upon the original warrant. He entered a plea of not guilty; whereupon, a jury was sworn and impaneled to try the case. The jury returned a verdict of guilty, and from the judgment imposed the defendant appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

Bedford W. Black and John Hugh Williams for defendant.

PER CURIAM. The State concedes that assignments of error Nos. 12 and 13 present prejudicial error.

Assignment of error No. 12 is based on an exception to the peremptory instruction given to the jury as follows: "Now, members of the jury, the court charges you that if you find from the evidence the facts to be as all the evidence tends to show, it would be your duty to return a verdict of guilty in this case."

In *S. v. Hayden*, 224 N.C. 779, 32 S.E. 2d 333, this Court, in considering a similar instruction, said: "The court's instruction deprived the defendant of his right to have the jury consider the question of his willfulness as an issuable fact. . . . Rarely may a peremptory instruction be given to convict the defendant, if the jury finds the facts to be

as testified, in cases where the substance of the offense is willfulness or a specific intent is an essential element."

The 13th assignment of error is based on an exception to the following portion of the charge to the jury: "The court charges you that if you are satisfied from this evidence beyond a reasonable doubt that the defendant has abandoned this child and has failed to support the child, failed to do anything for it, . . . it would be your duty to return a verdict of guilty."

Likewise, in this portion of the charge the court inadvertently failed to include in the instruction the element of wilful abandonment and nonsupport. The burden was upon the State to show beyond a reasonable doubt that the defendant wilfully abandoned his child, without providing adequate support for such child. *S. v. Smith*, 241 N.C. 301, 84 S.E. 2d 913.

For the errors pointed out, there must be a

New trial.

JOHNSON, J., not sitting.

MRS. LASENIA MURCHISON v. WASHINGTON TERRACE APARTMENTS, INCORPORATED, A CORPORATION.

(Filed 21 November, 1956.)

Landlord and Tenant § 11—

In an action against a corporation maintaining apartments with adjacent streets and sidewalks, evidence that plaintiff, in walking from the street along a sidewalk to an apartment, tripped at the slight elevation of the sidewalk and fell to her injury, is insufficient to be submitted to the jury on the issue of negligence, since the construction of a sidewalk some inch or two above the street level is customary.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Hobgood, J.*, first April 1956 Term of WAKE.

Plaintiff seeks to recover damages resulting from a fall on the premises of defendant. She alleges that defendant owned and operated in excess of two hundred apartments in the area in Raleigh known as Washington Terrace Apartments, one of which was occupied by plaintiff. She alleges that defendant had constructed and maintained streets and sidewalks within the apartment area for the use and convenience of the occupants of the apartments. She further alleges that on the night of 1 December, 1954, she visited her sister, and when returning

home via "A" Street, one of the streets maintained by defendant for the benefit of its tenants and their guests, she "proceeded across said 'A' Street and reached the north side of the same at a point where one of defendant's sidewalks abuts on said 'A' Street, she stepped up to proceed on the sidewalk, but tripped and fell on same because of a protrusion or raised portion of said sidewalk, as it adjoined 'A' Street. That in falling plaintiff struck her left hand upon a sharp glass jar lying upon said sidewalk and thereby seriously and permanently injured her left hand and arm . . ." She alleges that defendant negligently permitted the sidewalk to become and remain in an unsafe and dangerous condition, and with knowledge of this condition failed to repair it.

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

E. A. Solomon, Jr., and Mordecai, Mills & Parker for plaintiff appellant.

Ruark, Young & Moore for defendant appellee.

PER CURIAM. The evidence shows that "A" Street is paved to a width of ten feet. There are no sidewalks paralleling the street, but there are sidewalks leading from the street to the various apartment houses. Where plaintiff fell, the sidewalk is approximately one and one-half inches higher than "A" Street. Plaintiff describes her fall and its cause thus: "I went out of the back door of my sister's house, with my four-year-old son on my left and I was holding his hand with my left hand—went through her back yard—when I got to 'A' Street, I turned to my left and went about 60 feet before I was to turn to go on toward home. I attempted to turn on A Street to go up the sidewalk that leads to apartments A-11 and A-12, and just as I entered the sidewalk, I stepped on the sidewalk with my left foot and my right foot tripped on a raised portion of the sidewalk, and I fell about 2 or 3 feet up the sidewalk and fell on this glass and cut my hand very seriously."

To elevate a sidewalk an inch or two above the street is almost universally done. Such method of construction does not indicate negligence. That plaintiff should, in stepping from the street to the sidewalk, stumble and fall because the sidewalk was an inch or two higher than the street does not indicate that defendant was in any wise negligent. That plaintiff, in falling, should cut her hand is unfortunate but cannot impose any responsibility on the defendant. Plaintiff offered no evidence tending to show when or how the glass on which she cut her hand got there. The judgment is

Affirmed.

JOHNSON, J., not sitting.

GILBERT DEAL, CESAR PEYRONEL, L. O. DEAL, TROY CRAFT, RALPH SIGMON, JEWIS SIGMON, J. S. SIGMON, H. E. ABERNETHY AND WIFE, MRS. H. E. ABERNETHY, ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS IN SO-CALLED ENON SANITARY DISTRICT, WHO MAY WISH TO JOIN HEREIN, v. ENON SANITARY DISTRICT AND ROBERT L. BAIRD, WILSON DEAL AND R. EDGAR WILLIAMS AS COMMISSIONERS THEREOF; AND JOHN A. BLEYNAT, J. J. HALLYBURTON, ARTHUR H. WHISNANT, BEN H. BRACKETT AND X. H. COX AS COUNTY COMMISSIONERS OF BURKE COUNTY; AND MRS. NADINE BAKER, REGISTRAR, AND FRANK GRIFFIN AND SADIE BAIRD AS JUDGES OF SPECIAL BOND ELECTION FOR SO-CALLED ENON SANITARY DISTRICT.

(Filed 28 November, 1956.)

1. Appeal and Error § 50—

Upon appeal from an order granting or refusing an interlocutory injunction, the Supreme Court may review the findings of fact as well as the conclusions of law, and itself find the facts from the record evidence.

2. Sanitary Districts § 1—

The signature of 51% or more of the freeholders in the territory described in a petition for the creation of a sanitary district is prerequisite to the jurisdiction of the board of county commissioners to approve such petition, and such petition thus approved is prerequisite to the jurisdiction of the State Board of Health to define the boundaries of and create the district. G.S. 130-36.

3. Same—

Where 51% of the freeholders within the boundaries described therein sign a petition for the creation of a sanitary district, and the board of county commissioners approve such petition, the State Board of Health has jurisdiction, after hearing, to approve or disapprove the petition, and upon its approval to create the district, but the State Board of Health has no authority to exclude a portion of the territory described in the approved petition and create as a sanitary district a territory substantially less in area and in property values than the territory described in the petition.

4. Same—

The State Board of Health does not have authority to exclude from the territory described in an approved petition for the creation of a sanitary district, territory within the boundaries of the proposed district served by a municipal water system, notwithstanding that such territory would not benefit from the creation of the proposed district, since the authority of the State Board of Health to create a sanitary district is limited by statute to territory embraced within the boundaries described in an approved petition.

5. Appeal and Error § 50: Injunctions § 8—

Where on appeal it is determined that plaintiffs are entitled *pendente lite* to the injunctive relief for which they have applied, the judgment denying such relief will be vacated and the cause remanded with direction that an interlocutory order be entered in accordance with law.

JOHNSON, J., not sitting.
HIGGINS, J., dissenting.

APPEAL by plaintiffs from *Huskins, J.*, as Presiding Judge of the Twenty-Fifth Judicial District, entered at 24 May, 1956, Term, of Caldwell, from BURKE.

Civil action commenced 17 May, 1956, in the Superior Court of Burke County, to declare Enon Sanitary District, purportedly created and established by the State Board of Health under G.S., Chapter 130, Article 6, nonexistent as a body politic and corporate, and *pendente lite,* to enjoin the holding on 26 May, 1956, of a special bond election on the proposed issuance by Enon Sanitary District of $91,000.00 of water bonds, or, if the holding of such election be not enjoined, to "restrain the certification of the results thereof and any and all acts which might be predicated on such certified results—including restraining of bond issuance if voted for favorably in the election . . ."

After hearing on 24 May, 1956, upon return of a notice to show cause, Huskins, J., denied plaintiffs' application for injunctive relief pending final determination of the cause.

The general factual background is set forth below. Other factual matters will be considered in the opinion.

Plaintiffs reside within the territory purportedly created and established as Enon Sanitary District by the State Board of Health. Seven of the plaintiffs are resident freeholders therein. Six of these resident freeholders signed the petition described below.

On 7 February, 1955, a petition was presented to the Board of Commissioners of Burke County for the establishment of the territory described therein as a sanitary district to be known as Enon Sanitary District. The territory described therein is in Burke County, west of and adjoining the corporate limits of Valdese. The object was to provide a water supply for the residents of the proposed sanitary district. The petition was signed by more than 51% of the freeholders residing in the territory described in the petition.

On 12 March, 1955, after a public hearing thereon, the petition was approved by the Board of Commissioners and transmitted to the State Board of Health.

On 4 May, 1955, the State Board of Health conducted a public hearing on said petition within the described territory, to wit, at Enon Baptist Church.

The foregoing proceedings, in respect of the publication of notice and otherwise, were in strict compliance with G.S. 130-34 and G.S. 130-35; and plaintiffs do not challenge the regularity of any of them. The description of the proposed sanitary district incorporated in the pub-

lished notices of said two public hearings was the description set forth in said petition.

On 12 January, 1956, the State Board of Health adopted a resolution which, in part, provided: ". . . that in the opinion of the State Board of Health of the State of North Carolina, the territory described in said petition *except for the area mentioned above now served by water facilities* should be created as a sanitary district, and it is for the best interests of the residents and inhabitants of the said district for the purpose of preserving and promoting the public health that the said sanitary district be created, and that same be and is hereby created and established as a sanitary district, all in accordance with and pursuant to provisions of Chapter 130, Article No. 6, General Statutes of North Carolina 1943 and 1951 Cumulative Supplements thereto." (Italics added.) The said resolution then defined the boundaries of Enon Sanitary District purportedly created and established thereby. These boundaries do not include a substantial part of the territory described in said petition.

Subsequent events, all with reference to Enon Sanitary District as purportedly created and established by the State Board of Health, include the following:

1. On 21 January, 1956, the Board of Commissioners, pursuant to the State Board of Health's said resolution of 12 January, 1956, elected the members of a District Board of Enon Sanitary District.

2. On 19 April, 1956, the said District Board adopted a resolution providing for submission to the qualified voters within the district of a proposal that $91,000.00 of water bonds be issued by Enon Sanitary District and that a tax sufficient to pay the principal of and the interest on said bonds when due be levied and collected annually on all taxable property within the Enon Sanitary District.

3. By order of the Board of Commissioners, a special bond election was called for Saturday, 26 May, 1956; and notice of such special election and of the new registration required therefor was published.

The court below made findings of fact on which he based his order. Plaintiffs excepted to designated findings of fact, excepted to the court's refusal to make findings of fact tendered by them, excepted to the order and appealed therefrom; and, on appeal, plaintiffs have brought forward their exceptions by appropriate assignments of error.

C. David Swift for plaintiffs, appellants.

Byrd & Byrd for defendants, appellees.

BOBBITT, J. Upon an appeal from an order granting or refusing an interlocutory injunction, the findings of fact, as well as the conclusions

of law, are reviewable by this Court. *Arey v. Lemons*, 232 N.C. 531, 61 S.E. 2d 596; *Cameron v. Highway Com.*, 188 N.C. 84, 123 S.E. 465.

The evidence fails to show any irregularity subsequent to the resolution adopted 12 January, 1956, by the State Board of Health, sufficient to entitle plaintiffs to injunctive relief; and plaintiffs' assignments of error, directed to the order and published notice relating to the special bond election, are overruled.

Decision on this appeal turns on whether Enon Sanitary District was legally created and established by the State Board of Health.

The petition signed by more than 51% of the resident freeholders was for the establishment of the territory described therein as a sanitary district. This petition was approved, after public hearing thereon, by the Board of Commissioners. Another public hearing thereon was conducted by the State Board of Health.

The determinative question is this: Did the State Board of Health in the absence of a petition therefor, signed by 51% or more of the resident freeholders therein and approved by the Board of Commissioners, have authority to create as a sanitary district *a portion* of the territory described in the approved petition, that is, a territory substantially less in area and in property valuations than the territory described in the approved petition?

The question posed was answered by the court below in favor of defendants in this conclusion of law: "1. That the Enon Sanitary District has been legally created as provided by law, and this Court is of the opinion that G.S. 130-36 gives to the State Board of Health the discretionary right to adopt a Resolution defining the boundaries of the sanitary district and declaring the territory within such boundary to be a sanitary district, regardless of whether the boundary of the area defined coincides with the boundary of the area described in the Petition requesting the creation of such district." Plaintiffs' assignment of error thereto squarely presents the crucial question.

When hereafter used, "original boundaries" refers to the territory described in said approved petition and "excluded territory" refers to the portion thereof not included in the sanitary district purportedly created by the State Board of Health.

As a basis for determining plaintiffs' right to injunctive relief, *pendente lite*, this Court, after careful consideration of the evidence presented, finds the facts to be as stated below.

1. The excluded territory adjoins the Town of Valdese.

2. The properties in the excluded territory, with minor exceptions, are presently connected with the Valdese water system.

3. Other properties within the original boundaries, but not in the excluded territory, are presently connected with the Valdese water system.

4. The Town of Valdese let it be known that it planned to extend its corporate limits so as to annex the excluded territory and that it would not furnish water to a sanitary district embracing the excluded territory.

5. The 1955 valuations of properties in the excluded territory exceeded $83,865.00 and approximated 1/7 of the 1955 valuations of all properties within the original boundaries.

6. If the excluded territory is taken out of the original boundaries, this will reduce only by a 1/92 part (less than $1,000.00) the expected cost of the Enon water system.

7. If the excluded territory is taken out of the original boundaries, the result will be a sanitary district in which *ad valorem* taxes necessary to provide the Enon water system will be heavier than in a sanitary district created and established in accordance with the original boundaries.

8. No petition has been signed, presented or approved, requesting that the State Board of Health create and establish as a sanitary district the territory described in its resolution of 12 January, 1956.

In *Idol v. Hanes*, 219 N.C. 723, 14 S.E. 2d 801, a petition signed by 51% or more of the resident freeholders within the proposed sanitary district, was filed with the Board of County Commissioners in accordance with G.S. 130-34. Prior to the advertised public hearing on the petition, certain of the signers thereof requested that their names be withdrawn; and, if their names were withdrawn, the remaining signers constituted less than 51% of the resident freeholders within the proposed district. Notwithstanding such requested withdrawals, the Board of County Commissioners approved the petition and prepared to forward such approval to the State Board of Health for further action toward establishment of the district.

After holding that a signer had the legal right to withdraw his name from the petition prior to action thereon by the Board of County Commissioners, this Court, speaking through *Seawell, J.*, said: "The withdrawal of these petitioners, conceded in the stipulation to reduce the number to less than 51% of the resident freeholders, was fatal to the jurisdiction of the defendant Board of County Commissioners, and the judgment of the Superior Court so holding must be affirmed. *Tarboro v. Forbes*, 185 N.C. 59, 116 S.E. 81; *Armstrong v. Beaman, supra; Charlotte v. Brown*, 165 N.C. 435, 81 S.E. 611; *Shelton v. White, supra;* McQuillin's Municipal Corp., 1921 Supp., sec. 1858." Upon this basis, the defendant Commissioners were permanently restrained from taking further action with reference to said petition.

The jurisdictional petition required by G.S. 130-34 must set forth the boundaries of the territory to be created and established as a sanitary district. The request of the resident freeholders who sign the petition is that *the territory described therein* be created and estab-

lished as a sanitary district. The Board of Commissioners, after a public hearing on said petition, determines whether it approves the creation and establishment of *the territory described therein* as a sanitary district as requested by 51% or more of the freeholders resident therein.

If a petition signed by 51% or more of the freeholders residing in the territory described in said petition is prerequisite to the jurisdiction of the Board of Commissioners, as held in *Idol v. Hanes, supra,* said petition, approved by the Board of Commissioners, is prerequisite to the jurisdiction of the State Board of Health.

G.S. 130-36, in part, provides: "If, after such hearing the State Board of Health shall deem it advisable to comply with the request of said petition and that *a district* for the purpose or purposes therein stated should be created and established, the State Board of Health shall adopt a resolution to that effect, *defining the boundaries of such district* and declaring the territory within such boundaries to be *a sanitary district; . . .*" (Italics added.)

Relying upon the italicized words, defendants contend that the State Board of Health was authorized, in its discretion, to create and establish as a sanitary district a territory different from that described in said approved jurisdictional petition, that is, the territory remaining after the "excluded territory" is taken out of the "original boundaries." We are constrained to hold otherwise.

Our attention is directed to the fact that G.S. 130-34 and G.S. 130-35 refer to the "boundaries of the proposed sanitary district," "the proposed sanitary district," and "this sanitary district," while G.S. 130-36 refers to "a district" and "such district" and "a sanitary district." In this connection, it must be observed that no sanitary district exists unless legally created and established by the State Board of Health. We construe G.S. 130-36 to mean that the State Board of Health is to determine whether *it deems it advisable to comply with the request of said approved jurisdictional petition;* and, if so, it is authorized to create and establish *a sanitary district in compliance therewith.*

The approved petition, upon which the jurisdiction of the State Board of Health rests, requests that *the territory described therein,* be created and established as a sanitary district. Necessarily, as required by G.S. 130-36, the resolution of the State Board of Health must define the boundaries of any sanitary district created and established by it. To define, according to Webster, is "to determine with precision or to exhibit clearly the boundaries of." Here the State Board of Health did more than make precise and clear the boundaries of the territory described in said petition. The territory purportedly created and established as a sanitary district by the State Board of Health differs materially and substantially from that described in said petition. There

is a marked distinction between defining with precision and exhibiting clearly the territory created and established as a sanitary district and the purported creation and establishment as a sanitary district of an area substantially and materially different from that described in the approved jurisdictional petition.

In this connection, it is noted that G.S. 130-36 contains a proviso, namely, ". . . any industrial plant and its contiguous village shall be included within or excluded from the area embraced within such sanitary district as expressed in the application of the person, persons or corporation owning or controlling such industrial plant and its contiguous village, said application to be filed with the State Board of Health on or before the date of the public hearing as hereinbefore provided." All parties are charged with statutory notice that this may be done. Suffice to say, the proviso is not relevant here except as an aid to interpretation.

Defendants contend further that the State Board of Health was authorized to exclude from the proposed district properties now connected with, and using water from, the Valdese water system, on the ground that such properties would not benefit from the creation of the proposed district, citing *Sanitary District v. Prudden,* 195 N.C. 722, 143 S.E. 530. An analysis of the cited case seems appropriate.

Sanitary District v. Prudden, supra, was determined upon the submission of a controversy without action under C.S. 626, now G.S. 1-250. The plaintiff, Druid Hills Sanitary District, was created pursuant to the provisions of Ch. 100, Public Laws of 1927, which as amended is now G.S., Ch. 130, Art. 6. All proceedings were in full compliance with the statutory provisions, including the election authorizing the issuance of district bonds payable from an unlimited *ad valorem* tax upon all taxable property in said district and not from special assessments. Prudden, *et al.,* the defendants, refused to comply with their contract to purchase the bonds.

The defendants contended that Ch. 100, Public Laws of 1927, was in conflict with sec. 17, Art. I, the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States. They based this contention, *inter alia,* on these grounds: (a) "That the so-called tax authorized by chapter 100, Public Laws 1927, is a special assessment and limited to an amount not in substantial excess of the benefits accruing to the property taxed." (b) "Because it does not authorize the State Board of Health to exclude from a sanitary district property which will not be benefited by the proposed improvements."

This Court, in upholding the constitutionality of Ch. 100, Public Laws of 1927, rejected the contention that a special assessment district was involved. The basis of decision was that the health and welfare of all the people who lived in the sanitary district was the prime con-

sideration for the establishment thereof, not benefits, if any, to individual property owners as such. Upon this basis, this Court held that in such a sanitary district the tax to be levied is a general tax for a special purpose as distinguished from a special assessment and therefore is not limited by the amount of benefits conferred by the proposed improvement in respect of particular property. See: *Williamson v. Snow*, 239 N.C. 493, 80 S.E. 2d 262.

In the course of a discussion of the defendants' said contentions, the opinion states: "Then again, taking a reasonable construction of section 5, *supra* (G.S. 130-36), upon the hearing before the State Board of Health, any landowner if not benefited could be heard, before the State Board of Health defined the boundaries and created the sanitary district. It is well settled that 'no land can be taken without being benefited.' See *Drainage District v. Cahoon*, 193 N.C. p. 326." Defendants stress this excerpt from the opinion.

While the quoted excerpt, standing alone, lends some support to defendants' contention, it must be regarded as *dicta;* for the quotation from *Drainage District v. Cahoon*, 193 N.C. 326, 137 S.E. 185, shows plainly that the proposition stated relates to a special assessment district whereas the decision in *Sanitary District v. Prudden, supra*, was predicated squarely on the proposition that the Druid Hills Sanitary District was not a special assessment district.

The required public hearing (G.S. 130-35) contemplates that every interested person has a right to be heard by the State Board of Health before it determines whether it deems it advisable to create and establish a sanitary district in compliance with the request of the approved jurisdictional petition.

Assuming that, after the Town of Valdese had made known its aforesaid attitude, informal request was made that the territory defined in said resolution of 12 January, 1956, be created and established as a sanitary district, and that these developments were generally known to residents of the Enon Community, we are confronted by the fact that the State Board of Health had no authority except that conferred by the approved jurisdictional petition.

The intention of the General Assembly is clear. 51% or more of the resident freeholders may petition for the establishment of a specific territory as a sanitary district. The Board of Commissioners and the State Board of Health may approve or reject their petition. It is not contemplated that, upon consideration of said petition, a different territory, for which no jurisdictional petition has been presented, may be created and established.

If, as defendants contend, 51% or more of the resident freeholders within the boundaries set forth in the resolution of the State Board of Health favor the establishment *of that territory* as a sanitary district

they may sign and present their petition to the Board of Commissioners and otherwise proceed in accordance with G.S., Ch. 130, Art. 6. In such case, the further delay and additional expense are regrettable; but we are mindful that the law as declared by this Court is applicable to all proceedings for the establishment of sanitary districts under G.S., Ch. 130, Art. 6. Uncertainty as to the statutory authority vested in the State Board of Health by G.S. 130-36 may have contributed in large measure to the already considerable delay in these proceedings.

It is noted that the jurisdictional petition must be signed by 51% or more of the resident freeholders; but, if and when a sanitary district has been legally created and established, the qualified voters, whether freeholders or not, determine what bonds, if any, shall be issued by the district.

Upon the facts disclosed by this record, plaintiffs herein were entitled *pendente lite* to the injunctive relief for which they applied; and the failure to grant an interlocutory injunction was error. Therefore, the judgment of the court below is vacated and the cause remanded with direction that an interlocutory order be entered consistent with the law as declared herein.

Judgment vacated and cause remanded.

JOHNSON, J., not sitting.

HIGGINS, J., dissenting: I am unable to agree with the majority opinion in this case. A fair interpretation of G.S. 130-35 and G.S. 130-36 gives the State Board of Health authority to exclude in its discretion part of the territory embraced in the original petition filed with and approved by the Board of Commissioners, provided the district as approved has the support of 51 per cent of the resident freeholders. One of the purposes of the hearing to be held by the Board of Health is to determine whether the district as approved has the required support. G.S. 130-36 provides (not *the* district but) *a* district shall be created and established, and that the State Board of Health shall adopt a resolution to that effect *defining the boundaries of such district and declaring the territory within such boundaries to be a sanitary district.*

G.S. 130-35 provides the State Board of Health shall give notice, naming a time and place within the proposed district, and shall hold a public hearing concerning the creation of the proposed district. By requiring the Board of Health to conduct a hearing, to fix boundaries, and by order to set up the district, the Legislature had in mind the Board should have authority to do more than simply say, "yes," or "no," to the proposals submitted in the petition. I do not see in the acts referred to a legislative plan thus to place the Board of Health in a straight jacket. I vote to affirm.

HAROLD D. HARMON v. MARY PRIME HARMON.

(Filed 28 November, 1956.)

1. Appeal and Error § 46—

Ordinarily, the doing or refusing to do an act within the discretion of the court is not reviewable on appeal.

2. Pleadings § 6: Process § 6: Judgments § 18—

Upon motion to vacate a judgment based upon service by publication on the ground that the clerk of the Superior Court had not sent a copy of the notice of service as required by G.S. 1-99.2, the court may vacate the judgment, and, instead of dismissing the action, may in his discretion order that service be completed in accordance with the provisions of statute and enlarge the time for answering. G.S. 1-152. In the present case the question is moot because of defendant's general appearance.

3. Appearance § 1—

The filing of an answer is equivalent to a general appearance.

4. Appearance § 2—

A general appearance waives all defects and irregularities in process and gives the court jurisdiction of the answering party even though there may have been no service of summons.

5. Divorce and Alimony § 2½d—After divorce obtained in good faith without fraud, cohabitation with second wife is not rendered adulterous by decree setting aside divorce.

After decree of absolute divorce, the husband remarried. Thereafter, the first wife had the decree set aside for defective service for that the clerk had not mailed her a copy of the order of service by publication, although the affidavit of the husband had given her correct address. Upon intimation that the court would set aside the decree, the husband ceased to cohabit with the second wife, and continued his action for absolute divorce on the ground of separation. The first wife filed answer alleging his adulterous cohabitation as a bar. *Held:* The husband having done all required of him by law for service by publication and the evidence disclosing no intentional wrong on his part or fraud or collusion in procurement of the divorce decree, his cohabitation with the second wife up to the time he knew the decree would be set aside was not adulterous so as to bar his right of action.

6. Appeal and Error § 38—

Exceptions not set out in the brief and in support of which no reason or argument is stated or authority cited are taken as abandoned. Rule of Practice in the Supreme Court No. 28.

JOHNSON, J., not sitting.

APPEAL by defendant from *Campbell, J.*, May Term, 1956, of MECKLENBURG.

This is an action instituted by the plaintiff for an absolute divorce based on separation of more than two years.

The plaintiff, Harold D. Harmon, and the defendant, Mary Prime Harmon, were married 17 December 1933. The plaintiff and defendant, then living in Miami, Florida, separated on 22 October 1946. The plaintiff, a senior pilot for Eastern Air Lines, moved to Atlanta, Georgia, and was later transferred to Charlotte, North Carolina, where he has lived since 1 April 1954.

On 28 February 1955 the plaintiff instituted this action. Summons was issued and verified complaint was filed. The Sheriff of Mecklenburg County returned the summons issued in this action endorsed, "The defendant, Mary Prime Harmon, cannot after due and diligent search be found within the State of North Carolina. Said defendant is in fact a resident of Miami Springs, Dade County, Florida, and lives at 160 South Drive, Miami Springs."

Thereafter, on 1 March 1955, pursuant to an affidavit for service on the defendant by publication, the court entered an order of publication directing that such order be published in the *Mecklenburg Times*, a newspaper published in Mecklenburg County, once a week for four weeks. The affidavit for service by publication set forth therein that the defendant was a resident of Miami Springs, Dade County, Florida, and lived at 160 South Drive in Miami Springs.

The notice of publication was published as required by the order of the court in the *Mecklenburg Times* and the affidavit of the publisher of such paper was duly filed in proper form in this action. The defendant filed no answer.

At a term of the Superior Court in Mecklenburg County on the 26th day of April 1955, the case was tried. The jury answered the issues in favor of the plaintiff and he was granted an absolute divorce.

On the 23rd day of July 1955, the plaintiff married Betty Curtis of Birmingham, Alabama, who thereupon moved to Charlotte and lived with the plaintiff as his wife until the 9th day of February 1956.

The defendant, Mary Prime Harmon, on 29 August 1955, through her attorneys, made a special appearance and filed a motion (1) to vacate the judgment of divorce entered by Judge Patton for that the Clerk of the Superior Court of Mecklenburg County had not sent a copy of the notice of service of process by publication to the defendant as required by G.S. 1-99.2, and (2) to dismiss the action.

The hearing on the above motion was finally disposed of on 10 February 1956. On 9 February 1956 the court intimated that it would set aside the judgment on the next day. The plaintiff and his wife, Betty Curtis Harmon, of the second marriage, having been notified that the court would set aside the previous divorce decree entered in this cause, separated on 9 February 1956. Judge Campbell held that

"service of process upon the defendant was not completed at the time of the rendition of the judgment herein, that the same was improvidently entered, and that such judgment should be set aside." Judgment was accordingly entered. However, the court in its discretion ordered that notice of the institution of the action, with copy of the original summons and verified complaint theretofore filed in the cause, be mailed by the Clerk of the Superior Court of Mecklenburg County to Mary Prime Harmon, defendant, at 160 South Drive, Miami Springs, Florida, within five days after the entry of the order, "which notice shall further notify said defendant that she is required to appear before the Clerk of the Superior Court of Mecklenburg County, North Carolina, at the courthouse of said county in Charlotte, North Carolina, within thirty-five (35) days of the date of mailing said notice, and answer or otherwise plead to the complaint in this action, or the plaintiff will apply to the court for the relief demanded in the complaint herein."

The defendant excepted to the refusal of the court to dismiss the action. Later, however, she filed a verified answer in which she admitted that the plaintiff and defendant had lived separate and apart for more than two years; but alleged in her further answer and defense, as a bar to the relief sought by the plaintiff, that on or about 23 July 1955 and on numerous occasions thereafter the plaintiff had committed adultery with Betty Curtis in Birmingham, Alabama, and Charlotte, North Carolina.

This cause came on for trial at the May Term 1956 of the Superior Court of Mecklenburg County. Issues were submitted to the jury and answered as follows:

"1. Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the institution of this action?
Answer: Yes

"2. Were the plaintiff and defendant married as alleged in the complaint?
Answer: Yes

"3. Have the plaintiff and defendant lived separate and apart from each other for more than two years next preceding the institution of this action, as alleged in the complaint?
Answer: Yes

"4. Did the plaintiff commit adultery, as alleged in the answer?
Answer: No."

From the judgment entered on the verdict the defendant appeals, assigning error.

John H. Small for plaintiff appellee.
Carpenter & Webb and Charles F. Coira, Jr., for defendant appellant.

DENNY, J. The defendant's 15th assignment of error is based on her first exception which assigns as error the refusal of the court below to dismiss the action in addition to setting aside the judgment entered on 26 April 1955. The court below, in its discretion, instead of dismissing the action, ordered that service be completed in accordance with the provisions of G.S. 1-99.2, and enlarged the time for answering.

A judge of the Superior Court, in a civil action, may "in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time." G.S. 1-152; *Aldridge v. Insurance Co.*, 194 N.C. 683, 140 S.E. 706; *Roberts v. Merritt*, 189 N.C. 194, 126 S.E. 513; *McNair v. Yarboro*, 186 N.C. 111, 118 S.E. 913.

Ordinarily, where a judge is vested with discretion, his doing or refusing to do the act in question is not reviewable upon appeal. *Alexander v. Brown*, 236 N.C. 212, 72 S.E. 2d 522; *Church v. Church*, 158 N.C. 564, 74 S.E. 14; *Wilmington v. McDonald*, 133 N.C. 548, 45 S.E. 864.

The defendant prevailed on her motion to set aside the judment on the ground that service had not been completed or obtained on her at the time the judgment complained of was entered. Hence, she had nothing to appeal from at that time except the contention, wholly without merit, that the court could not thereafter get service on her without dismissing the action and requiring the plaintiff to reinstitute it. Even so, the question the defendant seeks to have us determine with respect to the failure to dismiss the action is now moot, since she has made a general appearance, filed a verified answer, set up a plea in bar and testified in her own behalf in the trial below.

G.S. 1-103 provides that, "A voluntary appearance of a defendant is equivalent to personal service of summons upon him." The filing of an answer is equivalent to a general appearance, and a general appearance waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons. *Harris v. Bennett*, 160 N.C. 339, 76 S.E. 217; *Ashford v. Davis*, 185 N.C. 89, 116 S.E. 162; *Burton v. Smith*, 191 N.C. 599, 132 S.E. 605; *Abbitt v. Gregory*, 195 N.C. 203, 141 S.E. 587; *Asheboro v. Miller*, 220 N.C. 298, 17 S.E. 2d 105; *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848, 25 A.L.R. 2d 818. This assignment of error is overruled.

The most serious question on this appeal is presented by the defendant's exception No. 16, on which she bases her assignment of error No. 3, challenging the correctness of the following portion of his Honor's

charge to the jury: "The court charges you as a matter of law that during the period that the judgment of absolute divorce was in full force and effect and until it was set aside on February 10, 1956, the relations between the plaintiff in this action and Betty Curtis would not constitute adultery, unless you find from this evidence and by its greater weight that during that interval of time the plaintiff knew that his divorce decree was invalid, and that his continuing to live with Betty Curtis was done in bad faith and at a time when he knew or had sufficient ground or reasonable ground to know that he did not have a valid divorce and that his marriage ceremony on July 23, 1955, was ineffective and did not constitute a marriage between himself and Betty Curtis."

The textbook writers and the courts are in considerable disagreement as to whether cohabitation, under circumstances such as this case presents, does or does not constitute adultery. There seems to be unanimity among the authorities, however, that cohabitation pursuant to the second marriage does constitute adultery if the parties to the second marriage obtained the divorce decree through collusion and in bad faith or by fraud. *S. v. Williams,* 220 N.C. 445, 17 S.E. 2d 769, reversed 317 U.S. 287, 87 L. Ed. 279; *s. c.*, 222 N.C. 609, 24 S.E. 2d 256; *s. c.*, 224 N.C. 183, 29 S.E. 2d 744, affirmed 325 U.S. 226, 89 L. Ed. 1577; *S. v. Whitcomb,* 52 Iowa 85, 2 N.W. 970; *S. v. Watson,* 21 R.I. 354, 39 A. 193, 78 Am. St. Rep. 871, affirmed in 179 U.S. 679, 45 L. Ed. 383.

The authorities also hold that where one party to a marriage obtains a divorce by fraud and marries another who knows nothing about the fraud and enters into the marriage in good faith, such innocent person is not guilty of any wrongdoing. Or, if one who is married represents that he is a single person and enters into a second marriage without obtaining a divorce, he may be prosecuted for having lived with the second spouse. *S. v. Cutshall,* 109 N.C. 764, 14 S.E. 107, 26 Am. St. Rep. 599.

In the last cited case, *Clark, J.,* later *Chief Justice,* quoted with approval from the case of *Alonzo v. The State,* 15 Tex. App. 378, as follows: "While it is true that to constitute adultery there must be a joint physical act, it is certainly *not* true that there must be a joint criminal intent. . . . While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party. One may be guilty, the other innocent . . . So, if one of the parties was mistaken as to a matter of fact, after exercising due care to ascertain the truth in relation to such fact, which fact, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime."

In 17 Am. Jur., Divorce and Separation, section 463, page 380, it is said: "Cohabitation pursuant to the second marriage *after the annulment* constitutes adultery," citing *S. v. Watson, supra,* and *S. v. Whitcomb, supra.* (Emphasis added.)

We find in 27 C.J.S., Divorce, section 56(3), page 599, the following: "Since an absolute divorce dissolves the marriage tie, . . . subsequent intercourse between a former spouse and a third person does not constitute adultery, provided a final decree has been rendered, and no fraud was practiced to obtain it. A subsequent reversal of the decree does not render the cohabitation under a second marriage before the reversal adulterous," citing *Gordon v. Gordon,* 141 Ill. 160, 30 N.E. 446, 33 Am. St. Rep. 294, 21 L.R.A. 387; *Bailey v. Bailey,* 45 Hun. 278, affirmed 142 N.Y. 632, 37 N.E. 566.

Likewise, in this same volume, section 67, page 626, it is said: "Where a wife, after having obtained a divorce, married and cohabits with her second husband before her first husband moves to vacate the decree, and the decree is vacated, the wife's act in cohabiting with her second husband does not constitute adultery so as to preclude her from obtaining a divorce," citing *Chisholm v. Chisholm,* 105 Fla. 402, 141 So. 302.

In the last cited case, the wife, after obtaining a divorce decree, married and cohabited with another, but separated from the second husband before her first husband moved to vacate the original decree. The original decree was vacated. The court held in the second trial for divorce from her first husband that her cohabitation with her second husband may technically be regarded as bigamy but did not constitute adultery such as would preclude her from obtaining a divorce.

In the case of *Bailey v. Bailey, supra,* the plaintiff instituted an action for divorce against his wife on the grounds of her adultery. A decree granting the plaintiff an absolute divorce was entered on 5 February 1886, which decree expressly gave him the right to remarry. From the judgment entered the defendant appealed. Plaintiff, without awaiting disposition of the appeal, married another woman and thereafter cohabited with her until 17 September 1886, when he heard that the court had decided to reverse the judgment. The court entered the order of reversal on 20 September 1886. The judgment was set aside because the question of the sanity of the wife at the time the action was instituted was raised. Her acts of adultery were proved beyond question. The Court said, however, "The court certainly had full and complete jurisdiction over the parties and the subject-matter of the action, and there is not the slightest suggestion of any wrong by the plaintiff in obtaining the judgment." And further, ". . . wherever the law invites an act, which would otherwise be unlawful, whether it be by express general provisions or through a *valid judgment* which purports to express the law of the particular case, the acts of parties in pursuance

thereof are not *illegal,* and especially is connubial cohabitation, under such circumstances, free from the charge of adultery."

In *Meyer v. Meyer,* 343 Ill. App. 554, 99 N.E. 2d 706, it appears that on 28 December 1942, Hester S. Meyer filed a complaint for divorce in the Circuit Court of Cook County against her husband, Arthur Meyer, on the ground of desertion. She alleged in her complaint that she was a resident of Cook County and the State of Illinois. The defendant filed an answer and a cross-complaint for divorce also on the ground of desertion. On 18 January 1943 the husband was granted an absolute divorce. Thereafter, on 1 May 1943, Arthur Meyer, relying on the validity of the divorce decree, married Constance Arts. A child was born to Meyer and Constance Arts on 9 June 1945. On 11 July 1944, Hester S. Meyer filed a petition attacking the divorce on the ground that the court lacked jurisdiction for the reason that neither she nor Arthur Meyer was a citizen of Cook County at the time the action was instituted and, therefore, she requested that the divorce decree be expunged. Arthur Meyer moved in the lower court to dismiss the petition for want of equity, which was allowed. Mrs. Meyer appealed. In the opinion filed 11 April 1946, the court reversed the order and remanded the cause for a new trial with specific instructions. *Meyer v. Meyer,* 328 Ill. App. 408, 66 N.E. 2d 457. There the Court said that, "The only question presented is whether plaintiff made out a *prima facie* case on the proposition that the decree of divorce was null and void for want of jurisdiction, her position being that neither of the parties was a resident of the County of Cook at the time the divorce proceeding was instituted, as required by the statute."

Finally, after another appeal, reported in 333 Ill. App. 450, 77 N.E. 2d 556, an order was entered in the Circuit Court on 1 April 1948, expunging the decree of divorce. Thereafter, it appears new pleadings were filed in the pending action. Plaintiff set up the cohabitation of the defendant with Constance Arts in bar of the relief sought by him in the cross-complaint. The court found the plaintiff, Hester S. Meyer, guilty of habitual drunkenness for the space of more than two years prior to the filing of the cross-complaint and granted the defendant, Arthur Meyer, an absolute divorce. The court said with respect to the second marriage of the defendant, "That Arthur Meyer's cohabitation up to February 17, 1948, under his marriage of May 1, 1943 to Constance Arts, was not adultery or bigamy, constituting a defense to his complaint for divorce; . . ." See *Smith v. Smith,* 64 Iowa 682, 21 N.W. 137; *Pratt v. Pratt,* 157 Mass. 503, 32 N.E. 746, 21 L.R.A. 97.

No one contends that the bonds of the marriage between the plaintiff and the defendant were dissolved by the judgment entered on 26 April 1954. The real question here, however, is this: Do the facts as revealed on this record warrant the conclusion that the plaintiff's conduct

in marrying Betty Curtis and living with her as his wife until the day before the decree of divorce entered on 26 April 1954 was set aside, constitutes adultery? We would answer this question in the affirmative without hesitation if the record disclosed any evidence of bad faith, collusion or fraud on the part of the plaintiff, Harold D. Harmon, in connection with the procurement of the divorce decree entered on 26 April 1954. *S. v. Williams, supra.* But there is no such evidence. He disclosed to the court in his affidavit the correct address of the defendant, Mary Prime Harmon. He employed competent counsel to represent him. He did what the law requires of a party when service must be obtained by publication. Therefore, in our opinion, it would be unfair and unjust to penalize this plaintiff when there is no evidence of intentional wrong on his part. Consequently, from the facts disclosed on this record, the charge of the court below will be upheld.

A careful examination of the record discloses that sixteen of the defendant's exceptions either have not been brought forward and assigned as error, or no reason or argument is stated, or authorities cited in support of the assignments based thereon. Hence, these exceptions and assignments of error will be taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562. In our opinion, the remaining exceptions and assignments of error present no question of substantial merit that would justify us in disturbing the result of the trial below.

In the trial below we find

No error.

JOHNSON, J., not sitting.

MARY ALICE DENNY, GUARDIAN OF THE ESTATE OF LOUISE HUFFINES DENNY, MINOR, AND MARY ALICE DENNY, INDIVIDUALLY, v. R. C. COLEMAN, SR., R. C. COLEMAN, JR., JOE COLEMAN, C. L. COLEMAN AND MRS. HARRIET L. SIKES, TRADING AND DOING BUSINESS AS GREENSBORO TOBACCO WAREHOUSE COMPANY, AND J. F. FUQUA, ALSO KNOWN AS J. T. FUQUA.

(Filed 28 November, 1956.)

1. Torts § 5—

Where the acts of several persons concur in producing a single tortious injury, the injured person may sue them either jointly or separately, notwithstanding that their liability as between themselves may be primary and secondary.

2. Trover and Conversion § 2—

Each party participating in a wrongful conversion may be sued by the owner without joinder of the others, since each is jointly and severally liable.

3. Torts § 6—

Where the owner sues some of the parties participating in a tortious conversion of his property and obtains judgment by default and inquiry, regular in all respects, the original defendants are not entitled to bring in the other tort-feasors as against plaintiff, and as between plaintiff and the original defendants, the action is pending solely to determine the amount of damages to be ascertained by the jury, G.S. 1-212, although the original defendants may seek to enforce their right of contribution against the other tort-feasors in the manner provided in G.S. 1-240.

JOHNSON, J., not sitting.

APPEAL by defendants R. C. Coleman, Sr., R. C. Coleman, Jr., Joe Coleman, C. L. Coleman and Mrs. Harriet Sikes, trading and doing business as Greensboro Tobacco Warehouse Company, from *Rousseau, J.*, September Term, 1956, of GUILFORD (Greensboro Division).

This action was instituted in the Civil Division of the Greensboro Municipal-County Court. Summons was issued on 21 March 1956 and plaintiffs' complaint was filed on 9 April 1956.

Plaintiffs allege that they rented to Ed Shearon for the 1955 agricultural season a certain farm owned by them for a cash rental of $600.00; that the said farm had a tobacco acreage allotment of 2.80 acres and that a tobacco acreage allotment marketing card for said farm was issued in the name of Mary Alice Denny; that the tenant Shearon cultivated a crop of tobacco on plaintiffs' farm and that the tenant Shearon and defendant Fuqua wrongfully obtained plaintiffs' tobacco marketing card from the Commodity Stabilization Service and sold the crop of tobacco grown on plaintiffs' land at the tobacco warehouse operated by the defendants Coleman and associates; that the tenant Shearon and defendant Fuqua received from the defendant Tobacco Warehouse Company the net proceeds from the sale of said tobacco in the sum of $896.10; that the tenant Shearon has paid to plaintiffs the sum of $122.00 on his rent account, leaving a balance due plaintiffs of $478.00.

Plaintiffs further allege that under the provisions of G.S. 42-15 they held a lien on all crops raised on their farm during the 1955 season and that the defendants Coleman and associates wrongfully paid to Ed Shearon and defendant Fuqua the proceeds of the tobacco raised on plaintiffs' farm and marketed by Ed Shearon and defendant Fuqua.

Before the time for answering expired, the defendant Fuqua filed with the court an unverified motion, praying that Ed Shearon be made a

party defendant. This motion has never been heard and is still pending in the Municipal-County Court.

Appellants failed to file any answer or other pleadings within the time allowed by law and no extension of time in which to file such pleadings was ever requested or granted by the court.

After the time for answering had expired, the judge of the Municipal-County Court entered a judgment by default and inquiry against the appellants. After the time for appealing from the entry of the judgment by default and inquiry had expired, appellants filed with the court their unverified motion, praying that said Shearon be made a party defendant as a proper and necessary party, and sought to adopt as their own the motion filed by their co-defendant Fuqua.

Upon the hearing of the inquiry as to damages and appellants' motion, the judge of the Municipal-County Court overruled the appellants' motion and awarded judgment in favor of the appellees in the sum of $478.00, with interest.

Appellants appealed to the Superior Court from the judgment of the Municipal-County Court. At the hearing on their motion in the Superior Court before his Honor J. A. Rousseau, they offered no evidence of any nature in support thereof and admitted in open court that they were not entitled to have the judgment by default and inquiry set aside. Judge Rousseau denied appellants' motion to make Ed Shearon a party defendant to the action. Judgment was accordingly entered and the above named defendants appeal, assigning error.

Chas. M. Ivey, Jr., for appellees.

Andrew Joyner, Jr., for appellants.

DENNY, J. A plaintiff may sue joint tort-feasors either jointly or separately. McIntosh, North Carolina Practice and Procedure, 2nd Edition, Volume 1, section 584, page 293; *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126; *Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736, 149 A.L.R. 1183; *Jones v. Elevator Co.,* 231 N.C. 285, 56 S.E. 2d 684.

McIntosh, *supra,* section 584, page 343, states: ". . . when the acts of defendants concur to produce a single injury, thus making them joint tort-feasors, plaintiff may sue them jointly or separately. He has the same option when two defendants are both liable to him in tort, though, as between themselves, their liability is primary and secondary."

In 53 Am. Jur., Trover and Conversion, sections 155 and 156, page 929, *et seq.*, it is said: "Although one of several tort-feasors may be held liable for the full amount of damages for a conversion in which he has participated, and it is not necessary to join the others, there is joint

and several liability on the part of several persons participating in a conversion . . .

"It is clear that it is not necessary to join the original converter of the property with a subsequent purchaser in an action against the latter for a wrongful conversion of the property."

Ordinarily, in an action arising out of a joint tort, wherein judgment may be rendered against two or more persons, who are jointly and severally liable, and not all of the joint tort-feasors have been made parties, those who have been made parties may at any time before judgment, upon motion, have the other joint tort-feasors brought in and made parties defendant in order to determine and enforce contribution. G.S. 1-240; *Godfrey v. Power Co., supra; Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434.

The motion to make an additional party, in the instant case, however, was not made until after a judgment by default and inquiry had been entered, a judgment which these appellants concede is valid and which they are not entitled to have set aside. Therefore, nothing is left open for further inquiry in this action, as between the plaintiffs and the appellants, except the amount of damages to be ascertained by the jury. G.S. 1-212; *Wilson v. Chandler,* 238 N.C. 401, 78 S.E. 2d 155; *DeHoff v. Black,* 206 N.C. 687, 175 S.E. 179; *Mitchell v. Ahoskie,* 190 N.C. 235, 129 S.E. 626; *Armstrong v. Asbury,* 170 N.C. 160, 86 S.E. 1038; *Plumbing Co. v. Hotel,* 168 N.C. 577, 84 S.E. 1008; *Blow v. Joyner,* 156 N.C. 140, 72 S.E. 319.

G.S. 1-240 authorizes defendants in tort actions to bring in other joint tort-feasors before judgment in order that their mutual contingent liabilities may be litigated "before they have accrued, *Lackey v. R. Co.,* 219 N.C. 195, 13 S.E. 2d 234, so that all matters in controversy growing out of the same subject of action may be settled in one action, *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434, though the plaintiff in the action may be thus delayed in securing his remedy." *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73. However, when a plaintiff has elected to sue one or more joint tort-feasors, but not all of them, the others are not necessary parties and the plaintiff cannot be compelled to pursue them. *Charnock v. Taylor, supra.*

In our opinion, when joint tort-feasors, who have been sued in an action, fail to file an answer to a complaint that states a good cause of action, and the plaintiffs obtain a judgment by default and inquiry, which is regular in all respects, a motion, lodged thereafter, to bring in other joint tort-feasors so as to determine liability for contribution as between themselves, comes too late, and we so hold. Such defendants may, however, seek to enforce their right to contribution in the manner provided in G.S. 1-240.

The cases of *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661, and *Strickland v. Shearon,* 193 N.C. 599, 137 S.E. 803, cited and relied upon by the appellants, are not in point. These cases involve motions to set aside judgments based on facts wholly unrelated to the factual situation on the present appeal.

The judgment of the court below is

Affirmed.

JOHNSON, J., not sitting.

WILLIAM HENRY TYNDALL AND WIFE, VESTA GENORA TYNDALL, v. R. F. TYNDALL AND WIFE, CARRIE TYNDALL, P. A. TYNDALL AND WIFE, MABLE TAYLOR TYNDALL, SMITHIE MAY TYNDALL AND HUSBAND, EARL TYNDALL, AND HATTIE TYNDALL DAIL AND HUSBAND, A. B. DAIL.

(Filed 28 November, 1956.)

Vendor and Purchaser § 18—Where vendors refuse to give information peculiarly within their knowledge as to the purchase price, tender is unnecessary.

A contract to convey was predicated upon the purchaser's payment of one-fifth the encumbrances on the land and one-fifth the medical, hospital and funeral expenses of the vendors' grantors, who had reserved a life estate in themselves. Evidence of the contract and its due execution and that the purchaser, prior to the male grantor's death, requested information as to the amount due and was met by threat of assault, that less than a year after the male grantor's death, he requested statement of the amount due and received no response, and that thereafter the vendors sold to a stranger, is sufficient to repel nonsuit, since the evidence discloses that tender may have been useless, in which event it is not required by law.

JOHNSON, J., not sitting.

PARKER and BOBBITT, JJ., dissent.

APPEAL by plaintiffs from *Bone, J.,* 13 February, 1956 Civil Term, LENOIR Superior Court.

Civil action instituted 6 July, 1954, to recover damages for the alleged breach of the following contract:

"THIS AGREEMENT, made this 22nd day of November 1938, by and between R. F. Tyndall and wife, Carrie Tyndall, P. A. Tyndall and wife, Mable Tyndall, Smithy May Tyndall and husband, Earl Tyndall, and Hattie Tyndall Dail and husband, A. B. Dail, all of the County of Lenoir and State of North Carolina, parties of the first part, and Henry Tyndall and wife, Vesta Tyndall of the

County of Lenoir and State of North Carolina, party of the second part;

"WITNESSETH: That whereas A. E. Tyndall and wife, Emma Tyndall, have this day executed and delivered a deed of Gift to the parties of the first part, for and in consideration of the assumption by the said parties of the first part as Grantees under said deed, of the mortgage indebtedness due against the Homeplace of A. E. Tyndall and wife, Emma Tyndall, and the further assumption by the parties of the first part of all medical, hospitalization and burial expenses of the said A. E. Tyndall and wife, Emma Tyndall. And Whereas the party of the second part was financially unable to assume or pay his proportionate part of the said debts and future debts which may be incurred and whereas the said first parties to this Agreement desire that the said second party have an opportunity to acquire a one-fifth interest in said lands this day conveyed to the first parties only.

"NOW, THEREFORE, in consideration of the sum of $1.00 and other valuables the parties of the first part contract and agree with the party of the second part that upon the death of A. E. Tyndall and wife, Emma Tyndall, or at anytime prior thereto that the party of the second part pays a one-fifth part of all indebtedness now existing against the lands belonging to Emma Tyndall and pays a one-fifth part to all medical, hospitalization and funeral expenses which may hereafter be incurred by A. E. Tyndall and Emma Tyndall. That the parties of the first part will convey by deed to the second party herein a one-fifth undivided interest in said lands and it is understood and agreed by and between all the parties to this Agreement that in the event any party whether Grantee under the deed hereinbefore referred to or otherwise fails to pay his or her one-fifth part of all mortgage indebtedness, taxes, insurance, medical, hospitalization or funeral expenses which may be incurred now or hereafter by A. E. Tyndall and Emma Tyndall that such party will divest himself or herself by deed of his interest in said lands belonging to Emma Tyndall to such other parties to this Agreement who may pay their proportionate part of said expenses.

"TO THE TRUE AND FAITHFUL PERFORMANCE of the above stipulations the parties of the first part and the party of the second part have hereunto set their hands and seals the day and year first above written."

The contract was under seal and its execution duly acknowledged by all parties. The deed of gift referred to was executed by A. E. Tyndall and wife, Emma Tyndall, conveying described lands to their four chil-

dren other than the plaintiff, William Henry Tyndall. Emma Tyndall died in 1939. A. E. Tyndall died in May, 1953. Each reserved a life estate in the lands conveyed.

The plaintiff, William Henry Tyndall, testified in substance that he requested R. F. Tyndall (who acted for all defendants) for information as to the amount of encumbrances on the land and the amount of expenses that he had paid. This inquiry was made before the death of A. E. Tyndall. The inquiry was met by a threat of assault with a deadly weapon.

On 20 October, 1953, the plaintiffs served written notice an all defendants that they had elected to take under the contract and that they were ready, able and willing to pay one-fifth of the encumbrances and expenses, and requested statement of the amount due. To this notice there was no response. The plaintiffs introduced in evidence the admission in the defendants' answer that they had sold the entire tract of land to Rex Howard for $18,600. The evidence disclosed that the encumbrances amounted to about $1,300. The amount of other expenses incurred by the defendants is undisclosed.

The defendants admit the execution of the contract but set up as a defense (1) the contract was without consideration, (2) the plaintiffs failed to comply with the terms by paying or tendering any part of the encumbrances and expenses, (3) the re-assignment of the one-fifth interest by Rex Howard to the plaintiffs was a sham and made for the purpose of instituting this action.

At the close of the plaintiffs' evidence, judgment of nonsuit was entered, from which the plaintiffs appealed.

Lamar Jones and J. Harvey Turner, for plaintiffs, appellants.
Jones, Reed & Griffin for defendants, appellees.

HIGGINS, J. The only question presented by the appeal is the sufficiency of the evidence to survive the motion for nonsuit. The plaintiffs introduced the written contract. Their evidence tended to show that Emma Tyndall died in 1939 and E. A. Tyndall died in May, 1953. Before Tyndall's death the plaintiffs requested of R. F. Tyndall information as to the amount of encumbrances and expenses, and by way of reply received a threat of an assault with a deadly weapon.

The plaintiffs, on 20 October, 1953, served written notice on all defendants of their election to take their one-fifth share provided in the contract and that they were ready, able and willing to make the payments required. They asked for a statement of the amount thereof. The defendants did not reply to the notice. The contract provided for payment at the death of A. E. Tyndall and Emma Tyndall. The amount due for hospital, doctor bills and burial expenses could not be

determined until after the death of the survivor. William Henry Tyndall testified he made the request for information as to amount paid and the request was met with a threat of violence. The plaintiffs were entitled to the information requested. It was within the peculiar knowledge of the defendants. Their refusal may be considered evidence of their intention not to comply. Their sale and conveyance of the land, according to their own admission, after the plaintiffs' request for the statement had been refused, may also be considered as evidence of their intention not to comply. Where tender is obviously useless, it is unnecessary. *Millikan v. Simmons*, 244 N.C. 195, 93 S.E. 2d 59; *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E. 2d 503; *McAden v. Craig*, 222 N.C. 497, 24 S.E. 2d 1; *Chesson v. Container Co.*, 215 N.C. 112, 1 S.E. 2d 357; *Gaylord v. McCoy*, 161 N.C. 685, 77 S.E. 959.

It may be noted the contract required the plaintiffs to pay "a one-fifth part *to* all medical, hospitalization and funeral expenses which may hereafter be incurred by A. E. Tyndall and Emma Tyndall." It is possible that final determination of the amount of such expenses incurred by A. E. Tyndall could not be ascertained with certainty until claims were filed in the course of administering his estate. The contract does not seem to require installment payments on the part of the plaintiffs, at least in the absence of a demand. For these reasons it appears not to have been contemplated by the contracting parties that payments should be made *eo instante* the death of the surviving parent.

The plaintiffs introduced the contract, evidence of its execution, failure to perform on the part of the defendants, and damages resulting. Taking the evidence in the light most favorable to the plaintiffs, they are entitled to have the jury pass on the issues of fact involved. Of course, the defendants will have equal opportunity to present their defenses, including their challenge to the validity of the reassignment by Rex Howard. The judgment of nonsuit entered by the Superior Court of Lenoir County is

Reversed.

JOHNSON, J., not sitting.

PARKER and BOBBITT, JJ., dissent.

E. L. LOWIE & COMPANY v. R. T. ATKINS, TRADING AS ATKINS OIL COMPANY.

(Filed 28 November, 1956.)

1. Appeal and Error § 19—

Assignments of error may not be filed initially in the Supreme Court but must be filed in the trial court and certified with the case on appeal, G.S. 1-282, and assignments not so supported by the record will not be considered. Rule of Practice in the Supreme Court No. 19(3).

2. Same—

An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment itself. Rule of Practice in the Supreme Court No. 21.

3. Appeal and Error § 21—

An appeal is itself an exception to the judgment, presenting the question whether error of law appears upon the face of the record.

4. Same—

An exception to the judgment must fail if the record proper fails to disclose error, and where the judgment is supported by the verdict, errors in matters of law do not appear upon the face of the record.

JOHNSON, J., not sitting.

APPEAL by defendant from *Bickett, J.*, at April 1956 Term, of JOHNSTON.

Civil action to recover on contract for merchandise sold and delivered.

Defendant in answer filed denied indebtedness, and set up further defense which upon motion was stricken. And upon trial in Superior Court both plaintiff and defendant offered evidence,—defendant taking exception to denial of motions for nonsuit. Two issues were submitted to the jury, and were answered as here indicated: "(1) Did the plaintiff and defendant enter into a contract, as alleged in the complaint? Answer: Yes. (2) In what sum, if any, is the defendant indebted to the plaintiff? Answer: $1723.36."

Thereupon and in accordance therewith judgment was signed and entered, to which defendant excepted, and appeals to Supreme Court, and assigns error.

Wood & Spence for Plaintiff Appellee.
Lyon & Lyon for Defendant Appellant.

WINBORNE, C. J. At the outset, while defendant entered exceptions Numbers 12 and 37, respectively, to the action of the trial court in

denying his motions for judgment as of nonsuit made first when plaintiff rested its case, and renewed at the close of all the evidence, there is no assignment of error based on these exceptions. Hence they will be deemed to be abandoned. Rule 19(3) of Rules of Practice in Supreme Court, 221 N.C. 544, at 554.

In this connection it is noted that appellant debates in his brief these two exceptions. Suffice it to say, as declared in *S. v. Dew,* 240 N.C. 595, 83 S.E. 2d 482, assignments of error may not be filed, in the first instance, in this Court. They must be filed in the trial court and certified with the case on appeal. G.S. 1-282. Therefore these exceptions here present no question for this Court to consider and decide.

Moreover, there appear in the record of case on appeal approximately forty-one other exceptions, referred to mainly by number, grouped under heading "ASSIGNMENTS OF ERROR," none of which is sufficient in form to present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is, as is required by Rule 21 of the Rules of Practice in Supreme Court. See *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829, and cases cited. See also *Tillis v. Cotton Mills,* 244 N.C. 587; *Armstrong v. Howard,* 244 N.C. 598. Again it may be noted in respect to these exceptions that assignments of error may not be filed, in the first instance, in this Court. *S. v. Dew, supra.*

But Exception 44 purports to be directed to the entry of the judgment. And an exception to the judgment rendered raises the question as to whether error in law appears upon the face of the record. Indeed the appeal to the Supreme Court is itself an exception to the judgment, or to any other matter of law appearing upon the face of the record. See *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555; *Culbreth v. Britt,* 231 N.C. 76, 56 S.E. 2d 15, and cases cited; also *Gibson v. Ins. Co.,* 232 N.C. 712, 62 S.E. 2d 320; *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555; *In Re Blalock,* 233 N.C. 493, 64 S.E. 2d 848; *S. v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; *Cannon v. Wilmington,* 242 N.C. 711, 89 S.E. 2d 595.

In *Lea v. Bridgeman, supra,* opinion by *Ervin, J.,* it is said: "The exceptions to the judgment present only the question as to whether error appears upon the face of the record, and the exceptions must fail if the judgment is supported by the record," citing cases.

The record, in the sense here used, refers to the essential parts of the record, such as the pleadings, verdict and judgment. See *Thornton v. Brady,* 100 N.C. 38, 5 S.E. 910, and citations of it as shown in Shepard's North Carolina Citations. And a judgment, in its ordinary acceptation, is the conclusion of the law upon facts admitted or in some way established. *Gibson v. Ins. Co., supra.* Hence in the light of these principles, applied to the case in hand, manifestly the judgment is supported

by the verdict. And error in matters of law upon the face of the record are not made to appear.

For reasons stated there is in the judgment from which appeal is taken

No error.

JOHNSON, J., not sitting.

WILLBURN H. SCOTT v. BURLINGTON MILLS CORPORATION.

(Filed 28 November, 1956.)

Master and Servant § 6f: Pleadings § 19b—

A complaint alleging plaintiff's wrongful and malicious discharge from his job and wrongful blacklisting by defendant employer, but failing to allege that the discharge was in breach of any contract of employment, fails to state a cause of action for wrongful termination of the employment, since without a contract of employment a discharge is not wrongful, and therefore the complaint is not demurrable on the ground that it joined a cause of action for wrongful discharge with an action for blacklisting. G.S. 14-355.

JOHNSON, J., not sitting.

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

APPEAL by plaintiff from *Preyer, J.*, 30 April, 1956 Term, GUILFORD.

The complaint alleges (a) the residence of plaintiff, the corporate existence of defendant, and the location of its mills in North Carolina; (b) that plaintiff had worked for defendant for eight years prior to 6 January, 1955, and because of such length of service was paid extra compensation when working for defendant; (c) that plaintiff was an expert weaver and when at work earned $180 every two weeks.

Section 7 of the complaint alleges:

"That on the 6th day of January, 1955, through malice and ill will and for the purpose of making an example of the plaintiff, the said plaintiff was fired from his said job as a weaver and although the plaintiff had been working for the defendant for a period of eight years straight, his termination paper was marked 'unsatisfactory work.' That such layoff paper, or discharge paper, was false. That the said defendant used this plaintiff as a 'guinea pig' to try to scare and coerce other weavers whose records were not as good as this plaintiff's and such discharge was malicious and entered into wrongfully and in violation of the General Statutes of North Carolina."

Section 8 of the complaint alleges:

"That the said defendant has blacklisted the plaintiff and, although he is an expert weaver of silk and rayon, every place he has applied for a job refused to employ the plaintiff when inquiry is made and the said Burlington Mills report to the weavers trade that the work of the plaintiff was unsatisfactory. That such blacklisting is false, untrue and has caused this plaintiff great distress in body and in mind and has caused him to lose his earnings and also his right to work; and the said defendant, by word of mouth, through its agent and by its false entry in regard to the work of the plaintiff, has prevented the plaintiff from securing work of the same kind at other plants, and in particularly at other plants of this defendant in the State of North Carolina. That the conduct of the defendant is in direct violation of the General Statutes of North Carolina, Section 14-355, and this suit is brought against the defendant as provided under said section and this plaintiff is entitled to recover penal damage in a civil action against the said defendant.

"That by reason of the defendant wrongfully blacklisting this plaintiff and by word of mouth and by written communication, the defendant has prevented this plaintiff from securing work; he has been wrongfully and maliciously discharged from his job."

Plaintiff alleges that he has sustained damages in the amount of $25,000.

Defendant demurred to the complaint for that "there is a misjoinder of causes of action in that the complaint attempts to allege an action for wrongful discharge and an action for blacklisting in the same complaint against this defendant."

The demurrer was sustained and the action dismissed. Plaintiff appealed.

H. F. Seawell, Jr., for plaintiff appellant.

Brooks, McLendon, Brim & Holderness for defendant appellee.

PER CURIAM. The complaint nowhere alleges that the discharge was in breach of any contract of employment. Without such contract, a discharge is not wrongful. No cause of action has been stated because of the termination of the employment. *May v. Power Co.*, 216 N.C. 439, 5 S.E. 2d 308; *Howell v. Credit Corp.*, 238 N.C. 442, 78 S.E. 2d 146. As only one cause of action is alleged, the judgment sustaining the demurrer is

Reversed.

JOHNSON, J., not sitting.

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

STATE v. NATHANIEL EDDIE DUNN.

(Filed 28 November, 1956.)

Narcotics § 2—

Evidence that there was found in the glove compartment of defendant's car a glass tumbler, three hypodermic needles, a hypodermic syringe, gauze, and a small bottle of water labeled for use in injections, without finding any habit forming drugs and without evidence that the articles had been used or were possessed for the purpose of administering habit forming drugs, is insufficient to be submitted to the jury in a prosecution under G.S. 90-108.

JOHNSON, J., not sitting.

APPEAL by defendant from *Williams, J.*, May Criminal Term, 1956, of CUMBERLAND.

Criminal prosecution on bill of indictment charging that defendant, on 2 January, 1956, "unlawfully, willfully and feloniously did have and possess a hypodermic syringe and needle adapted for the use of habit forming drugs by subcutaneous injections, and *which was possessed for the purpose of administering habit forming drugs*, in violation of N. C. General Statute 90-108, . . ." (Italics added.)

Upon the jury's verdict of guilty as charged, judgment was pronounced imposing prison sentence. Defendant excepted and appealed, assigning errors.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

Nance, Barrington & Collier for defendant, appellant.

PER CURIAM. Defendant played the saxophone in the DeLesa Club band. While driving home, about 3:35 a.m., he "ran" a stop sign and shortly thereafter failed to stop for a red light. A State Highway Patrolman observed him, "blew his siren on him," and defendant stopped. Defendant exhibited his operator's license and registration card. He was arrested, indicted and tried for said traffic violations.

With defendant's permission, the officer searched defendant's car. He found in the glove compartment a glass tumbler, three hypodermic needles, a hypodermic syringe, gauze, and a small bottle of water

labeled "water for injections, used for the preparation of solutions for injections." No habit forming drugs were found.

The officer testified: "I asked the defendant what he was doing with that (the articles) in his car. He stated first that it was for penicillin, and I asked him the second time, and he stated that he did not even know it was in there." According to the officer's testimony, defendant stated further that he frequently permitted others to use his car.

The testimony of defendant tended to exculpate him. According to defendant, the officer asked him: "What do you do with this?" And his answer was, "Looks like you use it for penicillin"; because it looked like the same thing used when he was given injections in the army.

The only character evidence was to the effect that defendant's general reputation in the community was good.

There is no evidence that defendant knew that these articles were in the glove compartment unless an inference of such knowledge may be drawn from the fact that they were there. Be that as it may, there is no evidence that these articles had been used or were possessed for the purpose of administering habit forming drugs.

The evidence, when considered in the light most favorable to the State, as the Attorney-General rightly concedes, does nothing more than raise a suspicion that defendant may be guilty of the offence charged.

The defendant's motion for judgment of nonsuit, aptly made at the close of all the evidence (G.S. 15-173), should have been allowed. Hence, the judgment of the court below is

Reversed.

JOHNSON, J., not sitting.

VALLIE FULK THORPE v. ROBERT O. BURNS AND MARY H. BURNS T/A TERMINIX COMPANY OF NORTH CAROLINA.

(Filed 28 November, 1956.)

Courts § 4b—

Where the record supports the finding that notice of appeal to the Superior Court from a municipal-county court was not given within the time required by statute, order of the Superior Court affirming the judgment of the municipal-county court and dismissing the appeal will be sustained.

JOHNSON, J., not sitting.

APPEAL by defendants from *Preyer, J.*, 9 January, 1956 Civil Term, GUILFORD Superior Court.

Civil action instituted in the Municipal-County Court, Guilford County, on 7 July, 1955, for the recovery of $330.53 damages for breach of contract. The defendants did not answer, though duly served with summons and copies of the complaint. Judgment by default and inquiry was entered 16 August, 1955, and on 1 September, 1955, the court, after hearing evidence, on the inquiry as to amount of damages, adjudged the plaintiff recover of the defendant the sum of $330.53. On 1 September, 1955, the day of the inquiry, "without notice or knowing of the default judgments already entered in the cause, the defendants forwarded to the Municipal-County Court and caused to be filed . . . answer to the plaintiff's complaint." From the judgment on the inquiry, the defendants appealed to the Superior Court of Guilford County.

In the Superior Court the plaintiff filed a motion to dismiss the appeal on the ground, among others, that answer had not been filed and that notice of appeal was not timely given. Judge Preyer, after hearing, found facts in accordance with the plaintiff's motion and on 8 February, 1956, signed judgment affirming the judgment of the Municipal-County Court and dismissing the appeal. The defendants appealed to this Court, assigning errors.

Shuping & Shuping for plaintiff, appellee.
George M. Anderson for defendants, appellants.

PER CURIAM. The record supports the findings of Judge Preyer that notice of appeal to the Superior Court was not given within the time required by the statute. The order affirming the judgment of the Municipal-County Court and dismissing the appeal from that court was warranted by the findings and is in accordance with law.

Appeal dismissed.

JOHNSON, J., not sitting.

STATE v. OSCAR HOLDER (AND OTHERS NOT APPEALING).

(Filed 28 November, 1956.)

APPEAL by defendant Oscar Holder from *Gwyn, J.*, at 6 February, 1956, Criminal Term of GUILFORD.

STATE *v.* HOLDER.

Criminal prosecution upon bill of indictment No. 4140 charging defendants Oscar Holder and Roxie Holder, *alias* Roxie Cumbee, with felonious assault upon one E. H. Hennis, with a deadly weapon, to wit, a certain rock, with intent to kill, inflicting serious injury, not resulting in death, consolidated for trial with other bills of indictment, including No. 4139 charging E. H. Hennis with assault upon Oscar Holder with a deadly weapon.

Upon trial in Superior Court the case was submitted to the jury upon evidence offered, and under the charge of the court.

Verdict in No. 4140: Both defendants are guilty of assault with deadly weapon.

Judgment: As to defendant Roxie Holder, *alias* Roxie Cumbee, prayer for judgment continued; and as to defendant Oscar Holder, judgment is that he be confined in common jail of Guilford County for the term of twelve (12) months, to be assigned to work under supervision of the State Highway and Public Works Commission.

Defendant Oscar Holder appeals therefrom to Supreme Court and assigns error.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Adam Younce and T. Glenn Henderson for Defendant Appellant.

PER CURIAM. The evidence offered upon the trial below taken in the light most favorable to the State, is abundantly sufficient to take the case to the jury, and to support the verdict returned by the jury, on which judgment rests.

And upon consideration of all exceptions taken in the course of the trial, and to the charge of the court, as a whole, prejudicial error is not made to appear. Hence in the judgment from which appeal is taken there is

No error.

JOHNSON, J., not sitting.

ODELL WEAVIL, ADMINISTRATOR OF DENNIS FREEMONT WEAVIL, DEC'D., v. C. W. MYERS TRADING POST, INCORPORATED.

(Filed 12 December, 1956.)

1. Automobiles § 10—

A motorist is required, in the exercise of reasonable care, to keep a proper lookout in his direction of travel, and while he is not required to anticipate that a truck will be standing on the highway without flares or other warning signs of danger prescribed by statute, he remains under duty to proceed as a reasonably prudent person would under the circumstances to avoid collision with the rear of such truck.

2. Automobiles § 9—

A red light is recognized by common usage as a method of giving warning of danger during hours of darkness, and a driver is required in the exercise of due care, upon seeing a red light, to heed its warning and reduce his speed.

3. Automobiles § 8—Whether red flashing lights were turn-signal lights held for jury upon the evidence in this case.

The evidence disclosed that the main lighting fuse in defendant's truck blew out, that the driver stopped the truck and immediately knocked on the flashing red signal lights on the front and rear of the left of the truck, which lights were round without signal arrows. There was no evidence that the signal device was of a type approved by the Department of Motor Vehicles. G.S. 20-154. *Held:* Plaintiff's contention that the truck gave the statutory left-turn signal is not supported by the evidence, and the conflicting contentions of the parties upon the evidence as to whether the red signal lights flashing on and off were sufficient to indicate a left turn or merely indicated the presence of the vehicle on the highway at that particular point, were properly submitted to the jury in the charge of the court.

4. Automobiles § 14—Right of driver of following vehicle to pass to the right of a vehicle in front of him on highway.

Notwithstanding the provisions of G.S. 20-149, a following vehicle may pass a vehicle in front of it on the highway on its right side when the driver of the front vehicle has given a clear signal of his intention to make a left turn and has left sufficient space to the right to permit the overtaking vehicle to pass in safety, and the circumstances are such that ordinary care dictates such course in order to avoid a collision. But this rule does not apply when the driver of the front vehicle has stopped and given no clear signal of his intention to make a left turn, but merely has red lights flashing on and off on the left rear and left front of his vehicle, in which instance the driver of the overtaking vehicle, in the exercise of due care, should approach with his automobile under control and reduce his speed or stop, if necessary, to avoid injury.

5. Automobiles § 46—

The charge of the court upon the evidence in this case as to whether flashing signal lights on the left rear and left front of defendant's stationary truck were left-turn signals or merely warning signals of the presence

of the truck on the highway, together with the law applicable to the duty of a motorist approaching from the rear of such vehicle, *is held* without error.

6. Automobiles § 10—

The charge of the court on the rule that the inability of a motorist, traveling within the statutory maximum speed, to stop before hitting a stationary vehicle without lights ahead of him on the highway, is not contributory negligence *per se, is held* without error, construing the charge contextually. G.S. 120-141(e).

7. Appeal and Error § 19—

An assignment of error must present a single question of law for consideration by the Court.

8. Appeal and Error § 42—

A charge must be read as a composite whole and not disjointedly.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Patton, Special Judge,* June Term 1956 of FORSYTH.

Civil action by administrator to recover damages for an alleged wrongful death.

The jury found for its verdict that plaintiff's intestate was killed by the actionable negligence of the defendant, and that plaintiff's intestate by his own negligence contributed to his death. Judgment was rendered in accordance with the verdict.

From the judgment, plaintiff excepts and appeals.

Deal, Hutchins & Minor for Plaintiff, Appellant.
Jordan & Wright for Defendant, Appellee.

PARKER, J. This is the second time this case has been before the Court. The first appeal was from a judgment sustaining a demurrer to the complaint. The judgment was reversed. *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733.

The plaintiff has appealed a second time, and his assignments of error, except formal ones, are to the charge of the court alone.

About 7:00 p.m. on 26 November 1954, a dark night, Zachary Battle, an employee of defendant and on his employer's business, with Eugene Davis riding with him, was driving to Winston-Salem on State Highway No. 311 at a speed of about 35 miles per hour, a truck of the defendant loaded with lumber about 10 feet high. The truck was a 1949 Reo with a 20 feet bed on it, steel trimmings, and a flat wooden floor. According to a witness for the plaintiff, the load of lumber extended 5 feet or more behind and beyond the body of the truck. Neither a red flag nor a red

light was displayed at the end of the load. The end of the load had no reflectors. Zachary Battle and Eugene Davis were the only eye witnesses to the collision, except plaintiff's intestate. Battle and Davis were examined adversely by plaintiff before trial, and at the trial plaintiff introduced their examinations in evidence. The head lights, tail lights and clearance lights worked on the same fuse. As Battle was driving along the road with his head lights, tail lights and clearance lights on, the main fuse blew out, and his head lights, tail lights and clearance lights went out. Battle stopped the truck in about two of its lengths. When the truck stopped, Battle saw no lights of a car approaching from the rear or meeting him from the front.

The truck had a signal light on each front fender, and two signal lights on the rear of the truck, one on each side. "The signal lights were on the frame of the truck, right on the side . . . they were flush with the back end of the steel bed." The signal lights were on a different fuse from the head lights, tail lights and clearance lights. The signal lights could only be turned on by knocking them on, and could only be turned on one side at the same time.

When the truck stopped, Battle immediately knocked on his left-turn signal lights, because he did not know where his truck was on the highway, but did know the left-hand side of it was farther on the highway than its right-hand side. He also testified he knocked on the left-turn signal lights, so people coming could have some light. He further testified he did not intend to turn to the left with his stopped truck, although a left-turn signal indicates a left turn: "that is what it is supposed to be." Before the truck stopped, Eugene Davis jumped off it with a flare, ran down the highway in front of it about 200 feet, and placed the flare on the highway. As he started back to the truck the collision occurred. Davis testified that before the collision occurred he saw the truck's left-turn signals flashing for a left turn. Battle got a flare, and, as he was getting out of the truck, he saw a flash of light in his rear view mirror, heard something "rip" that sounded like brakes, and an automobile driven by plaintiff's intestate crashed into and under the rear of the truck. That was about a minute after the truck's head lights, tail lights and clearance lights went out. No car was approaching the stopped truck from its front at the time of the collision. A piece of lumber from the rear end of the truck penetrated the windshield of the automobile driven by plaintiff's intestate, and practically decapitated him, causing almost instant death. Plaintiff's intestate had the lights of his automobile on.

State Highway Patrolmen E. W. Mabe, the sole witness for the defendant, examined the lighting system of the truck at the scene shortly after the collision. He testified: "I saw a light which was located on the left front fender of the truck; at the time I arrived it was function-

ing. The light located on the left front fender of the truck was a 4-inch-in-diameter light, round, with an amber plastic face on the front, in the direction of the front of the truck, and a red plastic lens that was facing the rear of the truck. I saw no arrow or other directional device whatsoever on that light. It was just a round red light when viewed from the rear, which flashed on and off . . . The signal lights in the rear of the truck on the side of the truck did not have any arrow pointing one way or the other; but they did indicate, when they flashed, a turn on the side the light was on, just like the front one indicated. If the left one was on, it indicated a left turn, and if the right one was on, it indicated a right turn."

Patrolman Mabe further testified substantially as follows: The concrete pavement of the highway where the truck stopped was 22 feet wide. The truck stopped on its right-hand side of the pavement with the left rear of the truck about a foot and a half to the right of the center line on the highway. There were three feet of driveable space on the right shoulder beside the stopped truck. South of the stopped truck and behind it the highway was straight and approximately level for about 800 to 1,000 feet, and to the North of the truck it was straight and about level between 350 to 400 feet. Single wheel skid marks for a distance of 39 feet led up to the rear wheels and front wheels of plaintiff's intestate's automobile at the scene of collision.

One of the allegations of negligence in the complaint is that Zachary Battle, when he stopped the truck, turned on his left-turn signals indicating his intention to make a left turn from the highway, though he had no intention of doing so, making it dangerous for plaintiff's intestate to pass the truck on its left, and forcing plaintiff's intestate to turn back on his right side of the highway, thus setting a trap for plaintiff's intestate from which it was impossible for him to extricate himself, which negligence was a proximate cause of his death. The answer alleges that, when Battle stopped his truck, he turned on the left-turn electrical signal lights on the truck; and the answer in alleging further defenses states, when the truck stopped Battle switched on the left-turn signal lights, thereby causing a flashing red light to be emitted from both the left-hand rear and left-hand front portions of the stopped truck.

Plaintiff's first assignment of error is based upon his Exceptions 1, 2, 3, 8 and 9. All these Exceptions have reference to the charge in respect to the signal lights on the stopped truck. Exception 1 is to the part of the charge in quotation marks that the defendant has offered evidence tending to show that, as soon as the truck stopped, Battle turned on the signal lights, "that it was not a signal light indicating a left-hand turn, but was only a flashing light."

The court charged as follows:

"(Now, there has been argument in this case and evidence tending to show that Battle, the operator of defendant's vehicle, when he stopped, turned on signals that were not operated by the main lighting mechanics of the vehicle, the plaintiff contending that he turned on a left-hand turn, a directional signal; the defendant contending that he only turned on a flashing light which would notify vehicles coming from both ways that he was there).

"Now, if you find from this evidence that the signal which he turned on was a directional signal, indicating a left-hand turn, then that would have been an indication to a person or operator of a vehicle coming from behind that he intended to turn left, and such person coming from behind had a right to rely upon that action, that he was intending to turn from a direct line to the left.

"(On the other hand, if you find that it was not a directional signal, indicating a left-hand turn, but was only a flashing signal, indicating the presence of the vehicle on the highway at that particular point, then a person coming from behind would have been required, under the law, to bring his vehicle under control and stop, or, in the exercise of ordinary care, to pass to the left and go on)."

Plaintiff's Exception 2 is to the first part of this excerpt from the charge in parentheses: his Exception 3 is to the last part in parentheses.

Plaintiff's Exception 8 is to the following part of the charge in parentheses, which immediately followed a part of the charge that gave plaintiff's intestate the benefit of the principle of a man confronted with a sudden emergency:

"And if you should find from this evidence that the vehicle of the defendant was sitting on the main-traveled portion of the highway on the right-hand side of the center line, with a directional signal indicating a left-hand turn, then, under the law, the deceased, Weavil, would have not been required to turn to the left and undertake to pass on the left, with the truck indicating a left-hand turn. (But, if you should find that the light on the defendant's truck—if you find there was one—was only a flashing signal, indicating its presence in the highway, and not a signal indicating a left-hand turn, then he would have been required, in the exercise of due care, to bring his vehicle under control and stop and avoid colliding with the defendant's truck)."

Plaintiff's Exception 9 is to this part of the charge in parentheses:

"Now, in Issue 2, if the defendant has satisfied you, from the evidence and by its greater weight, that Dennis Freemont Weavil, in the operation of his vehicle, was negligent in that he failed to keep a proper lookout in the direction in which he was traveling, or failed to keep his vehicle under reasonable control; or operated it at a speed greater than was reasonable and prudent under the circumstances; or if he saw the vehicle of the defendant in front of him and failed to bring his vehicle under control and stop, if necessary, to avoid colliding; (or if the defendant's vehicle was emitting a flashing signal, indicating that it was there, rather than a left-hand turn, and he failed either to stop or to pass at least two feet on the left-hand side of the defendant's vehicle)."

On a dark night defendant's truck, due to the head lights, tail lights and clearance lights suddenly going out by reason of a blown fuse, was stopped on its right-hand side of the 22 feet wide concrete pavement of the highway with its left rear about a foot and a half to the right of the center line on the highway. When these lights went out, there were no lights of a car approaching or coming from behind. Immediately upon the stopping of the truck, the driver knocked on its left-turn signals. The truck was then standing on its right side of the highway with its left-turn signal lights flashing red on and off. These signal lights had no arrow or other directional device. The highway behind the truck was straight and approximately level for about 800 to 1,000 feet. Plaintiff's intestate, driving his automobile, approached the stopped truck from the rear. His lights were on, and he was meeting no vehicle.

Plaintiff's intestate was not required to foresee or anticipate that a truck would be stopped and left standing on the traveled portion of the highway ahead of him, partially blocking it, without the flares or other warning signs of danger prescribed by our statutes, but this did not relieve him of the duty of exercising reasonable care, of keeping a proper lookout, and of proceeding as a reasonably prudent person would under the circumstances, to avoid collision with the rear end of a motor vehicle stopped or standing on the highway ahead. *Dawson v. Transportation Co.*, 230 N.C. 36, 51 S.E. 2d 921; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251.

"While the plaintiff had the right to assume that other motorists would not obstruct the highway unlawfully, and would show the statutory lights if they stopped, he could not for that reason omit any of the care that the law demanded of him." *Steele v. Fuller*, 104 Vt. 303, 158 A. 666.

Motorists on the public highways have equal and reciprocal rights to the use thereof. The legal standard of care required of them is unvarying and alike at all times—that of a reasonably prudent man

under the circumstances. *Kellogg v. Thomas,* 244 N.C. 722, 94 S.E. 2d 903; *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383.

We said in *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330: "It is the duty of the driver of a motor vehicle not merely *to look* but *to keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen."

There is nothing in the evidence to show that plaintiff's intestate, as he approached the truck standing in the highway ahead, could not see all that is ever visible on an automobile ahead stopped or standing in such a condition on a dark night. As he approached, on the left rear of the truck and on its left fender were red signal lights flashing on and off. A red light is recognized by common usage as a method of giving warning of danger during hours of darkness, for instance of excavations in the highway, of road barricades, of an automobile standing on the highway, or of other objects or conditions on the highway, that constitute a menace to travellers, and a driver on seeing a red light ahead in the highway is required in the exercise of due care to heed its warning. *James v. White Truck & Transfer Co.,* 1 Cal. App. 2d 37, 36 P. 2d 401; *Martin v. Puget Sound Electric Ry.,* 136 Wash. 663, 241 P. 360; Blashfield's Cyclopedia of Auto. Law and Practice, Per. Ed., Vol. 2A, sec. 1225.

In *James v. White Truck & Transfer Co., supra,* the Court said: "Appellants suggest that a motorist observing a red light ahead would assume or believe that it was attached to a moving vehicle, and therefore entitled to some other warning of a stationary object. We cannot give assent to this contention, nor approval to the doctrine involved in the suggestion. Whether the red light is on a swift or slow moving vehicle, or on a stationary obstruction, from the time it is first observed, it conveys the information of danger and the observer is bound to heed its warning."

In *Martin v. Puget Sound Electric Ry., supra,* the Court said: "It is not the rule that a driver of an automobile must stop his automobile or check his speed every time he sees a red light on the highway, at risk of being chargeable with negligence. Whether he is so negligent by not so doing must always depend upon the circumstances. While a red light is a signal of danger, it is also a signal that usually points out the place of danger. If it is at one side of the highway, an approaching driver has the right to assume that it marks the limit of danger, and that the other side of the highway is clear. It is only when the light blocks the highway, or is so placed as to indicate that the passage is so narrowed as not to afford a safe passage within the speed limit, that he is chargeable with negligence if he does not approach with his vehicle under control."

In the instant case the plaintiff contended that the driver of the truck, when he stopped, knocked on left-turn signal lights indicating a left-hand turn of the truck. The defendant contended that the signal lights did not indicate a left-hand turn, but they were only flashing lights. It is plain from the court's charge that such was the theory of the trial. It seems that both contentions find support in the reasonable inferences to be drawn from the evidence. The opinions of the witnesses were inferences they drew from the evidence. There is no evidence, however, that the mechanical or electrical signal device on defendant's truck was a device of a type approved by the Department of Motor Vehicles for use in giving the signals for starting, stopping, or turning as prescribed by G.S. 20-154. *Banks v. Shepard,* 230 N.C. 86, 52 S.E. 2d 215. Plaintiff's contention in his brief that the truck gave a *statutory* left-turn signal is not supported by the evidence. Whether, according to the evidence, the red signal lights on the truck flashing on and off were sufficient to indicate a left turn of the truck was for the jury to decide.

It was the duty of plaintiff's intestate to keep a proper lookout ahead in the direction he was travelling, to watch out for signals from the driver of any vehicle ahead to turn, stop or start, to give due regard to them, and in the exercise of ordinary care be prepared to avoid danger in case of any movement of the vehicle ahead which is properly signaled. *Cohen v. Ramey,* 201 Ark. 713, 147 S.W. 2d 338; *Wright v. Clausen,* 253 Ky. 498, 69 S.W. 2d 1062, 104 A.L.R. 480; *Cook v. Gillespie,* 259 Ky. 281, 82 S.W. 2d 347; *Branstetter v. Gerdeman,* 364 Mo. 1230, 274 S.W. 2d 240; *Evans v. Alexander,* 168 Pa. Super. 481, 78 A. 2d 879; 60 C.J.S., Motor Vehicles, p. 747; Blashfield, Cyclopedia of Automobile Law and Practice, Per. Ed. Vol. 2, sec. 1123. The driver of the automobile behind in failing to observe plain turning or stopping signals given by the motorist ahead may be guilty of contributory negligence in the event of a collision and injury to himself. *Lawson v. Darter,* 157 Va. 284, 160 S.E. 74.

The truck in this case was standing still, not moving forward. G.S. 20-149 prescribes that a motorist overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof. This Court said in *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613—quoted in *Ward v. Cruse,* 236 N.C. 400, 72 S.E. 2d 835: ". . . notwithstanding the provisions of this statute (G.S. 20-149), a motorist may, in the exercise of ordinary care, pass another vehicle, going in the same direction, on the right of the overtaken vehicle when the driver of that vehicle has given a clear signal of his intention to make a left turn and has left sufficient space to the right to permit the overtaking vehicle to pass in safety." The courts generally hold a motorist on the road is bound to exercise ordinary care for his own safety under all the circumstances, and that the so-called law of the road, established by common

law or statute, is not an inflexible rule, the violation of which will necessarily render an offender guilty of negligence or contributory negligence, but, if ordinary care so dictates under the circumstances, he may, in order to avoid a collision, turn in violation of the ordinary rule of the road. *Ledbetter v. English,* 166 N.C. 125, 81 S.E. 1066; *Cooke v. Jerome,* 172 N.C. 626, 90 S.E. 767; Anno. 24 A.L.R. pp. 1304 *et seq.,* where the cases are cited.

The rule stated in *Maddox v. Brown, supra, Ledbetter v. English, supra,* and *Cooke v. Jerome, supra,* does not fit the exact facts here, but it would seem to lend support to the principle that a motorist may, in the exercise of ordinary care, pass or attempt to pass another vehicle headed in the same direction, but standing still on the highway, on the right, when the driver of the vehicle ahead has given a clear signal of his intention to make a left turn and by such signal the motorist behind had reasonable grounds to believe, and believed, that the safe way to do was to pass or attempt to pass to the right, and it was unsafe to attempt to pass by going to the left, and there was sufficient space to the right to pass in safety. Under such circumstances it would not be negligence or contributory negligence upon the part of the motorist to pass or attempt to pass on the right. But where the driver of the stopped truck has given no clear signal of his intention to make a left turn, but the truck standing on the right of the highway merely has on the left rear and left fender a red light flashing on and off, it would seem that the driver of an automobile approaching at night from the rear, in the exercise of ordinary care, is bound to approach with his automobile under control, so as to reduce his speed or stop, if necessary, to avoid injury. See charge of trial court held without error in *Cooke v. Jerome, supra.*

Here plaintiff's intestate turned neither to the right nor to the left, but drove straight ahead into and under the rear of the truck stopped on its right side of the highway. It is attempted to justify this by showing it was necessary, owing to the conduct of the driver of the truck in turning on left-turn signals. As the evidence is conflicting as to whether the signals were clear left-turn directional signals, or merely a red light flashing on and off to give notice of the truck stopped in the highway, the court properly submitted the matter to the jury. We do not discover any error in the part of the charge embraced by plaintiff's assignment of error No. 1. The court in its charge as to the first issue clearly and correctly declared and explained the law arising on the evidence in the case as to the signal lights favorably to plaintiff. It would lengthen this opinion too much to set it out, and no exception is taken to that part of the charge. We think the charge as to the lights on the left side of the stopped truck presented the controversy to the jury

clearly and fairly, and gave the plaintiff all, if not more, than he was entitled to.

Plaintiff's assignment of error No. 2 is based upon his Exceptions 4, 5, 6 and 10. Exception 4 is to the part of the charge as to passing an automobile at least two feet to the left thereof, as required in certain cases by G.S. 20-149. Exceptions 5 and 6 are to the part of the charge as to stopping an automobile within the radius of the lights thereof, which inability to stop for one operating his automobile within the statutory maximum speed limits shall not be considered contributory negligence *per se,* as set forth in G.S. 20-141(e). Exception 10 is to the failure of the court in its charge to declare the law upon the evidence that defendant's driver made an abrupt stop without signal or warning thereof, its failure to declare the law upon the evidence that defendant's driver had room to pull off the hard-surfaced part of the highway on the dirt shoulder out of the way of oncoming traffic, etc. "An assignment of error must present a single question of law for consideration by the Court." *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. Assignment of error No. 2 presents several different questions of law for consideration, and is broadside in its nature. However, the plaintiff in his brief in discussing this assignment of error only refers to the part of the charge, to which he has excepted, which refers to G.S. 20-141(e). Yet the plaintiff admits in his brief that the court in its charge, immediately after the part of the charge which is the basis of his Exception 6, qualified this part of the charge excepted to by his Exceptions 5 and 6 by a statement "of the correct rule."

A charge must be read as a composite whole and not disjointedly. *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356; *Milling Co. v. Highway Com.,* 190 N.C. 692, 697, 130 S.E. 724. When the charge in this case is so read, prejudicial error sufficient to overthrow the trial below is not shown. All the assignments of error have been considered, and are overruled.

No error.

JOHNSON, J., not sitting.

RACHEL SMITH, EMPLOYEE, v. MECKLENBURG COUNTY CHAPTER AMERICAN RED CROSS, EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 12 December, 1956.)

1. Master and Servant § 53b—

The Workmen's Compensation Act contemplates but a single claim for disability for an injury regardless of whether the injury be total or partial, temporary or permanent. G.S. 97-2.

2. Master and Servant § 53a—

An agreement for the payment of compensation when approved by the Industrial Commission is as binding on the parties as an order, decision or award of the Commission.

3. Master and Servant § 53c—

The parties entered into an agreement for compensation for total temporary disability for a specified number of weeks, and the injured employee executed a receipt stating that claim for further compensation for change of condition would have to be made within one year from the date of final payment under the agreement. More than a year thereafter, upon discovery that the injury resulted in a permanent partial disability, the employee filed claim therefor. *Held:* The claim was barred by G.S. 97-47.

JOHNSON, J., not sitting.

APPEAL by defendants from *Rudisill, J.*, 26 March, 1956 Special Term, MECKLENBURG.

Plaintiff seeks compensation for permanent partial disability. Payment has been made for the period plaintiff was out of work.

A hearing was had by a deputy commissioner of the Industrial Commission in April 1955. He found these facts: Plaintiff was an employee of Mecklenburg County Chapter of American Red Cross. Travelers Insurance Company (hereinafter referred to as carrier) was its insurance carrier. Plaintiff and carrier filed with the Industrial Commission its Form 21, entitled "AGREEMENT FOR COMPENSATION FOR DISABILITY," by which the parties stipulated (a) that they were bound by the North Carolina Workmen's Compensation Act; (b) that plaintiff, on 2 October, 1952, at Cherry Point, N. C., sustained an injury by accident arising out of and in the course of her employment; (c) that her average weekly wage was $57.69; (d) that disability resulting from the injury began 4 November, 1952; (e) that "the employer and the insurance carrier hereby undertake to pay compensation to the employee at the rate of $30.00 per week beginning 11-11, 1952, and continuing for necessary weeks"; the first payment of compensation amounting to $60 was paid 29 November, 1952.

The deputy commissioner further found that said agreement was approved by the Industrial Commission on 9 December, 1952, and pursuant to said agreement, carrier paid to claimant compensation in the amount of $90. The deputy commissioner found that plaintiff, on 9 December, 1952, executed the Commission's Form 27. Form 27 bears the notation: "THE USE OF THIS FORM IS REQUIRED UNDER THE PROVISIONS OF THE WORKMEN'S COMPENSATION ACT." The instrument which plaintiff executed is as follows:

"CLOSING RECEIPT

NORTH CAROLINA INDUSTRIAL COMMISSION

This is to acknowledge that I have this date received from The Travelers Insurance Co. the sum of $30.00; that I have heretofore received weekly payments in the total amount of $60.00; that I have received a total of $90.00 as compensation for injury sustained on or about 10-2, 1952, while employed by The American National Red Cross.

I returned to work on 12-2, 1952, at a wage of $57.69 per week.

I understand that my compensation payments stop when I sign this receipt. I also understand that if my condition changes for the worse, I can claim further compensation only by notifying the Industrial Commission within one year from the day I received my last compensation payment.

Last compensation payment received on Dec. 9, 1952.

Witness:	Employee or Dependent:
s/Mrs. Mary E. Snyder	s/Rachel Smith
508 E. Morehead St.	2134 Crescent Ave.
Charlotte, N. C.	Charlotte, N. C.

Manual Classification Code No. 8742
Type of Disability (use Commission's Code) T
Number of Weeks Temporary Total 3
From 11-11-52 to 12-2-52
Number of Weeks Temporary Partial
From to
Number of Weeks Permanent Partial
From to

Amount of Compensation Paid	$90 00
Second Injury Fund (Major) (Minor)	$
Total Medical Paid (including nursing, hospital, drugs, etc.)	$310 55
Artificial Members	$
Funeral Benefits	$

Does this report close the case? (Yes or No):
Yes

The Travelers Insurance Company (Carrier)
s/A. C. Newson 2-12-53"

The commissioner found the injury of 2 October, 1952, was to plaintiff's right leg, that following the injury and until the hearing in April 1955, plaintiff had been under the care of an orthopedist, and she now has a permanent partial disability to her right leg as a result of the accident of October 1952. He found that plaintiff failed to file her claim with the Industrial Commission for permanent partial disability until after 9 December, 1953. The deputy commissioner thereupon concluded that plaintiff's claim for additional compensation was barred by G.S. 97-47. He denied the claim. Plaintiff duly excepted and appealed to the full Commission. The full Commission supplemented the findings of fact by the trial commissioner as follows:

"5. That the physician who was treating plaintiff advised defendants on May 26, 1954, he was still treating her for her injury; that defendants thereupon notified said physician they denied liability for this treatment on the grounds that the claim was barred by the statute of limitations.

"6. That as a result of the accident giving rise to this claim plaintiff has sustained a 20% permanent partial disability to her right leg."

Except as thus amended and supplemented, the Commission approved and adopted the findings of fact made by the deputy commissioner. A majority of the Commission (Commissioner Gibbs dissenting) concluded as a matter of law that G.S. 97-47 had no application to the facts of this case; that plaintiff was not seeking a review and alleged no change in her condition, that she simply stated that she had a 20% permanent partial disability to her right leg for which no compensation had been paid as provided in G.S. 97-31; that under the agreement of 26 November, 1952, the cause was still pending before it awaiting adjudication. It thereupon awarded compensation to plaintiff for the permanent partial disability found to exist. From this award defendants duly excepted and appealed to the Superior Court. The Superior Court overruled the exceptions filed by defendants to the findings of fact and the conclusions of law and affirmed the award made by the Industrial Commission. From the judgment entered thereon, defendants appealed.

Carpenter & Webb for plaintiff appellee.

Boyle & Potter for defendant appellants.

RODMAN, J. The judgment and assignments of error present for consideration this question: Does G.S. 97-47 bar plaintiff's claim for additional compensation?

The statute authorizes the Commission, on the application of a party in interest or on its own motion on the grounds of a change in condi-

tion, to review any award, increasing or diminishing the compensation to be paid. By express language of the statute "no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article . . ."

The Commission, in making the award for permanent partial disability, held that the filing of the "AGREEMENT FOR COMPENSATION FOR DISABILITY" tolled the statute of limitations (G.S. 97-24) and gave the Commission authority to hear the claim for permanent disability. It said: "The Commission thus obtained jurisdiction of this case until the matter had been adjudicated. One of the matters for adjudication in this case was the question of specific disability to the plaintiff and payment of compensation therefor under the provisions of G.S. 97-31. Such question was never adjudicated by the Commission, *nor settled by any agreement between the parties.* The question of specific disability was therefore pending before the Commission." (Emphasis added.)

The amount of compensation payable to an employee as a result of an accident is predicated on the extent of the disability resulting from the accident. Disability is defined by the statute as incapacity because of an injury to earn wages, G.S. 97-2. Disability may take any of several forms. It may be total or partial and may or may not be permanent. The statute fixes the *quantum* of disability for certain injuries, G.S. 97-31.

The common law gives but one right of action for injuries resulting from negligence. The cause of action cannot be split and recovery had for the various kinds of damage resulting from the negligence. *Eller v. R. R.*, 140 N.C. 140; *Underwood v. Dooley*, 197 N.C. 100, 147 S.E. 686; *Insurance Co. v. Motor Lines*, 225 N.C. 588, 35 S.E. 2d 879. An accident resulting in compensable injuries to an employee likewise gives only one right of action or claim to the employee, and any award made should, within the statutory limits, compensate for the disability, irrespective of the number of elements which go to make up the disability. Apparently the parties recognized this sound principle when they filed with the Commission the "AGREEMENT FOR COMPENSATION FOR DISABILITY." It is expressly stipulated that the parties "are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act." They agreed that employee sustained an injury by accident arising out of and in the course of employment and fixed the date of the accident. They stipulated the weekly wage and the date disability began. In response to the query as to the injuries sustained, they said: "Plane hit air-pocket throwing injured to floor." The agreement provided for compensation to the employee "beginning 11-11, 1952, and continuing for necessary weeks," clearly implying that compensation would be paid for the disability sustained in conformity with the pro-

visions of the Compensation Act. Manifestly, this was the understanding of the Commission when the agreement was filed with it. Otherwise, it would not have, on 9 December, 1952, approved the agreement. In fact, the Commission now says this agreement to pay compensation suffices to toll the statute of limitations for filing claims, G.S. 97-24, and is the basis on which it orders additional payment.

Plaintiff returned to work on 2 December, 1952, at the same wage she was receiving prior to the injury. She has worked continuously since 2 December, 1952. On 9 December, 1952, a week after she returned to work, settlement was made with her by the carrier for what it then thought was the extent of her disability. The carrier finished paying her for the time she lost from work. She executed the Commission's Form 27 designated "CLOSING RECEIPT." The receipt describes the injury using the Commission code as "T," meaning temporary total. It shows no compensation paid for permanent partial disability. It is stated in boldface type that payments stop when the receipt is signed, with the further statement that plaintiff understood that if her condition changed for the worse, further compensation could only be claimed by notifying the Commission within one year from the date of the last compensation payment. This receipt was duly and promptly filed with the Commission.

Plaintiff testified that she did not read the receipt before she signed it. It was handed to her by her employer. She was busy with other work. She is educated and concedes that she has the ability to read and understand what the receipt said. There is no suggestion of fraud or misrepresentation. It is manifest that none of the parties, on 9 December, 1952, realized that the injury which the plaintiff sustained would result in permanent disability. There is no specific finding on that fact, but there is nothing in the findings which negatives that conclusion.

As early as 1933 this Court held that where compensation for disability was paid pursuant to an agreement, the right to seek additional compensation was barred unless claim was filed, within one year from the last payment of compensation, as required by the statute, G.S. 97-47. *Lee v. Rose's Stores,* 205 N.C. 310, 171 S.E. 87. The *Lee* decision was approved in *Knight v. Body Co.,* 214 N.C. 7, 197 S.E. 563. These cases were followed in 1950 by *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109. It is there said: "An agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal." These cases were cited and approved this year. *Paris v. Builders Corp.,* 244 N.C. 35. We are dealing with a matter of statutory construction. Notwithstanding the lapse of time since the decision in *Lee v. Rose's*

Stores, supra, and the cases which have followed it, the Legislature has not modified the statute so as to affect those decisions and their application to this case.

Our decisions as to the effect of an agreement to pay compensation for disability are in harmony with decisions in other states. The Supreme Court of Vermont, speaking with respect to agreements between employer and employee, said: "The original agreement approved by the commissioner, being for an indefinite time, was equivalent to an award of such compensation . . ." *Bosquet v. Howe Scale Co.,* 120 A. 171; *Michelson v. Industrial Commission,* 31 N.E. 2d 940 (Ill.); *Hartford Accident & Indemnity Co. v. Industrial Com'n.,* 151 N.E. 495 (Ill.).

Practical considerations support the interpretation given the statute. The thirteenth biennial report of the North Carolina Industrial Commission shows 60,961 industrial injuries for the fiscal year 1952-1953 and 57,293 injuries for the year '53-'54. The cost resulting from these injuries was $7,389,338 in '52-'53, and $5,525,270 for '53-'54. In '52-'53 there were requests for hearings by the Commission in 920 cases, and in '53-'54 requests for hearings in 1,053 cases. It thus appears that more than 95% of all industrial injuries of the last biennium were disposed of without the necessity of calling on the Commission for formal hearings. The Commission was called upon to hold hearings in less than 20,000 cases from 1 July, 1929, through 30 June, 1954, approximately one-third of the industrial accident cases reported in a single year. If the theory on which the Commission proceeds in this case is a correct interpretation of the Act, it is doubtful if any employer or carrier would make settlement with an injured employee until a hearing was had and a formal award made. If the agreement to pay compensation leaves the case pending before the Commission to be heard five, ten, or twenty-five years hence at the option of the employee on the assertion that all of his disabilities were not included in the "AGREEMENT FOR COMPENSATION FOR DISABILITY" and "CLOSING RECEIPT," a Herculean problem would at once confront the Commission. Certain it is that employers and carriers would immediately demand that the extent of their liability be determined by a formal hearing at a time when testimony with respect to the scope and extent of the injuries would be available. The language of *Barnhill, J.* (later *C. J.*), in *Biddix v. Rex Mills, Inc.,* 237 N.C. 660, 75 S.E. 2d 777, is pertinent. He said: "The underlying spirit and purpose of the Act is to encourage and promote the amicable adjustment of claims and to provide a ready means of determining liability under the Act when the parties themselves cannot agree. The Industrial Commission stands by to assure fair dealing in any voluntary settlement and to act as a court to adjudicate those claims which may not be adjusted by the parties themselves."

To meet the problem, typified by this case, of changed physical condition following an award, our statute provides that the employee may, within one year from the final payment, make application for additional compensation because of a changed condition. Where the harmful consequences of an injury are unknown when the amount of compensation to be paid has been determined by agreement but subsequently develops, the amount of compensation to which the employee is entitled can be redetermined within the statutory period for reopening. It is a "change in condition" as the term is used in the statute. Speaking on this subject, the Supreme Court of Oklahoma, in *Skelly Oil Co. v. Standley*, 297 Pac. 235, said: "It is insisted that disability resulting from the injury to the arm was not claimed or made a part of the agreed statement of facts, and, therefore, the commission is without jurisdiction to act in review of the aggravated condition, as contemplated by section 7296, *supra*. This is tantamount to saying that the full effect of the accident must be known by the claimant and reported by him within the statutory period, and, if not, compensation cannot be allowed. Such a holding would be contrary to the spirit of the act as well as the liberal interpretation policy adopted. Moreover, section 7296 provides for a review of an award 'on the ground of a change in conditions.' A liberal interpretation impels us to hold that the change in condition, when proven, permits a continuing jurisdiction to end, diminish, or increase compensation previously awarded, even though the change in condition manifests itself in injuries not expressly enumerated in the original award, but yet attributable to the original accident."

In *Utah Fuel Co. v. Industrial Commission*, 159 P. 2d 877, 162 A.L.R. 1457, it appeared that one Gerard, an employee, sustained an injury while in the employment of plaintiff. It was anticipated that it would be necessary to amputate one of his legs. Settlement was made with him for the approximate amount he would be entitled to receive under the Workmen's Compensation Act. Subsequently it became necessary to amputate the other leg. The Supreme Court of Utah said: "Under these circumstances the commission did not err in assuming jurisdiction and granting a further award in consonance with the changed condition and in conformity with our Workmen's Compensation Act."

A copious note dealing with the statutes of the various states and the decisions thereunder with respect to the modification or extensions of awards because of changed conditions will be found in 165 A.L.R., beginning on p. 12.

The agreement for compensation for disability approved by the Commission and the payment made by the carrier followed by the execution of the closing receipt by plaintiff employee more than one year prior to the filing of application with the Commission for an addi-

tional award puts the case beyond the time given by G.S. 97-47 in which to claim additional compensation.

The judgment of the Superior Court affirming the award made by the Industrial Commission is

Reversed.

JOHNSON, J., not sitting.

FRED F. MURRAY, ADMINISTRATOR OF THE ESTATE OF JAMES C. MURRAY, DECEASED, v. E. W. WYATT, SR., AND E. W. WYATT, JR., AND JOE BOYLE.

(Filed 12 December, 1956.)

1. Appeal and Error § 51—

Where motion to nonsuit is made at the close of plaintiff's evidence and renewed after the close of all the evidence, only the second motion is to be considered on appeal. G.S. 1-183.

2. Trial § 22a—

Upon motion to nonsuit, the evidence, whether offered by plaintiff or by defendants, must be considered in the light most favorable to plaintiff.

3. Automobiles §§ 41k, 42k—

The evidence tended to show that intestate was directing the unloading or dumping of trucks at a "refuse pile," and was signalling the drivers before they made their respective movements, that he was standing at the rear of one truck when the operator of another truck backed into him and crushed him between the vehicles. There was conflict in the testimony as to whether the driver of the backing truck backed into intestate without having received signal. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence and did not establish contributory negligence as a matter of law.

4. Automobiles § 12—

Before backing a vehicle the driver is under duty in the exercise of due care to see that he can make the movement in safety.

5. Automobiles § 25—

Any speed may be unlawful and excessive if the operator of a motor vehicle knows or by the exercise of due care should reasonably anticipate that a person or vehicle is standing in his line of travel.

6. Automobiles § 36—

Where defendants allege that the operator of the vehicle causing the injury was backing at the direction of the injured person, by way of new matter constituting a defense, and by way of contributory negligence, the burden of proving such affirmative defenses is on defendants, the allegations being expressly denied in the reply.

7. Automobiles § 46: Negligence § 20—

The refusal of the court to give peremptory instructions on the issue of contributory negligence is proper when the determinative facts are in dispute.

8. Automobiles § 87: Trial § 23c—

The admission of testimony of witnesses that they did not see intestate, who was supervising the movement of the trucks, give defendant driver a signal to back and did not hear defendant driver give warning by sounding his horn will not be held prejudicial on the ground that the witnesses, from where they were, could not have seen what they testified they did see, when the evidence fails to prove such impossibility, and there is testimony, not objected to, of the same import, the probative value of the testimony objected to being for the jury.

9. Automobiles § 46: Trial § 31e—

Negative evidence may be for the court on the question of whether it has any probative value in determining the sufficiency of all the evidence to make out a case, but when the evidence, apart from such negative evidence, is sufficient to take the case to the jury, the trial court may not comment on the weight of the evidence, negative or otherwise.

10. Customs and Usages § 3—

Where the evidence discloses that truck drivers in the performance of their duties in dumping their trucks on a particular project had a safety rule to await a signal from the foreman before maneuvering their trucks to the "refuse pile," and that such practice was known to defendant driver, an instruction to the jury that if they found from the evidence that defendant driver moved his truck at the time in question without awaiting signal from the foreman, such failure would be negligence, is warranted.

JOHNSON, J., not sitting.

APPEAL by defendants from *Mallard, J.*, March Term, 1956, of WAKE.

Action to recover damages for the alleged wrongful death of James C. Murray on 16 July, 1953.

Plaintiff alleged that Murray's death was caused by the negligence of Boyle, defendants' employee. Defendants denied that Boyle was negligent and pleaded the contributory negligence of Murray in bar of plaintiff's right to recover.

Answering the issues of negligence and contributory negligence in plaintiff's favor, the jury awarded damages in the amount of $15,000.00.

The facts stated in the numbered paragraphs below are established by admission or stipulation.

1. Murray, truck and plant foreman for F. D. Cline Paving Company at its road mix plant near the Town of Youngsville, was engaged in the performance of his duties, which included the supervision and direction (1) of the movement of trucks engaged in the hauling of mixtures to and from said plant and the company's road construction project on U. S.

Highway #1, and (2) of the loading and unloading of said trucks at the plant site.

2. Defendants were engaged in the business of trucking and contract hauling, owning and operating a fleet of trucks.

3. Boyle was operating defendants' 1952 Chevrolet dump truck, engaged in hauling materials to and from said plant and said road construction project; and at or about 12 o'clock noon was operating said truck as agent, servant and employee of defendants.

4. The truck operated by Boyle, along with other trucks owned by defendants and operated by their employees, were returning from said highway construction project to said plant, hauling certain plant mixtures that had been rejected for use upon the highway.

5. Murray died "as the direct and proximate result of injuries received when Truck #2 (operated by Boyle) backed into Truck #1 (operated by Jones), pinning him between the trucks . . ."

Six witnesses gave testimony relevant to the circumstances of Murray's death. Perkins, Perry and Lambeth, offered by plaintiff, were employees of Cline on 16 July, 1953; and Boyle, Hutchins and Jones, offered by defendants, were employees (operating dump trucks) of defendants on that date.

The plant site was a big clearing. Bulldozers had pushed trees off in all directions. Perkins operated a tractor with a pan attached. His job was to strip the top soil and put it on a big pile near the mix plant, for use with stone in the mix plant. The mix plant was set up in the middle of the clearing.

The "refuse pile" was southwest of the "topsoil pile" and of the mix plant. It was composed of mixtures hauled to the road construction job and rejected. There had been no "refuse pile" prior to 16 July, 1953. The first "refuse" was dumped about 9 to 9:30 that morning. During the morning several of defendants' trucks had dumped rejected materials there, under the direction of Murray. When Murray was killed, the "refuse pile" was three feet high, fourteen yards each way.

About 12 o'clock noon, certain of defendants' trucks, loaded with rejected materials, returned to the plant site to dump their loads on the "refuse pile." According to Jones, four trucks, identified by the names of the respective drivers, came onto the plant site in this order: the Hawks truck, the Boyle truck, sometimes referred to as Truck #2, the Jones truck, sometimes referred to as Truck #1, and the Hutchins truck. It appears that all of the trucks, in the area east of the "topsoil pile" and mix plant, proceeded south until they got beyond the "topsoil pile" and mix plant; but thereafter different courses were taken by the Boyle, Jones and Hutchins trucks. Hawks, according to Jones, "was on ahead of all of us." It may be inferred from his testimony that Hawks had

dumped his load before the other three reached the immediate vicinity of the "refuse pile."

Upon reaching this area, Jones turned to his right, west, and stopped first on the east side of the "refuse pile." Then, according to Jones, Murray, who was then about 20-30 feet from his truck, told him "to pull on up and unload." Thereupon Jones drove up, then backed his truck against the "refuse pile." When he stopped, the Jones truck faced north. According to Jones, Murray "was standing there beside my truck . . . telling me what to do with my ticket . . . walked to the back of my truck hollering to . . . Hawks what was leaving, telling him what to do with his ticket." When Jones looked back, so he testified, "the truck backing down east struck him and pinned him between" the Jones truck and the Boyle truck. The Jones truck had not dumped its load.

While these events were in progress, Boyle had taken this course: He did not turn right, west, until he got beyond the "refuse pile." He then turned, went around the south end of the "refuse pile" and thence north along the west side thereof. When he stopped the Boyle truck faced west; and some 30 feet east of the rear of his truck, downgrade, was the northwest portion of the "refuse pile."

Hutchins, so he testified, followed Boyle around the south end of the "refuse pile" and to the west side thereof, but stopped some 50 yards behind him. As Hutchins put it: "I had stopped because I was waiting for Joe (Boyle) to get his signal then I was going to pull up. I was waiting for the signal to pull in there. I would not have pulled in had no signal been given to me. I would have stayed right there where I was and where I did stay."

As indicated, much of the foregoing is from the testimony of defendants' witnesses. Plaintiff's principal witnesses gave testimony, in substance, as set out below.

Perkins testified, in substance, as follows:

He had just dumped a load on the "topsoil pile." On his way down the "topsoil pile" he observed the trucks some 100 yards to the south. "Not knowing exactly what it was all about, I stopped the tractor just to look and see what was going on." His seat on the tractor was some five feet above the ground. ". . . I could see very clearly everything that was in my view out front." His tractor then faced west.

He saw Murray walk to the front of the truck that faced north and stand there. Then Murray walked towards the tail end of that truck. He (Perkins) could see underneath the bed of the truck, "little above knee high." Murray, standing with his face towards Perkins, held up his hand and gave directions to *this driver* to dump his load. "At the same time I saw a truck with the back coming towards Mr. Murray's back." The truck facing north was standing still. Murray was pinned

between the tail gates of the backing truck and the standing truck. He was "hung" between the two trucks.

He ran down the hill. The boys were hollering: "Pull up, pull up, pull up. You have a man pinned in here." The motor of the Boyle truck was not running. "I heard the truck crank up and instead of pulling forward it lurched backwards and Mr. Murray's feet flew off the ground, and this truck finally pulled up and Mr. Murray fell to the ground. Mr. Murray got up and fell all in the rock pile."

Further testimony by Perkins, admitted over defendants' objections, tended to show: that the plant foreman gave directions with reference to loading and unloading the trucks; that the practice at this plant site with reference to the backing of trucks into position for loading and unloading was to back when motioned to do so and to stop to dump his load when the person giving directions "put his hand up in the air"; and that this practice was followed at this plant site from 13 May, when he started to work there, until Murray's death.

Perry testified, in substance, as follows:

His job was to operate the "dozer" at the mixing plant. He was working on the "dozer," some 75-100 yards from the "refuse pile," when the Jones truck came in. Murray was riding on the running board. When the Jones truck came to a stop, Murray got off, paused at the door of the truck where the driver was, then left and walked down to the rear of the Jones truck, then turned left and faced back towards the front end of the Jones truck.

When the Boyle truck began backing, Murray was right at the corner. "I would say that Truck #2 backed about 30 feet before it came into contact with the rear of Truck #1." When Truck #2 drove off, he saw Murray fall to the ground. He then went to Murray.

Other evidential facts will be stated in the opinion.

Defendants alleged in substance that Boyle backed his truck in accordance with signals and instructions given him by Murray; that Murray left the place of safety from which he had given said signals and instructions to Boyle and moved quickly to a position directly in the path of the backing Boyle truck, but Boyle had no knowledge or notice that Murray had done so; and that Murray's negligence in so doing was the cause of his fatal injuries. Some of defendants' evidence, taken in the light most favorable to them, tends to support these allegations.

Judgment for plaintiff in accordance with the verdict, was signed and entered. Defendants excepted and appealed. They present assignments of error 1-62, both inclusive, based on exceptions of corresponding numbers, for our consideration.

Thomas A. Banks and William T. Hatch for plaintiff, appellee.
Smith, Leach, Anderson & Dorsett for defendants, appellants.

BOBBITT, J. Defendants offered evidence. Hence, the only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. G.S. 1-183; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209.

In determining its sufficiency for submission to the jury, the evidence, whether offered by plaintiff or by defendants, must be considered in the light most favorable to plaintiff. *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676; *Williamson v. Clay*, 243 N.C. 337, 90 S.E. 2d 727. Under the rule stated, there was no error in submitting the case to the jury.

There was plenary evidence that Murray (with his back towards Boyle), and the Jones truck, were standing at the north end of the "refuse pile" directly in the path of the Boyle truck while it backed downgrade and pinned Murray between the two trucks. Moreover, the evidence, including Boyle's testimony, tended to show that, while backing, he could not see what was behind him; and that Boyle gave no signal by horn or otherwise before he started to back or while backing.

In view of the evidence that both Murray and the Boyle truck were in fact directly behind him, it was for the jury, upon all the evidence, to say whether Boyle failed to use due care in backing his truck without first exercising due care to ascertain whether he could do so without striking Murray or the Jones truck. *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332. There is little difference between backing a truck when you cannot see what is behind you and in driving forward when blindfolded.

Conceding, as contended by defendants, that the Boyle truck moved at "a normal speed for backing up," there was evidence of a special hazard. See: G.S. 20-141(a)(c); *Baker v. Perrott*, 228 N.C. 558, 46 S.E. 2d 461. Any speed may be unlawful and excessive if the operator of a motor vehicle knows or by the exercise of due care should reasonably anticipate that a person or vehicle is standing in his line of travel.

As indicated above, defendants, by way of new matter constituting a defense (G.S. 1-135(2)) and by way of contributory negligence (G.S. 1-139), alleged that Boyle backed his truck as directed by Murray. The burden of proving such affirmative defense was on defendants. *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742. The same rule applied to defendants' plea of contributory negligence. *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326, and cases cited. It is noted that these allegations were expressly denied in plaintiff's reply thereto.

Defendants' said allegations, and *defendants' evidence* in support thereof, constituted the backbone of their defense. The jury was at

liberty to reject them and did so. Certainly, the *undisputed* evidence here, taken in the light most favorable to plaintiff, did not establish plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion could be drawn therefrom. *Dennis v. Albemarle*, 243 N.C. 221, 90 S.E. 2d 532.

Nor did the court err in refusing to give defendants' requested peremptory instruction, to the effect that they would answer the contributory negligence issue, "Yes," if they found the facts to be as all the evidence tended to show. The court did instruct the jury that if they found from the evidence and by its greater weight, first, that Murray was negligent "in that he failed to see what he should have seen, that he failed to keep a proper lookout and failed to exercise proper care for his own safety or that he signaled the driver to back in there and then stepped into the way of it or that he failed to keep looking and seeing what he would have seen," and second, that such negligence on the part of Murray was a proximate cause of Murray's death, they would answer the contributory negligence issue, "Yes." The instructions given were in substantial compliance with the requirements of G.S. 1-180.

Concerning the testimony of Perkins and of Perry, defendants insist that, from where they were, they could not have seen what they testified they did see. It is elementary that the probative value of their testimony was for the jury.

Even so, defendants contend it was error to permit Perkins and Perry to testify that they did not see Murray give any signal to Boyle and did not see Boyle give any signal, by hand, horn or otherwise, before or while he backed his truck. As to the latter, Boyle made no contention that he gave any signal. As to not seeing a signal by Murray, the gist of the testimony of Perkins and of Perry was that Murray was dealing with Jones, at his truck, facing away from Boyle, when Boyle started and continued to back his truck. And Jones testified, without objection, as follows: "I did not at any time see him turn his face in the direction of the truck of Joe Boyle, or give any signal in that direction whatsoever. I did not hear the sound of any horn or signal from the truck of Joe Boyle as it backed towards the rear and into the rear of my truck."

Defendants insist further that the court, even in the absence of special request, should have instructed the jury specifically "concerning the probative value, weight or effect of 'negative' testimony." Neither defendants' assignment of error nor their brief advises us as to the instructions they considered appropriate. In some cases, where defendant's motion for judgment of nonsuit turns on the sufficiency of certain negative evidence to take the case to the jury, the court must say *as a matter of law* whether such negative evidence has *any* probative value. *Johnson & Sons, Inc., v. R. R.*, 214 N.C. 484, 199 S.E. 704. But when

the evidence, apart from such negative evidence, is sufficient to take the case to the jury, the rule is that the trial court may not comment on the weight of evidence, negative or otherwise. *Carruthers v. R. R.*, 218 N.C. 49, 9 S.E. 2d 498. The decision in the *Carruthers case* was reversed on rehearing, 218 N.C. 377, 11 S.E. 2d 157; but this was on the ground of invited error, that is, the erroneous instructions were prepared by appellant and given by the court at his specific request. On rehearing, the Court adhered to the law as stated in the original opinion.

The defendants insist that the court erred in instructing the jury as follows:

"Gentlemen, I instruct you that if you find that there was an established practice pertaining to the manner of moving motor vehicles at that mixing plant site and that such practice was reasonable and that such practice was for the reasonable safety of those engaged in working thereon and that such practice required the operators of motor vehicles thereon to await a signal from the foreman before moving thereon, and that such practice was known to the said Joe Boyle, or in the exercise of reasonable care, should have been known by him, then the Court instructs you it would have been the duty of Joe Boyle to abide by signals from the foreman and failure so to do would be negligence."

As indicated above, Perkins testified to the existence of such a practice. But, apart from his testimony, there is ample evidence thereof. Indeed, Boyle testified that he pulled up and waited for instructions from Murray. On cross-examination, he testified that Murray "would show us where to unload and directed me." As indicated above, Hutchins testified that he stopped, waiting for Boyle to get a signal from Murray; and that he too was waiting for a signal before starting his truck. As indicated above, Jones backed his truck to the north edge of the "refuse pile" for dumping as directed by Murray. There was evidence that defendants' trucks had been loading and unloading at this plant site five or six weeks. Too, Boyle, then 18 years old, testified that he had operated defendants' dump truck some four months, part of the time at this plant site, loading and unloading in accordance with Murray's directions. The foregoing suffices to warrant the instruction. Indeed, Boyle's testimony, including his alleged reliance on Murray's directions, tends to show that the practice existed and that he was well aware of such practice.

The crux of this case was whether Boyle backed his truck in accordance with instructions from Murray. It is evident that the jury did not accept defendants' evidence and contention. Perhaps they thought it unreasonable that Murray, standing at the Jones truck then backed to the "refuse pile" for unloading, would give directions to Boyle to back his truck to the very same spot. Too, while Boyle and Hutchins testi-

fied that Murray gave certain directions to Boyle, it is noteworthy that, as indicated above, the testimony of Jones was *contra*.

We have discussed the assignments of error on which defendants appear to lay major emphasis. The others are too numerous to warrant discussion in detail. Suffice to say, each has been carefully considered; and we find no error sufficiently prejudicial to warrant a new trial. Indeed, the impression prevails that the case was well and fairly tried in accordance with settled principles of law.

No error.

JOHNSON, J., not sitting.

JOHNNIE A. HUGHES v. ANCHOR ENTERPRISES, INC.

(Filed 12 December, 1956.)

1. Negligence § 4d—

An owner is charged with knowledge of an unsafe condition of the premises created by its employee in discharge of his duties, but an unsafe condition created by a third party must have existed for such length of time that the owner knew, or, by the exercise of due care, should have known of its existence before the owner may be held responsible therefor.

2. Same—

Plaintiff's evidence tended to show that she slipped and fell in leaving defendant's restaurant at a place at the entrance made slippery by reason of soapy and slimy substances splattered on the floor by an employee in mopping the floor. Defendant's evidence was in conflict in material respects. *Held:* The evidence considered in the light most favorable to plaintiff is sufficient to require the submission of the case to the jury.

3. Evidence § 42f—

It is competent for defendant to introduce in evidence a statement in the original complaint even though the original complaint has been superseded as a pleading by an amended complaint.

4. Appeal and Error § 41—

The admission of testimony over objection cannot be held prejudicial when the objecting party's own witnesses thereafter testify to the same import.

5. Principal and Agent § 13c: Evidence § 42d—

Testimony of a statement made by an agent which is merely narrative of a past occurrence and not a part of the *res gestae* is hearsay and incompetent as substantive evidence against either the principal or the agent, but is competent as bearing upon the credibility of the agent as a witness when

the statement is in direct conflict with the testimony of the agent at the trial.

6. Trial § 17—

A general objection to testimony competent for a restricted purpose, without request that its admission be limited, is ineffectual. Rules of Practice in the Supreme Court No. 21.

7. Negligence § 18—

In the absence of other relevant statements or circumstances, evidence of an offer or promise made by a defendant or its agent to pay the hospital and medical expenses of the injured person is not competent as an admission of negligence when the statements do not relate to the cause of plaintiff's injuries.

JOHNSON, J., not sitting.

APPEAL by defendant from *Crissman, J.*, July Term, 1956, of RICHMOND.

Civil action to recover damages on account of personal injuries sustained by plaintiff, a patron, in defendant's "Howard Johnson Restaurant" near Rockingham, North Carolina.

Plaintiff alleged that she slipped and fell; and that her fall and consequent injuries were caused by the negligence of the defendant in creating an unsafe condition in the area where she fell.

Defendant, answering, denied negligence; also, defendant pleaded contributory negligence in bar of plaintiff's right to recover.

Issues of negligence, contributory negligence and damages were answered in plaintiff's favor. The jury awarded damages in the amount of $6,750.00.

Evidence offered in support of plaintiff's allegations tended to show the facts narrated in the numbered paragraphs below.

1. On 13 March, 1954, plaintiff, her husband, her sister, and plaintiff's two daughters by a former marriage, were on their way from Fayetteville, North Carolina, where they resided, to Rock Hill, South Carolina, to visit plaintiff's parents; and about 3:30 p.m. they stopped for a meal at defendant's restaurant.

2. The outer entrance to the restaurant consisted of double doors, glass in metal frames, which afforded access to a vestibule; and the inner entrance, beyond the vestibule, consisted of like doors affording access to the interior of the restaurant premises.

3. Entering the restaurant proper, immediately to the left there was a line of booths, the seat backs or partitions being three feet high; and the top of the seat back or partition nearest said inner entrance was so constructed as to constitute a plant or flower box. Beyond this, to the left, there was an aisle three feet wide, which was a passageway to the

booths along the front of the restaurant and to other booths across said aisle.

4. Entering the restaurant proper, straight ahead, there was a combination counter, consisting of a soda pickup, ice cream service, grocery, candy display and cash register stand; and to the right thereof there was a soda fountain and horseshoe counter.

5. When plaintiff and her party entered, the terrazzo floor of the vestibule and of the area between the inner entrance and the combination counter was dry and safe. They turned left, went to the fourth booth at the front of the restaurant; and plaintiff was so seated that her back was toward the entrance area.

6. Thereafter, and while plaintiff was occupied with her meal, defendant's employee, with a bucket and mop, undertook to clean an area near the inner entrance. In so doing, he left the floor of the area between the end of the aisle and the inner entrance in a slippery condition by reason of soapy and slimy substances splattered thereon.

7. Plaintiff, unaware of the mopping or cleaning operation, finished her meal, left the booth and walked down the aisle to leave the restaurant. As she turned to her right, at or near the seat back or partition in which the plant or flower box was located, she stepped onto one of the slippery places, slipped, fell and was injured.

Defendant's evidence tended to show that no mopping or cleaning had been done in any area where plaintiff walked; that the floor where plaintiff walked was dry and in all respects in first class condition; and that plaintiff's injuries were not caused by any negligence on its part.

Wall, defendant's employee, testified that he had started sweeping or mopping; that his mop bucket contained a mixture of water and cleaning compound; that the cleaning compound did not make the water slick; and that, before plaintiff was injured, he had mopped only in the area around the fountain, some distance from where plaintiff fell.

Bearing on the contributory negligence issue, defendant's evidence tended to show that plaintiff, when seated in the booth, faced the entrance area; and that on two or more occasions before her meal was served or eaten she went out through said entrances to see about a dog they had left (tied) outside the restaurant. This evidence was in direct conflict with evidence offered by plaintiff.

Batson, defendant's witness, who was the Assistant Manager, testified that he assisted plaintiff's husband in taking plaintiff to the hospital. On cross-examination, he was asked this question: "I'll ask you if you didn't tell him (plaintiff's husband) after you got to the hospital and after you talked to Mr. Lowery (the manager of the restaurant) to get Mrs. Hughes a good room and the best medical service that you could get and you would take care of it?" He testified, over defendant's objection, as follows: "I don't recall saying that to Mr. Hughes, sir."

The next question asked was this. "But you wouldn't swear that you didn't tell him that, would you?" He testified, over defendant's objection, as follows: "I don't know exactly how I put it in words, but we would take care of her."

Thereafter, plaintiff's husband, who had previously testified as plaintiff's witness, was recalled for further direct examination. He was permitted to testify, over defendant's objection, as follows: "Mr. Batson told me to go ahead and put my wife in a private room and get the best medical care available and they would take care of it."

Judgment for plaintiff, in accordance with the verdict, was signed and entered. Defendant excepted and appealed. Upon appeal, defendant assigns as error, *inter alia,* the overruling of its motions for judgment of nonsuit and the admission, over objection, of certain of plaintiff's evidence.

Pittman & Webb for plaintiff, appellee.

Leath & Blount and Varser, McIntyre & Henry for defendant, appellant.

BOBBITT, J. The principles of law governing the liability of the proprietor of a store or restaurant to an invitee are well settled. They are restated in *Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33, where *Johnson, J.,* cites numerous prior decisions.

It is well to bear in mind that, when the unsafe condition is created by a third party, it must be made to appear that it had existed for such a length of time that the defendant knew or by the exercise of due care should have known of its existence; but this is not required when the unsafe condition is created by the defendant's employee(s). The basis of the dissent in *Lee v. Green & Co., supra,* is that the minority of this Court considered the evidence insufficient to show that the alleged unsafe condition was created by defendant's employee(s) or the duration of its existence.

No structural defect is involved here. Plaintiff's allegations and evidence are that when plaintiff entered the restaurant and walked to the booth where she was served the floor of the entrance area and aisle was dry, safe and attractive; but that, while she was in the restaurant, defendant, through its employee, had created the unsafe condition that caused her to slip and fall when she undertook to use again the identical passageways.

The evidence was sufficient, when considered in the light most favorable to plaintiff, to require submission of the case to the jury. Since a new trial is awarded, for reasons stated below, we refrain from discussing the permissible inferences that may be drawn from the conflicting

evidence presently before us. *Sloan v. Glenn, ante,* 55; *Caudle v. R. R.*, 242 N.C. 466, 88 S.E. 2d 138, and cases cited.

It is noted that defendant, in support of its contention that plaintiff was contributorily negligent as a matter of law, quotes and relies on an excerpt from plaintiff's *original* complaint. This excerpt was offered as evidence by defendant and admitted for jury consideration. Even so, the case was tried on plaintiff's amended complaint and defendant's answer thereto. While the excerpt from the original complaint was competent as evidence, as a pleading it was superseded by the amended complaint. *Burrell v. Transfer Co.*, 244 N.C. 662, 94 S.E. 2d 829.

Testimony by plaintiff's witnesses, admitted over objection, tended to show that, after plaintiff fell, a man who worked in the restaurant, referred to as the Assistant Manager, helped plaintiff's husband assist her to the car and carry her to the hospital.

However, Batson, a witness for defendant, testified that he was the Assistant Manager; that he was in the kitchen when the accident occurred; that when he learned of it he went to the front; that plaintiff was then seated in said fourth booth; and that he and plaintiff's husband helped plaintiff down the aisle, out the front door and then to the hospital. Hence, if incompetent when offered, any prejudicial effect of said testimony by plaintiff's witnesses was eliminated when Batson, under direct examination, gave his said testimony.

Batson, on cross-examination, testified: "I did not tell Major Hughes that I had told J. D. Wall not to put water in front of the door when there were people in the restaurant and not to mop in that manner."

When plaintiff's husband (Major Hughes) was recalled, plaintiff's counsel asked this question: "Q. You testified yesterday that when you got to your wife and while Mr. Batson was standing at the place where she fell that Mr. Batson made a statement to you. Well, you go ahead and tell his Honor and the jury what statement that was." Over objection, he answered: "Mr. Batson stated to me, 'I have told the boy not to mop the floor like this.'" Defendant's motion to strike was denied.

There is no evidence that Batson was present when plaintiff fell. At that time, according to his testimony, he was back in the kitchen. The declaration, if made, was a narrative of what Batson had told Wall, an employee, on some unidentified past occasion. Hughes' said testimony was not competent against defendant as *substantive* evidence.

In *Hubbard v. R. R.*, 203 N.C. 675, 166 S.E. 802, *Stacy, C. J.*, stated the rules of evidence relevant here as follows:

"It is the rule with us that what an agent or employee says relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestae,* and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a

past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer. . . . (Citations omitted)"

"Notwithstanding the rule just stated, it has been held in a number of cases that what an agent or employee says, even though narrative of a past occurrence, may be offered in evidence, not for the purpose of fixing liability upon the principal or employer, but to contradict or to impeach the agent or employee, when his previous statement is at variance with his testimony given on the trial. . . . (Citations omitted)"

For later decisions in accord with the rule first stated by *Stacy, C. J.*, see *Lee v. R. R.*, 237 N.C. 357, 75 S.E. 2d 143, and Stansbury, N. C. Evidence, Section 169, and cases cited.

Batson, under direct examination, testified that when he assisted Hughes in helping plaintiff down the aisle to the front door he observed that the floor was dry, that it had not been mopped. Therefore, Hughes' testimony as to Batson's said declaration was competent for consideration as bearing on the credibility of Batson and the weight to be given his said testimony. Defendant's objection was general, challenging the competency of the testimony as to Batson's said declaration for any purpose. In view of defendant's failure to request that it be limited to impeachment of Batson, its admission, under the rule stated in *Hubbard v. R. R., supra,* and under Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 544, 558, was not prejudicial error.

But plaintiff was not content to let the matter rest here. In the phrase of *Stacy, C. J.*, plaintiff went a bowshot too far.

Both on cross-examination of Batson, and more specifically on direct examination of Hughes, when recalled for further testimony, plaintiff elicited testimony that Batson, after reaching the hospital, told Hughes to go ahead and put his wife in a private room and get the best medical care available and "they" would take care of it, as set forth in detail in the above statement of facts.

"Anything that a party to the action has said, if relevant to the issues, is admissible against him as an admission." Stansbury, N. C. Evidence, Section 167; *Hobbs v. Coach Co.*, 225 N.C. 323, 329, 34 S.E. 2d 211.

But, in accord with the weight of authority elsewhere, the rule in this jurisdiction is that, in the absence of other relevant statements or circumstances, evidence of an offer or promise made by the defendant to pay the hospital and medical expenses of the injured person is not competent as an admission of liability. The law will not stifle a party's disposition to succor an injured person by a red light, warning that if he responds to generous and humanitarian impulses he does so at the peril of having his benevolent conduct counted against him as an admission of liability. *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777; *Patrick v. Bryan,* 202 N.C. 62, 162 S.E. 207; *Brown v. Wood,* 201

N.C. 309, 160 S.E. 281; *Norman v. Porter,* 197 N.C. 222, 148 S.E. 41; *Barber v. R. R.,* 193 N.C. 691, 138 S.E. 17; Annotation: 20 A.L.R. 2d 291. See also, *Cab Co. v. Casualty Co.,* 219 N.C. 788, 15 S.E. 2d 295.

Brogden, J., in *Brown v. Wood, supra,* has reminded us that a contrary rule would consider the services of the Samaritan, whom the ages have called Good, in behalf of the man found stripped and wounded, an admission of liability for his condition rather than the actions of a man having compassion on his unfortunate neighbor.

True, cases arise in which the testimony goes well beyond an offer or promise to pay the hospital and medical bills of the injured person. Other cases arise in which the testimony falls short of an offer or promise to pay such bills. An analysis of certain of our decisions may be helpful.

In *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196, and in *Jernigan v. Jernigan,* 238 N.C. 444, 78 S.E. 2d 179, and in *Hobbs v. Coach Co., supra,* the testimony related to statements made by a defendant whose alleged negligent operation of a motor vehicle was the basis of plaintiff's cause of action. In the *Jernigan case,* the statement attributed to defendant was that "he could have stopped before he hit the Capps car" and that "there would have been several ways he could have missed Capps' car, without hitting." In the *Gibson case,* the statement attributed to the defendant was that he would take care of everything and plaintiff had nothing to worry about. In the *Hobbs case,* the statement attributed to the defendant (driver) was that he had gone to sleep and didn't know what happened. Evidence of such statements was held competent on the issue of the declarant's alleged negligence. It should be noticed that in the *Hobbs case,* the evidence was admitted as to the declarant, the defendant driver, but excluded as to his employer, the corporate defendant.

Here the declarations attributed to Batson do not relate to what caused plaintiff's injuries. Indeed, he was not present on the occasion of her injury. Nor was he a party to this action.

Another type of case is illustrated by *Brown v. Wood, supra.* Plaintiff's injuries arose out of an automobile collision. Wood, the owner, was not present when the collision occurred. Plaintiff alleged that Sanders, the driver, was operating the car as Wood's agent. The trial court sustained Wood's motion for judgment of nonsuit, for lack of evidence as to the alleged agency; but submitted the cause to the jury as to Sanders. Upon plaintiff's appeal from said judgment of nonsuit, statements attributed to Wood when he visited plaintiff in the hospital were considered. The conclusion reached was that Wood's offer or promise to pay plaintiff's medical and hospital bills, if this were all, would not be competent; but that, when he went further and assured plaintiff that he would see "that everything was all right" the evidence

should have been admitted as relevant to Wood's liability. These facts are important: (1) Wood had no personal knowledge as to how the collision occurred; (2) there was plenary evidence of the negligence of Sanders; and (3) the liability feature of the case to which the evidence was addressed was the liability of Wood for the negligent acts of Sanders.

Here the situation is different. Admittedly, the mopping or cleaning was done by Wall, defendant's agent. The crucial question was whether it was done in the area where plaintiff fell, as contended by her, or over near the fountain, some distance from where plaintiff fell, as contended by defendant. Wall's agency is not in dispute. Hence, the theory on which *Brown v. Wood, supra,* was decided, has no application here.

In *Barber v. R. R., supra,* it was in evidence, without objection, that immediately after plaintiff's injury he was placed in the baggage car of defendant's train, taken to Danville, Virginia, and carried to the hospital there for treatment by Dr. Miller. Plaintiff was permitted to testify, over objection, that defendant sent him to Dr. Miller for treatment.

This Court regarded *Barber v. R. R., supra,* as a borderline case. The fact that plaintiff was taken to the hospital was considered relevant, the extent of plaintiff's injuries being in controversy. Apart from this, the evidence to which objection was made did not add appreciably to the testimony theretofore admitted without objection.

Here Batson testified that he assisted Hughes take plaintiff to the hospital. Had plaintiff stopped there, a different situation would confront us. Indeed, the final instruction to the jury was this: ". . . the Court charges you that the mere fact that the management of the defendant was solicitous of the plaintiff's condition on this occasion would not *of itself* indicate or create any liability on the part of the defendant." (Italics added.)

But plaintiff pressed on, undertaking to show a specific offer or promise by Batson that "they" would pay all bills for a private room in the hospital and for the best medical care available. When the court, in the quoted final instruction, told the jury that mere solicitude would not *of itself* indicate or create liability, the failure to refer to the admitted incompetent evidence as to a specific promise to pay the hospital and medical bills would seem to accentuate the prejudicial effect thereof.

Under the facts here, the court was in error in admitting the testimony as to Batson's specific promise that defendant would pay the hospital and medical bills incurred in the treatment of plaintiff's injuries; and in a case such as this, where the evidence was in sharp conflict as to the cause of plaintiff's injuries, the error must be regarded sufficiently prejudicial to necessitate a new trial.

Questions posed by other assignments of error may not arise when the cause is tried again.

New trial.

JOHNSON, J., not sitting.

ARTHUR M. DEBRUHL AND WIFE, JANIE W. DEBRUHL, PETITIONERS, v. STATE HIGHWAY & PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 12 December, 1956.)

1. Evidence § 25: Trial § 5½—

Where a pretrial order fixes the issue to be submitted to the jury, such issue becomes the theory upon which the case must be tried, and evidence irrelevant to such issue is incompetent.

2. Eminent Domain § 18c—

Where, in condemnation proceedings, a pretrial order establishes that petitioner is entitled to recover compensation only for the value of the land taken excluding the value of a house thereon, evidence as to the value of the house is not germane, and when voluminous testimony as to the value of the house is admitted and it is apparent that such testimony affected the verdict, the admission of such testimony must be held prejudicial notwithstanding an instruction to the jury that it should not consider the testimony as to the value of the house.

3. Appeal and Error § 41—

Where voluminous evidence as to an item of damages not recoverable upon the issue upon which the case was tried is admitted and it is obvious from the verdict that the jury considered such incompetent testimony in fixing the amount of damages, the admission of such testimony must be held prejudicial notwithstanding an instruction to the jury that they should not consider evidence as to such item of damages.

4. Appeal and Error § 2—

Where a new trial is awarded on respondent's appeal for error in the admission of evidence as to an item of damage not recoverable upon the theory upon which the case was tried, but petitioners maintain that the theory of trial erroneously excluded certain items of damage, which contention could not be presented on respondent's appeal from the verdict in favor of petitioners, the Supreme Court may nevertheless determine the basic question in order to avoid protraction of the litigation.

5. Contracts § 8—

The legal effect of the language in a written instrument is a question of law to be determined by the court.

6. Same—

In construing a written instrument, the court must seek to ascertain from the language used, the subject matter, the end in view and the purpose sought to be accomplished, the intention of the parties at the time the document was executed.

7. Same—

All instruments should receive a sensible and reasonable construction and not one which will lead to absurd consequences or unjust results.

8. Highways § 8b—

The State Highway and Public Works Commission was created for the purpose of constructing and maintaining the State highways, and all other powers it possesses are incidental to the purpose of its creation. G.S. 136-18. Therefore, in acquiring a right of way it has no power to acquire title to any building or part of a building not within the boundaries of the right of way sought, no more by deed than by condemnation.

9. Eminent Domain § 9—Right-of-way agreement held not to give Commission title to residence but gave owners right to remove that part lying within the right of way acquired.

The owner of land executed an option to the State Highway and Public Works Commission which stated that it included the purchase price of a residence and any and all other improvements on the right of way sought, less their salvage value, with provision that a stipulated amount should be paid upon delivery of the right-of-way agreement and the balance paid when the dwelling was removed from the right of way. The right-of-way agreement and release later executed provided that the owners agreed to remove the dwelling, in lieu of salvage materials, by a stipulated time or the same should become the property of the Commission. Only a small part of the dwelling was within the boundaries of the right of way then sought. Later the Commission, in making improvements, condemned the rest of petitioners' land. *Held:* The Commission did not acquire title to the residence under the right-of-way agreement, but gave petitioners the right to remove that portion thereof which was within the right of way then sought, and upon the later condemnation of the rest of the tract, the petitioners are entitled to have the value of the residence considered upon the question of the amount of compensation.

JOHNSON, J., not sitting.

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

APPEAL by defendant from *Froneberger, J.*, March Term 1956 of BUNCOMBE.

This is a condemnation proceeding authorized by G.S. 136-19.

Prior to December 1948 plaintiffs were the owners of a lot on the south side of Druid Drive in Asheville. The lot was fifty feet in width and approximately 148 feet deep. Situate on the lot was a brick residence occupied by plaintiffs. For the purpose of relocating and improving Highways 19 and 23, the Highway Commission, in 1948, took an

option from plaintiffs for a portion of their property. The option was exercised in January 1949. This acquisition was in connection with Highway Project 9075.

In 1952 the Highway Commission, deeming further improvements to Highways 19 and 23 advisable, set up Project 9086 for that purpose. To consummate the Commission's purpose, it was necessary to acquire all of plaintiff's remaining property rights. The Commission, on 7 May 1952, gave notice that it had appropriated plaintiffs' property. Plaintiffs, in due time, instituted this proceeding, alleging ownership of the lot with the building thereon, subject to the easement acquired by defendant in 1949. Defendant answered, admitting that plaintiffs were the owners of the land taken by it. It denied, however, that plaintiffs were the owners of the building or any part of the building, asserting that it owned the building by virtue of the purchase made in 1949. Commissioners were appointed for the purpose of ascertaining compensation to which plaintiffs were entitled. The commissioners held hearings and made reports stating separately the value of the building and the value of the land. Plaintiffs and defendant each filed exceptions to the reports. The clerk overruled the exceptions and entered judgment confirming the reports. From this judgment the parties appealed to the Superior Court.

The issue to be submitted to the jury was fixed at a pretrial hearing in October 1954. Plaintiffs excepted to the order fixing the issue and appealed. The appeal was dismissed as premature but without prejudice to the rights of plaintiffs. See 241 N.C. 616, 86 S.E. 2d 200.

Judge Froneberger held a pretrial conference. He concluded the issue settled in 1954 was correct.

The cause was submitted to the jury on the issue fixed at the pretrial hearing; viz.: "What amount are petitioners entitled to recover of respondent for the land, excluding the house thereon, condemned for highway purposes on the 7th day of May 1952?" The jury assessed the damages at $12,500. Judgment was entered on the verdict. Defendant excepted and appealed. Additional facts necessary to a determination of the appeal will be set out in the opinion.

Sanford W. Brown for petitioner appellees.

R. Brookes Peters and McLean, Gudger, Elmore & Martin for respondent appellant.

RODMAN, J. The basic question in this case is: What is the property for which compensation is to be paid? At the pretrial conference in October 1954 the court concluded that compensation was to be paid for the land taken, excluding any house thereon. The order fixing the issue to be submitted to the jury became the theory on which the case was to

be tried. So long as that remained the pattern on which the case was to be tried, the evidence should be confined to the value of the land. Evidence tending to show the value of the house was not germane and hence was not competent. *Godfrey v. Power Co.*, 190 N.C. 24, 128 S.E. 485; *Connor v. Mfg. Co.*, 197 N.C. 66, 147 S.E. 672; *Shepherd v. Lumber Co.*, 166 N.C. 130, 81 S.E. 1064; *Moore v. Horne*, 153 N.C. 413, 69 S.E. 409; *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E. 2d 171. Where it is apparent that the incompetent evidence affected the verdict of the jury, the admission of such evidence is prejudicial error. *S. v. Page*, 215 N.C. 333, 1 S.E. 2d 887; *Deming v. Gainey*, 95 N.C. 528.

Plaintiffs consistently assert that the theory on which the case was tried is not correct and unduly circumscribes their right to compensation. To protect and preserve their rights they offered evidence as to the value of the land and the house. This evidence was extensive. The evidence so offered was admitted over objection by the defendant. The evidence and statement of contentions with respect thereto in the charge of the court form the basis of more than 200 exceptions. While many of these exceptions may be lacking in substantial merit, enough remain to make it appear that the verdict was affected by the incompetent evidence.

Arthur DeBruhl was permitted, over objection, to testify to the size of his house, its width and depth, the direction it faced, its location with respect to the northern line of the right of way acquired in 1949, that this line passed some two feet north of the southeast corner of his home and six feet north of the southwest corner. He exhibited a map which showed the lot and house thereon with the north right-of-way line indicated by a red line. He testified the house had seven rooms, describing the size of each room, the kind of flooring to be found in each room, the kind and number of bath fixtures and where located, the type of water heater, the kind of electric range and other electric fixtures with which the house was equipped, the kind of walls and kind of paint used on the different walls, the kind of furnace used to heat the house, the number of rooms on the second floor, with a description of the stairway leading to the second floor, the kind of roof, the size of the basement, the size and kind of porches, and the tapestry brick used to veneer the house. For the purpose of illustrating his testimony he offered photographs and a floor diagram of the house. He was asked his opinion of the fair market value of the land on 7 May 1952. He replied: "It was $200.00 a front foot." It is not disputed that the lot has a frontage of fifty feet. Hence, applying plaintiff's value to the land, the jury should have answered the issue $10,000. Immediately after plaintiff fixed the value of the land alone he was asked: "What was the value in dollars of the entire property?" He replied: "$22,800.00."

Four other witnesses were used by plaintiffs to establish their claim for compensation. None were called upon to express an opinion as to the value of the land without the house.

Witness McKinney was asked his opinion of "the fair, reasonable market value of the DeBruhl property north of the red line on Druid Drive, on May 7, 1952." He replied: "From $14,000 to $15,000. After the end of that building was taken off." Witness Whitaker, responding to a similar question, fixed the value at $17,500. Witness Riddle fixed the value at $15,500, and Mrs. DeBruhl placed the value at $22,800.

The jury fixed the value of the land without the house at $12,500. We are unable to find any evidence in the record to support the verdict. There is plenary evidence in the record to support the verdict if compensation is to be paid for that portion of the house beyond the north line of the right of way acquired by defendant in 1949. That the evidence with respect to the house, detailed and minute as it was, affected the verdict is too apparent to admit of debate, and this is so notwithstanding the express instruction given the jury at the request of defendant. "You will not consider any evidence in this case concerning any house that may have been located upon the lands appropriated by the respondent for highway purposes."

Counsel for appellees, with commendable frankness, says: "If respondent did own the remainder of the dwelling or had paid for damages to it, it is obvious that error was committed in permitting testimony as to the value of the remainder of the dwelling."

To remand the case for a new trial without more would leave the basic question stated in the beginning of the opinion unsettled and would, we apprehend, result in protracted litigation which may be avoided if that question is now answered. Normally questions not determinative of the appeal are not decided, but in this instance we feel justified in answering the question essential to a correct solution of this case. We have the benefit of the briefs filed at the Spring Term 1955 which are directed at that identical question.

The parties are in agreement that the question does not involve any issue of fact. The answer is to be found upon a construction of the written instruments executed in 1948 and 1949 in connection with the construction of Project 9075 and is a question of law to be determined by the court. *Brown v. Hodges*, 232 N.C. 537, 61 S.E. 2d 603.

On 2 December 1948 plaintiffs gave to defendant an option to purchase a specifically described right of way for highway purposes. Following the description fixing the boundaries of the right of way, the option provides: *"This option also includes the purchase price of a 1½ story brick veneer residence and any and all other improvements on said right of way,* less their salvage value. The property owners reserve the right herein to occupy said residence for a period of 12 months

from date of this option and shall have the right during said 12 months period of time to remove the dwelling and other improvements from the right of way, which operation shall be at the expense of the property owners in lieu of the salvage materials therein. Failure to remove the said residence and/or improvements within the time allotted, they shall become the property of the State Highway & Public Works Commission and shall therefore be disposed of at the option of the Commission." (Emphasis added.) Then follow provisions fixing the time within which the option may be exercised and the amount to be paid if the option is exercised. Following these provisions is a paragraph: "And it is further understood and agreed that the consideration herein stipulated to be paid shall be paid and *received in full payment of the purchase price of said right of way and in full compensation for all damages,* if any, result from the granting of this option and of this right of way, and the construction of said streets, roads and/or sidewalks upon said right of way across said lands." (Emphasis added.) Then follows: "NOTE: It is understood and agreed by all parties hereto that $4,200 shall be paid upon delivery of a duly executed right of way agreement to the Commission, *and the balance of $500.00 shall be paid when dwelling has been removed from the right of way.*" (Emphasis added.)

Defendant exercised its option to purchase, and on 21 January 1949 plaintiffs executed a "RIGHT OF WAY AGREEMENT," conveying the right of way and the rights called for in conformity with the option. On the same day plaintiffs executed a "RELEASE OF CLAIM FOR RIGHT OF WAY AND DAMAGE." This release, after reciting payment of $4,200 for the damages sustained for the relocation of the highway, provides: "We further agree herein to remove brick dwelling from aforesaid right of way on or before December 2, 1949, at our expense in lieu of the salvage materials therein, or the same shall become the property of the State Highway Commission and shall therefore be disposed of at the option of the State Highway Commission without further obligation to we, the undersigned.

"Right of way appropriation and purchase price of brick dwelling	$4,700
"Less amount held until building is moved	500
"Partial Payment	4,200"

Plaintiffs contend that the defendants purchased and paid for and hence acquired only that portion of the building within the right of way. Defendant, on the other hand, asserts it paid for and acquired both the portion within and outside of the right of way.

Courts, in construing written instruments, seek to ascertain the intention of the parties at the time the document was executed. "The

heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295.

"An elementary rule invoked in the construction of contracts requires the court to ascertain the intention of the parties, and to do this note must be taken of the purpose to be accomplished, the situation of the parties when they made, and the subject-matter of the contract." *U. S. v. D. L. Taylor Co.*, 268 F. 635; *Jones v. Casstevens*, 222 N.C. 411, 23 S.E. 2d 303; *Rhyne v. Rhyne*, 151 N.C. 400, 66 S.E. 348.

"All instruments should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results . . ." *Fairbanks v. Supply Co.*, 170 N.C. 315, 86 S.E. 1051.

When we apply this rule to the facts of this case, it is apparent, we think, that the parties never contemplated, in 1948 and in 1949, that defendant was acquiring more than a right of way across the lands of plaintiffs with the incidental right to have its right of way freed from any use and occupancy by plaintiff. Hence, plaintiffs were given the right within twelve months to move the house. Plaintiffs were to have such materials as they could salvage in moving the house or in cutting off the portion of the house within the right of way. To guarantee that plaintiff's would clear the right of way of any portion of the house, the Commission retained $500, which was to be paid when the whole house or the portion of it in the right of way was cut off and moved from the right of way. The agreement was, by express language, "to remove brick building from aforesaid right of way on or before December 2, 1949, at our expense . . ." Only a small portion of the house was within the boundaries of the right of way. According to plaintiffs' contention, only some two feet was within the right of way. According to defendant, some ten to fifteen feet was within the right of way. In any event, it would seem that the portion within the right of way could have been removed without destroying the value of the remainder for residential purposes. Certainly it would not be argued that $500 retained by the Commission was for the purchase of the entire residence. If defendant, as it now contends, was the owner of the entire building, why should it retain $500 to insure the destruction of a building of no value to nor wanted by it, but having distinct value to plaintiffs? Is it not clear that the $500 retained was intended to reimburse the Highway Commission for the cost of removing the portion of the building from the right of way if plaintiffs neglected to do so within the time fixed?

Defendant is the State agency created for the purpose of constructing and maintaining our public highways. All the other powers it possesses are incidental to the purpose for which it was created, G.S. 136-18. The Commission was not authorized to purchase residences not needed in the

construction or maintenance of our highway system. Had defendant condemned a right of way across plaintiffs' land in 1949, it would not have acquired any title to any building or part of a building not within the boundaries of the right of way. A deed conveying a right of way gives the grantee no more rights than he would acquire by condemnation. *Shepard v. R. R.*, 140 N.C. 391. Of course, it would have been obligated to pay just compensation for all the damages suffered by the property owner in the relocation of the highways then under construction. *Proctor v. Highway Commission*, 230 N.C. 687, 55 S.E. 2d 479; *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778.

Since defendant did not acquire, in 1948 and 1949, any portion of the building or land lying outside the right of way conveyed to it, it follows that plaintiffs are entitled to be fairly compensated for the part of the house as well as the land taken by the Highway Commission. The amount to be paid must be determined upon an appropriate issue submitted at a time when both plaintiffs and defendant have an opportunity to submit evidence as to the value of the property so taken.

For the errors committed there must be a

New trial.

JOHNSON, J., not sitting.

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

STATE v. JAMES DAVIS AND JAMES E. McCALL.

(Filed 12 December, 1956.)

1. Burglary and Unlawful Breakings § 11—

Upon an indictment charging possession, without lawful excuse, of a crowbar, hack saw and automatic pistol, in a prosecution under G.S. 14-55, without charge or evidence of possession of such implements with intent to use them for the purpose of unlawfully and feloniously breaking and entering, the State's evidence of possession, with further testimony that the crowbar and hack saw were ordinary implements used by carpenters and mechanics, and without contention that either is an implement designed for the purpose of housebreaking or that in combination they may not be used for legitimate purposes, is insufficient to be submitted to the jury.

2. Burglary and Unlawful Breakings § 6—

In a prosecution under G.S. 14-55, the burden is on the State to prove beyond a reasonable doubt that the possession of the implements specified was "without lawful excuse" within the spirit of the statute, and the

possession of a pistol for personal protection, even though unauthorized, cannot be unlawful possession within the meaning of the statute.

JOHNSON, J., not sitting.

APPEAL by the defendant McCall from *Williams, J.*, February Term 1956 of CUMBERLAND.

The defendants James Davis and James E. McCall were jointly indicted in one bill for larceny of an automobile, and in another charging that they unlawfully, wilfully, and feloniously did have and possess, without lawful excuse, certain implements of housebreaking, to wit, one crowbar, one hack saw, and one automatic pistol, in violation of G.S. 14-55. The cases were consolidated and tried together.

The State's evidence tends to show that the defendants were first seen about 1:30 a.m. on 11 January 1956 in a 1953 Oldsmobile near Dowd's Grocery Store on Water Street in the City of Fayetteville. McCall was driving the car and Davis was beside him. They pulled away from the grocery store and went down the street a short distance and turned around. They got mixed up in traffic and the officer who saw them on Water Street caught up with them on Eastern Boulevard about 15 minutes later. He followed them and stopped them on the Old Wilmington Road, near Campbell Avenue. He checked McCall's driver's license and made inquiry about the ownership of the car; he was told it had been borrowed from a soldier whom Davis knew. The officer saw part of a hack saw sticking out from under the front seat. Davis was requested to get out of the car and the officer found a crowbar under the front seat and a .25 automatic pistol in the glove compartment, with one bullet in it. A pair of pliers was also found in the glove compartment by another officer. The defendants did not have a key to the trunk of the car.

According to the State's evidence, McCall admitted that the pistol and the tools belonged to him. Both defendants told the officers they were plasterers' helpers and used the tools in their work. The evidence is to the effect that the crowbar was the type in general use in construction work and can be bought in any hardware store; that the pliers were the same type most anyone would have in the home and in his automobile, and the hack saw was of the ordinary type one could buy in any hardware store in the State; that they were common tools used by carpenters and mechanics. The evidence is in conflict as to where and when McCall obtained the pistol.

The State's evidence further tends to show that McCall drove the Oldsmobile to his work on Monday. According to the arresting officer, the arrest took place on Tuesday, 12 January 1956, about 1:30 a.m. The indictment gave the date as 11 January 1956. Other evidence of

the State tends to show the arrest was actually made on Tuesday, about 1:30 a.m., on 10 January 1956. (As a matter of fact, 12 January 1956 fell on Thursday following the trip to Durham made by the defendants on the previous Sunday, 8 January 1956.)

The arresting officer testified "I had no information or knowledge that these tools were to be used by these defendants . . . for the purpose of housebreaking or for burglary purposes. It came to my mind that that is probably what they were to be used for. I was suspicious that is what they intended to use them for. I have no proof that they intended to use them in breaking and entering or for working or for anything."

The evidence of the defendants tends to show that Davis, accompanied by Mack Williams, drove the Oldsmobile to the home of McCall on the Sunday prior to the time of their arrest, and requested him to drive the car to Durham. Neither Davis nor Williams had a driver's license. McCall testified that he owned the gun found in the glove compartment of the car; that he carried it with him for protection; that he put the pistol and the pliers in the glove compartment before he left for Durham on Sunday; that he got the tools out of his father's car and put them in the Oldsmobile; that Davis told him he didn't have any tools in the Oldsmobile and he got the tools so they could change a tire if he had a blowout; that "the hack saw was just there with the crowbar and I took them all." He further testified that he had been employed in construction work for about a year by R. B. Benton for whom his father also worked; that he (the defendant) used these tools (referring to those introduced in evidence) in his work. According to the evidence, the defendant did have to change a tire on the Durham trip, and Davis had to get into the trunk through the back seat of the car to get the spare tire because they did not have a key to the trunk.

The defendant McCall admitted on cross-examination that he had been in Juvenile Court on several occasions charged with breaking and entering, but was convicted of such an offense only once; that he was convicted in September 1953 and given a sentence of two years. At the time of the trial below the defendant McCall was 17 years of age.

After the State rested and the defendants rested, the State recalled its first witness, C. D. McLaurin, the arresting officer, who testified that he had to chase the defendants in order to catch up with them at a speed of 75 to 80 miles an hour. The defendant Davis on cross-examination had denied that they had driven 75 miles an hour, and further testified that they had not tried "to give the officers the slip."

At the close of all the evidence, the solicitor announced that the State would take a *nol-pros* as to the defendant McCall on the charge of larceny of the automobile. The defendant Davis was convicted on

both counts, and the defendant McCall was convicted on the count charging him with the possession, without lawful excuse, of certain implements of housebreaking. From the judgment imposed on the defendant McCall, he appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

Henry C. Blair and L. S. High for appellant.

DENNY, J. The most serious question on this appeal is whether or not we should sustain the defendant's assignments of error based on exceptions duly entered to the refusal of the court below to allow his motion for judgment as of nonsuit interposed at the close of the State's evidence and renewed at the close of all the evidence.

The indictment upon which the defendant was tried and convicted was based on the provisions of G.S. 14-55, which read as follows: "If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of housebreaking; or shall be found in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court."

The State is relying upon the cases of *S. v. Vick*, 213 N.C. 235, 195 S.E. 779, and *S. v. Baldwin*, 226 N.C. 295, 37 S.E. 2d 898, to sustain the verdict below. On the other hand, the defendant is relying upon the case of *S. v. Boyd & Wilborn*, 223 N.C. 79, 25 S.E. 2d 456, for a reversal thereof.

In the case of *S. v. Vick, supra*, the indictment charged that the defendant did unlawfully, wilfully, and feloniously, without lawful excuse, have in his possession certain pick-locks, keys, bits, hammers, crowbars, nitroglycerin, dynamite caps, fuses, drills, soap, shotguns, rifles, axes and other implements for housebreaking contrary to the form of the statute. About 4:00 o'clock on a morning in May 1935, officers of Nash County were searching for one Alfred Denton, an escaped convict. They went to the home of one Bottoms at Gold Valley and waited. They saw an automobile approach Bottoms' home and drove out to meet it with their lights off. When the officers got within 150 or 200 yards of the approaching automobile they turned their lights on. Denton was driving the approaching car and attempted to turn around. In doing so he cut the wheels in a ditch and the car was unable to move. The officers recognized this defendant in the car with Denton. As the

officers approached the car Denton opened fire with a pistol. The defendant picked up a rifle and shot at them from the rear seat. The officers returned the fire. Whereupon Denton and Vick got out of the car and escaped, using their car as a shield, but were apprehended later.

The defendant made no contention that the articles found in the possession of Denton and the defendant were not implements of housebreaking. His defense was bottomed entirely on an alibi. He was convicted and appealed to this Court, which found no error in the trial below. In disposing of the appeal, this Court, speaking through *Barnhill, J.* (later *C. J.*), said: "There are many facts of which the court may take judicial notice, and they should take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind. 15 R.C.L., 1057. It is not unusual for the court to take judicial notice that certain weapons not specifically described in the statute are deadly weapons. They likewise take notice of other like generally known facts. While each of the articles found in the possession of the defendant has its legitimate use, it cannot be said that taken in combination these articles are tools of any legitimate trade or calling. There is no legitimate purpose for which this defendant and his companion could have the combination of articles found in their possession. On the other hand, taken in combination, they are the instruments and tools usually possessed and used by housebreakers."

In *S. v. Baldwin, supra,* the bill of indictment charged the defendant "unlawfully, wilfully and feloniously was found armed with and having in his possession without lawful excuse certain dangerous and offensive weapons, to wit: One 18" Stillson wrench, one brace #4310, one ½" drill, one 5/16" drill, one 3/16" drill, one 7/32" drill, five detonating caps, two flashlight batteries Ray O Vac, one burgess super service battery, 2" cell, one pair brown gloves, one way pack pickle jar containing two sticks of dynamite, four .32 calibre bullets, one drill chuck key, one bottle containing paregoric and other implements of dangerous and offensive nature fitted and designed for use in burglary or other housebreakings or for the use in burglary with explosives *with intent to so use said implements for the purpose of unlawfully and feloniously breaking and entering a dwelling or other building* against the form of the statute in such case made and provided . . ." (Emphasis added.) The second count charged that the defendant had in his possession, without lawful excuse, the articles enumerated in the first count in the bill. At the close of all the evidence, the State took a voluntary nonsuit on the first count which charged the defendant with having such tools and other implements "with intent to so use said implements for the purpose of unlawfully and feloniously breaking and entering a dwelling or other building."

In the case of *S. v. Boyd, supra,* the implements found in the possession of the defendants were enumerated in the bill of indictment as follows: "3 pistols with cartridges for same, bolt clippers, wrecking bar, two big screwdrivers, 2 pairs of gloves and flashlights, blackjack, brace and bit, and pliers or nippers and other implements of dangerous and offensive nature fitted and designed for use in burglary or other housebreaking or for use in burglary with explosives."

The Highway Patrolman who arrested the defendants testified that when he stopped them, Wilborn said, in the presence and hearing of Boyd, that "they had that stuff in there for their protection"; that "they had been stopped with some liquor and had some liquor taken from them." On cross-examination, the Patrolman continued: "The bolt clippers are what is known as a bolt clipper or cutter, is used for cutting bolts, are part of a mechanic's tools—you can use them to cut most anything—they are used around a garage . . . The brace and bit is a common tool of the carpenter, I would say . . . The screwdriver you see in every garage and in homes, that is a very common tool . . . I believe the wrecking bar is an ordinary wrecking bar—nothing unusual about it . . . a lot of mechanics have them and use them . . . This little screwdriver is an ordinary screwdriver . . . You can buy them anywhere, and the same thing about the pliers—they are used around garages and filling stations, and carpenters and electricians use them—everyone should have flashlights. . . . Mr. Wilborn told me that he had the pistol for protection—that he had some liquor taken off of him . . . Mr. Boyd said that he was just riding with him as a passenger. Mr. Wilborn said he was a mechanic. That was what he said that he had followed the trade of a mechanic for a long number of years and these were his tools."

On the present appeal, the defendants are not charged with possessing a single item or tool enumerated in G.S. 14-55. In fact, the indictment enumerates a crowbar, which is an ordinary tool, according to the State's evidence, used by carpenters and mechanics, and an ordinary hack saw that may be purchased in any hardware store in the State. However, if the State had been in a position to indict and prove that these defendants had possession of these tools, "with intent to so use said implements for the purpose of unlawfully and feloniously breaking and entering a dwelling or other building," we would have an entirely different question for consideration and determination. But the State expressly negatives any knowledge or proof of any such intent and purpose on the part of the defendants. Moreover, there is no contention on the part of the State that the crowbar or hack saw is an implement designed for the purpose of housebreaking, or that in combination they may not be used for legitimate purposes.

In the last cited case, *Winborne, J.* (now *C. J.*), pointed out that under the English cases, ". . . when a person is charged with possession of an implement of housebreaking, the burden of proving lawful excuse is on the person so charged, that burden is discharged by the accused if he prove that the alleged implement of housebreaking, capable of being used for that purpose, is a tool used by him in his trade or calling." He further said, "The phrase 'without lawful excuse' must be construed in the spirit of the statute. And, even though the possession of the pistols and blackjack be unlawful, and even though the defendants possessed the pistols and blackjack for the purpose of personal protection in the unlawful transportation of intoxicating liquor, in accordance with statement of defendant Wilborn, such possession is not within the meaning of the statute in question." The judgment of the Superior Court was reversed as to both defendants.

The above cited cases, however, do not relieve the State of the burden of showing beyond a reasonable doubt that the possession of the tools enumerated in the bill of indictment was without lawful excuse.

While the record of this 17-year-old defendant is bad for housebreaking, his intent and purpose in having possession of the enumerated tools and pistol constituted no part of the crime charged in the bill of indictment upon which he was tried. The sole question for the determination of the jury was simply this: Did the defendants have possession of these tools without lawful excuse?

We have reached the conclusion that the State failed to offer sufficient evidence to sustain the verdict from which the defendant McCall appeals. His motion for judgment as of nonsuit should have been sustained.

The judgment of the Superior Court against the defendant James E. McCall is

Reversed.

JOHNSON, J., not sitting.

OTIS C. BRUNSON, ADMINISTRATOR OF BOBBY RAY BRUNSON, MINOR CHILD, DECEASED, v. HAROLD HARTWELL GAINEY.

(Filed 12 December, 1956.)

1. Automobiles § 19—

If, under the circumstances, a reasonably prudent man could foresee and anticipate that an emergency would arise as a result of defendant's own conduct, defendant may not excuse himself on the ground that he was called upon to act in the emergency thus created.

2. Automobiles § 25—

A motorist is required by statute to operate his vehicle so as not to endanger or be likely to endanger any person or property, and to reduce speed when special hazards exist with respect to a narrow or winding roadway, pedestrians or other traffic. G.S. 20-140, G.S. 20-141.

3. Automobiles § 34—

A motorist approaching a place where he knows children of tender years are likely to be on or near the highway is under duty to exercise care for their protection in recognition of their childish impulses.

4. Automobiles § 46—Evidence held to require instruction that doctrine of sudden emergency does not apply if defendant's own negligence causes emergency.

There was evidence from which the jury could find that defendant knew he was approaching a place where children of tender years were likely to be on the highway, that defendant was traveling along the dirt road in the area at 40 miles per hour, and that when the child which defendant struck was first visible he was in the center of the road, without anything to obstruct vision for a distance of 350 yards, but that defendant was less than 150 feet from the child when he first observed him. Defendant contended to the contrary that the child suddenly ran in front of his car. *Held:* It was error for the court to charge on the doctrine of sudden emergency without also charging, in response to apt request, that a person whose own negligence brings about the emergency may not rely thereon to excuse his negligent conduct, it being a permissible inference from the evidence that the emergency was due to defendant's excessive speed or failure to maintain a proper lookout.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Hobgood, J.*, February 1956 Regular Term of HARNETT.

Plaintiff seeks to recover damages for the death of a three-year-old son who was struck and killed by an automobile operated by defendant. The tragedy occurred 6 May 1955 on a rural road. Plaintiff alleges that the child was struck and killed as a result of the negligent operation of defendant's automobile. He alleges that the automobile was being operated at a speed of 40 to 45 m.p.h., which speed was neither reasonable nor prudent under the existing circumstances. He alleges defendant was traveling in a neighborhood well known to defendant as a place where children of tender years were accustomed and at a time when they were likely to be at play on the highway. He alleges that plaintiff's intestate, on the opposite side of the road from the home, started to cross the road on the approach of the automobile, and in his attempt to cross was struck and killed; and, if defendant had been operating his automobile at a careful and reasonable rate of speed, maintaining a proper lookout, and in a prudent manner, he could have

seen the child in his attempt to cross the highway in ample time to stop before striking the child.

Defendant by answer admits he was familiar with the road. He admits that the car he was driving struck and killed the child about noon, that the sun was shining. He denies that children were wont to play in the road. He denies that he was operating his vehicle at the speed alleged by plaintiff, asserting that his speed was 30 to 35 m.p.h., which was reasonable and proper under the then existing conditions. He alleges the road he was traveling was "an average dirt road"; that he was observant and "was keeping a proper lookout down the road ahead of him; that as he approached the home of plaintiff's intestate he saw a small child sitting on the porch of said home, but no other person was in sight; that just as he approached the home proper, plaintiff's intestate jumped from behind a bush that was growing along said road or highway directly into the path of the automobile that was being driven by this defendant, and it was impossible for him to have stopped his automobile before striking said child . . ."

The court submitted the case to the jury on two issues: negligence of the defendant and damages. The jury answered the first issue in the negative. Thereupon the court rendered judgment for defendant and plaintiff excepted and appealed.

Bryan & Bryan for plaintiff appellant.
Young, Lamm & Taylor for defendant appellee.

RODMAN, J. Plaintiff, by assignments of error 9, 11, 14, and 15, presents for consideration the accuracy of the charge, as related to the defense asserted by defendant, that he was confronted by a sudden emergency.

Plaintiff testified: "that the defendant passed by the deceased's house about three or four times a day, and sometimes more than that; that the defendant passed the deceased's house every single day; that the home of the deceased had a small front yard; that the children of the witness, including the deceased, played in the yard and in the edge of the ditch in front of the house, because the yard was very small; that the witness had four children at that time; that they played in the yard and in the edge of the road every day; that they were playing in the yard and the edge of the road many times when the defendant passed in front of the house . . ."

No person testified that he witnessed the accident. Plaintiff relied largely upon the testimony of Highway Patrolman Williams, who investigated the occurrence. He described the physical conditions as he found them and related statements made to him by defendant. Defendant did not offer any evidence.

It appears from Mr. Williams' description that the home is on the south side of the road, which is approximately fourteen feet wide. At some places the road is sand and gravel with a very hard surface, and in other places it is sandy with just one wheel rut down the center of the road. In front of the house the road was sandy with a one-car path. The depth of the sand in the road ranged from three to seven inches. The road lay in an east-west direction. It was straight for 350 yards approaching plaintiff's house from an easterly direction. From the edge of plaintiff's house to the edge of the road is twelve feet. From the edge of plaintiff's steps to the edge of the road is seven feet. Just north of the center of the road was a patch of blood that covered "a right large area." Defendant told the witness the blood spot marked the point where he struck the child. Defendant's car was in the highway, forty-three feet west of the blood spot. There were skid marks from the blood spot to a point 138 feet east of the blood. There is an embankment on each side of the road. There were trees, bushes, and weeds growing on the embankments. The embankment on the north side of the road is about three feet high. On the north side of the road and about fifty-seven feet east of the house is a mail box.

Because of the bushes and trees, one traveling in a westerly direction would not see the porch of plaintiff's residence when he was more than forty-five feet east of the mail box. From a point where the skid marks started to the front wheels of defendant's car was 181 feet. Defendant told witness "that he was traveling from east to west, and passed the house at approximately 40 miles per hour and that the first thing the defendant knew there was a child in the road in front of him and that he applied his brakes; and that the defendant told the witness that he did not know whether the child was sitting or walking."

In another part of his testimony the witness stated he was "told by the defendant that when the defendant first saw the child the child was in the middle of the road, that he applied his brakes, that he did not know whether the child was sitting or walking at the time he was struck; that the defendant said he was driving about 40 miles per hour at the time."

When defendant pointed out the skid marks to witness, he asked defendant "why it was so long to the skid marks east of the car and that the defendant answered that he was traveling about 40 miles per hour when he saw the child, and that he attempted to stop before striking the child . . ."

In answer to defendant's contention that the jury should not find that the child came to his death by the negligence of defendant for that defendant was confronted with a sudden emergency, plaintiff requested the court to charge the jury: "The doctrine of sudden emergency is

unavailing to one who, by his own negligence, placed himself in such a position of emergency."

Plaintiff also requested the court to charge the jury: "The duty of due care on the part of the driver does not just begin when the victim, infant or adult, is actually observed in a perilous position, but as soon as the victim should have been foreseen by the driver by his keeping a proper lookout, prior to the injury or death."

The court declined to give either of the requests of plaintiff, and this refusal is made the basis of assignments of error 14 and 15.

The court charged on this phase of the case as follows: "Now, I would like to charge you thus as to the defendant's contention with reference to sudden emergency. I charge you, gentlemen of the jury, that it would be incumbent upon you, as jurors, to determine whether or not a sudden emergency or peril did in fact exist at the time and place of the accident, and if you do find that an emergency did exist at that time, (I charge you that one who is required to act in an emergency is not held by law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence similarly situated would have made, because it is well understood that a person in the presence of an emergency is not usually held to the same deliberation and circumspect care as in ordinary circumstances where no emergency exists. The standard of conduct required in an emergency, as elsewhere, is that of a prudent man.)"

Plaintiff excepted to the portion of the charge in parentheses and assigns that portion as prejudicial error. Again, on the question of sudden emergency, the court charged: " 'when a person is confronted with a sudden emergency he is not held by law to the same degree of care as under ordinary circumstances, but only the degree of care which an ordinary prudent person would use under similar circumstances,' and that would be for you, the jury, to determine."

Plaintiff excepted to the foregoing portion of the charge, and this constitutes his eleventh exception and assignment of error.

The instructions requested by plaintiff point to the error in the charge. One cannot, by his negligent conduct, permit an emergency to arise and then excuse himself on the ground that he was called upon to act in an emergency. Foreseeability is the test of liability for asserted negligent injuries. If a reasonably prudent man can foresee and anticipate that injury is apt to result from his conduct, prudence would dictate and the law demands that he exercise reasonable care to prevent the injury.

In *Goss v. Williams*, 196 N.C. 213, 145 S.E. 169, this instruction was given approval: "You are instructed that the mere fact that a child runs in front of a moving motor vehicle so suddenly that the driver had no notice of danger, does not necessarily relieve a defendant from lia-

bility. There still remains the question whether the negligent driving of the automobile made it impossible for the driver to avoid the accident after seeing the child, or when by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury, there being a greater degree of watchfulness and care required of automobile drivers as to children than adults."

In *Bullock v. Williams,* 212 N.C. 113, 193 S.E. 170, the Court gave its approval to this charge: "An automobile driver, who by the negligence of another, and not by his own negligence, is suddenly confronted with an emergency and is compelled to act instantly to avoid an accident or injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make; even though he didn't make a wise choice, and whether he used reasonable care under the circumstances is ordinarily a question for the jury."

Speaking with respect to the duty of one to exercise care to avoid a situation which might result in an emergency, the Missouri Court said, in *Windsor v. McKee,* 22 S.W. 2d 65: "Plaintiff complains that instruction C is erroneous because it does not require the jury to find, before excusing the conduct of defendant McKee, on the ground that he acted in an emergency, that such emergency was not brought about by the negligence of McKee himself. It is well-recognized doctrine that a person may not excuse his conduct on the ground that he acted in an emergency, or under the influence of a sudden peril, where the emergency or peril resulted from his own negligence. *Hall v. St. Louis-San Francisco Ry. Co.* (Mo. Sup.) 240 S.W. 175; *Garvey v. Ladd* (Mo. App.) 266 S.W. 727. The doctrine as thus stated is somewhat misleading. It is not the conduct in the emergency that the law does not excuse. There is no culpability in such conduct. It is the negligent conduct which brought about the emergency which the law does not excuse. The act done in the emergency immediately causing the injury is a mere link in the causal chain connecting the negligent act, which brought about the emergency, with the injury. It is this negligent act, and not the non-negligent act done in the emergency, that liability springs from." *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898; *A. C. L. R. R. v. Trucking Co.,* 238 N.C. 422, 78 S.E. 2d 159; *Butler v. Allen,* 233 N.C. 484, 64 S.E. 2d 561; *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593; *Independent Oil Refining Co. v. Lueders,* 134 So. 418 (La.); *Gootar v. Levin,* 293 P. 706 (Cal.); *Harper v. Crislip,* 138 S.E. 93 (W. Va.).

The statute law (G.S. 20-140) commands the operator of an automobile to drive with caution and circumspection. He is commanded not to operate in a manner so as to endanger or be likely to endanger any person or property. Further statutory directions (G.S. 20-141) are

given with respect to speed when traveling upon a narrow or winding roadway or when special hazards exist with respect to pedestrians or other traffic.

There was evidence from which the jury could find defendant knew he was approaching a place where he was likely to find children of tender years on the highway. This knowledge would impose a duty to exercise care for their protection and a recognition of childish impulses. *Pope v. Patterson,* 243 N.C. 425, 90 S.E. 2d 706; *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129; *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Henson v. Wilson,* 225 N.C. 417, 35 S.E. 2d 245; *S. v. Gray,* 180 N.C. 697, 104 S.E. 647. Was the emergency on which defendant relies due to excessive speed?

There was evidence from which the jury could find that when the child was first seen he was in the center of the road, and defendant did not know whether the child was sitting or walking. The evidence would justify a finding that the point where the child was struck was visible for a distance of 350 yards, but defendant was less than 150 feet from the child when he first observed him, and it was then too late to avoid the child. Was the emergency on which defendant relies due to his failure to keep a proper lookout?

If the peril suddenly confronting the defendant was due to excessive speed or to his failure to maintain a proper lookout, the fact that care was exercised after the discovery of the peril would not excuse the negligent conduct which was the proximate cause of the injury and damage. The court should have so instructed the jury.

New trial.

JOHNSON, J., not sitting.

STATE v. SQUIRE MOORE, JR.

(Filed 12 December, 1956.)

1. Criminal Law § 31c: Evidence § 51—

The competency of a witness to testify as an expert in the particular matter at issue is addressed primarily to the discretion of the trial court, and its determination is ordinarily conclusive unless there be no evidence to support the finding or unless there is abuse of discretion.

2. Same—

Where a witness is tendered as an expert upon abundant evidence of qualification, the act of the trial court in permitting him to testify as an

expert is tantamount to holding him to be an expert in the field of his testimony.

3. Criminal Law § 31h: Evidence § 47f: Automobiles § 71—

Where there is ample evidence of a witness' qualification as an expert on the subject of chemical analysis of human blood to determine the alcoholic content thereof, and as to the effect of certain percentages of alcohol in the blood stream, the admission of his testimony as to the alcoholic content of defendant's blood as revealed by a test made by the witness shortly after defendant's arrest and as to the effect of certain percentages of alcohol in the blood stream, will not be held for error upon objection, the qualification of the witness being addressed to the discretion of the trial court and abuse of discretion not appearing.

4. Criminal Law § 62f—

Where appeal is taken to the entry of judgment suspending the prison term, the judgment will be stricken on appeal and the cause remanded for proper judgment.

JOHNSON, J., not sitting.

APPEAL by defendant from *Gwyn, J.*, at 16 April, 1956, Criminal Term of GUILFORD.

Criminal prosecution upon a bill of indictment charging that on 27 May, 1955, Squire Moore, Jr., at and in the County of Guilford, "unlawfully and willfully did drive a motor vehicle upon the public highways of North Carolina while under the influence of intoxicating liquor and narcotic drugs, against the form of the statute in such case made and provided," etc.,—it being stipulated that the prosecution originated in Municipal Court of the City of Greensboro upon a proper warrant charging defendant with the identical offense charged in the bill, and same was lawfully transferred to Superior Court for trial when defendant demanded trial by jury.

Plea: Not guilty.

Upon trial in Superior Court the State offered testimony of a member of the Greensboro police department tending to show that while on duty as a police officer, driving in a police car around 3:30 or 3:45 a.m., on 27 May, 1955, he saw a Buick automobile traveling on certain public streets in the city of Greensboro; that it was going from side to side; that he stopped the Buick automobile at the intersection of Wilkerson and Bennett Streets; that defendant was driving it, and was so intoxicated that the officer helped him out, and arrested him for driving intoxicated, and took him to the police station; that in the opinion of the officer the physical and mental faculties of defendant were impaired, and he was under the influence of some intoxicating beverage,—that he was drunk; and that on the way to the police station the officer told defendant he could get a blood test if he wanted it, and explained to

him the blood test would show up the alcoholic content in his blood; and defendant "agreed to take it, and he took it." The State then rested its case.

Defendant, reserving exception to the denial of his motion for judgment as of nonsuit, offered testimony tending to show that he had a general good character, and that he only had beer to drink, and was sober. And defendant, as witness, testified that he was driving his automobile; that he told the officer he had been drinking a couple of beers, and was not under the influence of any kind of intoxicating drink or liquor,—did not feel them; that the officer said, quoting defendant, "looked like I had drunk a case of beer"; and that the officer asked him (defendant) about taking a blood test, to which he said "O.K." and went on and took the test.

Defendant renewed motion for judgment as of nonsuit, and same was denied, and defendant excepted. The State then rested, and counsel for defendant made and completed his address to the jury on behalf of defendant, but counsel for State had not addressed the jury.

Counsel for State then moved the court to re-open the case and permit further evidence to be offered.

Thereupon further evidence for the State was offered. R. B. Davis, Jr., testified in pertinent part as follows: ". . . I am a chemist. I own and operate the Doctors' Medical Laboratory here in Greensboro. I perform all types of tests for the medical profession of Greensboro and Guilford County on patients in an attempt to help them arrive at a diagnosis. We run tests on blood, sputum, all types of body fluids and body secretions. We run tests for determination of the alcoholic content in the bloodstream. I have run over 1500 tests here in Greensboro. That covers a period which will be four years this coming October. As to my training in my profession, I graduated from Wake Forest College with a Batchelor of Science degree. I had nearly two years of medicine in Medical School and . . . a year and a half extra training at Burge Hospital in Springfield, Missouri. After that time I came back to Greensboro and opened the Doctors' Medical Laboratory. As to whether in any of these institutions I did any work in connection with alcohol tests, it was all types of tests I performed and learned the procedures, and so on. I did run tests analyzing blood. Most of the analyzing of blood was done at Burge Hospital . . . for component parts of blood in disease and conditions under those situations. The courses I had in medical school pertinent and relevant to the work I am now performing were: . . . gross anatomy, neurological anatomy, haemotology, physiology, bio-chemistry . . . I have run tests correlating my observation of an individual with my findings of the blood tests. I have done so in a hundred cases. I have made the mental observation, and so forth, to compare with my test. In the cases that I have studied

from a physical appearance . . . a man's action, his reflex actions, pupils of his eyes . . . to attempt to determine whether or not I could draw any kind of similarity between a man's physical appearance and that of my blood-alcohol test. In all cases where a person's appearance would indicate intoxication, my test bore it out." Then, over objection and exception by defendant, the witness, in response to question by the State, as to what recognized medical associations and professional group he is a member of pertinent to this line of work, stated: "I belong to the American Technologists Association; . . . to a group sponsored by the American Technologists Association in which we have membership known as Clinical Laboratory Directors; . . . to the North Carolina Public Health Association, the North Carolina Bacteriological Association, the American Council of Bio-Analysts, and . . . of the American Association for the advancement of Science . . . a 108-year-old organization."

Then over objection and exception by defendant, this question was asked the witness: "Q. Mr. Davis, based upon your education, training, and experience in the analyzing of blood, particularly with reference to the alcoholic content, state whether you are able to give an opinion as to whether or not a person is under the influence of some intoxicating beverage from the results of your laboratory tests and results of your finding in regard to the alcoholic content of that blood," to which the witness answered: "Yes, I am, sir."

Thereupon the State submitted Mr. Davis to the court "as an expert haemotologist and clinical technologist and technician and chemist."

Objection by defendant was overruled, and he excepted.

Then the witness proceeded to testify, without objection: That in response to call, in early morning of 27 May, 1955, he went to police station, arriving around 4 o'clock, and there as result of conversation with defendant, and for defendant, he took a sample of blood from defendant, and later made an analysis at his laboratory.

Then over objection and exception by defendant, the witness was asked these questions to which he answered as indicated: "Q. Now, then, Mr. Davis, what were the results of this blood-alcohol test that you ran on the defendant Squire Moore's blood? A. The result of this test showed that there was 0.22% concentration of alcohol in the bloodstream. Q. Mr. Davis would you explain to the jury exactly what 0.22% of alcohol means in relation to whether or not a person is intoxicated? A. 0.22% alcoholic concentration shows that the person is under the influence of alcohol. Q. At what point does a person become under the influence in regard to the percentage of alcohol in his bloodstream? A. At 0.15% or above. Q. Mr. Davis, in your opinion, at what point is a person not under the influence in regard to the percentage of alcohol in his bloodstream? A. In my opinion 0.01 to 0.04 a person is not under

the influence of alcohol. Q. Mr. Davis, in your opinion, at 0.05% state whether or not a person is under the influence? A. At 0.05% a person could or could not be. That is to say maybe one person out of a hundred would be under the influence at 0.05. Q. Mr. Davis, in your opinion, at what scale in regard to the percentage of alcohol in a person's bloodstream could a person be or not be under the influence? A. The scale would be 0.05, 0.06, and so on up to 0.14%, anywhere in that range. Q. So you say from 0.05 up to but not including 0.15 a person could or could not in your opinion be under the influence of some intoxicating liquor? A. That's right. Q. Mr. Davis, would you explain to the jury . . . the variance there? A. Well, progressing, 0.05 might have one person out of a hundred under the influence of alcohol at that concentration, at 0.06 we might have a few more showing being under the influence, and so we go on up the scale to 0.14 maybe you wouldn't have but one person out of the average hundred who was not showing being under the influence of alcohol. So, as the scale progresses upward, more and more people become under the influence. Q. And then at 0.15 everyone is considered to be under the influence? A. Yes, sir. (The Court, in his discretion, permitted the leading character of question.) Q. Mr. Davis, at what point does a person become unconscious in regard to the alcoholic content in his bloodstream? A. At 0.35% above. Q. At what point does death ensue, Mr. Davis, in regard to the alcoholic content of a person's blood? A. At a concentration of 0.45 to point 50. Q. Mr. Davis, state whether or not alcohol in the stomach causes a person to become intoxicated? A. It will not. Q. When does and where is its location in respect to causing a person to become intoxicated? A. The alcohol must be in the bloodstream. Q. Now, Mr. Davis, does the alcoholic content that you in your laboratory findings . . . indicate the amount of alcoholic beverages that a person has consumed? A. No, sir. Q. What does it? A. It simply represents the concentration of alcohol in the bloodstream, how much is concentrated in the bloodstream. Q. Mr. Davis, what factors determine the amount of alcohol that will show up in the bloodstream in relation to an individual? A. Well, whether there is any food in the stomach, particularly proteins and fats will slow down the absorption rate of alcohol. Another thing that is depended on is the condition of an individual's liver, inasmuch as the liver is the chief organ in the body of getting rid of alcohol. Whether or not the individual is . . . alcoholic or whether or not he is a person who might be called a temperate or moderate drinker. Those are the factors which enter into that question, I believe. Q. Mr. Davis, from your education, training and experience do you have an opinion satisfactory to yourself as to whether or not the defendant Squire Moore was under the influence of some intoxicating beverage when you took the blood sample from him there on the 27th day of

May, 1955, at the police station? A. Yes, sir. Q. What is your opinion? A. He was, sir."

Then defendant, through his counsel, cross-examined the witness Davis as to subjects he studied at Wake Forest College and at Oglethorpe University; and as to tests made by him at Burge Hospital; and as to the establishment by him of the laboratory at Greensboro; and as to how he made tests for ascertainment of alcoholic content of blood; and as to instructions in connection therewith; and as to whether he had any personal memory of defendant to indicate that he was intoxicated. In the course of the examination, the court inquired of counsel if he were undertaking to show instructions as to operation of apparatus the witness had were wrong. Counsel replied that he was "undertaking to find out really how this man gets to be a blood tester for alcohol." The cross-examination was concluded with the question: "Q. He didn't do anything then, so far as you know, to make it obvious to you he had drunk anything? A. I don't have any reason to remember anything of that kind."

Thereupon the State rested. Defendant renewed motion for judgment as of nonsuit. Overruled. And counsel for defendant was permitted to re-argue the case to the jury.

The case was then submitted to the jury under charge of the court.

Verdict: Guilty as charged.

Judgment: Confinement in common jail of Guilford County for the term of six months, to be assigned to work under the supervision of State Highway and Public Works Commission and pay a fine of $100.00 and costs. Prison sentence suspended for a period of three years on conditions stated.

Defendant excepted thereto and appeals therefrom to Supreme Court and assigns error.

Attorney-General Patton and Assistant Attorney-General Robert E. Giles for the State.

Robert S. Cahoon for Defendant Appellant.

WINBORNE, C. J. While this appeal contains numerous assignments of error, founded upon exceptions to evidence offered, and to the charge, the basic question presented is this: Did the trial court err in finding the witness Davis (1) qualified as an expert to testify on the subject of chemical analysis of human blood to determine alcoholic content thereof, and (2) qualified as an expert to testify as to the effects of certain percentages of alcohol in the bloodstream?

If the witness were qualified, his testimony was competent, and if he were not, it would be incompetent.

In this connection this Court has uniformly held that the competency of a witness to testify as an expert is a question primarily addressed to the court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuse his discretion. *LaVecchia v. Land Bank,* 218 N.C. 35, 9 S.E. 2d 489, and cases cited. See also *S. v. Smith,* 221 N.C. 278, 20 S.E. 2d 313; *In re Humphrey,* 236 N.C. 142, 71 S.E. 2d 915; *Samet v. Ins. Co.,* 237 N.C. 758, 75 S.E. 2d 913. Anno. 166 A.L.R. 1067.

In the *Smith case, supra, Seawell, J.,* writing for the Court, declared: "The qualification of a witness to give an opinion as one skilled, or as is usually termed, an expert, depends on matters of fact and the question is addressed to the trial judge, with opportunity to the objector to test the experience of the witness by appropriate examination. Regardless of the professional label, it is for the court to say whether the witness is qualified to testify as one skilled in the matter at issue, and his finding will not be disturbed when there is evidence to support it, and the discretion has not been abused."

Here the witness testified in detail as to his study, training and experience. He was then tendered by the State as an expert haemotologist and clinical technologist and technician and chemist. Objection by defendant was overruled, and the witness was permitted to testify in the capacity of an expert. This was tantamount to the judge holding him to be an expert in the field of his testimony. The testimony indicates the knowledge and experience of the witness in conducting experiments as to alcoholic content in the blood of a human being, and as to the effect of alcohol upon the human system in respect to intoxication, when introduced into the blood stream. Thus it appears that there is abundant evidence to support the holding of the judge that the witness Davis is such expert.

Indeed in *S. v. Willard,* 241 N.C. 259, 84 S.E. 2d 899, this Court considered the question as to whether expert testimony as to the results of a blood test taken after a defendant's arrest on charge of driving under the influence of an intoxicating beverage is admissible in the courts of this State. In that case the witness was R. B. Davis, Jr., the same person as here. The trial court there held him to be an expert chemist and haemotologist, and defendant made no objection. And this Court held there that the expert testimony (given by the witness Davis) as to the results of tests of defendant's blood was admissible on the trial of the case on the charge of driving a motor vehicle upon the public highways within the State while under the influence of intoxicating beverage. G.S. 20-138.

Now on the present record it appears that this same witness has run tests correlating his observation of individuals, in a hundred cases, with his findings of the blood tests, and that in all cases where the person's

appearance would indicate intoxication, his test bore it out. And he testified that based upon his education, training and experience in the analyzing of blood, particularly with reference to the alcoholic content, he is able to give an opinion as to whether or not a person is under the influence of some intoxicating beverage from the results of his laboratory tests and results of his finding in regard to the alcoholic content of that blood.

Hence it does not appear that the trial judge abused his discretion in holding the witness Davis an expert. Therefore his testimony to which defendant excepts is competent evidence for the consideration of the jury.

Moreover the assignments of error, based upon exceptions to the portions of the charge, apparently are predicated upon contention that because evidence was erroneously admitted, the charge is in error. No error, however, is made to appear.

All assignments of error have been duly considered, and in the trial from which appeal is taken, there is no error.

However, appeal having been taken to entry of judgment, suspending prison term, the judgment is stricken and the cause remanded for proper judgment. See *S. v. Ritchie*, 243 N.C. 182, 90 S.E. 2d 301, and cases cited. Also *S. v. Ingram*, 243 N.C. 190, 90 S.E. 2d 304.

Error and remanded.

JOHNSON, J., not sitting.

STATE v. WILBORD N. HENDERSON.

(Filed 12 December, 1956.)

APPEAL by defendant from *Gwyn, J.*, at 27 February, 1956, Criminal Term of GUILFORD.

Criminal prosecution upon a bill of indictment charging that on 10 September, 1955, Wilbord N. Henderson, late of the County of Guilford "unlawfully and willfully did drive a motor vehicle upon the public highways of North Carolina, while under the influence of intoxicating liquor and narcotic drugs, against the form of the statute in such case made and provided" etc.,—the bill having been found and returned by the grand jury after warrant issued out of Municipal County Court of the city of Greensboro, on affidavit charging like offense, had been forwarded to Superior Court of Guilford County upon motion being made by defendant for a trial by jury.

Upon the trial in Superior Court the State introduced two officers of the police department of the city of Greensboro tending to support the charge under which defendant stands indicted. Then R. B. Davis, Jr., held to be an expert technician, testified in substantial accord with the testimony given by him in the case of *S. v. Moore, ante,* 158, bringing to focus alleged errors similar to those presented in that case.

Verdict: Guilty.

Judgment: Confinement in common jail of Guilford County for term of six months, to be assigned to work under supervision of State Highway and Public Works Commission and pay a fine of $100.00 and the costs,—prison sentence suspended on condition stated.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General Patton and Assistant Attorney-General Giles for the State.

Elreta Melton Alexander for Defendant Appellant.

PER CURIAM. Decision on this appeal is controlled by decision on the appeal in the case of *S. v. Moore, ante,* 158. Hence, in the light of the decision there, this Court finds no error in the trial below. However, appeal having been taken to entry of judgment suspending the prison term, the judgment is stricken and the cause remanded for proper judgment. See *S. v. Ritchie,* 243 N.C. 182, 90 S.E. 2d 301; also *S. v. Ingram,* 243 N.C. 190, 90 S.E. 2d 304.

Error and remanded.

JOHNSON, J., not sitting.

MAMIE P. LINEBERGER v. SECURITY LIFE & TRUST COMPANY AND PILOT FREIGHT CARRIERS, INC.

(Filed 12 December, 1956.)

1. Insurance § 32c—Facts agreed held to disclose final discharge terminating certificate under group policy.

Where the certificate under a group policy states that upon termination of the employment the insurance of the employee under the group policy ends, and under the agreed statement of facts it is disclosed that the employee was discharged from his regular employment over a month prior to his death, and his name removed from the employer's insurance records, that at no time thereafter did his name appear on such records, and that no premium was paid to insure his life thereafter under the group policy, the beneficiary in the certificate may not recover thereon, notwithstanding

that the employee worked thereafter at irregular intervals for the employer for a total of sixteen days during the month and two-thirds following his final discharge, there being nothing in the findings of fact to support the contention that his final discharge as a regular employee was a temporary lay-off.

2. Same—

Provision in a certificate under a group policy that upon termination of employment the employee might apply within a thirty-one day period for a policy of life insurance with insurer in any one of the forms customarily issued, except term insurance, does not have the effect of continuing the certificate in force after termination of the employment in contradiction of the express terms of the certificate, but merely gives the employee the right to apply for, in accordance with terms stipulated, and have issued a policy of insurance.

3. Same—

Where certificate under a group policy sets forth in plain language that insurance thereunder should terminate upon termination of the employment and that the insured employee should have right to apply for a regular policy within thirty-one days after termination of the employment, neither insurer nor the employer is required to give the employee notice that termination of employment terminates the insurance or notice of his privilege of conversion.

4. Same—

The employer paying premiums under a group policy is not the agent of the insurer, and error of the employer in reporting to insurer that a certain person was an employee when in fact the relationship had been terminated by final discharge, does not bind insurer.

5. Same—

Where, by the plain and unambiguous terms of a group certificate, insurance as to the employee thereunder is terminated when employment is terminated, such terms fix the period of coverage under the certificate and will be interpreted and enforced according to the terms of the policy in their usual, ordinary and accepted meaning.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Patton, Special Judge,* June Civil Term 1956 of FORSYTH.

Civil action to recover the sum of $3,000.00, the face value of a certificate of insurance issued to Jasper C. Lineberger under a group life insurance policy issued by Security Life & Trust Company to Pilot Freight Carriers, Inc.

The parties waived a jury trial, agreed upon a statement of facts arising upon the pleadings, and consented that the judge could enter judgment thereon.

The judge rendered judgment that the plaintiff have and recover nothing from Security Life & Trust Company, and dismissed the action.

Plaintiff excepted to the judgment, and appealed.

Weston P. Hatfield for Plaintiff, Appellant.

Womble, Carlyle, Sandridge & Rice for Security Life & Trust Company, Defendant, Appellee.

PARKER, J. On 8 March 1953 Security Life & Trust Company issued to Pilot Freight Carriers, Inc., a motor vehicle public carrier, its Group Policy No. G-198, which was a Non-Contributory Policy with all premiums thereon paid monthly by Pilot Freight Carriers, Inc., and no part thereof paid by any of its employees covered by said policy. Under the arrangement between them the Pilot Freight Carriers, Inc. was a self-administrative unit, and it kept and maintained in its office a record showing the names of its employees covered by the policy at any given time. Security Life & Trust Company had the right at will to inspect this record, or any other records in the office of Pilot Freight Carriers, Inc. pertaining to the policy of Group Insurance and to the employees covered by it. Pilot Freight Carriers, Inc. was required, and did make a monthly report to Security Life & Trust Company on forms furnished by it, entitled "Premium Statement for Group Life Insurance," which report contained the number of its employees covered by the policy, the amount of insurance in force on the lives of its employees under the policy as of the given insured date, the number of new employees insured since the last due-date, employees terminating insurance since last due-date, and other pertinent information.

At the times mentioned in the pleadings Pilot Freight Carriers, Inc. maintained a freight terminal in Forsyth and Mecklenburg Counties. On 30 June 1952 Jasper C. Lineberger entered the employment of Pilot Freight Carriers, Inc. as a freight checker at its terminal in Forsyth County, and was discharged on 31 January 1953. He was rehired on 26 May 1953, and worked as a full-time employee as a freight checker until 31 July 1954. On 31 July 1954 his employment was terminated by Pilot Freight Carriers, Inc., and he, together with several other employees, was discharged, on account of a lack of work for them at the Forsyth County Terminal. The effective date of his discharge was 1 August 1954. He was offered a job at its terminal in Charlotte, which he declined to accept. When he was discharged on 31 July 1954, he received his final pay cheque, and was notified there was no further work for him at the Forsyth County Terminal.

When he was discharged on 31 July 1954, Pilot Freight Carriers, Inc. removed his name from its insurance record showing the names of all its employees covered by the Group Policy, and at no time thereafter

did his name appear on its insurance records showing the names of its employees covered by the Group Policy. Pilot Freight Carriers, Inc. paid no premium for coverage under said policy of group insurance on his life for either the months of August or September 1954. The last premium paid by it for coverage under the policy of group insurance on his life was for the month of July 1954, the due-date of which was 1 July 1954.

For the due-date of 1 August 1954 Pilot Freight Carriers, Inc. submitted to Security Life & Trust Company on 6 August 1954 the "Premium Statement for Group Life Insurance," which showed Jasper C. Lineberger as one of its 48 employees, and it delivered to Security Life & Trust Company its cheque for $1,153.22 in payment of the premium due for August 1954.

When Jasper C. Lineberger was rehired on 26 May 1953, there was issued to him a certificate in accord with the terms of the Group Policy showing that he was insured under the Group Policy. The certificate named plaintiff as beneficiary. Pursuant to a rider attached to the Group Policy on 1 September 1953 the amount of insurance under the certificate was increased to $3,000.00.

When he was discharged on 31 July 1954, he was not notified by his employer or by Security Life & Trust Company that the insurance on his life under the Group Policy was being terminated, or that the same could be converted as provided by the certificate. Neither he, nor Pilot Freight Carriers, Inc., nor anyone, paid any sum whatsoever to Security Life & Trust Company on the premium on the policy of Group Insurance for coverage thereunder on his life for the month of August 1954, or for any month thereafter.

For the work done by him for Pilot Freight Carriers, Inc., prior to 1 August 1954, he was paid weekly by cheque, and was carried on the regular payroll of the company as a full-time employee. After his discharge on 31 July 1954, he worked at irregular intervals during August and September 1954 for Pilot Freight Carriers, Inc. for a total number of 16 days prior to his death on 20 September 1954. During this period of irregular work his name was not carried on the insurance records or on the employment records kept by Pilot Freight Carriers, Inc., showing the names of its regular and full-time employees, who were covered by the Policy of Group Insurance during the months of August and September 1954, and he was paid in cash from the petty cash fund.

A copy of Group Policy No. G-198 was attached to the agreed statement of facts, and made a part thereof. This policy provides: "TERMINATION OF INSURANCE. The insurance of any employee insured hereunder shall automatically cease: . . . (2) *On the date of the termination of his employment.* Termination of employment for the purposes

of insurance hereunder, shall mean cessation of active work as an employee, except . . ." There are two exceptions: one, if an employee's cessation of active work is caused by sickness, injury or retirement, and two, if an employee is on leave of absence or temporary lay-off. The two exceptions are not relevant here.

It seems evident that the words "termination of his employment" within the terms of the policy refer to the *status* of the employee rather than to a contractual relationship, and must mean a complete severance of the relationship of employer and employee, of which the employee has knowledge, by positive act on the part of either or both. It is such a termination of employment as will make effective all parts of the insurance contract. This is apparent from the exception that "if an employee's cessation of active work is caused by sickness, injury or retirement, his employment may be deemed to continue until premium payments for such employee's insurance are discontinued by the employer." *Pearson v. Assurance Society*, 212 N.C. 731, 194 S.E. 661; *Emerick v. Conn. Gen. Life Ins. Co.*, 120 Conn. 60, 179 A. 335, 105 A.L.R. 413; *Beecey v. Traveler's Ins. Co.*, 267 Mass. 135, 166 N.E. 571; *Colter v. Traveler's Ins. Co.*, 270 Mass. 424, 170 N.E. 407; *Peters v. Aetna Life Ins. Co.*, 279 Mich. 663, 273 N.W. 307; 44 C.J.S., Insurance, p. 1265; Appleman's Insurance Law and Practice, Vol. 1, sec. 122.

The agreed statement of facts sets forth that there was a complete severance of the relationship of employer and employee between Pilot Freight Carriers, Inc. and Jasper C. Lineberger by his discharge from employment on 31 July 1954, effective 1 August 1954, at which time he received his final pay cheque. He knew he was discharged from employment because of lack of business at its Forsyth County Terminal, and when he was offered employment at its Mecklenburg County Terminal, he refused to accept it. When he was discharged on this date, Pilot Freight Carriers, Inc. removed his name from its insurance records showing that he was an employee covered by the Group Policy, and at no time thereafter did his name appear on such records. From then until his death on 20 September 1954 no premium was paid by anyone to Security Life & Trust Company for coverage on his life under the Group Policy. From the agreed statement of facts it is clear that the report made to Security Life & Trust Company by Pilot Freight Carriers, Inc. on 6 August 1954 that he was an employee on 1 August 1954 was made in error. His termination of employment on 31 July 1954 was such a termination as to make effective all parts of the insurance contract. Plaintiff's contention that Jasper C. Lineberger's discharge on 31 July 1954 was a temporary lay-off finds no support in the agreed statement of facts. As Jasper C. Lineberger's discharge on 31 July 1954 was a complete severance of the relationship of employer

and employee existing between them, the employer had no right to continue the insurance as to him. "Group insurance policies are issued to the employer to insure employees. One who is not an employee is not insurable." *Hawthorne v. Met. Life Ins. Co.*, 285 Mich. 329, 280 N.W. 777.

The Group Insurance Policy provides: "EMPLOYEES ELIGIBLE. . . . (b) Each employee in the employ of the Employer after the Effective Date of this policy shall be eligible for insurance upon the completion of one month of continuous service." Jasper C. Lineberger during the irregular intervals in August and September 1954 that he worked for Pilot Freight Carriers, Inc. for 16 days was not eligible for insurance under the Group Policy.

The certificate of insurance issued to Jasper C. Lineberger on 26 June 1953, after he was rehired on 26 May 1953, is attached to the agreed statement of facts, and made a part thereof. This certificate issued to him provides that it is subject to the terms and conditions of Group Policy No. G-198, and contains this provision:

> "CONVERSION. Upon termination of insurance under the group life policy, because of termination of employment with the Employer, any employee shall be entitled to have issued by the Insurance Company, without medical examination, a policy of life insurance in any one of the forms customarily issued by the Insurance Company, except term insurance, upon written application made to the Home Office of the Insurance Company within thirty-one days after the termination of employment and upon payment of the premium applicable to the class of risk to which the employee belongs and to the form and amount of policy at the employee's then attained age. Any individual policy issued in accordance with this provision shall become effective at the expiration of the thirty-one day period during which the employee was entitled to make application for the individual policy. The amount of the individual policy shall not exceed the amount of the employee's life insurance in force at the beginning of such thirty-one day period."

Jasper C. Lineberger's termination of employment was on 31 July 1954, and he died on 20 September 1954. There is nothing in the agreed statement of facts to indicate that he made any effort to use the conversion privilege set forth in plain English in his certificate of insurance, which inured to his benefit. What was said in *Pearson v. Assurance Society, supra,* is pertinent here: "It (a conversion right in the certificate of insurance and master policy) grants the insured employee a privilege or option under certain conditions therein stipulated. The insured did not exercise this option or privilege by applying for such

policy or by paying the required premium. The plaintiff, therefore, has no claim against the defendant by reason of the terms of this provision." See also: Appleman's Insurance Law and Practice, Vol. 1, p. 115.

The certificate of insurance issued to Jasper C. Lineberger plainly sets forth that upon the termination of his employment with Pilot Freight Carriers, Inc. his insurance as an employee under the Group Policy ended. The policy does not require that notice that termination of his employment terminated his insurance under the Group Policy, or that notice of his privilege of Conversion, be given to him by either employer or the insurer. Group Policy No. G-198 was a Non-Contributory Policy with all premiums thereon paid monthly by Pilot Freight Carriers, Inc., and no part thereof paid by any of its employees covered by the policy. Jasper C. Lineberger was charged with knowledge of those terms, and neither the insurer nor the employer had any duty to apprise him that he was not covered by the policy after his discharge as an employee, of which discharge he had full knowledge, or that he had a privilege of Conversion. *Beecey v. Traveler's Ins. Co., supra; Thull v. Equitable Life Assurance Society,* 40 Ohio App. 486, 178 N.E. 850; *Equitable Life Assurance Society of U. S. v. Yates,* 288 Ky. 309, 156 S.W. 2d 128; *Metropolitan Life Ins. Co. v. Thompson,* 203 Ark. 1103, 160 S.W. 2d 852; *Adkins v. Aetna Life Ins. Co.,* 130 W. Va. 362, 43 S.E. 2d 372; 44 C.J.S., Insurance, p. 1265; Appleman's Insurance Law and Practice, Vol. 1, pp. 108-109.

In *Adkins v. Aetna Life Ins. Co., supra,* it is said: "As the conversion privilege clause of the policy, for the reasons already stated, gave the insured nothing more than the right to obtain a converted policy upon stated conditions within the specified period after the termination of his employment and did not extend his insurance under the policy beyond the end of the policy month in which his employment terminated, no notice by his employer that his employment had terminated could restore his insurance under the policy or serve to keep it in force or effect. *Pearson v. Equitable Life Assurance Society of United States,* 212 N.C. 731, 194 S.E. 661; *Duval v. Metropolitan Life Ins. Co.,* 82 N.H. 543, 136 A. 400, 50 A.L.R. 1276; *Murphy v. Chrysler Corporation,* 306 Mich. 610, 11 N.W. 2d 261; *Metropolitan Life Ins. Co. v. Hawkins,* 156 Va. 720, 158 S.E. 877; *Costelle v. Metropolitan Life Ins. Co.,* Mo. App., 164 S.W. 2d 75; *Equitable Life Assurance Society of United States v. Yates,* 288 Ky. 309, 156 S.W. 2d 128; *English v. Metropolitan Life Ins. Co.,* 300 Mass. 482, 15 N.E. 2d 804; *Kowalski v. Aetna Life Ins. Co.,* 266 Mass. 255, 165 N.E. 476, 63 A.L.R. 1030."

It is written in *Haneline v. Casket Co.,* 238 N.C. 127, 76 S.E. 2d 372: "It was said in *Dewease v. Insurance Co.,* 208 N.C. 732, 182 S.E. 447, 'the employer in a group insurance policy is not ordinarily the agent of the insurance company.' "

Deese v. Ins. Co., 204 N.C. 214, 167 S.E. 797, relied on by the plaintiff is distinguishable. In that case Oscar J. Deese had agreed to pay his employer the sums required to keep the Group Policy in force as to him. The employer had not renewed the Group Policy. In reliance upon the provisions of the Group Policy, Deese continued to pay the sums which he had agreed to pay after the Group Policy had expired, but within the grace period of 31 days allowed by the policy for the payment of the renewal premium. The jury found by its verdict that Deese was an employee of the Carolina Nash Company at the time of his death. The facts are quite different from the facts in the instant case. The other cases relied upon by appellant from other jurisdictions are distinguishable.

The Group Policy by express terms provided that Jasper C. Lineberger's insurance as an employee ended when his employment terminated, and these express terms fixed his coverage period. These terms are plain, clear and unambiguous, and of the essence of the contract, and they will be interpreted and enforced according to the terms of the policy in their usual, ordinary and accepted meaning. *Haneline v. Casket Co., supra; Motor Co. v. Ins. Co.*, 233 N.C. 251, 63 S.E. 2d 538. "It is our duty to construe policies of insurance as written, and not to rewrite them." *Scarboro v. Ins. Co.*, 242 N.C. 444, 88 S.E. 2d 133.

Jasper C. Lineberger's insurance under the Group Policy ended, when he was discharged on 31 July 1954. There is nothing to show that he tried or intended to exercise his conversion privilege. Security Life & Trust Company is not liable in any way to plaintiff on the certificate sued upon. The judgment is correct, and is

Affirmed.

JOHNSON, J., not sitting.

MURRAY J. HORN (EMPLOYEE) v. SANDHILL FURNITURE COMPANY (EMPLOYER), AND HARTFORD ACCIDENT & INDEMNITY COMPANY (CARRIER).

(Filed 12 December, 1956.)

1. Appeal and Error § 28—

On appeal to the Supreme Court from judgment of the Superior Court affirming or reversing an order of the Industrial Commission, review is limited to assignments of error relating to matters of law at the trial in the Superior Court.

2. Appeal and Error § 21—

An exception to the judgment presents the questions whether the facts found are sufficient to support the judgment and whether error of law appears upon the face of the record.

3. Master and Servant § 40c—

In order for an injury to be compensable under the Workmen's Compensation Act, the injury must be traceable to the employment as a contributing proximate cause.

4. Same—

Whether an injury arises out of the employment is a mixed question of law and fact.

5. Master and Servant § 55d—

Findings of the Industrial Commission which involve mixed questions of law and fact are not conclusive if the conclusion of law is not supported by the facts found.

6. Master and Servant § 40c—Injury to employee from accident on highway while going to place of his own choice for lunch is not compensable.

The evidence tended to show that claimant parked his car on the employer's land across the highway from the plant, leaving his lunch in the car, that the employer merely permitted such use of the land, that claimant was not paid for the time taken out for lunch and was free to go to a place of his own choosing, and that claimant was struck by an automobile while crossing highway to his car for his lunch. *Held:* The risk of going to lunch is not a risk incident to the employment but is a risk incident to the hazards of the street like those to which the public generally is subjected, and therefore the evidence supports the finding and conclusion that the injury did not arise out of the employment.

JOHNSON, J., not sitting.

APPEAL by claimant from *Armstrong, J.*, May Civil Term 1956 of MOORE.

Proceeding before the Industrial Commission for compensation for injuries to Murray J. Horn, which injuries the claimant contends he suffered by accident arising out of and in the course of his employment by the Sandhill Furniture Company.

The Hearing Commissioner's findings of fact and conclusions are summarized: The jurisdictional facts found were based on a stipulation of the parties. On and prior to 3 December 1954 claimant worked as a laborer on the second shift at the main furniture plant of the Sandhill Furniture Company, which was situate on the west side of N. C. Highway No. 211, a dominant highway about 60 feet wide. The employer owned land on the east side of this highway, where claimant and a majority of the other employees at the plant parked their cars and

ate their lunches. Such use of this land was with the consent of the employer, but was permissive and not compulsory.

On 3 December 1954 claimant went to work between 4:00 and 5:00 o'clock p.m., and parked his car on the land of his employer on the east side of the highway. He left his lunch in his car. He had "a break" to eat lunch for 30 minutes between 9:00 and 9:30 p.m., during which period he, and the other employees, were not paid, and were free to go where they pleased. The employees, including claimant, were not required by the employer to go to this land, where their cars were parked, to eat lunch. About 9:05 p.m. claimant, together with other employees at the plant, started walking across the highway from the plant where they worked to the place where their cars were parked across the highway to eat lunch. When claimant had walked about half way across the hard-surfaced part of the highway, he was struck and injured by a car driven along said highway by an employee at the plant, who, at the time, was "off duty." Claimant did not sustain an injury by accident arising out of and in the course of his employment, and the Hearing Commissioner made a conclusion to that effect. The Hearing Commissioner further concluded there was no causal relationship between claimant's injury and his employment. Based upon his findings of fact and conclusions of law, the Hearing Commissioner denied the claim.

On appeal to the Full Commission, the findings of fact, conclusions of law and denial of the claim by the Hearing Commissioner were affirmed, and claimant appealed to the Superior Court.

In the Superior Court the order of the Full Commission was in all respects affirmed, and claimant appealed to the Supreme Court.

Teague & Johnson and Mason & Williamson for Appellant.
Boyette & Brogden for Appellees.

PARKER, J. Claimant has two assignments of error. The first one is to the judgment, the second is that the judge erred in affirming the Full Commission's order that claimant did not sustain an injury by accident arising out of and in the course of his employment by the Sandhill Furniture Company.

The consideration of an appeal from a judgment of the Superior Court affirming or reversing an award made by the Full Industrial Commission, or affirming or reversing an order of the Full Commission denying a claim, is limited to a review of only such assignments of error, as are properly made that there was alleged error in matters of law at the trial in the Superior Court. *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410; *Glace v. Throwing Co.*, 239 N.C. 668, 80 S.E. 2d 759;

Worsley v. S. & W. Rendering Co., 239 N.C. 547, 80 S.E. 2d 467; *Rader v. Queen City Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609.

An exception to the judgment presents two questions: one, are the facts found sufficient to support the judgment, and two, does any error of law appear upon the face of the record? *Rader v. Queen City Coach Co., supra; Bailey v. Bailey*, 243 N.C. 412, 90 S.E. 2d 696.

It is settled law that, "where an injury cannot fairly be traced to the employment as a contributing proximate cause . . . it does not arise out of the employment." *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751; *Lewter v. Enterprises, Inc., supra; Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342; *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89. Therefore, if claimant's injury cannot fairly be traced to his employment as a contributing proximate cause, it is not compensable under our Workmen's Compensation Act. *Lewter v. Enterprises, Inc., supra; Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97; *Gilmore v. Board of Education*, 222 N.C. 358, 23 S.E. 2d 292. "There must be some causal relation between the employment and the injury." *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266.

Whether an accident arose out of the employment is a mixed question of law and fact. *Poteete v. Pyrophyllite Co.*, 240 N.C. 561, 82 S.E. 2d 693; *Matthews v. Carolina Standard Corp.*, 232 N.C. 229, 60 S.E. 2d 93; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370.

This Court said in *Perley v. Paving Co.*, 228 N.C. 479, 46 S.E. 2d 298: "The rule declared by the statute and uniformly upheld by this Court that the findings of fact made by the Industrial Commission, when supported by any competent evidence, are conclusive on appeal, does not mean, however, that the conclusions of the Commission from the evidence are in all respects unexceptionable. If those findings, involving mixed questions of law and fact, are not supported by evidence the award cannot be upheld."

That claimant sustained severe injuries is not disputed. Claimant has no exceptions to the findings of fact made by the Hearing Commissioner, and adopted as their own by the Full Commission on appeal, and affirmed by the Superior Court, except that he contends that the Superior Court erred in holding that the facts found from the evidence by the Full Commission supported its conclusion that his injury by accident did not arise out of and in the course of his employment by the Sandhill Furniture Company.

In *Matthews v. Carolina Standard Corp., supra*, the evidence upon which the Industrial Commission made its findings of fact and conclusions showed the following: The decedent was employed as a general laborer by defendant corporation in and about its planer mill and lumber yard. He was paid an hourly wage. The work hours were from 8:00 to 4:45, except that from 12:00 noon to 12:45 work was stopped

for lunch. During this time employees were not paid, and were free to eat lunch there or go anywhere they wished. Most of them ate their lunch on the premises, some went home for lunch, and some went to a nearby store. It did not affirmatively appear that decedent brought his lunch on the day of his injury. During the lunch recess the decedent attempted to get on a moving truck belonging to one Dockery and delivering lumber to defendant corporation on the premises, and in some way fell under the rear wheels, and was killed. Decedent had been given no order, and had no duty with the truck or its contents. The Court said: "We conclude that the Commission has found from the facts in evidence that they were insufficient to show any causal connection between the injury suffered and the employment of decedent by the defendant corporation. After a careful examination of all the evidence reported by the Commission, we think this conclusion was supported by the evidence and should have been upheld." The Full Commission denied the claim, the Superior Court reversed the Commission, and remanded the proceeding with instructions that an award of compensation be made, and this Court reversed the Superior Court.

In *Bryan v. T. A. Loving Co., supra,* the decedent was on his way to his place of employment to report for work. He alighted from a bus that had carried him to a point in front of and across the highway from his place of work. He started on foot across the highway behind the bus to his work. He was hit and killed by a car while he was still on the hard surface. This Court said: "We conclude that the claimant has failed to bring her claim within the provisions of the Workmen's Compensation Statute. The specific facts found are insufficient to sustain the conclusion that the injury resulting in death arose out of and in the course of the employment." See also: *Davis v. Mecklenburg County,* 214 N.C. 469, 199 S.E. 604.

In *Bray v. Weatherly & Co.,* 203 N.C. 160, 165 S.E. 332, it is said: "The relation of employer and employee is usually suspended when the servant leaves the place of his actual employment and is resumed when he puts himself in a position where he can again do the work at the place where it is to be performed."

In *California Casualty Indem. Exch. v. Industrial Acci. Com.,* 190 Cal. 433, 213 P. 257, it was held that where the driver of an ice truck was killed while crossing the street from a cigar store just after having obtained lunch at a place where his duties did not call him, the employer permitting him to eat lunch where he desired, the injury did not arise out of his employment so as to warrant an award of compensation. The Court said: "The injury must have its origin in a risk connected with the employment, and must have flowed from that source as a rational and natural course."

In *Dreyfus & Co. v. Meade,* 142 Va. 567, 129 S.E. 336, it was held that a night watchman, whose place of duty was on the premises of his employer, was not injured in the course of his employment, where he was hit and injured by an automobile on the street, after he had left the premises to go two blocks away for lunch.

In *Jack v. Morrow Mfg. Co.,* 194 App. Div. 565, 185 N.Y.S. 588, the Court said: "The deceased was clearly not in the course of his employment when going to his midday meal after leaving the employer's plant or premises."

In *Boal v. State Workmen's Ins. Fund,* 127 Pa. Super. Ct. 237, 193 A. 341, the Court held that an injury received by night janitor with definite hours of employment, but with permission to go home for lunch, while returning to place of employment after having gone for lunch during hours of employment, was not compensable as having occurred in course of employment. See to same effect *Rybitski v. Lebowitz,* 175 Pa. Super. Ct. 265, 104 A. 2d 161.

In *Pearce v. Industrial Com.,* 299 Ill. 161, 132 N.E. 440, 18 A.L.R. 523, it was held that an injury from a fall upon the sidewalk to an employee in a building, who had gone for supplies for the noonday lunch, in accord with an agreement among certain employees to purchase such supplies, and eat them on the premises of employer, in preference to bringing cold lunches, does not arise out of his employment within the meaning of the Workmen's Compensation Act.

In *Lipinski v. Sutton Sales Co.,* 220 Mich. 647, 190 N.W. 705, an injury while returning to salesroom after lunch was held not compensable as one arising out of and in the course of employment.

In the following cases it was held that an injury to employee away from employer's premises during lunch hour did not arise out of and in the course of the employment: *De Porte v. State Furniture Co.,* 129 Neb. 282, 261 N.W. 419; *California Highway Com. v. Industrial Acci. Com.,* 61 Cal. App. 284, 214 P. 658; *Layton v. Spear & Co.,* 261 App. Div. 856, 24 N.Y.S. 2d 793; *Moore v. Sefton Mfg. Corp.,* 82 Ind. App. 89, 144 N.E. 476; *Heffren v. American Medicinal Spirits Corp.,* 272 Ky. 588, 114 S.W. 2d 1115; *Ohrmund v. Ind. Com.,* 211 Wis. 153, 246 N.W. 589; *Pillen v. Workman's Comp. Bureau,* 60 N.D. 465, 235 N.W. 354; *Goodyear Tire & Rubber Co. v. Ind. Com.,* 100 Utah 8, 110 P. 2d 334; *Mitchell v. Ball Bros. Co.,* 97 Ind. App. 642, 186 N.E. 900; *McInerney v. Buffalo & S. R. Corp.,* 225 N.Y. 130, 121 N.E. 806; *Furino v. Lansing,* 293 Mich. 211, 291 N.W. 637.

All the evidence shows that claimant was entirely free to go where he pleased to eat lunch. While going to lunch he was struck and injured on N. C. Highway No. 211 by a car driven along the highway by an employee of the Sandhill Furniture Company, who, at the time, was not on duty. It is perfectly clear from these facts that claimant's

duty as a laborer for Sandhill Furniture Company did not require him to be on N. C. Highway No. 211 at the place where the automobile struck him. At the exact time of his injury he was on a personal errand, and was not performing any service to his employer as a laborer. Where claimant should take his lunch, or how he should go there, were not matters in any way incidental to or connected with the character of work for which he was employed. Or to phrase it differently, claimant's exposure to the risks of the highway was voluntary on his part, and was not incidental to the performance of his work, or in any way connected with it, so as to make his presence on the street a part of the duty required of him by reason of his employment. The risk of going to lunch is not a risk incident to the employment, but is a risk incident to the hazards of the street, precisely like those to which the public generally is subjected.

We conclude that upon the record and the entire evidence in the proceeding, the finding and conclusion that claimant did not sustain an injury arising out of and in the course of his employment is supported by the evidence, and that the ruling of the court below in affirming the order of the Full Industrial Commission was correct. No error of law appears upon the face of the record.

Affirmed.

JOHNSON, J., not sitting.

CITY OF WINSTON-SALEM v. WINSTON-SALEM CITY COACH LINES, INC.

(Filed 12 December, 1956.)

1. Appeal and Error §§ 3, 16—

A defendant is authorized to file petition for writ of *certiorari* to an order overruling demurrer when, in its opinion, the order will prejudicially affect a substantial right to which it is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits. Rule of Practice in the Supreme Court No. 4(a).

2. Appeal and Error § 16—

Where *certiorari* is allowed to review an order overruling defendant's demurrer, the writ does not eliminate the necessity for the preservation of exceptions, entered in the court below, bearing on the question or questions sought to be reviewed, but the allowance of the writ constitutes an exception to the judgment, presenting for review errors of law appearing on the face of the record.

3. Carriers § 5: Utilities Commission § 2—Utilities Commission has exclusive original jurisdiction of dispute as to curtailment of services by intra-city bus carrier.

Where a municipality has granted a franchise to a utilities company to operate passenger buses over its streets, the parties may mutually agree upon extensions and services, changes in routes, or curtailment of services, when in the opinion of the governing board of the municipality such changes are, under the existing conditions, for the best interest of all concerned, including the public. However, when the parties are unable to agree to a proposed curtailment of existing services, the matter is within the exclusive jurisdiction of the Utilities Commission, G.S. 62-121.47(h), and the municipality may not enjoin the utility from proposed curtailment of services, although the utility may not change its schedules or curtail its services unless given authority to do so by the Utilities Commission.

JOHNSON, J., not sitting.

CERTIORARI allowed upon petition of the defendant to review the order of *Johnston, J.*, overruling the demurrer to plaintiff's complaint, at Chambers in Winston-Salem, North Carolina, 21 July 1956. From FORSYTH.

This proceeding was instituted in the Superior Court of Forsyth County by the City of Winston-Salem on 10 July 1956 to restrain the defendant Coach Lines from putting into effect on 22 July 1956 a proposed schedule which would have substantially curtailed bus service within the corporate limits of the City of Winston-Salem and which included the elimination of all bus service by the defendant company at night and on Sundays.

The defendant's letter addressed to the Chairman of the Public Safety Committee of the Board of Aldermen of the City of Winston-Salem was dated 19 June 1956 and, among other things, stated that copies of the schedules which the defendant proposed to put into effect on 22 July 1956 were enclosed. The letter also contained the following statement: "Unless we are advised to the contrary, we will assume that these schedules meet with the approval of your Committee."

The defendant demurred to the complaint on the ground that the Superior Court is without jurisdiction of the controversy between the plaintiff and the defendant for that the North Carolina Utilities Commission (hereinafter called Utilities Commission) has exclusive jurisdiction thereof.

His Honor Frank M. Armstrong, presiding over the regular July Term 1956 of the Superior Court of Forsyth County, on 10 July 1956 issued an order directing the defendant to appear before the Honorable Walter E. Johnston, Jr., Resident Judge of the Twenty-first Judicial District, at Chambers in the Forsyth County Courthouse, at 10:00 a.m., Saturday morning, 21 July 1956, and show cause, if any it may have,

why an order should not be entered by the court, restraining the defendants, its officers, agents and employees from putting into effect its proposed schedule of routes and trips intended to take effect on 22 July 1956; and further restraining the defendant, its officers, agents and employees from curtailing its service to the traveling public of the City of Winston-Salem and from discontinuing any portion thereof.

This matter was heard before Judge Johnston at the time and place scheduled. His Honor, after considering the verified complaint, the demurrer, the written briefs filed by both parties, and the argument of counsel, entered an order overruling the demurrer, granting the defendant thirty days in which to answer, and restraining the defendants, its officers, agents and employees from putting into effect its proposed schedules.

The defendant excepted to the order and filed a petition for writ of *certiorari* pursuant to the provisions of Rule 4(a), Rules of Practice in the Supreme Court, 242 N.C. 766. We allowed the petition.

Womble, Carlyle, Sandridge & Rice, attorneys for City of Winston-Salem.

Lassiter, Moore & Van Allen and Weston P. Hatfield, attorneys for petitioner Coach Lines.

Attorney-General Patton, Asst. Attorney-General Paylor, Amicus Curiae, for the State.

DENNY, J. The defendant was authorized to file the petition for a writ of *certiorari* pursuant to the provisions of the above Rule, if the order overruling its demurrer, in its opinion, will prejudicially affect a substantial right to which it is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits. Such writ was allowed by the Court in its discretion. Ordinarily, such writ will not eliminate the necessity for the preservation of exceptions entered in the court below, bearing on the question or questions sought to be reviewed. The allowance of the writ, however, like an appeal, constitutes an exception to the judgment, and the Court may review errors of law appearing on the face of the record proper.

It appears from the complaint that the defendant is a corporation duly created, organized and existing under the laws of North Carolina with its principal office in the City of Winston-Salem; that it is engaged in transporting passengers for hire by bus over the streets of said City for a stipulated fare, and was incorporated for the purpose of taking over the bus business formerly operated in the City of Winston-Salem for many years by Duke Power Company. That under date of 9 May 1955, the plaintiff and the defendant entered into an agreement in the

form of a franchise ordinance, duly adopted by the Board of Aldermen of the City of Winston-Salem, which in pertinent part reads as follows:

> "*Section 2.* The Company is hereby given and granted a non-exclusive and non-transferable franchise to engage in the business of furnishing bus passenger transportation service to the public over the streets and highways of the City along the routes now assigned to Duke Power Company, with such additions thereto and deletions therefrom as may be hereafter adopted . . .
>
> "*Section 3.* During the term of the franchise hereby granted, the Company shall maintain such schedules and will otherwise render such bus transportation service over the routes assigned to it in accordance with the foregoing provisions as will meet the reasonable needs of the public. All controversies with respect to extensions and services shall be determined by The North Carolina Utilities Commission . . ."

It appears from the record, however, that prior to the institution of this action the Board of Aldermen of the City of Winston-Salem adopted a resolution which purports to delete from the franchise ordinance or contract, the provision that "All controversies with respect to extensions and services shall be determined by The North Carolina Utilities Commission . . ."

The appellee concedes that decision in this case turns upon the correct interpretation of G.S. 62-121.47. This statute exempts from regulation eight classes of services, to wit: "(a) transportation of passengers for or under the control of the United States government, or the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State; (b) transportation of passengers by taxicabs or other motor vehicles performing *bona fide* taxicab service and carrying not more than six passengers in a single vehicle at the same time and not operated on a regular route or between fixed termini; provided, no taxicab while operating over the regular route of a common carrier outside of a town or municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the Commission as provided in (h) of this paragraph, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers; (c) transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations; (d) transportation of passengers to and from airports and passenger airline terminals when

such transportation is incidental to transportation by aircraft; (e) transportation of passengers by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service; (f) transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services; (g) transportation of *bona fide* employees of an industrial plant to and from their regular employment; (h) transportation of passengers when the movement is within a town or municipality exclusively, or within contiguous towns or municipalities and within a residential and commercial zone adjacent to and a part of such town or municipality or contiguous towns or municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone.

"The Commission shall have and retain jurisdiction to fix rates and charges of carriers operating under (e) and (h) of this subsection, and shall have jurisdiction to hear and determine controversies with respect to extensions and services, and the Commission's rules of practice shall include appropriate provisions for bringing such controversies before the Commission and for the hearing and determination of the same. . . ."

Notwithstanding the above concession on the part of the appellee, it contends that the controversy in this case is not "with respect to extensions and services," but relates solely to a threatened breach by the defendant of its contract with the City of Winston-Salem, by which the defendant will substantially curtail the services which it specifically agreed to furnish.

The defendant, in its letter of 19 June 1956, referred to above, pointed out that it had protested the heavy inroads into its traffic by so-called "Suburban" bus lines which are openly providing rides wholly within the city limits along the few routes which could be profitable to the defendant. That, in spite of a substantial doubt that these carriers were ever intended by the Board of Aldermen to carry passengers wholly within the City, the Board of Aldermen has not seen fit to protect it from this destructive practice. That these carriers operate only during the hours while travel is heavy, while the defendant operates its buses 18 hours daily. The letter further states, "We have continued to suffer monthly recurring losses while trying to offer the high level service which we have been operating. It is apparent that we must either expand our routes into the areas where traffic is available to us or balance our expenses and income by adjusting the volume of our service."

Any provisions with respect to rates and services contained in a franchise contract between a utilities company and a municipal corporation, authorizing the utilities company to transport passengers over

its streets, are subject to the orders of the Utilities Commission in respect thereto. G.S. 62-121.47; G.S. 62-122(1); *In re Southern Public Utilities Co.*, 179 N.C. 151, 101 S.E. 619; *Utilities Commission v. Greensboro*, 244 N.C. 247, 93 S.E. 2d 151.

It makes no difference whether the provision in the franchise to the effect that, "All controversies with respect to extensions and services shall be determined by The North Carolina Utilities Commission," has or has not been deleted therefrom. The Utilities Commission is vested by law with jurisdiction of such controversies. G.S. 62-121.47(1). This does not mean, however, that the officials of a municipality and one to whom a municipality has granted a franchise to operate passenger buses over its streets, may not mutually agree upon extensions and services, changes in routes, or curtailment of services when in the opinion of the governing board of the municipality it is, under the existing conditions and circumstances, for the best interest of all concerned, including the public, to approve such extensions, changes in routes or the curtailment of existing services. It is only when the parties to such controversies are unable to reach an amicable agreement that the Utilities Commission, and not the courts, is the proper forum to hear and determine such controversies. However, no change in fares or rates may be made except in the manner prescribed by statute. *In re Southern Public Utilities Co., supra.* Controversies in regard to schedules, rates, extensions and services, changes in routes, or curtailment of existing services, are within the power of the Utilities Commission to remedy, upon complaint being made, and are not proper subjects for injunctive or other equitable relief by the courts. *Transit Co. v. Coach Co.*, 228 N.C. 768, 47 S.E. 2d 297; *City Coach Co. v. Transit Co.*, 227 N.C. 391, 42 S.E. 2d 398; *Warren v. R. R.*, 223 N.C. 843, 28 S.E. 2d 505; *Carolina Motor Service v. R. R.*, 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165.

We interpret G.S. 62-121.47(1) to mean that the Utilities Commission is not vested with power to require the operators of services enumerated therein to obtain a franchise from it and does not have any supervision or jurisdiction over such operation, except the operations set forth in subsections (e) and (h), and as to them it retains "jurisdiction to fix rates and charges," and "to hear and determine controversies with respect to extensions and services." *Utilities Commission v. Coach Co.*, 236 N.C. 583, 73 S.E. 2d 562.

In our opinion the Utilities Commission has exclusive jurisdiction to hear and determine the controversy involved in this proceeding, and we so hold, subject to the right of appeal therefrom to the Superior Court. G.S. 62-26.6, as amended by the 1955 Session Laws of North Carolina, Chapter 1207.

In light of the conclusion we have reached, the action of the court below in overruling the defendant's demurrer and restraining it from putting into effect its proposed schedules, is reversed. This does not mean, however, that the defendant may proceed to put its proposed schedules into effect. The controversy with respect thereto having arisen, the defendant may not change its schedules or curtail its services unless it is given authority to do so by the Utilities Commission.

Reversed.

JOHNSON, J., not sitting.

STATE v. PAUL A. ALLEN.

(Filed 12 December, 1956.)

1. Assault and Battery § 4—

In prosecutions for assault by intimidation, each case must depend upon its own peculiar circumstances, but it is sufficient to constitute a criminal assault if there is such show of violence as to cause reasonable apprehension of immediate bodily harm so as to put a reasonable person in fear whereby he is forced to leave a place where he has a right to be.

2. Assault and Battery § 14—Evidence of assault on female by show of violence causing her to leave place where she had a right to be, held sufficient.

Evidence tending to show that defendant repeatedly, day after day, stopped his car for a few minutes within a very few feet of prosecutrix at a place on a public street corner where prosecutrix customarily awaited her ride to work, that defendant would constantly gaze at her and move the lower part of his body back and forth implying a lustful desire directed particularly toward prosecutrix, and that because of fear of him prosecutrix quit walking the usual way to the place for her ride, and that, on the occasion before his arrest, caused prosecutrix to run to the steps of a public school at the place, *is held* sufficient to be submitted to the jury in a prosecution for assault on a female. G.S. 14-33.

JOHNSON, J., not sitting.

APPEAL by defendant from *Gwyn, J.*, April Term 1956 of GUILFORD (Greensboro Division).

Criminal prosecution upon a warrant charging defendant with an assault on a female person, G.S. 14-33, heard on appeal from the Municipal-County Court, Criminal Division, upon the defendant's plea of Not Guilty.

The State's evidence presented these facts:

Nancy Powers, a 21-year-old woman, lives with her parents at 1519 Andover Avenue, one block off of Summit Avenue, in the city of Greensboro. She is employed as a stenographer by Sears, Roebuck & Co., at its local place of business. She regularly rides to work each working day with Mr. & Mrs. Paul Rumley. She walks down Andover Avenue to Textile Drive, and East up Textile Drive to get to Summit Avenue, where she stands on the Southwest corner of Summit Avenue and Textile Drive to wait for her ride. The Rumleys regularly pick her up there about 25 minutes to 8:00 o'clock each working morning. On the morning of 19 January 1956 when Nancy Powers was walking down Andover Avenue, to reach the place where the Rumleys pick her up, the defendant slowly drove his automobile along Andover Avenue, staring at her, and practically stopped when he got beside her. She did not know him, and defendant's acts frightened her. She walked on to her regular place for her ride. While she was waiting there for her ride, she saw the defendant a few minutes later at the corner of Andover Avenue and Textile Drive. His automobile was stopped. He then left, drove up to the corner of Textile Drive and Summit Avenue, and sat there about four or five minutes staring intently at her. He was about 12 or 15 feet from her, and seemed to be moving back and forth the lower part of his body. She was frightened by his sitting there staring at her. The Rumleys came by, and she left.

On the morning of 20 January 1956 Nancy Powers went the same way to the place where the Rumleys met her. Her father followed her in their car, and parked at the Northwest corner of Summit Avenue, and Textile Drive. While there she saw the defendant driving his car South on Summit Avenue. He stopped his car about 200 yards behind their car. In two or three minutes the defendant started his car and came by her driving very slow and looking at her, as if he were going to stop.

Nancy Powers did not go to work on Saturday, 21 January, or Sunday, 22 January. On Monday, 23 January, she went to work. She left her home, and cut through the row of houses on Summit Avenue, instead of going down Andover Avenue. Upon reaching Summit Avenue, she turned to the right, and went to the usual place to meet the Rumleys. She saw the defendant coming South on Summit Avenue. He drove slowly by looking at her, and turned at the corner South of Textile Drive and Summit Avenue. Three times on that morning he slowly drove by her looking at her. When he would get to the intersection of Textile Drive and Summit Avenue, he would stop, sit there and look at her, and seemed to be moving the lower part of his body. At that time he was across a paved street from her. She testified: "That morning I ran toward the school; I wait for my ride in front of

Proximity School; I started walking fast toward the school and got almost to the walk which leads up to the school, I saw him going up the other side of the boulevard, going north on Summit Avenue and I ran to the steps of the school; then my ride came and picked me up. I called my grandfather when I got to work that morning."

On Tuesday, 24 January, there was snow, and Nancy Powers did not see the defendant, when she went to meet the Rumleys.

On Wednesday, 25 January 1956, Nancy Powers in going to meet the Rumleys cut through and between the houses on Summitt Avenue, and went down Summit Avenue to the corner to the usual place for her ride with the Rumleys. As she approached this place, she saw the defendant sitting in his car on the Northwest corner of Textile Drive and Summit Avenue, and he was parked in front of a car in which her grandfather was sitting. As she stood waiting for her ride, the defendant drove his car across to the Southwest corner and stopped three or four feet in front of her. He sat there four or five minutes staring at her, and moving his body back and forth. Then her grandfather drove his car in front of the defendant's car, stopped, got out, went to the defendant's car and asked him to get out. The defendant drove off fast almost hitting her grandfather. She did not go anywhere then, though she was frightened, because her grandfather was there.

J. H. Powers, Nancy's grandfather, testified that when she called him over the telephone on 23 January 1956, and told him about the defendant's acts, she was crying.

Sergeant H. M. Evans, a member of the Greensboro Police Department, arrested the defendant on the charge in this case. He asked the defendant if he was the person, who had been driving by Nancy Powers. The defendant replied he was, and had been watching her for about ten days, and turned on Summit Avenue to see her. The defendant said he was engaged in self-pollution, and was trying to get Nancy Powers to look at him, while he was so engaged.

The defendant told Lt. Maurice Geiger of the Greensboro Police Department that what Sergeant Evans said he was doing was true.

The defendant offered no evidence.

The jury returned a verdict of Guilty, and from judgment of imprisonment imposed for 30 days the defendant appeals.

George B. Patton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

Z. H. Howerton, Jr., for Defendant, Appellant.

PARKER, J. The defendant presents for decision one question: did the trial court commit error in denying his motion for judgment of nonsuit made at the close of the State's evidence?

The warrant charges an assault, not an assault and battery.

In *S. v. McIver,* 231 N.C. 313, 56 S.E. 2d 604, the facts were as follows: On 7 January about 7:00 a.m. Mrs. Helen Outlaw was walking to work on Russell Street in the city of Fayetteville. Near the railroad crossing she met the defendant, who said to her, "you are looking pretty this morning." On Thursday on her way to work she met him again. It had been raining and she was walking a little to the edge of the sidewalk. She saw the defendant coming toward her, and he started talking. This Court said his words may be fairly construed as an indecent sexual proposal. She was frightened, and ran across the street. On Friday morning she met the defendant at the same place, and he made a similar remark. Police were nearby because Mrs. Outlaw had told them of the former occurrences, and they arrested the defendant. This Court held that the evidence was properly submitted to the jury, and said: "North Carolina is rightly listed as one of the jurisdictions in which it is not essential to the definition of assault, or to the completion of that crime, that there should be a present ability to carry out the threat or menace if it is sufficient in manner and character to cause the person menaced to forego some right of conduct he intended to exercise, or to leave a place where he had a right to be."

In *S. v. Sutton,* 228 N.C. 534, 46 S.E. 2d 310, this Court held the State's evidence made out for the jury a case of assault, where the defendant's standing and staring at Mrs. Louise Allen caused her to leave her office where she was at work in the courthouse at Plymouth, and go out into the hall, and stand on the first step leading to the courtroom. The defendant followed her into the hall, and continued to stare at her. She stepped up two more steps, and the defendant stepped towards her two more steps still staring. She became frightened and ran up the steps screaming, and the defendant ran up the steps behind her.

In *S. v. Williams,* 186 N.C. 627, 120 S.E. 224, evidence that a 23-year-old man several times accosted a 15-year-old girl on the streets of a town, with improper solicitation, causing her to flee from him in a direction she had not intended to go, and, in her great fear of him, causing her to become nervous and to lose sleep at night, was held to make out a case for the jury of an assault on a female.

In *S. v. Daniel,* 136 N.C. 571, 48 S.E. 544, it is said: "The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one by the show of violence has the right to put another in fear and thereby force him to leave a place where he has a right to be."

In *S. v. Martin,* 85 N.C. 508, the Court said: "The principle governing this case has been decided by several adjudications on the subject by this Court. The principle is that no man by the show of violence

has the right to put another in fear and thereby force him to leave a place where he has the right to be."

The rules of law in respect to assaults are plain, but their application to the facts is sometimes fraught with difficulty. Each case must depend upon its own peculiar circumstances.

The defendant told Sergeant of Police H. M. Evans he had been watching Nancy Powers for ten days. Considering the evidence in the light most favorable to the State, and giving to it the benefit of every reasonable inference to be drawn therefrom, as the law requires us to do, when a motion for judgment of nonsuit is made, the facts show the defendant repeatedly day after day stopping his car a few minutes within a few feet of Nancy Powers, while she was standing on a public street corner in the city of Greensboro waiting for her ride to go to work, a place where she had a right to be, gazing at her and moving the lower part of his body back and forth, implying a lustful desire directed particularly toward her. It seems apparent from the defendant's conduct and acts, that he, possessed by his lustful obsession for Nancy Powers, deliberately planned to meet her at the same place on successive mornings. Because of fear of him she quit walking the usual way to the place for her ride, and went a different way. On the morning of 23 January 1956 she was standing on the street corner waiting for her ride to work, and three times the defendant drove by looking at her, and, when he would get to the intersection of Textile Drive and Summit Avenue, he would stop his car, sit there, look at her, and seemed to be moving the lower part of his body. At such times he was across a paved street from her. Such acts of the defendant frightened her, and caused her to run to the steps of Proximity School. At that time the Rumleys came along, and she left. Considering the defendant's acts there on the morning of 23 January 1956, in connection with similar acts of the defendant there on 19 January 1956 and 20 January 1956, in the light most favorable to the State, can it be said as a matter of law, thereby taking the case away from the jury, that the defendant's acts on 23 January 1956 were insufficient to constitute a show of violence creating in the mind of Nancy Powers a reasonable apprehension that the defendant was planning to get out of his car and inflict upon her immediate bodily harm to satisfy his lust, and thereby put her in fear, and forced her to run from a place where she had a right to be? In our opinion, the answer to the question is, No: it is a case for the jury.

A show of violence, causing "the reasonable apprehension of immediate bodily harm" (*S. v. Ingram*, 237 N.C. 197, 74 S.E. 2d 532), whereby another is put in fear, and thereby forced to leave a place where he has a right to be, is sufficient to make out a case of an assault. *S. v. McIver, supra; S. v. Daniel, supra; S. v. Martin, supra.*

The trial court correctly denied defendant's motion for judgment of nonsuit. In the trial below we find

No error.

JOHNSON, J., not sitting.

ED DEATON v. LEWIS D. COBLE.

(Filed 12 December, 1956.)

1. Frauds, Statute of, § 5—

A memorandum stating that defendant owed a stipulated sum to a certain person for plumbing and heating work on a house and that defendant "agreed to" plaintiff "$1000.00 of this amount when I pay off" *is held* insufficient under the statute of frauds to charge defendant with the debt due by the third person to plaintiff, there being no special promise to answer for the debt of the third person. G.S. 22-1.

2. Evidence § 40—

While parol evidence is incompetent to contradict an unambiguous written instrument, where the writing is insufficient to constitute a legally effective instrument, parol evidence is competent to show facts which would render the writing inoperative or unenforceable.

3. Appeal and Error § 42—

Where the parties do not object to the issues submitted, an exception to the charge on the ground that its subject matter related to an issue which should not have been submitted, is untenable.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Crissman, J.*, at 18 June, 1956, Civil Term of CABARRUS.

Civil action to recover upon alleged contract.

Plaintiff alleges in his amended complaint: (2) That on or about 6 August, 1953, defendant executed a paper writing in words and figures as follows:

"8-6-53

"I owe Bill Mabrey $1538 for plumbing and heating in house on Kannapolis Road.

"I agree to Ed Deaton $1000.00 of this amount when I pay off.

(Signed) Lewis D. Cole
Sept. 10-53
Bill Mabry."

(3) That co-temporaneously with the execution of the foregoing paper writing and at the special instance and request of defendant, plaintiff advanced and paid to Bill Mabry the sum of $1,000.00 in sole reliance upon the promise of defendant to repay to plaintiff said amount; and that defendant promised and agreed to repay same on or about 10th day of September, 1953,—which (4) defendant has refused to do after payment demanded.

Defendant, answering, denies each of these allegations of the amended complaint, except he admits that he has refused to repay plaintiff anything on his alleged claim.

And for further answer and defense, defendant avers: (1) That prior to 10 September, 1953, Bill Mabry had contracted and agreed with defendant to do the plumbing and heating work on a house on which defendant was general contractor; that plaintiff and Bill Mabry came to see defendant and asked that he agree to pay to plaintiff $1,000.00 of the amount to be earned by Mabry under the sub-contract for a past indebtedness due to plaintiff by Mabry; that defendant agreed that whenever Bill Mabry completed the plumbing and heating work in accordance with the sub-contract, and defendant was ready to settle with Mabry, in accordance with the sub-contract, defendant would pay to plaintiff $1,000.00 of the amount earned by Mabry, if he and Mabry so desired; (2) that Mabry failed and refused to comply with said sub-contract and defaulted on same, and defendant is not indebted to him in any amount by reason of the sub-contract; and that it became necessary for defendant to engage and pay someone else to do the plumbing and heating work; (3) that Mabry was adjudged a bankrupt by the U. S. District Court on 4 December, 1953, etc., (4) that "defendant received no consideration from plaintiff or from Mabry for his agreement to pay plaintiff rather than Mabry when Mabry complied with his contract;" "(5) that the purported agreement was not written with sufficient definiteness to comply with the Statute of Frauds (G.S. 22-1) and is not enforceable, which is hereby expressly pleaded in bar of any recovery by plaintiff herein."

Upon trial in Superior Court, plaintiff, as witness in behalf of himself, testified in pertinent part as follows:

"I am a contractor. I did not know the defendant until the 6th day of August, 1953, when I first met him. I know Bill Mabry and had known him six or seven years. On the 6th of August, Mr. Coble came to Bill Mabry's shop . . . Mr. Mabry, Mr. Coble and I had a conversation that day. Bill said he wanted to borrow $1,000.00, would Mr. Coble sign for it? He was sitting in back of the car and Bill wrote it out and Mr. Coble signed it, and I gave him the money . . . currency, $100 bills . . . I have seen that piece of paper before. Mr. Mabry's signature is at the bottom. Mr. Coble signed it, Lewis G. Coble . . ."

Plaintiff then offered in evidence the paper writing described in the amended complaint as hereinabove set forth.

Then the plaintiff continued: "At that time Mr. Mabry, Mr. Coble and I discussed the matter as to approximately when amount was to be paid, which was to be in about three months . . . and around three I called Coble. He said he hadn't collected any money. In a few weeks I called him again . . . At that time Mr. Coble did not deny that he owed me money. At the time that paper was written and signed and a $1000 in bills was passed by me to Mabry, Mr. Mabry did not owe me any money. Mr. Mabry has never paid me any part of that $1000.00 . . ."

Then under cross-examination plaintiff continued, in pertinent part, as follows: ". . . Mr. Mabry and I were in an automobile at Mr. Mabry's shop on the occasion that we are talking about. Mr. Coble came up . . . I did not know anything at that time about Mr. Coble building a house . . . until Bill told me. . . . Mr. Mabry did not tell me he was building; said he was having a fellow to come by there and he needed the money and if I'd sign a statement without any, and I said 'Yes.' Mr. Coble did not say anything about that plumbing work having been finished at the time the statement was signed. I know that Mr. Klutz is the one who finished the plumbing work. I . . . don't know what Mr. Mabry had done about the plumbing work."

And the plaintiff continued under cross-examination: "The money changed hands when Mr. Coble was there, right after Mr. Coble signed. Mr. Coble did not tell me that if he owed anything to Mr. Mabry because of the plumbing, from what he owed Mabry, he would give me a thousand dollars. He signed the statement just like it reads and that is all. I do not know how long after that it was before Mr. Mabry went into bankruptcy. I did not file any kind of claim in bankruptcy against Mr. Mabry. I gave the money to Mr. Mabry. I have never tried to collect that amount from Mr. Mabry. This particular paper was not already written before Mr. Coble got over there. It wasn't sometime later that Mabry signed it. It was mentioned that in about three months the work would be finished and Mr. Coble would pay off. That date is 8/6/53. Underneath 'Coble' is 'September 25, 1953.' Underneath that 'Bill Mabry.' Both of those dates were put in there at the same time. I guess they were. I know that, I saw it. I cannot explain why two different dates were put there . . . It was after Bill Mabry went into bankruptcy that I got in touch with Mr. Coble, and said something to him about the money."

Then on re-direct examination plaintiff testified: "I gave the cash to Mr. Mabry." And on re-cross-examination he concluded: "That is my signature on that paper . . . the original complaint which I filed in this case. I did not allege in it that I advanced the thousand dollars

to Coble . . . I didn't know what all was in it . . . It says there I gave the money to Coble, but I didn't give any money to Coble; and he did not get any money out of the transaction, not that day."

Then Bill Mabry, as witness for plaintiff, testified in pertinent part: "I am a plumber engaged in the plumbing business, and was so engaged in August 1953. I had a conversation on August 6, 1953, with Ed Deaton and Lewis Coble . . . at the shop. I had been doing some work for Lewis Coble, couple of jobs, prior to the time I had the conversation with Coble and Deaton . . . I told Coble I wanted him to come by there . . . I wanted him to borrow some money from Ed Deaton, would he sign for a thousand dollars. He said 'Yes.' . . . He read the paper and signed it . . . Ed gave me the money, a thousand dollars. At that time Mr. Deaton did not owe me any money, and I did not owe Mr. Deaton any money. That is my handwriting on Exhibit A (the paper writing sued on) . . . I signed it . . . I saw Mr. Coble sign that paper. We were all three in the car. I received the money from Mr. Deaton when we signed it or when we left; Deaton paid me."

Then the witness Mabry continued under cross-examination: "Mr. Coble had asked me to do the plumbing work on a house that he was building before this time. I had agreed to do the plumbing work." Then over objection and exceptions by plaintiff, numbered 2 to 14, both inclusive, the witness was permitted to testify that at this time he had actually just started the work, just roughed it in; that he was obligated to put in the furnace and heating plant, but he hadn't completed that work at the time the paper was signed; that Mr. Deaton knew that; that he did not strike a lick of work on this house after that date; and that he didn't go back to the job after the paper was signed."

Then the witness Mabry continued under cross-examination: "It was more than two months after that before I went into bankruptcy. It was about the 4th of December . . . Mr. Deaton has never asked me for this thousand dollars or to pay him back . . . I did not give Mr. Coble any of that thousand dollars, I wasn't supposed to. That was between me and Mr. Deaton. I have never paid back the thousand dollars; I am not supposed to. No, I have never paid it."

Here plaintiff rested his case, and motion of defendant for judgment as of nonsuit was overruled, and defendant excepted. And defendant offered no evidence and rested his case, and renewed his motion for judgment as of nonsuit. Motion was overruled and he excepted.

Then under charge of the court the case was submitted to the jury, without objection, upon these issues, the first three of which were answered as shown, and the last two were not answered:

"1. Did the defendant execute the paper writing referred to in the complaint? Answer: Yes.

"2. Did the defendant promise to repay plaintiff for money he advanced? Answer: No.
"3. If so, did plaintiff advance money to Bill Mabry in reliance thereon? Answer: No.
"4. Did defendant breach his promise to plaintiff? Answer:
"5. In what amount, if any, is the defendant indebted to the plaintiff? Answer:"

Judgment was signed in favor of defendant. Plaintiff excepted thereto, and appeals to Supreme Court and assigns error.

C. M. Llewellyn and M. B. Sherrin for Plaintiff Appellant.
John Hugh Williams for Defendant Appellee.

WINBORNE, C. J. The statute of frauds, G.S. 22-1, in pertinent part provides that "no action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith . . ."

Testing the paper writing sued on by the provision of this statute, it is seen that it lacks the essential of a "special promise to answer the debt . . . of another person" the plaintiff. The second sentence is incomplete, and uncertain in meaning. Thus there is no written special promise. Hence an action may not be maintained on it.

Moreover, exceptions to the testimony of the witness Mabry brought forward as basis for assignments of error are without merit.

It is erroneously contended that the paper writing is unambiguous, and hence the meaning of it is a matter of law to be determined by the court, and it cannot be varied, modified or added to by parol evidence. But the parol evidence rule is inapplicable. This rule presupposes the existence of a legally effective written instrument. It does not in any way preclude a showing of facts which would render the writing inoperative or unenforceable. Stansbury North Carolina Evidence, Sec. 257, p. 519.

Furthermore, when the portions of the charge to which exceptions are taken are considered in context, it is seen that they are without merit. Likewise the ground upon which exception is taken to the failure of the court to properly charge the jury as required by G.S. 1-180 is without merit. Appellee suggests, in brief filed here, that in these exceptions appellant is actually complaining because of the subject matter and submission of the second issue which left to the jury the determination as to whether defendant promised to repay plaintiff.

Be that as it may, the record fails to show that the issues submitted were objectionable to the parties.

Some of the assignments of error appear to have been abandoned. But, in any event, due consideration has been given to all assignments of error, and in the judgment from which plaintiff appeals there appears to be

No error.

JOHNSON, J., not sitting.

SUSIE PATRICK v. JAMES PATRICK.

(Filed 12 December, 1956.)

1. Judgments § 25—

The Superior Court has jurisdiction of a motion in the cause to set aside a judgment on the ground that it was obtained and the court induced to assume jurisdiction by fraud upon the court intrinsic to the cause of action.

2. Judgments § 26—

Where the institution of a cause of action and the rendition of a decree therein is fraudulently concealed from defendant, his motion in the cause to set aside the judgment for intrinsic fraud made less than a month after his discovery of the decree is made in apt time.

3. Abatement and Revival § 14—

The court may vacate a decree of divorce on the ground of fraud even after complainant's death when property rights are involved.

4. Judgments § 27e: Divorce and Alimony § 22—Findings held to support decree setting aside absolute divorce on the ground of fraud on the court.

The evidence was to the effect that the wife obtained a decree of absolute divorce on the grounds of five years separation upon service by publication in accordance with the letter of the law then in effect, which did not provide service outside the State and did not require mailing notice to defendant's last known address. The evidence further tended to show that the husband was then working in another state but communicated with the wife regularly, sending her money and visiting her frequently, that thereafter she joined him in such other state, and that they then moved back to their home in North Carolina, where they lived together until her death, and that during the entire time she kept him in ignorance of the divorce, and that he did not discover that the decree had been entered until it was presented in support of a motion to oust him as administrator of her estate. *Held:* The evidence supports the court's finding that the wife, by means of the false allegations contained in her complaint, perpetrated a fraud upon

the court thereby causing the court to assume jurisdiction of defendant and grant the divorce decree, and judgment setting aside the divorce upon the husband's motion in the cause is affirmed.

5. Process § 6—

The purpose of service of process is to give notice and an opportunity to be heard, and, even though the letter of the law may be followed with respect to the affidavit for publication, when this method of service is not intended to give notice, but to conceal it, in accordance with a calculated effort on the part of plaintiff to keep actual notice from defendant, jurisdiction of defendant is not acquired.

JOHNSON, J., not sitting.

APPEAL by the administrator of the plaintiff from an order of *Bone, J.*, upon motion in the cause.

The essential facts necessary to an understanding of the case are set forth in the order entered by Judge Bone at the May, 1956 Term, Lenoir Superior Court, as follows:

"This cause comes on to be heard before the undersigned Judge presiding at this term upon motion in the cause by the defendant to set aside the Judgment of Absolute Divorce heretofore rendered at the April 1929 Term. After hearing the proof offered by both sides and the argument of counsel, the Court finds the following facts:

"1. That plaintiff and defendant were married to each other in the City of Philadelphia, State of Pennsylvania, on the 7th day of June 1907, and lived together in said City and State until about the year 1917, when they moved to the City of Kinston, North Carolina, and took up residence there.

"2. That no children were born to said marriage.

"3. That during the year 1923 the defendant obtained employment in the City of Philadelphia, State of Pennsylvania, and moved to that City and resided therein through the year 1930 while the plaintiff continued to live in Kinston, North Carolina.

"4. That between the years 1923 and 1930 plaintiff and defendant communicated with each other, defendant sent to the plaintiff money from time to time, and came back to Kinston on frequent visits to the plaintiff, remaining with her at times from a week to ten days.

"5. That on January 21, 1929 the plaintiff instituted this action and filed her complaint in which she alleged that the defendant abandoned her without just cause; that plaintiff and defendant had

lived separate and apart for five successive years and that plaintiff was the injured party, all of which said allegations were untrue.

"6. That plaintiff caused summons to be served upon defendant by publication, which in all respects complied with the laws of this State, and that at the April 1929 Term a judgment of absolute divorce was rendered in this action as appears of record.

"7. That about the year 1930 the plaintiff left Kinston, North Carolina, for the purpose of reuniting with the defendant, who was then living in the City of Philadelphia, State of Pennsylvania, and thereafter plaintiff and defendant returned to the City of Kinston, North Carolina, and there lived together for about ten years and until the time of the death of the plaintiff, which occurred on February 28, 1956.

"8. That on March 2, 1956, upon application of the defendant, the Clerk of the Superior Court of Lenoir County issued to him letters of administration upon the estate of the plaintiff, which said letters of administration were subsequently revoked and Henry Scott was appointed administrator of the estate of plaintiff. Thereafter defendant filed an account with the Clerk and turned over to the said Henry Scott, Administrator, all monies which had come into his hands as administrator of the estate of the plaintiff.

"9. That the defendant had no knowledge of the aforesaid judgment of Absolute Divorce, nor of the pendency of this action until on or about March 9th 1956.

"10. That the plaintiff, by means of the false allegations contained in her complaint, perpetrated a fraud upon the court, thereby causing the Court to exercise its jurisdiction and grant the said Judgment of Divorce.

"NOW, THEREFORE, it is by the Court ORDERED, ADJUDGED AND DECREED:

"1. That the judgment of Absolute Divorce herein rendered at the April 1929 Term be, and the same is hereby set aside and declared void.

"2. That this action be dismissed from the docket."

From the foregoing order, the administrator of the plaintiff appealed.

LaRoque & Allen and Lamar Jones for respondent, appellant.
Albert W. Cowper for defendant, appellee.

HIGGINS, J. The findings of fact by Judge Bone are abundantly supported by the evidence before him. A number of neighbors testified the defendant, James Patrick, frequently visited his wife in Kinston between 1923 and 1929. These visits lasted from a week to 10 days. The plaintiff's sister testified: "I am 81 years old—Susie Patrick was my sister and I visited her . . . as long as she lived except during the periods when Susie was living in Philadelphia. . . . To my knowledge Susie Patrick and her husband, James Patrick, were never separated but lived together as husband and wife from the time of their marriage until Susie Patrick's death in 1956." She further testified she had never heard of any divorce until after Susie's death.

Another witness testified that from 1924 to 1928 she lived directly across the street from James and Susie Patrick; that in the Spring of 1925 James Patrick came to Kinston on visits and lived in the home with his wife. He made numerous visits between 1925 and 1929. Susie Patrick received letters from him. The witness knew nothing of a divorce until Susie Patrick's death. Other witnesses gave evidence of like import.

The administrator offered evidence of three persons who said they knew James and Susie Patrick. They separated in 1923 and lived separate and apart until 1929 or 1930. They knew of the divorce proceeding. One of the witnesses testified she mailed a copy of the newspaper notice of the divorce proceeding to James Patrick.

The defendant stated under oath he knew nothing of the divorce proceeding until 9 March, 1956.

This appeal presents these questions of law:

1. Did the Superior Court of Lenoir County, on motion in the cause, have authority to set aside the divorce decree entered at its April Term, 1929?

2. Was the motion to set the decree aside timely made?

3. Do the facts found support Judge Bone's order setting aside the divorce decree?

Both *Henderson v. Henderson*, 232 N.C. 1, 59 S.E. 2d 227, and *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617, recognize the right of an injured party to seek relief by motion in the cause where service is by publication and lack of due notice deprives the party of an opportunity to be heard. In the *Henderson case*, the Court said: "Moreover, if a judgment be obtained by means of a fraud practiced upon the court, the question may be raised by motion in the cause." In the *Carpenter case*, this Court said: "Where fraud on the court deprives the defendant of due process, that is, due notice and opportunity to defend, and hence of jurisdiction of the person of the defendant, the court, upon sufficient findings, will set aside the decree. Upon motion in the cause, and upon sufficient findings of fact made by the

court incident to its determination thereof, the decree may be set aside." *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138; *Bass v. Moore,* 229 N.C. 211, 49 S.E. 2d 391; *Hatley v. Hatley,* 202 N.C. 577, 163 S.E. 593; *Fowler v. Fowler,* 190 N.C. 536, 130 S.E. 315.

The Superior Court has power, upon motion in the cause, to make inquiry, to find facts, and to determine whether proper notice was given affording an opportunity to be heard. If, therefore, in the original divorce proceeding the plaintiff caused the court to assume jurisdiction over the defendant when notice of the pendency of the action was fraudulently concealed from him, the court had power to set the decree aside, even though the letter of the law had been complied with by publication of notice in a newspaper. The purpose of service of process is to give notice and an opportunity to be heard. The letter of the law may have been followed with respect to the affidavit for publication and the notice itself, yet the composite of Judge Bone's findings shows a calculated effort on the part of the plaintiff to keep actual notice from James Patrick. When the method of service is not intended to give notice, but to conceal it, jurisdiction of the defendant is not acquired. In the *McLean case* this Court said: "The defendant presents the view that not only was the service in this case invalid because not reasonably calculated to give notice (*Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L. Ed. 865) but that the plaintiff's attempt to secure a divorce by the means employed was a fraud upon the court. The rule is that if a fraud is perpetrated on the court whereby jurisdiction is apparently acquired, when jurisdiction is in fact lacking, the judgment rendered therein is a nullity and may be vacated by motion in the cause."

The court found the defendant knew nothing of the divorce decree until 9 March, 1956, when it was presented to the clerk in support of a motion to oust him as administrator of his wife's estate on the ground he was not her husband. Twenty-five days after the notice the defendant moved to set aside the divorce decree. He had the right thus to proceed, even though the adverse party was dead. "By the weight of authority, for the purpose of establishing property rights, the court may vacate a decree, even after complainant's death, when it was obtained by fraud, and imposition on the part of the complainant, or without due service of process." *Fowler v. Fowler, supra; Poole v. Poole,* 210 N.C. 536, 187 S.E. 777. In answer to question No. 2, we hold the motion in the cause was properly and timely made.

The court's finding of fact No. 6, in the light of the other findings, simply means the plaintiff filed an affidavit in due form, obtained an order of publication and published the notice of her divorce action in a local newspaper, and that she obtained an uncontested decree of

divorce. It must be conceded at that time the law did not provide for service outside the State and did not require mailing of a notice to the defendant's last known address. From the findings it must be concluded, however, the plaintiff had no cause for divorce on the grounds alleged (five years continuous separation). The husband was away at work, communicating with his wife, sending her money, visiting her frequently for a week or 10 days at a time. This course of conduct continued from the time he went to Philadelphia in 1923 until she joined him there in 1930. Thereafter they lived together in Philadelphia and Kinston until her death separated them in 1956. During that entire time she kept him in ignorance of the divorce. In fact, her conduct after she obtained the decree shows she did not consider herself bound by it. The divorce decree seems not to have influenced their lives in the slightest degree.

The facts found warranted the court in setting aside the divorce decree on the ground the court was fraudulently induced to assume jurisdiction over the person of the defendant when jurisdiction was not obtained by the method of service employed. Lack of notice denied the defendant the opportunity to appear and to defend. The order appealed from is

Affirmed.

JOHNSON, J., not sitting.

PARKER, J., concurs in result.

ROBERT A. COLLIER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF R. W. MILLS, v. ELIZABETH MILLS, EUGENE F. MILLS, MRS. LILLIAN M. RAPE, MILDRED M. EVANS, MARY FRANK W. GILLELAND AND IDA BELL M. WALKER.

(Filed 12 December, 1956.)

1. Appeal and Error § 3—

The granting of a petition for writ of *certiorari* to review order of the trial court striking certain allegations of a pleading, in effect grants petitioners the right of immediate appeal, in perfection of which the Rules of Practice in the Supreme Court apply.

2. Appeal and Error § 16—

Where *certiorari* is allowed to review order of the trial court striking certain allegations from a pleading, the petition for *certiorari* is in effect an assignment of error directed to the entire order and is sufficient to pre-

sent for review the question whether the lower court was in error in hearing the motion and entering the order thereon.

3. Wills § 39—

In an action to obtain construction of a will, the admissibility of evidence as to circumstances attendant when the will was made, to enlighten the court in ascertaining the intent of testator as expressed in the instrument, is to be determined by the court. Therefore, the court should be free to make decision as to the competency of such evidence when offered, unimpeded by any prior rulings striking allegations relating to the circumstances attendant.

4. Pleadings § 31—

G.S. 1-153 does not apply to a motion to strike allegations from a pleading which relate solely to questions of fact addressed to the court.

5. Appeal and Error § 1—

A matter which has not been ruled upon in the lower court is not presented for decision in the Supreme Court.

JOHNSON, J., not sitting.

ON writ of *certiorari* to review order of *Phillips, J.*, entered at August Term, 1956, of IREDELL.

Action for declaratory judgment brought by executor for construction of the will of R. W. Mills, deceased, and for instructions in the administration of the estate.

Testator, a resident of Iredell County, died 12 January, 1955. His will, executed 24 December, 1949, was duly probated. Plaintiff qualified and is now acting as executor.

The six defendants, children of the testator, are the only legatees and devisees.

A list of property, alleged to be that owned by R. W. Mills at the time of his death, is attached to the complaint. Included therein are these items: (1) "200 shares of Dividend stock in Home Building & Loan Association $20,000.00." (2) "Note of Aaron Baker & wife for $4,200.00 dated Feb. 20, 1951, with interest paid to Dec. 11, 1954." (3) "Note of David Scott, principal balance $60.00 & interest."

Plaintiff alleged that a controversy exists between defendants "as to the disposition of the notes, mortgages and Home Building & Loan stock enumerated in the inventory." (In said list of property, the word "mortgage(s)" does not appear. Presumably, the Baker and Scott notes are secured by mortgages.)

Plaintiff alleged further that the controversy arises from contradictory interpretations placed on the second and fourth items of the will which, in pertinent part, provide:

"ITEM 2: I give, devise and bequeath unto my daughter, Elizabeth Mills in fee simple and forever all of my household and kitchen furni-

ture, my family automobile, all cash, money in bank and bonds that I own at my death, after payment of my funeral expenses and costs of paying my debts and settlement of my estate, and also the house and lot situated on the East side of the Boulevard . . ."

"ITEM 4: My executor, hereinafter named, shall convert all the rest and remainder of my property, real and personal, into cash and I give, devise and bequeath the same when so converted equally, share and share alike unto my six children, Eugene, Elizabeth, Lillian, Mildred, Ida Bell and Mary Frank, to be theirs absolutely and forever. . . ."

A joint answer was filed by defendants Elizabeth Mills, Mildred M. Evans and Ida Bell M. Walker. After admitting plaintiff's allegations of fact, they asserted their contention that the said items in controversy passed to Elizabeth Mills under Item 2. Further answering, "and by way of CROSS ACTION for affirmative relief," they alleged, in eleven numbered paragraphs, facts concerning the testator's relationships to his children, especially defendant Elizabeth Mills, and concerning the testator's property when the will was made and thereafter until his death.

Defendants Eugene F. Mills, Lillian M. Rape and Mary Frank W. Gilleland did not answer. In lieu thereof, they moved to strike paragraphs 3, 4, 5 and 10 from said further answer of their codefendants. They asserted, as the basis for their motion, these grounds: (1) The facts alleged have no legal bearing upon a proper construction of said will; (2) evidence in support of said allegations would be incompetent; (3) movants would be prejudiced if said irrelevant, immaterial and improper allegations were allowed to remain in said further answer.

The hearing before Judge Phillips was on said motion to strike. Allowing the motion, he entered an order on 6 September, 1956, striking paragraph 3, 4, 5 and 10 from said further answer. The answering defendants excepted and gave notice of appeal.

In apt time, the answering defendants filed a petition in this Court for a writ of *certiorari* under Rule 4(a), 242 N.C. 766, for immediate review of said order of 6 September, 1956, which petition was allowed by this Court.

Raymer & Raymer for defendants Elizabeth Mills, Mildred M. Evans, and Ida Bell M. Walker, appellants.

R. A. Hedrick and Adams, Dearman & Winberry for defendants Eugene F. Mills, Mrs. Lillian M. Rape and Mrs. Mary Frank M. Gilleland, appellees.

BOBBITT, J. When the petition for writ of *certiorari* was allowed, this in effect granted to petitioners the right of immediate appeal from

the order of 6 September, 1956. In perfecting such appeal, Rules of Practice in the Supreme Court, 221 N.C. 544, apply.

The record before us contains no assignment of error. Even so, it shows that exception was taken to the order of 6 September, 1956; and the petition for *certiorari* was in effect an assignment of error directed to the entire order. This suffices to bring before this Court for review the question as to whether the court below was in error in entertaining appellees' motion and in entering an order thereon.

When the cause was before Judge Phillips, the pleadings were incomplete. Appellees had not answered the complaint. The hearing related solely to their motion to strike the designated allegations in appellants' further answer.

The court made no construction or interpretation of the will.

The admissibility of evidence as to "circumstances attendant" when the will was made, to enlighten the court in its task of ascertaining the intent of the testator as expressed in the will, is discussed fully in *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246.

The question now presented concerns allegations, not evidence. In this connection, it appears that certain of the alleged facts relate to "circumstances attendant" when the will was made, referring "to the relationships between the testator and the beneficiaries named in the will, and the condition, nature and extent of his property." *Trust Co. v. Wolfe, supra.* However, on this appeal, we do not undertake to mark out which of the alleged facts, if any, are or may be relevant to a proper construction or interpretation of the will.

It is settled that, in the absence of stipulation, "the circumstances attendant" are to be established by findings of fact made by the court on competent evidence presented to it. *Trust Co. v. Wolfe, supra.*

The rules applicable upon consideration of a motion to strike made under G.S. 1-153 are grouped and restated by *Johnson, J.,* in *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. In the cases cited, the pleadings raised issues of fact for determination by a jury.

Here the situation is different. The challenged allegations, if controverted, raise questions of fact for determination by the court. Issues of fact, for determination by a jury, are not involved.

A party may be prejudiced before a jury when irrelevant and redundant allegations, or allegations of incompetent matters, are read in the hearing of the jury. When challenged allegations are stricken, they are withheld from the ears of the jurors but not from the eyes of the judge. In hearing a motion to strike, the court must read the challenged allegations and consider argument relating thereto; and, whether the motion is allowed or disallowed, the court becomes fully aware of the alleged facts. And when the ultimate question, to wit, the construction or interpretation of the will in the light of the "circumstances

attendant" when the will was made, is presented to another Superior Court judge for decision, he, too, upon his inspection of the court file, becomes fully aware of all alleged facts theretofore stricken.

When the cause comes on for hearing on said ultimate question, the Superior Court judge then presiding should be free to make his own decisions as to what alleged facts, if any, constitute "circumstances attendant" as well as the significance, if any, thereof. He should be free to make such decision, *when evidence of the alleged facts is offered,* unimpeded by prior rulings relating solely to allegations.

After the order of 6 September, 1956, was entered, appellees filed an answer in which they alleged factual matters. If a motion to strike may be entertained, no doubt appellants will address such a motion to designated allegations made by appellees. In such event, before the cause comes on for hearing on said ultimate question, there would be at least two preliminary hearings relating solely to allegations.

A series of hearings before successive Superior Court judges relating solely to allegations, apart from the element of delay, would serve no useful purpose. Reason and experience impel the conclusion that the Superior Court judge who passes on the ultimate question, after all pleadings have been filed, should determine what are relevant "circumstances attendant" and their significance, if any.

We are constrained to hold that the legislative intent expressed in G.S. 1-153 has no application when the challenged allegations relate solely to questions of fact addressed to the court. See: *Gallimore v. Highway Commission,* 241 N.C. 350, 85 S.E. 2d 392; *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810.

Whether the findings of fact made by the Superior Court judge are based on competent evidence, and whether the facts found have any significant bearing on the proper construction or interpretation of the will, are subject to review by this Court.

Our conclusion is that the motion to strike was improvidently made and that the court was in error in entertaining the motion and in ruling thereon. Hence, the order is vacated and the cause remanded for further proceedings consistent herewith.

Nothing herein should be considered as an intimation of opinion as to the proper construction or interpretation of the will. No ruling thereon has been made by a Superior Court judge and the matter is not before us on this appeal. *Trust Co. v. Wolfe, supra.*

Error and remanded.

JOHNSON, J., not sitting.

STATE v. VERNIE HIPP.

(Filed 12 December, 1956.)

1. **Homicide § 11—**

A defendant may set up self-defense under a plea of not guilty to a charge of murder.

2. **Homicide § 27f—Evidence held to raise question of self-defense for consideration of jury.**

Defendant's evidence was to the effect that her husband had made repeated threats against her life, that on the occasion in question she was awakened by an assault committed by him, that he got a rifle, pointed it at her heart and threatened to kill her, struck her on the side of the head, and that when she realized what had happened, he was on the floor dead. The evidence further tended to show that the deceased was a heavy, strong man and defendant a frail woman. There was also testimony of other statements made by her not consonant with the theory of self-defense. *Held:* The evidence raises the question of self-defense, notwithstanding contradictory evidence of the State or even defendant's own declarations, and it was prejudicial error for the trial court to fail to submit the question to the jury under appropriate instructions.

3. **Criminal Law § 51—**

It is the function of the jury, not the court, to determine the credibility of the testimony.

JOHNSON, J., not sitting.

APPEAL by defendant from *Fountain, S. J.*, March, 1956 Term, LEE Superior Court.

Criminal prosecution upon an indictment charging the defendant with the crime of murder in the first degree in the killing of her husband, Clayton Hipp. Upon arraignment the solicitor announced in open court he would not ask for a verdict of guilty of murder in the first degree, but for murder in the second degree or manslaughter.

The State offered evidence tending to show the following: The deceased and the defendant were husband and wife. They lived in the City of Sanford. They had a son, John Wayne, 16 years of age, who, at the time of the homicide was not at home. At about eight o'clock on Sunday evening, 18 July, 1954, the defendant called the police department over the telephone and said to Officer Ferguson, "Policeman, come over to my house. I have shot my husband and killed him. Bring the coroner." Officers Ferguson and Eatmon arrived at the apartment in about five minutes. The defendant was standing in front of a chair. The body of the deceased was slumped down on his knees beside a couch with his right hand on the couch. A cigarette in the fingers of his right hand was still burning. Lying against the chair was

a .22 calibre auto-loading (erroneously called automatic) rifle. When asked what happened, the defendant replied that she had shot Clayton, that she aimed at his heart. She said he had loaded the rifle, given it to her and "told her she was a damn liar and a s.o.b. if she didn't shoot him." She said she shot him five times, twice in the chest and three times after he fell. Examination disclosed two bullet wounds in the chest and three in the back.

On cross-examination, the officer testified the defendant was drinking. She said she was tired of taking his beatings; that he had hit her and put a lot of bruises on her, numbers of times, and she was getting tired of taking it. The officers saw bruises on her neck, arm and chest and, "We had had reports he had been beating her. We had been around there a number of times before when she had bruises." The deceased was "a little on the stocky build, weighing about 175 pounds." The defendant "was more or less frail in appearance."

The defendant testified in her own behalf as follows: "On Thursday night before Sunday, he drew a butcher knife on my back. . . . We . . . started to go to bed . . . When I looked back, he had a butcher knife and was fixing to stab me in the back. I looked up at him. I said, 'Clayton, what do you mean?' He dropped his hand and he just froze. He didn't speak for a few minutes, turned and went back to the kitchen and put the knife up. He never mentioned the knife any more and I didn't either.

". . . on Sunday (the day of the homicide) my husband was home part of the day. He was there from 2:30 Sunday morning until 12 or one o'clock Sunday evening. . . . The next time I saw him was when he awakened me on Sunday evening. I had not been out of the house. . . . When he woke me up he was twisting my leg and cursing me and fighting me. I managed to get away from him and get on the opposite side of the bed and tried to get out of the room. He chased me, was still fighting me with his hands. He hit me over the face and neck, twisted my arm. I was trying to get out, begging him to lie down and let me go to Mama's. . . . I was trying to get to the door because he was pretty drunk. I figured if I could get to the outside door I could get out, . . . He was drunk, and all the time he was fighting I was trying to get away. . . . He said he was going out to get John Wayne and that he was going to beat hell out of him. When he started out the door he told me, 'If you stick your head out the door while I am gone, I will pull every hair of your head out and choke you to death.' . . . I thought that would be my break. I thought he would go, but he came and sat in the corner; he picked his gun up; he cursed me again and said, 'No, I am going to kill you right now, and get John Wayne later.' He picked up the gun and checked the ejector, a bullet fell out. He came towards me with the gun, still cursing, and the gun pointed

toward my heart, and the last word I spoke to him, I said, 'Please put the gun away.' That is when he struck me up the side of the head, with what, I don't know, and I don't know what happened; how the gun got in my hand or out of my hand, but I was stunned for awhile. When I came to he was lying slumped over the couch with his left arm over the couch and the rest of him on the floor. . . . I reached back and picked up the telephone and I called the police station. . . . I was afraid of my husband at that time. I was scared of him because he was all man. He could fight. . . . I don't know why I shot him because I never had in my mind to shoot him or anybody else. He had taken the gun down and threatened to use it on me before, several times."

The jury returned a verdict of guilty of manslaughter. From a judgment that the defendant be confined in the quarters provided for women at the State's Prison for a term of not less than eight nor more than 12 years, the defendant appealed.

George B. Patton, Attorney General, and Harry W. McGalliard, Asst. Attorney General, for the State.

S. Ray Byerly and Gavin, Jackson & Gavin for defendant, appellant.

HIGGINS, J. The defendant's plea of not guilty placed upon the State the burden of proving her guilt beyond a reasonable doubt. The plea permitted her to justify the killing, if she could, by showing the act was done in self-defense. The evidence for the State was sufficient to go to the jury on the charge of murder in the second degree, but did it not also raise the question of self-defense?

The State introduced the defendant's admission as evidence in the case. The defendant told her story from the stand. That, too, was evidence in the case. Boiled down to its essentials, her evidence paints this picture: The deceased, a strong man, had assaulted and beaten her repeatedly. Three days before the homicide he had a butcher knife at her back. On the fatal day he threatened to pull every hair in her head out and choke her to death. Upon his return after being gone for a few hours, he began an assault on her while she was asleep. She tried unsuccessfully to get away from him and to go to her mother's, but after twisting her arm and choking her, he got the rifle, threatened to kill her, and pointed the gun at her heart. He struck her on the side of the head, stunned her, and when she realized what had happened, he was on the floor, dead. She called the officers.

It is neither the function of the trial court nor of this Court to say whether the defendant's story is true or false. That is the jury's function. "There is in this evidence an inference of self-defense which is not cancelled out by the contradictory evidence of the State, even her own declarations to others that the actual shooting was accidental. In

her own evidence she attributed it to a fear, which neither humanity nor reason may disallow, and of which the law itself is considerate. Taking all the evidence together, the inference that the defendant acted under a reasonable apprehension of great bodily harm cannot be said to be based on a mere scintilla." *S. v. Greer,* 218 N.C. 660, 12 S.E. 2d 238.

If the defendant's story is to be believed, she was not at fault in bringing on the difficulty. Therefore, the door to the sanctuary of self-defense was not closed to her. Even though a frail woman, her natural reaction to an assault would be to defend herself. The instinct of self-preservation is strong in most creatures of this earth. Even a mouse will bite the hand that squeezes it. The question of self-defense arises on this evidence and only the jury can answer it. The circumstances under which one may fight and, if necessary, kill in self-defense are clearly set forth in an opinion by the present *Chief Justice* in the case of *S. v. Robinson,* 213 N.C. 273, 195 S.E. 824.

The learned trial judge charged the jury: "Because of remarks made by counsel in the arguments, I instruct you, gentlemen, that there is no evidence of self-defense in this case. There is no evidence of a justifiable shooting or killing of Clayton Hipp." The instruction is the basis of defendant's Exception No. 40 and is preserved by Assignment of Error No. 13. The exception is well taken. It was the duty of the trial court to submit to the jury the question of self-defense under proper instructions. For the error in failing to do so, the defendant is entitled to a

New trial.

JOHNSON, J., not sitting.

CITY OF STATESVILLE, A MUNICIPAL CORPORATION, v. THOMAS H. ANDERSON.

(Filed 12 December, 1956.)

1. Eminent Domain § 10—

Where a part of a tract of land is condemned, the owner is entitled to recover compensation for the part taken and compensation for injury to the remaining portion, and thus receive as compensation the difference between the fair market value of the entire tract before the taking and the fair market value of the remaining land immediately after the taking, to be offset by general and special benefits when applicable under the controlling statute.

2. Same: Eminent Domain § 18e—

In a proceeding by a municipality to condemn a narrow strip from defendant's land for street and sidewalk purposes, it appeared that the line ran through a house on the property. The applicable statute provided that title should vest in the city when it paid the compensation awarded. *Held:* In the absence of evidence by the city showing that defendant would have the right to remove the house and the cost and feasibility of removal, an instruction to the effect that the damages should be diminished by the value of defendant's right to remove the house, must be held for prejudicial error.

3. Eminent Domain § 18b—

While defendant in condemnation proceedings has the burden of establishing by competent evidence the damage he will sustain by reason of the taking, the burden is on petitioner to show matters in diminution of damages by reason of defendant's right to remove structures from that part of the land condemned.

4. Eminent Domain § 9—

Where land is condemned for sidewalk and street purposes, the possibility of the later abandonment of the easement is ordinarily too speculative and conjectural to be considered in diminution of damages.

JOHNSON, J., not sitting.

APPEAL by defendant from *Johnston, J.*, February Term 1956 of IREDELL.

This is a proceeding to acquire by condemnation a right of way across lands of defendant adjacent to the west side of North Race Street in order to widen the street and provide a sidewalk. The petition specifically describes the land to be acquired, asserting the area involved is nine-tenths of an acre.

Defendant in his answer admits he owns a tract of land which includes the area described in the petition. He alleges the area taken is in excess of an acre and further alleges: "to widen North Race Street all on the West side of said street as proposed, will undermine and destroy the usefulness of a dwelling, located on said property, and the defendant will be compelled to move the house at great expense or demolish it."

Commissioners were appointed to determine the amount of compensation to which defendant was entitled. They made a report to the clerk. He approved the report and rendered judgment, directing payment of the amount reported. Plaintiff and defendant each excepted and appealed to the Superior Court.

Defendant's land abuts on Race Street approximately 1650 feet. The tract contains about thirty-six or thirty-seven acres. Situate on this tract is a dwelling facing Race Street. The western line of the

area described in the petition and to be acquired by plaintiff runs through the house.

The jury, under instructions from the court, assessed defendant's damages. Judgment was entered in conformity with the verdict, and defendant excepted and appealed.

Baxter H. Finch and R. A. Hedrick for petitioner appellee.

Scott, Collier & Nash and Land, Sowers & Avery for respondent appellant.

RODMAN, J. The only issue for determination by the jury was the amount of compensation to which defendant was entitled.

The court instructed the jury: "Now, members of the jury, the court instructs you that under the estate sought to be acquired by the plaintiff that the defendant would have the right at any time prior to the asserting of the easement acquired to remove from the premises the house that has been described as being on the property, or being on the line of the property. The court instructs you that at any time prior to asserting the rights sought to be acquired by the plaintiff that the defendant would have the right to use this property for any purpose not inconsistent with the purposes for which the right is acquired by the plaintiff."

The court further instructed the jury: "Now the court instructs you that you will answer the first issue in such an amount and in only such an amount as the defendant has satisfied you that he will be damaged by this taking, that is, you will answer it in such an amount as you will arrive at, determining the fair market value of the entire tract before the taking and subtracting therefrom the fair market value of the property after the taking, bearing in mind that the defendant will have the right to remove the house from the tract to be taken but that he would be under no obligaion or duty to do so."

In other parts of the charge the jury was advised "that the defendant would have the right to remove the house, but that he would be under no obligation to do so."

Defendant noted exceptions to the charge and assigned these exceptions as prejudicial error. Defendant's exceptions are well founded. The measure of damages when a portion of a tract of land on which there is situate, in whole or in part, a building was stated with clarity in *Proctor v. Highway Commission*, 230 N.C. 687, 55 S.E. 2d 479. What was there said was repeated in *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778. We quote from that opinion: "Where only a part of a tract of land is appropriated by the State Highway and Public Works Commission for highway purposes the measure of damages in such proceeding is the difference between the fair market value

of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. *The items going to make up this difference embrace compensation for the part taken and compensation for the 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." Amplification would not add clarity to the rule so definitely stated.

The record in this case does not describe in any detail the building affected by the acquisition. It does appear from the testimony of the witness Stafford that the building must be moved. He testified that the area to be acquired varies from seventeen to twenty-nine feet in width. He estimated an average width of nineteen to twenty feet. He said: "in order to obtain the width of 17 to 25 feet on the western side of North Race Street it would go through the tenant house; and that the tenant house should be taken away and moved." Plaintiff's other witnesses, testifying about the building, merely placed a value of about $1,000 on the house. Evidence for defendant tends to fix the value of the house at $2,500. The only other evidence with respect to the house is that it "has three excessive big rooms, two porches, underpinning, and is in extremely good condition . . ."

This proceeding is under the charter of the City of Statesville, c. 243, P.L. 1911. That Act provides that title shall vest in the city when it pays the compensation awarded. Hence the city has the right to possession at the moment it pays the amount fixed by the jury. A narrow strip of land is being condemned. Its maximum width is twenty-nine feet. The city is acquiring it to widen the street and construct a sidewalk. The undisputed testimony is that the building must be moved to accomplish that purpose. It may be reasonably assumed that the city will act promptly in taking possession. Otherwise there would be no reason for condemning defendant's land.

What credit under the instruction should the jury properly allow (1) for the right to remove the house and (2) the right of defendant "to use this property for any purpose not inconsistent with the purposes for which the right is acquired by plaintiff"? The court did not instruct the jury that the plaintiff could immediately upon the ascertainment of the damages take possession by paying into court the amount awarded. It did not fix any time within which removal could be effected, nor did it lay down any rule to guide the jury in measuring this right of occupancy or right of removal. Not only did the court not give the jury any rule by which to measure the rights which it said the defendant had, but there was no evidence on which he could formulate any rule. What would it cost to move the building? How far would it be necessary to move it? What was the method of construction and

how would this relate to the feasibility of moving the building? All of these are material factors as well as the time element in measuring the rights which the jury were advised could be used to diminish defendant's damages. Under the factual situation presented by this case we are of the opinion that these rights, like the value which may attach to the possibility of the abandonment of a right of way, are too minute and conjectural to measure, and that the correct rule to apply is as we have quoted from *Highway Commission v. Black, supra.*

Defendant has the burden of establishing by competent evidence the damage he will sustain by the act of the plaintiff. The jury will not be permitted to base their verdict on a speculation, *Lieb v. Mayer,* 244 N.C. p. 613, nor can defendant's damages be diminished by ascribing to him rights which have not been shown by the evidence to be of value.

New trial.

JOHNSON, J., not sitting.

F. L. TAYLOR v. E. M. HUNT.

(Filed 12 December, 1956.)

Master and Servant § 41—

Where an injured employee has accepted compensation under the Workmen's Compensation Act, no action instituted within six months from the date of the injury may be maintained in the name of the injured employee unless the complaint discloses that the action was instituted in the name of the employee by either the employer or the insurance carrier. G.S. 97-10.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *McKeithen, Special J.,* 28 May Special Term 1956 of MOORE.

This is a civil action instituted by the plaintiff on 23 January 1956 to recover for personal injuries sustained by him on 10 November 1955 when a motor vehicle operated by the defendant collided with a motor vehicle being operated by the plaintiff on Highway No. 109, near Denton, North Carolina.

The plaintiff, F. L. Taylor, at the time of the accident was president of the Troy Lumber Company, a North Carolina corporation, and the motor vehicle which he was operating belonged to the company and was being used on a business trip for the company. Plaintiff was covered by the provisions of the North Carolina Workmen's Compensation

Act at said time and the insurance carrier of the Troy Lumber Company has paid certain compensation for plaintiff's injuries.

The defendant, in answering the plaintiff's complaint, set up in his second further answer and defense, as a plea in bar, which in substance alleges that, since the plaintiff was covered by the provisions of the Workmen's Compensation Act and had accepted compensation thereunder, the carrier had the exclusive right under the Act to bring the action within six months from the date of the accident. Therefore, it is alleged, this action should be dismissed since it was instituted within six months of the date of the injury and there is nothing on the face of the complaint to indicate that it was instituted by the carrier in the name of the injured employee.

The plaintiff moved to strike all of the second further answer and defense. The motion was denied.

The plaintiff applied for a writ of *certiorari* pursuant to the provisions of Rule 4(a) of the Rules of Practice in the Supreme Court, 242 N.C. 766. We allowed the petition.

David H. Armstrong for appellant.

W. D. Sabiston, Jr., for appellee.

DENNY, J. The appellant states in his brief that the action was instituted with the knowledge, consent and approval of the insurance carrier. We construe this statement to be tantamount to an admission that the action was not instituted by the carrier in the name of the injured employee, as authorized by G.S. 97-10. We think this view is further confirmed by the appellant in his brief in which he contends that the right of the employer or carrier to bring the action within six months from the date of such injury or death, may be waived, citing *Foster v. Congress Square Hotel Co.*, 128 Me. 50, 145 A. 400, 67 A.L.R. 239.

We express no opinion as to whether the exclusive right given to an employer or his carrier to bring suit within six months from the date of the injury or death may or may not be waived in favor of the injured employee, since waiver of such right is not pleaded by the plaintiff. See *Wright v. Insurance Co.*, 244 N.C. 361, 93 S.E. 2d 438.

Under the original provisions of our Workmen's Compensation Act, Section 11, Chapter 120, of the Public Laws of 1929, an employee or his personal representative had to elect whether he would accept the benefits available to him under the Workmen's Compensation Act, or would proceed in a suit at common law against a third party to recover damages for such injury. And where the injured employee or his personal representative elected to accept the benefits available under the

provisions of the Workmen's Compensation Act, such acceptance was a complete bar to his right to proceed with the alternate remedy.

The Act, however, has always provided that where an employer has assumed liability for an award for compensation, he shall be subrogated to such rights as the injured employee or his personal representative had against any other party for such injury or death. Likewise, the Act provided that where an insurance carrier has paid an award for which the employer was liable, the insurance carrier shall be subrogated to all the rights of the employer, and that such subrogated rights may be enforced against a third party in the name of the employer, or the insurance carrier, as the case may be, or in the name of the injured employee or his personal representative. *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613; *McCarley v. Council*, 205 N.C. 370, 171 S.E. 323.

In 1933 the General Assembly amended the Workmen's Compensation Act, eliminating the requirement for an election of remedies, and authorizing the employee or his personal representative to bring an action against a third party if the employer had not instituted such action within six months of the date of such injury or death. Chapter 449, Public Laws of 1933. The Act was amended again by Chapter 622, Session Laws of 1943, which amendment provided "that after the Industrial Commission shall have issued an award, or the employer or his carrier has admitted liability in writing and filed the same with the Industrial Commission, *the employer or his carrier shall have the exclusive right to commence an action.*" (Emphasis added.) Such action may still be instituted in the name of the injured employee, or his personal representative, and if not brought within six months by the employer or his carrier, the employee or his personal representative may institute such action. G.S. 97-10; *Eledge v. Light Co.*, 230 N.C. 584, 55 S.E. 2d 179.

In the case of *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E. 2d 886, this Court, speaking through *Ervin, J*,. said: "G.S. 97-10 specifies how the liability of the negligent third party to the injured employee is to be enforced. The employer or the insurance carrier, who has paid or become obligated to pay compensation to the employee injured by the negligent third party, has the exclusive right in the first instance to commence an action 'in his own name and/or in the name of the injured employee' against the third party for the damages suffered by the employee on account of the injury. If neither the employer nor the insurance carrier commences the action against the negligent third party within six months from the date of the injury, the right of action passes to the injured employee, and the injured employee thereafter has the right to bring the action in his own name against the third party for the damages suffered by him on account of his injury."

It is now settled, however, in this jurisdiction that in a compensation case where the employee dies as a result of an accident arising out of and in the course of his employment, any action against a third party, whose negligence may have contributed to the death of the employee, must be brought by the personal representative of the deceased and not by the employer or his carrier. *Whitehead & Anderson, Inc. v. Branch,* 220 N.C. 507, 17 S.E. 2d 637.

In our opinion, where an injured employee has accepted compensation under our Workmen's Compensation Act, no action instituted within six months from the date of the injury may be maintained in the name of the injured employee, unless the complaint discloses that the action was instituted in the name of such injured employee by either the employer or his carrier. This view was adopted upon similar facts by the Supreme Court of Appeals of Virginia in the case of *Smith v. Virginia Ry. & Power Co.,* 144 Va. 169, 131 S.E. 440.

The ruling of the court below is

Affirmed.

JOHNSON, J., not sitting.

STATE v. VERNON LEGRAND MORGAN.

(Filed 12 December, 1956.)

1. Homicide § 22—

Where defendant contends he acted in self-defense, evidence of the general reputation of deceased for violence is competent, but this rule does not render admissible evidence of specific acts of violence which have no connection with the homicide, and therefore, the court in such case properly excluded proof of a conviction of the deceased in the recorder's court on an unrelated charge of assault with a deadly weapon.

2. Homicide § 27f—

The court's charge to the jury on defendant's plea of self-defense *held* without error.

3. Criminal Law § 53f—

Defendant's objection that the court failed to stress his contentions equally with those of the State, *held* not supported by the record.

JOHNSON, J., not sitting.

APPEAL by defendant from *Williams, J.,* July Term, 1956, of MONTGOMERY.

The defendant was indicted for the murder of Roy Cagle. The Solicitor announced he would not ask for a verdict of murder in the first degree but for a verdict of murder in the second degree or manslaughter as the evidence might warrant.

The evidence offered by the State tended to show that on Sunday afternoon, 8 January, 1956, the deceased, Roy Cagle, accompanied by the State's witness Melvin Davis, drove his automobile into Clegg's Garage in Star, N. C., and stopped 10 or 15 feet from a parked automobile in which the defendant Vernon Morgan and his brother Arthur Morgan and Marvin Hancock were sitting. Shortly afterwards, the defendant got out of his automobile with a double barrel shotgun in his hand, approached the right side of the Cagle automobile and motioned the occupants to roll down the window, which was done. Defendant then charged Roy Cagle with having followed him and blocked the road on him, and Cagle, according to the testimony of Melvin Davis, reached over and opened the right front door of his automobile (the left front door could not be opened from the inside), and immediately the defendant shot Cagle. Davis sprang out and begged him not to shoot him again, but the defendant stepped back and again shot Cagle, who had then fallen on the front seat. The gun had been loaded with buckshot, and the first discharge struck the deceased's right breast and the second struck his neck, ranging downward. The deceased died almost instantly. It was testified by the examining physician that his death was due to these gunshot wounds. Melvin Davis testified that neither he nor Roy Cagle had any weapon of any kind; that Arthur Morgan, brother of defendant, stood by at the time of the shooting with a pistol in his hand.

The defendant Morgan admitted he fired the fatal shots, but claimed this was done in self-defense. He testified that some time before he had reported to the officers a whiskey still which he discovered while hunting, and that afterwards an automobile which he identified as Roy Cagle's followed him on two occasions, blocked the road on him, and had stopped in front of his driveway; that he had been told of threats against him by Cagle, and he carried a gun in his automobile for protection; that when Cagle drove up and stopped near him on this occasion, he got out with his gun unbreached and motioned to the occupants of the Cagle car to roll down the glass, and Davis, who was in the Cagle car, reached in the dash and pulled out a pistol and placed it on the seat between him and Cagle. Defendant testified he asked Cagle why he blocked the road on him; that Cagle said, "I will kill you," and "shoved the pistol directly across Melvin Davis' face and right into my face." Thereupon defendant said he fired twice. The second shot was only a moment after the first. He said he told his brother to take the pistol out of Cagle's hand, which he did, and ex-

hibited the pistol in evidence at the trial. The defendant also offered evidence tending to show that Roy Cagle was a violent and dangerous man and that he had been convicted several years before for assault with a deadly weapon. He offered certified copy of a Recorder's Court judgment showing Roy Cagle's plea of guilty of assault with deadly weapon. The State's objection to the copy of the judgment was sustained, and defendant excepted.

The State offered evidence in rebuttal that Roy Cagle did not have reputation for violence; that he was a married man engaged in trucking between Lumberton and Star; that he did own a pistol, but this was at his home, and that the one exhibited by the defendant was not his.

The jury returned verdict of guilty of murder in the second degree, and from judgment imposing sentence defendant appealed.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

H. F. Seawell, Jr., and Charles H. Dorsett for defendant, appellant.

DEVIN, J. The defendant admitted that he shot and killed the deceased, but claimed that this was done in self-defense. The jury rejected his plea and found him guilty of murder in the second degree. The evidence supports the verdict and judgment.

The defendant has brought his case here for review, assigning errors in the trial which he asserts influenced the adverse verdict.

Error is assigned in the ruling of the court in sustaining objection to the introduction of a copy of a Recorder's Court judgment showing the conviction of Roy Cagle, the deceased, in 1952 on the charge of assault with a deadly weapon. Having offered, on his plea of self-defense, evidence that the deceased bore the general reputation of being a violent and dangerous man to his knowledge, the defendant contends he was entitled also to show instances of violence on the part of the deceased in support of his contention that he acted under the reasonable apprehension of death or great bodily harm.

The competency of evidence of the general reputation of the deceased for violence, known to the defendant, when offered in support of his plea that he acted in self-defense, has long been recognized by this Court. *S. v. Turpin*, 77 N.C. 473; *S. v. Blackwell*, 162 N.C. 672, 78 S.E. 316; *S. v. Hodgin*, 210 N.C. 371, 186 S.E. 493; *S. v. Rawley*, 237 N.C. 233, 74 S.E. 2d 620. But the competency of testimony relating to a single instance of lawlessness on the part of the deceased may not be held supported by the rule enunciated in those cases. *S. v. LeFevers*, 221 N.C. 184, 19 S.E. 2d 488.

In the *LeFevers case, supra*, we said: "Where there is evidence tending to show that the defendant acted in self-defense, evidence of the

general reputation of the deceased for violence may be admitted, but this rule does not render admissible evidence of specific acts of violence which have no connection with the homicide. *S. v. Hodgin,* 210 N.C. 371, 186 S.E. 493; *S. v. Melton,* 166 N.C. 442, 81 S.E. 602; *Smith v. State,* 197 Ala. 193." See also *Gunter v. State,* 63 Ga. App. 65, 10 S.E. 2d 264.

There was no error in sustaining objection to the proffered testimony.

The defendant also assigns error in the rulings of the trial judge with respect to the admission of testimony in several other instances to which he noted exceptions, but upon examination we find no error in the rulings complained of.

The defendant assigns error in the court's charge to the jury in the respects to which he noted exception. His 16th, 17th and 18th exceptions are directed to the following language of the court:

"Now in this case the defendant has seen fit to set up as a defense a plea of self-defense as a justification for taking the life of the deceased." (Exception No. 16.)

"The burden of satisfying you as to that defense is upon the defendant to show, not beyond a reasonable doubt or by the greater weight of the evidence, but to show it to your satisfaction, therefore, it becomes necessary for you to know under what circumstances and with what qualifications the law justifies the taking of a human life under that theory." (Exception No. 17.)

"Now insofar as possible for the law to make that plea definite it has done so through the decisions of the Supreme Court of this State." (Exception No. 18.)

These exceptions are without merit. We also note from the record that immediately following the quoted sentences the court in appropriate language set out the pertinent principles of the law of self-defense as approved by the decisions of this Court.

The defendant in his brief raises the point that the court in the charge to the jury failed to give equal stress to the contentions of the defendant as to those of the State, but the record does not support this criticism. *S. v. Buffkin,* 209 N.C. 117, 183 S.E. 543. Nor is the charge open to the objection that the court failed to comply with G.S. 1-180.

The defendant in his brief asks for a new trial for the additional reason that the trial judge did not speak in a voice loud enough to be heard and understood by the jury, but there is nothing in the record to support this suggestion. On the contrary, it is stated in the record: "The charge was given the jury in a clear and audible voice and no indication was made at any time it was not heard and understood by the jury."

After a careful examination of the entire record, and considering each of the assignments of error brought forward in defendant's appeal, we reach the conclusion that in the trial there was no error.

No error.

JOHNSON, J., not sitting.

STATE v. LUCILLE ROPER FURLEY.

(Filed 12 December, 1956.)

1. Criminal Law §§ 31d, 31c(3)—Form of testimony of expert witness held not prejudicial under facts of this case.

While expert opinion evidence must be based upon facts within the witness' personal knowledge or upon the hypothesis of the finding of stipulated facts by the jury, testimony of an expert witness in an abortion prosecution that it was quite possible that pregnancy could be interrupted in such a fashion as described by a prior witness, cannot be held for prejudicial error when, under the circumstances of the case, the witness must have been referring to articles and instruments then before the jury as exhibits, and in view of the subsequent testimony of the same witness, to which no objection was noted, to the same import, it being apparent that the matter could not have improperly influenced the result.

2. Criminal Law § 50d—

The interrogation of a witness by the court solely to obtain a definite answer to a question theretofore asked the witness by defendant's counsel *held* not prejudicial, the interrogation not tending to discredit the witness or express an opinion.

3. Criminal Law §§ 53b, 53d—

The court's charge on reasonable doubt and the caution given the jury in the admission of evidence in corroboration *held* without error.

JOHNSON, J., not sitting.

APPEAL by defendant from *Williams, J.*, March Term, 1956, of CUMBERLAND.

The defendant was indicted for using instruments on the body of one Maline Brewington for the purpose of causing a miscarriage, in violation of G.S. 14-45.

There was evidence on the part of the State tending to show that Maline Brewington, an unwed girl eighteen years of age, being pregnant, went to the home of the defendant in Fayetteville and asked her to produce an abortion. She testified that the defendant agreed to do

so for $35, and that pursuant to this arrangement, at the defendant's home, the defendant applied to the body of the witness an instrument which she described; that thereafter the abortion was accomplished and the two or three months old foetus destroyed and discharged, resulting in severe illness to the witness.

Several small metal objects, wires and rubber tubing were found by an officer in defendant's room, and were identified and offered in evidence at the trial.

Dr. Foster, a physician and County Health Officer, admitted by defendant as qualified to testify as an expert, examined the witness Maline Brewington, and testified she had had a miscarriage. He also testified in corroboration of the statements she made to him. He was asked if "from the application of the instrument, objects and wires which Maline Brewington said to you were made upon her body by Lucille Roper Furley, do you have an opinion satisfactory to yourself as to whether or not that would cause a miscarriage?" Objection by defendant was overruled. The witness answered: "It is quite possible that pregnancy could be interrupted in such a fashion as described to me by Maline." He subsequently testified without objection that among the objects exhibited in evidence was a catheter with a piece of wire inserted inside the catheter, also forceps and an unusual style of scissors; that he couldn't say that every one of these objects was foreign to anything pertaining to miscarriage. "There is something in that, as I just described, that could be used in a hospital or elsewhere pertaining to a miscarriage."

The defendant denied that she had performed any operation or used any instrument to produce a miscarriage on Maline Brewington; that Maline had never been to her house; that she did not know her before these charges were made. She further testified that the objects offered as exhibits were either ordinary household objects, or some articles of junk, she having been in the junk business in 1954. She offered evidence of her good character, and there was evidence by the State *contra*.

The jury returned verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

Nance, Barrington & Collier for defendant, appellant.

DEVIN, J. The defendant was convicted of the sordid crime of using instruments to produce an abortion on the person of one Maline Brewington. The evidence offered by the State was sufficient to sustain the charge set out in the bill of indictment and to support the verdict and

judgment, but the defendant assigns errors in the trial which she contends were sufficiently prejudicial to entitle her to another hearing.

As the basis of her appeal, in her brief, she presents two questions for review:

1. The State's witness Maline Brewington testified as to the manner and means and to the fact of the abortion performed on her by the defendant. Certain metal and rubber articles which had been found in the defendant's room were without objection offered in evidence as exhibits. Dr. Foster, a medical expert, testified in corroboration of the State's witness as to the means by which the abortion was brought about as described by her. Dr. Foster was asked whether the use of the instruments described upon the body of the State's witness could cause a miscarriage. Defendant's objection to the question was overruled and Dr. Foster stated: "It is quite possible that pregnancy could be interrupted in such a fashion as described to me by Maline."

The general rule undoubtedly is that the expression of an opinion as to a material matter in issue, even by an expert, to be competent as evidence must have been based on facts within the witness' personal knowledge or upon the hypothesis of the finding by the jury. *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818. However, we do not think in view of all the evidence in this case the circumstances under which this question arose and the subsequent testimony of Dr. Foster, to which no objection was noted, that prejudicial error should be predicated upon the statement quoted. *Summerlin v. R. R.*, 133 N.C. 550, 45 S.E. 898: *Hester v. Motor Lines*, 219 N.C. 743, 14 S.E. 2d 794; Stansbury, page 240.

In *S. v. Shaft*, 166 N.C. 407, 81 S.E. 932, where a similar situation arose in an abortion case, we find this language in the opinion of the Court:

"Exceptions 3, 4, 5, and 6 relate to the competency of certain witnesses to testify as experts, and to their qualifications as such. A previous witness had testified that the capsule offered in evidence, and some of which had been administered to the girl, contained aloes, and these witnesses as experts were permitted to testify as to the effect of this drug upon pregnancy, when administered in large doses. We see no objection to the competency of this evidence."

From the original record in the *Shaft case* it appears that the exceptions referred to by number in the Court's opinion related to the testimony of Dr. Sevier. This witness had been asked the question whether or not aloes had a tendency to produce an abortion, and he replied over objection, "Aloes in an excessive dose I should think would have an indirect tendency to produce an abortion." Similar questions were asked Dr. Morris, and similar answer elicited. In our case, Dr. Foster apparently had in mind the articles and instruments which were then

before the jury as exhibits. We do not think the admission of the statement objected to was of sufficient moment to have improperly influenced the result, or to require a new trial. *Rea v. Simowitz,* 226 N.C. 379, 38 S.E. 2d 194.

2. The defendant assigns error in the action of the trial judge in propounding questions to the defendant's witness Godwin. This witness, on direct examination, had testified that in 1954 the defendant was buying and selling junk, and that at the place where witness worked there was some junk from Fort Bragg—odds and ends from hospital supply—and that looking at the State's exhibits he thought they had some things of that nature. Asked to look at a pitcher, a ladle, some small wires, he said, "We did have something of that nature." "The Court: He asked you whether or not you had them. A. I would hate to say on that definitely because there was so much junk out there and people came and looked at it and I didn't never go through it. The Court: Did you have it? A. No, I wouldn't say we did."

Obviously the court was endeavoring to obtain a definite answer to the question asked by defendant's counsel. We do not think the court's questions tended to discredit the witness or to express an opinion. *Andrews v. Andrews,* 243 N.C. 779, 92 S.E. 2d 180; *S. v. Kimrey,* 236 N.C. 313, 72 S.E. 2d 677.

In addition to the two questions presented for consideration in defendant's brief, additional assignments of error were brought forward in defendant's appeal, based on exceptions to the judge's charge to the jury in defining reasonable doubt, and in the caution given the jury in the admission of evidence in corroboration. We observe, however, that the court's statement of the rule as to reasonable doubt is in accord with approved precedents (*S. v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133), and that the caution to the jury with reference to evidence admitted for the purpose of corroboration seems to be in substantial compliance with Rule 21.

In the trial we find no error of which the defendant can justly complain.

No error.

JOHNSON, J., not sitting.

WOODROW W. DRIVER v. ORVILLE SNOW, TRADING AS HANES HARDWARE AND APPLIANCE COMPANY.

(Filed 12 December, 1956.)

1. Sales § 15—

There can be no implied warranty in regard to a defect which is as equally visible or discoverable by the purchaser as the seller.

2. Same—Evidence held to show that defect was equally discoverable by purchaser and therefore was not covered by implied warranty.

Plaintiff's evidence was to the effect that he purchased a second-hand stove, equipped with a jacket for the purpose of heating water, upon the seller's representation that the stove would be equally usable for heating a room, that the seller furnished him plugs to stop up the two water holes of the jacket, that plaintiff took the stove home, fitted the plugs, built a fire, and that there was an explosion which seriously and permanently injured plaintiff. *Held:* While the evidence supports the inference that the explosion occurred from steam created from water left in the water jacket, it discloses that this fact was at least as easily discoverable by the purchaser as the seller, and therefore nonsuit was properly entered in an action to recover for the injuries on the theory of breach of an implied warranty that the article was fit for the purpose for which it was sold.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Armstrong, J.*, July, 1956 Term, FORSYTH Superior Court.

Civil action for damages alleged to have resulted from the explosion of a second-hand coal stove sold to the plaintiff by the defendant.

The plaintiff alleged:

"The stove was a second-hand stove which had been slightly used. The stove was equipped with a water jacket for the purpose of heating water in addition to furnishing room heat. At the time plaintiff purchased the stove from the defendant, there were two short lengths of pipe about six inches long extending from the water jacket inside the heater through the shell of the heater to the outside. The plaintiff explained to the defendant that he did not wish to use the stove for the purpose of heating water, but only for the purpose of heating his kitchen. The defendant, Orville Snow, thereupon instructed the plaintiff that the stove would operate very well as a room heater, and that all that was necessary to do was to remove the two short pieces of iron pipe with a small pipe wrench, and to replace the two pipes removed with two plugs. The defendant, at the same price, gave to the plaintiff two iron plugs, which he instructed the plaintiff to place in the openings left

when the pipes were removed. The two pipes removed were open pipes having no caps at either end."

The plaintiff further alleged the defendant knew the plaintiff wanted a stove to heat a room and not to heat water, and in selling it the defendant impliedly warranted it as suitable for the purpose for which it was bought; and in giving the defendant plugs to take the place of two pipes which were to be removed, he knew, or should have known there might be water in the jacket surrounding the fire box which would develop into steam and wreck the stove; that the stove did blow up when so used, seriously and permanently injuring the plaintiff. The plaintiff introduced evidence that he took the stove home, removed the pipes, plugged the holes, set up the stove and, when he built a fire in it next day, the stove blew up, injuring him so that he stayed in the hospital for months; that he lost a leg as a result of his injury.

The defendant denied negligence, warranty, knowledge that there was water in the stove; and alleged that the plaintiff had a better opportunity than did the defendant to ascertain the stove jacket contained water. He pleaded contributory negligence on the part of the plaintiff.

At the close of plaintiff's evidence, the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

Deal, Hutchins and Minor.
By: Roy L. Deal, for plaintiff, appellant.
Parker & Lucas, for defendant, appellee.

HIGGINS, J. At the time the defendant bought the second-hand stove he bought a water tank which had been attached to the stove. The plaintiff bought the stove knowing it was second-hand and knowing it had been used to heat water. He declined to buy the tank. After the purchase he loaded the stove on his truck, took it home, removed the pipes which permitted the water to circulate between the tank and the stove, and plugged the holes left by the removal of the pipes. He installed the stove, built a fire in it, and in about 20 minutes it exploded, seriously and permanently injuring him.

The evidence is sufficient to permit the inference the explosion was caused by the presence of water in the jacket. It is sufficient to permit the inference the water was there when plaintiff bought it. There is no evidence, however, the defendant had such knowledge. There is evidence the stove, though second-hand, had been recently polished; but whether by the defendant or by the person from whom he purchased it, does not appear. Even if polished by the defendant, and there is no evidence to that effect, that would show at most some opportunity to

discover the presence of water. But after all, the plaintiff had the real opportunity to make such discovery. He loaded the stove, carried it home, unloaded it, removed the pipes and sealed up the water jacket.

The plaintiff contends, however, that under the circumstances the defendant is liable by reason of the implied warranty that the stove was safe for the purpose for which it was bought. "Implied warranty cannot extend to defects which are visible and alike within the knowledge of the vendee and vendor, or when the sources of information are alike open and accessible to each party." *Hudgins v. Perry,* 29 N.C. 102; *Phillips Petroleum Co. v. Gibson,* 232 Fed. 2d 13 (5th Ct.). "Where the purchaser is not deceived by any fraudulent representations and demands no warranty, the law presumes that he depends on his own judgment in the transaction and applies the maxim, *caveat emptor.*" Am. Jur., 46, p. 521. "It is generally held upon the sale of a designated, specific article sold as secondhand, that there is no implied warranty as to its quality or fitness for the purpose intended, at least where it is subject to inspection at the time of sale." Am. Jur., 46, p. 454. "There is no implied warranty where the buyer has knowledge equal to that of the seller . . . the presence of the goods at the time of sale open and available for inspection . . . prevents the implication of warranties." 55 C.J., secs. 703, 704, pp. 716, 718.

We have examined the authorities cited by the plaintiff and find they do not point to liability in this case. In *Dalrymple v. Sinkoe,* 230 N.C. 453, 53 S.E. 2d 437, the seller represented the article as suitable for the purpose for which it was purchased, whereas it was dangerous for that purpose. Am. Jur. 46, sec. 803, p. 928, quoted in appellant's brief, limits legal liability to "a seller having actual knowledge of a latent defect not discoverable upon ordinary examination." Neither *Lexington Grocery Co. v. Vernoy,* 167 N.C. 427, 83 S.E. 567, nor *Rabb v. Covington,* 215 N.C. 572, 2 S.E. 2d 705, support plaintiff's position. They deal with latent defects not discoverable by ordinary examination.

In this case the trouble arose because someone left water in the jacket, probably when the tank was detached. The finger of suspicion would point to the man who last used it for heating water. But, as between the plaintiff and defendant, the man who had the last and best opportunity to discover the water would appear to be the man who loaded the stove, unloaded it, removed the pipes, plugged the holes, installed it for use, and built a fire in it—the plaintiff.

This is a most unfortunate case. The plaintiff was gravely and permanently injured. But injury alone does not make out a case of liability. The judgment of the Superior Court of Forsyth County is

Affirmed.

JOHNSON, J., not sitting.

ASHLEY GOLDSTON v. RANDOLPH MACHINE TOOL COMPANY, INC., AND W. D. SMITH AND WIFE, JEANNETTE H. SMITH.

(Filed 12 December, 1956.)

1. Laborers' and Materialmen's Liens § 5—

Where the evidence, considered in the light most favorable to plaintiff, tends to show that plaintiff filed his claim for labor and material with the owners before they had completed payment to the main contractor, or that the owners' agent, entrusted with the duties of disbursing the funds, waived the requirement of filing notice, nonsuit is error. G.S. 44-6, *et seq.*

2. Attorney and Client § 4: Evidence § 13—

Where the evidence tends to show that the owners constituted an attorney their agent for the distribution among subcontractors of the amount remaining due on the main contract for the construction of a dwelling, and plaintiff testifies that he gave the attorney notice of his claim for labor and material and the attorney stated no further notice was necessary, plaintiff has the right to examine the attorney for the purpose of showing that the claim was filed or that filing was waived, there being nothing to indicate that the examination would relate to any confidential communication between attorney and client.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Fountain, S. J.*, July, 1956 Civil Term, RANDOLPH Superior Court.

Civil action instituted 10 January, 1956, to recover $576.00 alleged to be due for material furnished and labor performed in the construction of a dwelling which the corporate defendant contracted to build for the individual defendants. The corporate defendant sub-contracted to the plaintiff certain concrete work on the building. The plaintiff completed the work on 24 October and the contractor failed to pay for it. At the time the work was completed the individual defendants were due the contractor $5,000. However, there were, besides the plaintiff's claim, others outstanding in excess of the amount due by the individual defendants on the contract. These defendants turned over to their attorneys, Miller and Beck, the amount due to the contractor with instructions to pro rate the amount among the subcontractors who had not been paid for work done and material furnished. The plaintiff gave notice by telephone on 8 December to Mr. Beck, one of the attor-

neys, and Mr. Beck told him he had the claim and that no further filing would be necessary. On 19 December, 1955, the plaintiff filed formal notice in the office of the Clerk Superior Court. The defendants' attorneys paid the plaintiff nothing, but instead applied all the money in their hands on other claims. The foregoing is in accordance with the plaintiff's allegations and evidence.

The corporate defendant did not answer. The individual defendants, by answer, denied they had any personal knowledge that plaintiff did work on the building until after 20 December, 1955. At that time their attorneys distributed to those having filed claims all the funds in their hands which constituted full payment of the amount due under their contract. They denied the plaintiff filed his claim or gave notice of it until all the money constituting the balance due had been paid out to other creditors.

The individual defendants were adversely examined by the plaintiff. Mr. Smith testified on cross-examination that he paid the $5,000 to Mr. Miller, attorney, on 21 November, 1955, with instructions to settle the claims for work done by subcontractors in so far as the amount due by him would go. The plaintiff called Attorney Miller as a witness. However, the court, on objection, refused to permit the plaintiff to examine him, apparently upon the theory his examination would violate the attorney and client privilege rule. At the conclusion of plaintiff's evidence the court signed a judgment of involuntary nonsuit, from which the plaintiff appealed.

Ottway Burton, for plaintiff, appellant.

G. E. Miller, for defendants W. D. Smith and wife, Jeanette H. Smith, appellees.

HIGGINS, J. The plaintiff alleged and offered evidence tending to show (1) he performed labor and furnished material as subcontractor in the construction of a new dwelling which the corporate defendant contracted to build for the individual defendants; (2) the contractor failed to pay for the work done; (3) the plaintiff filed a claim with the individual defendants, or their agent, as provided in G.S. 44-6 to G.S. 44-9, before they completed payment to the contractor; (4) they failed and refused to pay the plaintiff his pro rata share of the amount due on the contract.

The plaintiff's evidence, when considered in the light most favorable to him, is sufficient to raise a jury question as to whether he filed his claim in time to share in the payments made to the subcontractors, or if a proper claim was not filed, whether the defendants' agent waived the requirement. *Pumps, Inc., v. Woolworth Co.*, 220 N.C. 499, 17 S.E.

2d 639; *Mfg. Co. v. Holladay*, 178 N.C. 417, 100 S.E. 597; *Foundry Co. v. Aluminum Co.*, 172 N.C. 704, 90 S.E. 923.

The defendants constituted Attorney Miller their agent to settle the claims by pro rating the payments among the subcontractors. The plaintiff had the right to show by Mr. Miller, if he could, that the claim was filed or that filing was waived. There is nothing to indicate the examination would relate to any confidential communications. When the court refused to permit the examination, the plaintiff had no opportunity to ask competent questions and to have the answers placed in the record. This was error.

As is customary in reversing a nonsuit, we refrain from discussing the evidence, except to the extent necessary to show the reason for the conclusion reached. *Harrison v. Kapp*, 241 N.C. 408, 85 S.E. 2d 337; *Pavone v. Merion*, 242 N.C. 594, 89 S.E. 2d 108. The judgment of involuntary nonsuit is

Reversed.

JOHNSON, J., not sitting.

MRS. SARAH WILLIAMSON v. EDNA WILLIAMSON.

(Filed 12 December, 1956.)

Trial § 31b—

Where the court, relative to one of the determinative issues, charges only on plaintiff's evidence as the basis for an affirmative finding, without charging upon defendant's evidence thereon or any hypothesis upon which the jury could answer the issue in the negative, the charge must be held prejudicial on defendant's appeal.

JOHNSON, J., not sitting.

APPEAL by defendant from *Rousseau, J.*, February Term, 1956, of SURRY.

This was an action to recover damages for breach of contract on the part of defendant to provide services for the plaintiff for life.

It was admitted that on 21 October, 1947, in consideration of $5,000 paid by plaintiff, the defendant and her husband, M. V. Williamson, who was then living, agreed in writing "to furnish Mrs. Sarah Williamson with a room, board and care for her at their home near State Road, N. C. for and during the remainder of her life." M. V. Williamson, who was the son of the plaintiff, died 22 February, 1950. It was not

controverted that the plaintiff remained in the home of defendant from October 1947 until February 1951.

The plaintiff, who is 77 years of age, testified that after her son M. V. Williamson died and the defendant Edna Williamson's parents moved in the home, conditions were not pleasant; that in February 1951 the defendant and her parents announced they were going to a quilting party but declined to permit the plaintiff to accompany them. The father of the defendant, Houston Lewis, then drove the plaintiff to the home of her granddaughter, Mrs. Miller. There the plaintiff suffered a stroke of paralysis and remained until October 1951. While there, the defendant visited her. Plaintiff then went to the home of her daughter Mrs. Southard, and later went to the home of another daughter, Mrs. Melton, in Danville, Va. Plaintiff testified the defendant did not at any time during this period send for her or ask her to return to defendant's home. She admitted, however, that her relations with defendant were friendly and that she wrote her several post cards. During the period since February 1951, the plaintiff has had to incur expenses for doctors and medicine for which the plaintiff paid.

The defendant's evidence tended to show that the plaintiff left defendant's home because she wished to go and be with her granddaughter, and to attend the funeral of a relative, and that Mrs. Miller, her granddaughter, came for her. Defendant testified that when plaintiff left she said she did not know how long she would be away, but would be back; that defendant went to see her and told her to come back when she got ready, and that plaintiff said she would when she wanted to; that her relations with plaintiff were always pleasant.

Issues were submitted to the jury and answered as follows:

"1. Did the plaintiff and defendant enter into a contract as alleged in the complaint? Answer: Yes.

"2. Did the defendant breach the contract, as alleged in the complaint? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to receive? Answer: $3,000."

From judgment on the verdict, defendant appealed.

James J. Randleman and Earl C. James for defendant, appellant.

Allen, Henderson & Williams for plaintiff, appellee.

DEVIN, J. On the second issue the court charged the jury as follows: "Now, if you find by the greater weight of the evidence that the defendant carried the plaintiff to her granddaughter's and did not return or send for her, you will answer the issue No. 2 Yes."

To this instruction the defendant duly noted exception and now assigns same as prejudicial error. We think the exception was well taken.

Examining the entire charge of the court in this case, we do not find any other instruction in which opportunity for an alternative finding was afforded the jury. There was no hypothesis upon which they were instructed they could answer the issue "no." The court stated the contentions of the parties on the evidence offered, but in the instruction on the 2nd issue only the ground for an affirmative answer was stated. The burden of proof on the issue was on the plaintiff, and the defendant's evidence tended to throw a different light on the question at issue. We think the defendant was entitled to have her evidence submitted to the jury in such a way as to afford opportunity for a negative response to the issue if the jury so found. The charge coupled the second issue only with the plaintiff's evidence for the purpose of decision.

We think the defendant entitled to a new trial, and it is so ordered.

New trial.

JOHNSON, J., not sitting.

STATE v. R. BRADY SMITH.

(Filed 12 December, 1956.)

Criminal Law § 57b—

Where an appeal is taken and subsequently abandoned after the termination of the trial term, the Superior Court is without jurisdiction to entertain a motion for a new trial on the ground of newly discovered evidence.

JOHNSON, J., not sitting.

APPEAL by defendant from *Rousseau, J.*, February Term 1956 of STOKES.

Defendant's motion for a new trial on the ground of newly discovered evidence was denied, and defendant appealed.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Buford T. Henderson and Dallas C. Kirby for Defendant, Appellant.

PARKER, J. At the October Term 1955 of the Superior Court of Stokes County defendant was convicted by a jury of the crime of carnal knowledge of Georgia Lee Wilkins, a female child over twelve

and under sixteen years of age, who, the bill of indictment alleged, had never before had sexual intercourse with any person, an offense condemned by G.S. 14-26. After judgment was pronounced on the verdict, defendant in open court appealed to the Supreme Court.

The October Term 1955 of Stokes County was a one-week criminal term, which opened on the 3rd day of October. On 28 October 1955, in the office of a lawyer in Martinsville, Virginia, Georgia Lee Wilkins made an affidavit repudiating her testimony at the trial and stating that, before she had sexual relations with the defendant, she had had sexual relations with a man now in the army.

The next term of Stokes Superior Court after the October Term 1955 was the February Term 1956. Upon the discovery of the affidavit that Georgia Lee Wilkins made 28 October 1955, defendant abandoned his appeal to the Supreme Court, and at the February Term 1956 made a motion for a new trial on the ground of newly discovered evidence. The presiding judge entered judgment that in his opinion it was not newly discovered evidence, and denied the motion.

A motion for a new trial in a criminal case on the ground of newly discovered evidence may be made in the Superior Court at only two terms—"the trial term and the next succeeding term following affirmance of judgment on appeal." *S. v. Edwards,* 205 N.C. 661, 172 S.E. 399. In *S. v. Casey,* 201 N.C. 620, 161 S.E. 81, it is said, "unless the case is kept alive by appeal, such motion can be entertained only at the trial term."

At the February Term 1956 the appeal taken at the October Term 1955 had been abandoned, and the Superior Court at the February Term 1956, or at any other succeeding term of the Superior Court, had no jurisdiction to entertain a motion for a new trial on the ground of newly discovered evidence. *S. v. Edwards, supra; Jeffries v. Garage, Inc.,* 244 N.C. 745, 94 S.E. 2d 841.

If the appeal had not been abandoned, a motion for a new trial for newly discovered evidence at the February Term 1956 would have been *coram non judice*, for the case would have been pending in the Supreme Court on appeal. *S. v. Edwards, supra; S. v. Casey,* 201 N.C. 185, 159 S.E. 337.

What is said in *S. v. Williams,* 185 N.C. 643, 116 S.E. 570, may be aptly quoted here: "If there is any particular virtue in the changed statement of the witness, it should be addressed to the executive and not to the judicial branch of the Government."

Appeal dismissed.

JOHNSON, J., not sitting.

PORTER G. WALL, SR., v. J. H. BLALOCK.

(Filed 12 December, 1956.)

Libel and Slander § 7c—

Where it appears from the allegations in an action for slander that the defendant, in his argument to the jury in a prior action, stated that plaintiff had "a mental condition" for the purpose of showing why plaintiff testified against his client in that case, the action for slander is properly dismissed upon demurrer, since it appears from the allegations that the defamatory words were in a judicial proceeding and were material and pertinent thereto, and therefore were absolutely privileged.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Sink, E. J.*, July, 1956 Term, SURRY Superior Court.

Civil action for slander based on words spoken to a Superior Court jury by the defendant appearing as counsel for a client then being tried for the crime of larceny. The plaintiff had testified in the case as a witness for the State. In the argument, the defendant used the following language: "This man, Porter Wall, is degraded mentally is why he is here trying to punish Mr. Beck. You know, gentlemen of the jury, what I mean, he has a mental condition." All the foregoing appears from the allegations of the complaint which also alleges the words were spoken wilfully and maliciously for the purpose of injuring and damaging the plaintiff. There is no allegation in the complaint that the statements made lacked pertinency or materiality.

The defendant demurred on the ground the statements made under the circumstances alleged were absolutely privileged. From a judgment sustaining the demurrer and dismissing the action, the plaintiff appealed.

W. Reade Johnson, for plaintiff, appellant.
Folger & Folger,
By: Fred Folger, Jr., for defendant, appellee.

HIGGINS, J. This Court has seldom had before it for review the question whether words spoken by an attorney in the course of a trial render him liable in an action for slander. Two views are generally held. One is, the occasion gives the attorney a privilege absolute and unqualified. The other is, the privilege is absolute, provided the statements are material and pertinent. The former is the English rule. The latter is the rule supported by the weight of authority in the United States. Am. Jur., 33, sec. 179, p. 172; C.J.S., 53, sec. 104, p. 179.

Our Court has followed the prevailing American rule. In the case of *Shelfer v. Gooding,* 47 N.C. 175, this Court said: "To make the aid (of counsel) effective, great latitude must necessarily be allowed to counsel, not only in the examination and cross-examination of the witnesses, but in commenting on their testimony and their demeanor in giving it. They must be allowed to speak freely whatever is relevant and material to the cause without the fear of being harassed with slander suits and by attempts to prove that they were actuated by malicious motives in the discharge or their duty." In the recent case of *Scott v. Veneer Co.,* 240 N.C. 73, 81 S.E. 2d 146, quoting from *Jarman v. Offutt,* 239 N.C. 468, 80 S.E. 2d 248, this Court said: "The general rule is that a defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice." In a subsequent paragraph of the opinion the Court recognizes the materiality and pertinency rule. The following cases are to like effect: *Mitchell v. Bailey,* 222 N.C. 757, 23 S.E. 2d 829; *Harshaw v. Harshaw,* 220 N.C. 145, 16 S.E. 2d 666; *Baggett v. Grady,* 154 N.C. 342, 70 S.E. 618; *Ramsey v. Cheek,* 109 N.C. 270, 13 S.E. 775; *Gudger v. Penland,* 108 N.C. 593, 13 S.E. 168; *Nissen v. Cramer,* 104 N.C. 574, 10 S.E. 676.

In this case materiality and pertinency of the argument appear from the allegations of the complaint. The argument, therefore, was privileged. When the allegations affirmatively disclose that the plaintiff's supposed grievance is not actionable—a statement of a defective cause of action—it may be dismissed on demurrer. *Scott v. Veneer Co., supra.*

The judgment of the Superior Court of Surry County is

Affirmed.

JOHNSON, J., not sitting.

ROBERT HICKS (EMPLOYEE) v. NORTH CAROLINA GRANITE CORPORATION, SELF-INSURER (EMPLOYER).

(Filed 12 December, 1956.)

Master and Servant § 40f—

Where the evidence supports the findings of the Industrial Commission that claimant had not been injuriously exposed to the inhalation of silica dust for as much as two years in the ten years prior to the last exposure, the denial of his claim for compensation must be affirmed. G.S. 97-63.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Olive, J.*, June Civil Term, 1956, of SURRY.

Claim for compensation for disability due to the occupational disease of silicosis.

The Industrial Commission found the facts as follows: "That the plaintiff was employed by the defendant and exposed to the hazards of silicosis for many years prior to 31 July 1939; that he was not so exposed from August 1939 to 5 May 1950; and that he was again so exposed for thirty-seven days, or parts thereof, during the period 5 May 1950 to 26 June 1950. The plaintiff was, thus, last injuriously exposed to the inhalation of dust of silica in 1950. See G.S. 97-57. And the plaintiff was, therefore, not exposed to the inhalation of dust of silica for a period of at least two years in the ten years prior to the last exposure. His claim for compensation must, therefore, be denied because of the provisions of G.S. 97-63."

On appeal to the Superior Court, the findings and conclusions of the Industrial Commission were affirmed, and plaintiff appealed to this Court.

J. H. Blalock for plaintiff, appellant.

Folger & Folger for defendant, appellee.

PER CURIAM. The findings of the Industrial Commission were supported by the evidence. In accord with the provisions of the statute, G.S. 97-63, and the decision of this Court in *Midkiff v. Granite Corp.*, 235 N.C. 149, 69 S.E. 2d 166, the judgment of the Superior Court is

Affirmed.

JOHNSON, J., not sitting.

ELSIE SWANN v. MARGARET SWANN—DEFENDANT, AND, WILLIAM PINK BIGELOW, ADDITIONAL DEFENDANT, BY ORDER OF THE COURT.

(Filed 12 December, 1956.)

APPEAL by (additional) defendant Bigelow from *Fountain, J.*, 9 July, 1956, Special Term, of CASWELL.

Plaintiff's action was to recover damages from Margaret Swann, original defendant, on account of her alleged negligence.

After answering the complaint, the original defendant alleged that the negligence of Bigelow caused or contributed to plaintiff's injuries; and that, if adjudged liable to plaintiff, she was entitled to enforce

contribution from Bigelow. Upon her motion, Bigelow was joined as a party defendant (G.S. 1-240) so that the original defendant's alleged right to contribution might be determined in this action.

Plaintiff's injuries were caused by an automobile collision between the Swann car, owned and operated by the original defendant, and the Bigelow car, owned and operated by the additional defendant. Plaintiff, a sister of the original defendant, was riding as a passenger in the Swann car.

The collision occurred 5 June, 1954, in Caswell County, on the portion of Highway #119 leading from Hightowers towards Baynes' Store. Both cars were proceeding south, the Bigelow car in front of the Swann car. Bigelow was on his way to Sweet Gum Church, located on his left side of the highway; and the collision occurred near the entrance to the church grounds. Approximately at the same time, the original defendant overtook and attempted to pass the Bigelow car and the additional defendant began his left turn towards the said entrance to the church grounds. The cars collided, the right of the Swann car with the left of the Bigelow car. Locked together, they went forward a short distance (bearing to the left) and stopped when the Swann car struck a large tree.

Three issues were submitted to and answered by the jury, viz.:

"1. Was the plaintiff Elsie Swann injured by the negligence of Margaret Swann as alleged in the complaint? Answer: Yes. 2. If so, was the plaintiff Elsie Swann injured by the negligence of William Pink Bigelow as alleged in the cross-action? Answer: Yes. 3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $15,000.00."

Thereupon, plaintiff was awarded judgment against Margaret Swann, original defendant, for $15,000.00 and costs; and it was further adjudged that said original defendant have and recover contribution from Bigelow, the additional defendant, as provided in G.S. 1-240.

Bigelow, the additional defendant, excepted to said judgment and appealed, assigning as errors rulings of the court during the progress of the trial.

D. Emerson Scarborough for defendant William Pink Bigelow, appellant.

John W. Hardy and Sharp & Robinson for defendant Margaret Swann, appellee.

PER CURIAM. There was evidence sufficient to support the jury's answer to each of the issues submitted. Hence, the motions for judgment of nonsuit were properly overruled.

The charge of the trial court was not included in the record on appeal and is presumed to be correct. *Hatcher v. Clayton*, 242 N.C. 450, 88 S.E. 2d 104.

Each of appellant's assignments of error has been carefully considered. None shows prejudicial error or requires particular discussion. Hence, the verdict and judgment will not be disturbed.

No error.

JACK KIENTZ v. NORTON B. CARLTON AND SEARS, ROEBUCK AND COMPANY, A CORPORATION.

(Filed 11 January, 1957.)

1. **Negligence § 1—**

Actionable negligence is the breach of a legal duty owed by defendant to plaintiff, under the relationship existing between the parties and the attendant circumstances, which proximately causes plaintiff's injury.

2. **Sales § 30—Evidence held insufficient to show that plaintiff's injuries resulted from instrument inherently dangerous by reason of absence of safety feature.**

The evidence tended to show that plaintiff, as employee of the purchaser, was using a power lawn mower with a rotary blade, that as plaintiff pushed it into tall grass, the vibration of the machine shook plaintiff's hands loose from the handle bars, that plaintiff lost his balance, slipped and fell on his back, and his left foot went under the guard and came in contact with the rotating blade. The evidence further tended to show that the guard at the back of the machine extended within two inches of the ground, and that plaintiff's foot could not have gone under the guard except for the fact that, incident to the accident, the back portion of the mower was raised several inches. *Held:* The evidence is insufficient to support a finding that the mower was inherently dangerous because of the want of certain safety features found on other power mowers and that the seller should have reasonably foreseen that injurious consequences were probable if the machine were operated by a person who was himself not at fault, and therefore nonsuit as to the seller was proper.

3. **Same—**

In the absence of express warranty, the seller can have no greater liability than the manufacturer for injuries to third persons resulting from alleged defective condition of the article sold.

4. **Negligence § 9—**

Breach of a legal duty is not sufficient predicate for liability for an injury which could not have been foreseen according to ordinary and usual experience.

5. Sales § 30—

A merchant of power lawn mowers is not required by law to sell only the latest models or only those having specified safety features.

6. Master and Servant § 4a—

Proof that plaintiff was employed by defendant to cut the grass around defendant's home with implements furnished by defendant is sufficient to support plaintiff's contention that he was an employee and not an independent contractor.

7. Master and Servant § 14—

The duty rests upon an employer to exercise that degree of care which a man of ordinary prudence would exercise under like circumstances, having regard to his own safety, to furnish the employee a reasonably safe place to work and reasonably safe machinery, implements and appliances with which to perform the work.

8. Master and Servant § 15—

In respect of implements and appliances purchased for personal use and for use by a domestic servant or other employee engaged to perform ordinary household or yard chores on the employer's residence premises, the employer cannot be held responsible solely on the ground that a particular implement or appliance was not known, approved or in general use for the purpose for which it was made and sold.

9. Same—

The relative knowledge and experience of the employer and employee in the use of power mowers must be considered upon the question whether the employer exercised reasonable care in providing such appliance for use by the employee, especially when there is no latent or concealed defect or hazard but only such danger as is obvious.

10. Appeal and Error § 51—

Admitted testimony, whether competent or incompetent, must be considered in passing on defendants' motions for nonsuit.

11. Evidence § 45—

In the absence of a finding or admission that a witness is an expert, the competency of his opinion testimony is to be determined by the rules applicable to testimony of nonexpert witnesses.

12. Evidence § 49—

Testimony of nonexpert witnesses to the effect that a certain power lawn mower was unsafe for use on embankments is not a statement of a composite fact or a shorthand statement of fact, and is incompetent.

13. Master and Servant § 15—Evidence held insufficient to show negligence on part of employer in failing to exercise due care to furnish employee reasonably safe instrumentality.

The evidence tended to show that plaintiff was employed to cut the grass around defendant's residence, that plaintiff was furnished a power lawn mower with rotary blade and that as plaintiff pushed it into tall grass, the

vibration of the machine shook plaintiff's hands loose from the handle bars, that plaintiff lost his balance, slipped and fell on his back, and his left foot went under the guard and came in contact with the rotating blade. There was no evidence that the employer had any knowledge or notice of defect in the mower, or that, if the mower of this particular type was not in general use, the employer had any knowledge or notice of such fact, nor evidence that at the time of the accident plaintiff was cutting grass on the slope of an embankment or evidence that the employer had knowledge or notice that the machine was unsafe or unsuitable for such purpose. *Held:* The evidence is insufficient to show negligence of the employer in failing to exercise due care to provide the employee a reasonably safe and suitable mower, and nonsuit as to the employer was properly entered.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Froneberger, J.*, January-February Regular Civil Term, 1956, of BUNCOMBE.

Civil action to recover damages for personal injuries, alleged to have been caused by the negligence of defendants.

On 9 June, 1954, plaintiff, employed to do yard work on the residence premises of defendant Carlton, was injured while operating a power lawn mower which Carlton had purchased (new) on or about 25 May, 1954, from defendant Sears, Roebuck and Company, hereinafter called Sears.

Plaintiff alleged that, at the time he was injured, this occurred: ". . . when plaintiff commenced to operate said machine on said embankment in high grass said machine commenced to violently jerk and vibrate and threw plaintiff suddenly to the ground on said embankment and caused plaintiff to fall on said embankment, which embankment was latently slippery and an unsafe place to work and caused plaintiff to be thrown under said mower causing his foot to be thrown under the skirt at the rear of said power mower and into the blade while same was rotating, . . ."

Plaintiff alleged that the mower was inherently dangerous because it was not equipped with specific safety features, alleged to be approved and in general use and which could have been provided at small expense, to wit: (1) a control at the handle bars, to enable the operator to stop the motor and rotation of the blade without going to the front of the machine; (2) a safety clutch, within reach of the operator, whereby the blade could be disconnected from the motor; (3) a guard extending from the rear of the casing to the ground; (4) a guard between the tip of the blade and the (inside) rear of the casing; and (5) that the motor should have been at the rear of the casing, rather than at the center thereof, with the blade farther to the front, thus widening the distance between the tip of the blade and the back of the machine.

The mower, identified by model number and offered in evidence, was a Craftsman 2 H.P. rotary type mower. It was "of light weight," so plaintiff alleged, weighing 47-50 pounds. The metal casing was mounted on four wheels. The motor was on top of the casing. A flat blade was under the casing. Both were connected with a shaft. The motor drove the shaft; the shaft rotated the blade; and the rotating blade cut the grass. The motor did not propel the machine. The operator had to push it, using for that purpose handle bars some three feet back of the machine.

At the front of the machine, the lower portion of the casing consisted of a small comb-like aluminum guard through which the grass passed before coming into contact with the rotating blade. At the back, towards the operator, the metal casing covered the blade completely. When the blade was parallel with the sides of the casing, the clearance between the back end of the blade and the back of the casing was approximately three inches.

The motor was started by pulling a cord or rope as in case of an outboard motor. It was stopped by pressing a metal attachment at the front of the mower, which caused a short circuit when it made contact with the spark plug.

This action was commenced on 19 August, 1954. Carlton, originally the sole defendant, answered. On 15 December, 1954, pursuant to G.S. Ch. 1, Art. 46, plaintiff was adversely examined by Carlton. On 9 May, 1955, the court, on Carlton's motion, ordered that Sears be made a party defendant.

Thereafter, by leave of court, plaintiff filed an amended complaint. He alleged therein that his injuries were caused by the concurring negligence of defendants. Defendants, answering separately, denied negligence; and each defendant pleaded affirmative defenses, including contributory negligence and assumption of risk.

At the close of plaintiff's evidence, the court granted each defendant's motion for judgment of involuntary nonsuit; and such judgments were entered. Plaintiff excepted and appealed; and, upon appeal, plaintiff assigns as error the entry of each judgment of involuntary nonsuit and the court's exclusion of certain evidence offered by plaintiff.

Additional facts necessary to an understanding of the questions presented will be stated in the opinion.

James S. Howell and William J. Cocke for plaintiff, appellant.

McLean, Gudger, Elmore & Martin for defendant Carlton, appellee.

Harkins, Van Winkle, Walton & Buck for defendant, Sears, Roebuck & Company, appellee.

BOBBITT, J. The facts disclosed by the evidence impel the conclusion that the judgments of nonsuit were proper.

To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach. *Ramsbottom v. R. R.*, 138 N.C. 38, 41, 50 S.E. 448; *Petty v. Print Works*, 243 N.C. 292, 90 S.E. 2d 717.

Negligence is the basis of plaintiff's action against each defendant. Even so, the duty owed by each defendant to plaintiff is determined by the relationship subsisting between them. *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893; *Petty v. Print Works, supra.* Hence, it becomes necessary to consider the liability of each defendant separately; but, before doing so, it seems appropriate that we consider the circumstances under which plaintiff was injured.

Plaintiff, who was employed by Carlton under circumstances narrated below, had been furnished the mower, a swinging scythe or blade and a pair of shears, all practically new and in good repair. He started the motor, pushed the mower up the driveway and reached a place referred to generally as being on an embankment. As he pushed the mower into tall grass, six to eight inches high, he felt the handle bars vibrate and noticed that the motor was slowing down. He testified: "As I pushed the mower forward I thought that this shaking that it was doing would gradually clear up and I kept pushing further and further in hopes that it would before I fell." Again: "As I pushed the mower into the grass it kept getting a little worse and it threw me." The gist of his testimony is that the vibration of the handle bars shook his hands loose; that he lost his balance; that he slipped and fell on his back, his feet flying forward; and that the mower went forward "a little ways" ahead of him and the back came up three or four inches. Under these circumstances, his left foot went under the raised back portion of the mower and came in contact with the rotating blade.

Plaintiff testified that he didn't know what made the back end rise up. For his foot to reach the blade, it was necessary that it extend at least three inches under and beyond the casing. He testified: "Not as long as I held on to it was there any chance for the machine to go up and do anything. If I had stood and held it the blades could never have been exposed at all. If I had stood still and held it or walked away from it or anything else there is no way in the world I could have gotten my foot under there. There is a guard there right down within two inches of the back of that machine that would have kept this foot out of it unless something did make it turn over."

After his left foot was cut by the blade, plaintiff didn't recall anything that happened except that an unidentified person came up, used his belt as a tourniquet to stop the flow of blood; and then plaintiff was taken to the hospital. There was no evidence as to the exact place

where plaintiff fell or as to the position of the mower after plaintiff had fallen.

As to Sears, the evidence most favorable to plaintiff, set forth in some detail below, tends to show that this mower was not constructed or equipped with specified safety features; that it was not approved and in general use for mowing on embankments; and that there were other power mowers, approved and in general use for mowing on embankments, having one or more of said specified safety features. By reason of this deficiency, so plaintiff alleges and contends, this mower was an inherently dangerous instrumentality. The alleged negligence of Sears, in substance, is that it offered for sale and sold such a mower, with knowledge or notice of its said condition. Plaintiff bases his right to recover on legal principles discussed, although not the basis of decision, in *Gas Co. v. Montgomery Ward & Co.,* 231 N.C. 270, 56 S.E. 2d 689. Incidentally, it is noted that the cited case, and also *Dalrymple v. Sinkoe,* 230 N.C. 453, 53 S.E. 2d 437, relate to gas water heaters; and in each case the alleged liability of the vendor was predicated upon alleged negligence in representing to the purchaser that it was safe to use liquid gas in the operation of such heater.

The evidence discloses that both the construction and operation of the mower were simple, readily observed and understood upon casual inspection. There is no evidence of defective materials or workmanship in its construction or that it was in disrepair or otherwise out of order. It was in fact what it purported to be, a comparatively small, light weight, power mower. There was no evidence that it was not suitable for use in mowing ordinary lawns. As to Sears, there was no evidence that it was intended to be used for any other purpose.

In our opinion the evidence is insufficient to support a finding that this mower was an inherently dangerous instrumentality and that Sears should have reasonably foreseen that injurious consequences were probable if operated by a person who was not himself at fault. Annotations: "Liability of seller of article not inherently dangerous to third person for injury or death due to dangerous condition of article sold." 42 A.L.R. 1243; 60 A.L.R. 371.

The absence of the several alleged safety features was obvious, not latent. Injury alleged to have occurred because of the absence of a guard or stopping device on an "onion topping" machine was involved in *Campo v. Scofield,* 301 N.Y. 468, 95 N.E. 2d 802. The basis of decision, supported by the authorities cited, is epitomized in these excerpts from the opinion of *Judge Fuld:* "The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers." Again: ". . . since the duty owed by a manufacturer to remote users

does not require him to guard against hazards apparent to the casual observer or to protect against injuries resulting from the user's own patently careless and improvident conduct, the complaint was properly dismissed." *Campo v. Scofield, supra,* is discussed with approval in 15 Albany Law Review 196. Absent an express warranty, certainly no greater duty would rest upon the seller than upon the manufacturer of such a machine. While the recent case of *Driver v. Snow, ante,* 223, 95 S.E. 2d 519, was based on alleged implied warranty, the principles as stated by *Higgins, J.*, would seem equally applicable when a remote user grounds his alleged action for negligence upon defects discoverable upon ordinary examination.

Even if there were a breach of legal duty, this would impose "responsibility for consequences which are probable, and which could reasonably have been foreseen, according to ordinary and usual experience, but not for consequences which are merely possible according to occasional experience." *Brady v. R. R.*, 222 N.C. 367, 373, 23 S.E. 2d 334. It is noteworthy that the evidence fails to disclose any incident, apart from that of plaintiff's injury, where the operator of a machine similarly constructed and equipped was injured under the same or similar circumstances or for that matter under any circumstances.

It is common knowledge that the various models of power mowers differ in size, weight, design, safety devices, etc., and that new models constantly come into the market, and that purchasers select according to their choice and the price of the respective models. No law of which we are aware requires that a merchant sell only the latest models or those having specified safety features. *Pontifex v. Sears, Roebuck & Company,* 226 F. 2d 909.

As to Carlton, the evidence was sufficient to support the allegation that plaintiff was Carlton's employee, not an independent contractor. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137; *Hinkle v. Lexington,* 239 N.C. 105, 79 S.E. 2d 220; *Bell v. Sawyer,* 313 Mass. 250, 47 N.E. 2d 1.

The oft-stated rules of the common law are summarized by *Winborne, J.* (now *C. J.*), in *Baker v. R. R.*, 232 N.C. 523, 61 S.E. 2d 621, as follows:

"When such relationship exists, the accepted and well settled rule of law is that the master owes to the servant the duty to exercise ordinary care to provide a reasonably safe place in which to do his work and reasonably safe machinery, implements and appliances with which to work. The master is not an insurer, however. Nor is it the absolute duty of the master to provide a reasonably safe place for the servant to work, or to furnish reasonably safe machinery, implements and appliances with which to work. He meets the requirements of the law in the discharge of his duty if he exercises or uses ordinary care to provide for

the servant such a place, or to furnish such machinery, implements and appliances as are approved and in general use in places of like kind, that is, *that degree of care which a man of ordinary prudence would exercise or use under like circumstances, having regard to his own safety, if he were providing for himself a place to work, or if he were furnishing for himself machinery, implements and appliances with which to work.* This rule of conduct of 'the ordinarily prudent man' measures accurately the duty of the master and fixes the limit of his responsibility to his servant. (Citations omitted.)" (Italics added.)

The alleged failure of Carlton to exercise due care to provide plaintiff a reasonably safe place in which to work may be put aside as irrelevant. Manifestly, when plaintiff undertook to mow the grass on Carlton's premises he had to work where the grass was growing.

It is noteworthy that the above-stated common law rules were formulated when the subsisting relationship was described as that of master and servant rather than that of employer and employee. Our decisions deal principally with persons employed on railroads, in manufacturing plants and like establishments; and underlying these rules as so formulated are these premises, (1) the superior knowledge of the employer, and (2) the dependent status of the employee. The basic rule relevant is that the employer must exercise reasonable care to furnish his employee reasonably safe machinery, implements and appliances with which to do his work. As pointed out by *Hoke, J.* (later *C. J.*), in *Kiger v. Scales Co.*, 162 N.C. 133, 78 S.E. 76: "And as a feature of this obligation *in the operation of mills and other plants* where the machinery is more or less complicated, *such employers* are held to the duty of supplying machinery and implements which are known, approved, and in general use. (Citations omitted.)" (Italics added.) *Ainsley v. Lumber Co.*, 165 N.C. 122, 81 S.E. 4. It is noted that consideration and application of these common law rules have been infrequent since the adoption of the Workmen's Compensation Act (1929).

Where one is engaged in a transportation, manufacturing or other business or industrial enterprise, it is reasonable that the law should impose upon him the legal duty to provide such machinery, implements and appliances as are known, approved and in general use. *Helms v. Waste Co.*, 151 N.C. 370, 66 S.E. 312, and cases cited. But, in respect of implements and appliances purchased for personal use and for use by a domestic servant or other employee engaged to perform ordinary household or yard chores on the employer's residence premises, experience and reason dictate that it would be unreasonable to charge such an employer *as a matter of law* with knowledge or notice as to which of the various implements and appliances placed on the market from time to time are deemed known, approved and in general use as of a particular date by persons well informed in such matters. Conse-

quently, we adopt the rule that such employer cannot be held responsible *solely* on the ground that a particular implement or appliance was not known, approved and in general use for the purpose for which it was made and sold. In the absence of evidence that such employer had knowledge or notice of some defect therein or of probable danger in the ordinary use thereof, when such employer provides a new appliance, purchased from a reputable dealer, ostensibly safe and suitable for the purpose for which it was made and sold, it cannot be said that he failed to exercise due care to provide a reasonably safe and suitable appliance.

The ultimate test of Carlton's liability is this: Did he fail to exercise reasonable care, under the circumstances disclosed, to provide a reasonably safe and suitable mowing machine for plaintiff's use; and, if so, did his negligence in this respect proximately cause plaintiff's injury?

Notwithstanding their widespread use, we would not say that a power mower falls within the category of a simple tool. Yet when it appears that the employee's knowledge of power mowers is equal or superior to that of the employer, this is a significant fact in determining whether the employer was negligent in providing it for the employee's use. Compare: *Petty v. Print Works, supra.*

As stated by *Connor, J.*, in *Covington v. Furniture Co.*, 138 N.C. 374, 50 S.E. 761: "The general rule of law is that when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by anyone else, and when the servant has as good an opportunity as the master or anyone else of seeing what the danger is, and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the conditions of things which constituted the danger. If the servant is injured, it is from his own want of care. This rule is especially applicable when the danger does not arise from the defective condition of the permanent ways, works or machinery of the master, but from the manner in which they are used, and when the existence of the danger could not be well anticipated, but must be ascertained by observation at the time." *Warwick v. Ginning Co.*, 153 N.C. 262, 69 S.E. 129.

With reference to an appliance, *e.g.*, a power mower, whether such employer exercises reasonable care in providing such appliance for use by a particular employee will depend, at least in part, upon their relative knowledge and experience in the use of power mowers. 56 C.J.S. Master and Servant, sec. 203; 35 Am. Jur. Master and Servant, sec. 128. This is especially true when as here there is no latent or concealed defect or hazard but only such danger as is obvious, that is, from having hands or feet injured if they get *under* the casing and in contact with

the rotating blade. "A failure to warn him of what he already knows is without significance." *Petty v. Print Works, supra.*

In the light of these principles, we consider the evidence relative to plaintiff's employment by Carlton.

Plaintiff's regular work was that of a service station attendant. Carlton was accustomed to have his car serviced at this station. In a conversation on Tuesday, 8 June, Carlton remarked to plaintiff that he could not find anybody to cut his grass. Thereupon, plaintiff told Carlton that he had "done that type of work"—that he had "used power mowers"—and volunteered to do the job; and, as agreed, plaintiff reported for work about 8 a.m. on Wednesday, 9 June, plaintiff's day off from his service station job.

After plaintiff arrived Carlton went to a hardware store and procured a new swinging scythe or blade. Carlton told plaintiff how to start the motor, a procedure already familiar to plaintiff. Carlton said nothing more as to the operation of the mower and plaintiff made no inquiries or requests for instructions. The motor was not actually started until after Mr. and Mrs. Carlton had left for town, leaving plaintiff alone on the Carlton premises.

Plaintiff's testimony was that Carlton's instructions to him were as follows: ". . . to mow the grass and trim the shrubbery around his home"; "to take this power mower and mow the lawn where it needed it"; and, "Mr. Carlton had already had his lawn mowed around his home. He had an embankment that the lawn hadn't been mowed. He instructed me to take this power mower and mow that embankment."

Plaintiff was then 28 years of age and in good health. He had no physical defects as to eyes, feet, hands, or otherwise. The testimony as to his weight varied from 170 to 205 pounds.

When the Carltons left, plaintiff brought the mower out of the garage and started it. Plaintiff testified: "In my opinion, it was operating all right and sufficient for me to mow the lawn with." Plaintiff was unable to describe the Carlton premises. His evidence is not clear as to the route he took before he reached the place where he began to push the mower into the tall grass.

There is no testimony to the effect that the mower, pushed by plaintiff, struck any object, tree, shrub, rock, etc., causing it to bounce back towards plaintiff. On the contrary, when he lost his grip on the handle bars and fell the mower moved "a little ways" forward.

Plaintiff's allegations and evidence refer to the site of plaintiff's injury as being on an embankment. There is no evidence as to the extent or slope of such embankment, nor is there evidence as to the extent or character of the ground at the top of such embankment. As stated above, plaintiff's testimony was that, after reaching the area described as the top of the embankment, he pushed the mower out into

the tall grass. The exact site of plaintiff's unfortunate accident rests wholly in the realm of conjecture. But this fact should be noted: There is neither allegation nor evidence that plaintiff, as he pushed the vibrating machine into the tall grass, was proceeding over the crest of an embankment or down such embankment.

Plaintiff undertook to show the deficiencies in this mower by two witnesses, Tinney and Brown. Tinney had seen it before the trial. Brown's first observation of it was made at the trial. Their testimony does not indicate that they were familiar with Carlton's premises. When they refer to banks or embankments, the reference is general.

Admitted testimony, whether competent or incompetent, must be considered in passing on defendants' motions for nonsuit. *S. v. McMilliam*, 243 N.C. 771, 92 S.E. 2d 202; *Early v. Eley*, 243 N.C. 695, 91 S.E. 2d 919. Such admitted testimony was in substance as follows:

Tinney testified that "this machine was not in common, general and approved use *by employers* in Buncombe County, North Carolina, in June, 1954, for the mowing of high grass on embankments." (Italics added.) The widespread use of power mowers by the owners in doing their own yard work is a matter of common knowledge. It is unrealistic to say that a particular model is not known, approved and in general use by owners who regularly or occasionally provide such machine for use by a person employed for the job. Inherent in the concept of due care to provide reasonably safe and suitable appliances for the employee's safety is that the employer must exercise the care of an ordinarily prudent person for his own safety if working on the same job with the same appliances.

Also, Tinney testified to certain obvious facts, viz.: All four wheels were of the same size. At the back, there was no guard other than the rear of the casing. There was no clutch whereby the blade could be disengaged without stopping the motor. There was no throttle at the handle bars by which the operator could regulate the speed of the motor.

Brown testified, over objection, that in his opinion this mower was unsafe for use on embankments. This (opinion) generalization is not directed to the absence of any specified safety features or related to the proximate cause of the plaintiff's injury.

Much of Tinney's testimony was excluded. Such excluded testimony, given in the absence of the jury, was in substance as follows: The construction of this mower made it unsafe "for hazardous land," such as a bank, because the wheels were all the same size and the motor was atop the center of the casing. "When you are cutting on a bank you have a crest, and in cutting on that bank you are bound to hit the crest, your wheels will overlap, thus causing your blade to drop down and dig into the dirt." In addition, the location of the motor was such that "this mower has a tendency in going down a bank to tip or topple," its

weight being to the front at such time. The evidence is insufficient to show that plaintiff was pushing the machine over "the crest" or "down a bank." Nor is there evidence sufficient to show that this mower tipped or toppled because its wheels were of the same size or the motor was atop the center of the casing.

Further excluded testimony of Tinney included the following: In June, 1954, there were in general and approved use other power motors constructed or equipped with these safety features:

1. A mower so constructed that the motor was atop the back portion of the casing, the rotating blade being under the front portion of the casing; and that a patent for a machine so constructed had been granted by the Patent Office on 17 November, 1953. Incidentally, in three of the four cases involving power mowers that have come to our attention the injury was sustained at or near the front, not the back, of the machine. *Pontifex v. Sears, Roebuck & Company, supra; Marks v. Goldstein,* Ky., 266 S.W. 2d 104; *Wilson v. White,* Springfield (Mo.) Court of Appeals, 272 S.W. 2d 1.

2. A power mower having an "arcuated guard" installed under the casing between the skirt and tip of the blade.

3. A guard or apron on the back of the casing, extending "lower to the ground than the skirt on this mower . . ."

In the absence of a finding or admission that the witness is an expert, the competency of excluded opinion evidence must be considered in relation to the rules applicable to the testimony of nonexpert witnesses. *Lumber Co. v. R. R.,* 151 N.C. 217, 220, 65 S.E. 920; *Boney v. R. R.,* 155 N.C. 95, 105, 71 S.E. 87. Here neither Tinney nor Brown was tendered as an expert.

The admitted opinion testimony of Brown, and the excluded opinion testimony of Tinney, to the effect that this machine was unsafe for use on embankments, was incompetent under the rule stated in the oft-cited case of *Marks v. Cotton Mills,* 135 N.C. 287, 47 S.E. 432. Also: *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797; *Trust Co. v. Store Co.,* 193 N.C. 122, 136 S.E. 289; and many others. The exception to the rule is explained by *Allen, J.,* in *Marshall v. Telephone Co.,* 181 N.C. 292, 106 S.E. 818. Suffice to say, this testimony cannot be considered a "shorthand statement of fact" or a statement of a "composite or compound fact," that is, testimony based on observation of appearances, facts and conditions that could not be reproduced to the jury.

Incidentally, there was no testimony as to the existence or use of any power mower with wheels of one size at the front and of a different size at the back.

When we consider the liability of Carlton, we are confronted with these facts. He purchased the mower from Sears, a reputable dealer, on or about 25 May, 1954. Whether he had personally used this mower

or any power mower does not appear. He had no knowledge or notice of any defect therein. In fact, there was no defect. If this mower was not approved and in general use for the mowing of grass on level ground or on embankments, there is no evidence that Carlton had knowledge or notice of such fact. There is nothing in the evidence to suggest that the use of this mower by Carlton himself would have constituted a failure on his part to exercise due care for his own safety. There is less reason that Carlton should have reasonably anticipated that a mature man, of plaintiff's physique and declared previous experience in the use of power mowers, would have so operated it as to lose control, fall, upraise the casing, and by this combination of circumstances get his foot under the casing. Reasonable foreseeability is a requisite element of proximate cause. *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331. "Reasonable apprehension does not include anticipation of every conceivable danger, nor does the duty to exercise care impose obligation to guard against dangers which are remote and improbable." *Muldrow v. Weinstein,* 234 N.C. 587, 68 S.E. 2d 249. Omniscience is not required. *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383.

The words, "Keep hands and feet from under mower," appeared on the machine. This warning would seem unnecessary, for this was an obvious danger. *Marks v. Goldstein, supra.* While plaintiff had ample opportunity to make a complete inspection of the machine, he testified that he did not examine the machine sufficiently to notice these words or to notice the way in which the mower was constructed. Apparently, he relied wholly on his prior experience in the use of power mowers. Carlton left the machine and other tools with plaintiff, plaintiff to do the work in his own way. It would appear that the new swinging blade, purchased that very morning, was for plaintiff's use in cutting over the grass in places where it was too tall for the mower.

While we are not disposed to stress the point, we cannot overlook the fact that the plaintiff alleged that Sears warranted and represented that this mower "cut perfectly on regular lawns and in addition cut weeds and grass of any height and was for use on banks and terraces," and that it was "for sale particularly to possessors of homes for cutting grass on lawns, terraces and embankments." These allegations were admitted by Carlton, denied by Sears. Suffice to say, there is no evidence that Carlton had knowledge or notice that it was unsafe or unsuitable for such purposes.

Under the circumstances disclosed, we hold that the evidence, both that admitted and that excluded, was insufficient to support a jury finding that Carlton was negligent in providing this mower, along with other tools, for plaintiff's use on this job.

This significant fact must be kept in mind. *The blade was completely covered by the casing.* To reach it, plaintiff had to get his foot

under the casing; and his foot had to extend *under* the casing at least three inches. Indeed, it appears from plaintiff's testimony, quoted above, that the rear of the casing was a sufficient guard to keep the operator's foot from going under the mower unless it turned over or the back end was raised. It is unlike *Marko v. Sears, Roebuck & Co.*, 24 N. J. Super. 295, 94 A. 2d 348, where the machine struck a rock and bounced back and cut the operator's foot. In that case, the plaintiff (purchaser) "saw there was an opening in the back and the blade was open and exposed at this point." It is noted that the decision there was that the evidence was sufficient to make out a *prima facie* case for breach of express warranty, but that the case was properly dismissed as to the negligence count.

In view of the decision reached, it is unnecessary to consider the serious questions as to the alleged contributory negligence of and assumption of risk by plaintiff. Suffice to say, it seems clear that, as between plaintiff and Carlton, plaintiff had equal, if not greater opportunity, to anticipate such danger as resulted from his handling of the machine in the manner described in his testimony.

Plaintiff lost his grip, fell and his foot went *under* the *upraised* casing. It would seem pure speculation as to whether the injury would have occurred if this machine had been equipped with any of the guards or other features described by Tinney as in general and approved use on other power mowers. *Crisp v. Lumber Co.*, 199 N.C. 343, 154 S.E. 311; *Miller v. Mfg. Co.*, 202 N.C. 254, 162 S.E. 925, and cases cited.

Although impracticable to discuss all of plaintiff's assignments of error as to evidence rulings in detail, each has been carefully considered; and the result reached is that the judgments of nonsuit entered by the court below must be and they are

Affirmed.

JOHNSON, J., not sitting.

W. A. HEDRICK v. A. H. GRAHAM, J. EMMETT WINSLOW, H. MAYNARD HICKS, C. HEIDE TRASK, M. E. ROBINSON, DONNIE A. SORRELL, C. A. HASTY, J. VAN LINDLEY, FORREST LOCKEY, JAMES A. GRAY, JR., JAMES A. HARDISON, W. RALPH WINKLER, JUNE F. SCARBOROUGH, J. F. SNIPES, HARRY E. BUCHANAN.

(Filed 11 January, 1957.)

1. Pleadings § 15—

A demurrer admits the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom, but it does not admit any legal inferences or conclusions.

2. Same—

Upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. G.S. 1-151.

3. Easements § 2—

The owner of land abutting a highway has a right of egress from and ingress to his own property, which right constitutes an easement appurtenant beyond the right enjoyed by the public in general.

4. Eminent Domain § 3—

The deprivation, by the exercise of the right of eminent domain or the police power, of the right of the owner of land abutting a public highway to access to the highway is a taking of his property *pro tanto* for which compensation must be allowed.

5. Eminent Domain § 1—

Eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation.

6. Constitutional Law § 11—

The police power is a necessary attribute of sovereignty and is coextensive with the necessity of safeguarding the interests of the public.

7. Eminent Domain § 5—

The right to authorize the power of eminent domain and the mode of the exercise thereof are wholly legislative, subject to the constitutional limitations that private property may not be taken for public use without just compensation and reasonable notice and opportunity to be heard.

8. Statutes § 5a—

While the words of a statute must be taken in the sense in which they were understood at the time the statute was enacted, this rule does not preclude a statute from applying to things and conditions not in existence at the time of the enactment when the language of the statute is sufficiently broad and comprehensive to include them by a fair and reasonable interpretation.

9. Eminent Domain § 6—

The State Highway and Public Works Commission has been given statutory authority, in the construction or reconstruction of a public highway, to condemn or severely curtail an abutting landowner's right of access to the highway, upon payment of just compensation, in order to constitute the highway one of limited-access. G.S. 136-1, G.S. 136-18(b), G.S. 136-18 (e), G.S. 136-19.

10. Statutes § 5a—

Where the language of a statute expresses the legislative intent in clear and unambiguous terms, the words employed must be taken as the final expression of the meaning intended unaffected by its legislative history.

11. Same—

Legislative acquiescence in the practical interpretation of a statute by the administrative agency is entitled to some weight by the courts in construing the act.

JOHNSON, J., not sitting.

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

APPEAL by plaintiff from *Johnston, J.,* June Civil Term 1956 of DAVIDSON.

Civil action for a permanent injunction heard upon a demurrer.

This is a summary of the allegations of plaintiff's complaint:

The defendants, sued as individuals, are the Chairman and Members of the State Highway and Public Works Commission, and in respect to the acts hereafter alleged have purported to act in their official capacity and by virtue of their offices as such Commission.

Plaintiff owns two tracts of land in Davidson County, which are described by metes and bounds. A public highway designated as U. S. Highway 29, 70 and 52 (a project sometimes specified as No. 6734) crosses plaintiff's two tracts of land, and is, and for some time past has been, in the course of reconstruction under the control and direction of the State Highway and Public Works Commission. Both tracts of plaintiff's land abut for a considerable distance on both sides of the right of way of this highway. Plaintiff is the owner of the fee in said highway abutting his land. The State Highway and Public Works Commission does not own in fee any of the lands abutting plaintiff's land used by this highway, or which it has attempted to appropriate for a limited-access highway.

The defendants, purporting to act under the authority of their offices as the State Highway and Public Works Commission, and by virtue thereof, have designated a portion of this highway crossing plaintiff's land a limited-access highway, thereby attempting to extinguish plaintiff's rights as an abutter, and limiting his access thereto except at points permitted by the defendants; have advised plaintiff and others that this highway across his land has been appropriated as a limited-access highway, and have caused signs to be erected along the portion of the highway crossing his land to that effect. Notwithstanding repeated requests by plaintiff, the defendants have refused, and still refuse, to rescind the limited-access highway designation and to permit access from plaintiff's abutting land to the highway.

The defendants, acting individually and collectively as members of the State Highway and Public Works Commission, have attempted to appropriate some of plaintiff's land for a limited-access highway. The defendants are without legal authority to create limited-access high-

ways, or to deprive plaintiff of his right of access (both ingress and egress) to said highway at any point where it abuts his land, and by their acts have invaded, and threaten further to invade, his personal and property rights. As a proximate result of such acts, much of his land has been cut off from access to this highway diminishing its value and preventing sales to purchasers desirous of highway access, all to his irreparable injury, for which he has no adequate remedy at law.

Wherefore, the plaintiff prays that the defendants, individually and collectively, be permanently enjoined from designating Highway 29, 70 and 52, where it abuts plaintiff's land, a limited-access highway, from erecting signs to that effect, from in any way interfering with the right of access to the highway by plaintiff, or those who may hereafter have an interest in his land, and from taking or attempting to take limited-access easement rights from plaintiff thereby extinguishing or attempting to extinguish plaintiff's right of access to the highway as an abutting landowner.

The defendants demurred to the complaint on the following grounds: One, the court has no jurisdiction of the defendants and the subject of the action, for that the defendants are the Chairman and Members of the State Highway and Public Works Commission, an unincorporated agency or instrumentality of the State of North Carolina, and do constitute such instrumentality, as alleged, that the relief sought is to enforce action by the Commission, that the Commission has the right of sovereign immunity against suit, except where consent to be sued has been given by law, and consent has not been given for a suit of this nature, and the Superior Court is not a court of original jurisdiction over it. Two, the complaint does not allege facts sufficient to constitute a cause of action for that: (a) The complaint alleges that the defendants constitute the State Highway and Public Works Commission, which has lawful authority to do all of the alleged acts; (b) the allegations relied on to establish irreparable injury state an alleged diminution of the value of his land after the completion of the highway improvement project, and sound in damages in a proceeding in law and not for relief in equity; (c) that if plaintiff has suffered any damages by reason of any alleged diminution in the value of his land, he has an adequate remedy at law by virtue of G.S., Chapters 136 and 40; (d) the complaint fails to allege any facts constituting any unlawful act or wrongful omission by defendants, or any threatened wrongful act, or any facts entitling plaintiff to injunctive relief, and (e) the acts alleged have been consummated, and there is no injunctive relief for a *"fait accompli."*

From a judgment sustaining the demurrer, plaintiff appeals.

Clarence Kluttz, Lewis P. Hamlin, Jr. and Walser & Brinkley for Plaintiff, Appellant.

R. Brookes Peters, E. W. Hooper and Womble, Carlyle, Sandridge & Rice for Defendants, Appellees.

PARKER, J. It is familiar learning that a demurrer admits the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader, and that we are required to construe the pleading challenged by a demurrer liberally with a view to substantial justice between the parties and to make every reasonable intendment in favor of the pleader. G.S. 1-151; *McKinley v. Hinnant,* 242 N.C. 245, 87 S.E. 2d 568; *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440.

The complaint alleges, "the State Highway and Public Works Commission does not own in fee any of the lands now used by said U. S. Highway 29, 70 and 52 which abut the property of the plaintiff, or which the State Highway and Public Works Commission has attempted to appropriate for limited-access purpose." The complaint further alleges that the defendants purporting to act under their authority, and by virtue of their office as the State Highway and Public Works Commission, have designated a portion of said highway where it crosses plaintiff's land as a limited-access highway, thereby attempting to extinguish plaintiff's rights as an abutter by limiting his access to the highway, and that they have erected signs along the highway announcing "this area appropriated for highway purposes to be limited-access." It seems plain that the acts complained of were the acts of the State Highway and Public Works Commission as an agency or instrumentality of the State.

In Anno. 43 A.L.R. 2d, p. 1073, note 1, it is stated: "A limited-access highway may be defined as a roadway designed particularly for the movement of through traffic, upon which cross traffic has been eliminated or severely curtailed, to which entrances and exits are strictly controlled, and in which abutting landowners have no easement or right of access different from that enjoyed by the general public. Such highways are sometimes called 'freeways,' 'thruways,' 'express ways,' 'parkways,' or 'belt-lines.' "

The Federal-Aid Highway Act of 1956 in Sec. 108(a) states: "It is hereby declared to be essential to the national interest to provide for the early completion of the 'National System of Interstate Highways.' . . . It is the intent of the Congress that the Interstate System be completed as nearly as practicable over a thirteen-year period and that the entire system in all the States be brought to simultaneous completion. Because of its primary importance to the national defense, the name of

such system is hereby changed to the 'National System of Interstate and Defense Highways.'" Sec. 108(i) provides: "The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary of Commerce in cooperation with the State highway departments. Such standards shall be adequate to accommodate the types and volumes of traffic forecast for the year 1975." Sec. 112 of this Act provides: "All agreements between the Secretary of Commerce and the State Highway Department for the construction of projects on the Interstate System shall contain a clause providing that the State will not add any points of access to, or exit from, the project in addition to those approved by the Secretary in the plans for such project, without the prior approval of the Secretary." This Act provides for the apportionment of federal funds among the States for the purposes of the Act, and in Sec. 108(h) provides for construction by the States of such highways in advance of apportionment of federal funds.

The complaint alleges that the "public highway designated as U. S. Highway 29, 70 and 52, which crosses" plaintiff's "land is presently, and for sometime past has been, in the course of reconstruction under the control and direction of the State Highway and Public Works Commission of North Carolina, of which the defendants are members, such project being sometimes designated as No. 6734." G.S. 136-18(L) provides "the said State Highway and Public Works Commission shall have such powers as are necessary to comply fully with the provisions of the present or future federal aid grants." It would seem a fair inference from the allegations of the complaint set forth above in this paragraph that the reconstruction of the section of Highway 29, 70 and 52 by the State Highway and Public Works Commission was, and is, being done in compliance with the requirements of Project No. 6734, and that it is being reconstructed to meet the standards and requirements of the 1956 Federal-Aid Highway Act, so that it can be incorporated into the National System of Interstate and Defense Highways.

Motor car transportation is a basic need of modern society. It is of vital importance in the social and economic life of our people. The development of high speed motor car transportation has brought more and more traffic congestion and an ever mounting grisly toll of automobile accidents. Forty thousand deaths, a million and one-half injuries, and two billion dollars worth of property damage each year (Levin, "Public Control of Highway Access and Roadside Development 3"—Public Roads Administration, 1943) demonstrate the gravity of the problem confronting public highway authorities.

It is said in Anno. 43 A.L.R., 2d, p. 1073, note 2: "According to an article in 3 Stanford L. Rev. 298 (citing as authorities Levin, 'Public Control of Highway Access and Roadside Development 3' and Bulletin

No. 67 of the American Road Builders' Association, entitled 'Highway Economics and Design Principles') less than 15 per cent of the mishaps on ordinary roads will occur on an equal mileage of limited-access highways, and, while limited-access urban highways can easily handle 1,500 vehicles per lane per hour, only 400 vehicles per lane per hour can be carried on ordinary urban streets."

This Court said in *Sanders v. Smithfield,* 221 N.C. 166, 19 S.E. 2d 630: "It is generally held that the owner of abutting property has a right in the street beyond that which is enjoyed by the general public, or by himself as a member of the public, and different in kind, since egress from and ingress to his own property is a necessity peculiar to himself. *Colvin v. Power Co.,* 199 N.C. 353, 154 S.E. 678; *Hiatt v. Greensboro,* 201 N.C. 515, 522, 160 S.E. 748; *Davis v. Alexander,* 202 N.C. 130, 162 S.E. 372; *Glenn v. Board of Education,* 210 N.C. 525, 187 S.E. 781; *Henderson v. Lexington,* 132 Ky. 390, 111 S.W. 318; 29 C.J.S. 910, sec. 105. The right is in the nature of an easement appurtenant to the property, and abridgment or destruction thereof by vacating or closing the street, resulting in depreciation of the value of the abutting property, may give rise to special damages compensable at law. *Brakken v. Mpls. & St. L. Ry.,* 29 Minn. 41, 11 N.W. 124; also cases cited *supra.* Beyond acceptance of this fundamental principle, authorities differ as to practically every other phase of the subject under discussion. However, following the line of authorities considered commendable and controlling, it is settled law in this State that under such circumstances the interference with the easement, which is itself property, is considered *pro tanto,* a 'taking' of the property for which compensation must be allowed, rather than a tortious interference with the right. *Hiatt v. Greensboro, supra; Phillips v. Telegraph Co.,* 130 N.C. 513, 41 S.E. 1022; *Stamey v. Burnsville,* 189 N.C. 39, 126 S.E. 103."

The most important private right involved in limited-access highway cases is the right of access to and from the highway by an abutting landowner. The basic problem in every case involving destruction or impairment of the right of access is to reconcile the conflicting interests—*i.e.* private *versus* public rights. The time has come when ever increasing consideration must be given to the promotion of public safety on the highways and to the concept of roads whose purpose is not land service but traffic service. The term, a land service road, has been used to describe an ordinary highway intended primarily to enable abutting landowners to have access to the outside world as distinguished from the limited-access road designed primarily to move through traffic. Anno. 43 A.L.R. 2d, p. 1074, note 7. Two methods are available for curtailing the right of access—the right of eminent domain and the police power. Eminent domain is the power of the sovereign

to take or damage private property for a public purpose on payment of just compensation. *Mount Olive v. Cowan,* 235 N.C. 259, 69 S.E. 2d 525. "As was said by *Mr. Justice Brown,* in *Camfield v. United States,* 167 U.S. 518, 524, 42 L. Ed. 260, 262, 17 Sup. Ct. Rep. 864, citing *Rideout v. Knox,* 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N.E. 390: 'The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interests.' " *Tanner v. Little,* 240 U.S. 369, 60 L. Ed. 691. The police power is a necessary attribute of sovereignty. *Brewer v. Valk,* 204 N.C. 186, 167 S.E. 638. The construction of limited-access highways is bound to cause a dislocation of rights. Justice demands that these dislocations be adjusted in a way that will be fair to both property owners and the public.

In *Georgia v. Chattanooga,* 264 U.S. 472, 68 L. Ed. 796, the Court said: "The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. Citing authorities. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will. Citing authorities. It is superior to property rights (*Kohl v. United States,* 91 U.S. 367, 371, 23 L. Ed. 449, 451); and extends to all property within the jurisdiction of the state . . ."

"This power (eminent domain) existed in each of the original thirteen states immediately on the assumption of independence." 18 Am. Jur., Eminent Domain, sec. 7.

Under our division of governmental power into three branches, executive, legislative and judicial, the right to authorize the exercise of the power of eminent domain, and the mode of the exercise thereof, is wholly legislative. *Little v. Loup River Public Power Dis.,* 150 Neb. 864, 36 N.W. 2d 261, 7 A.L.R. 2d 355; *Paine v. Savage,* 126 Maine 121, 136 A. 664, 51 A.L.R. 1194; 18 Am. Jur., Eminent Domain, sec. 9, p. 637, sec. 308, p. 954. However, as both the Federal and our State Constitutions protect all persons from being deprived of their property for public use without the payment of just compensation and a reasonable notice and a reasonable opportunity to be heard, proceedings to condemn property must not violate these guaranties. *Dohany v. Rogers,* 281 U.S. 362, 74 L. Ed. 904.

There seems to be no doubt that the General Assembly of North Carolina can authorize the State, or a governmental agency or instrumentality of the State, to exercise the power of eminent domain to condemn or to severely curtail an abutting landowner's right of access to a public highway adjacent to his property for the construction or reconstruction of a limited-access highway upon the payment of just

compensation for the destruction or impairment of his right, which is in the nature of an easement appurtenant to his property, and upon giving him a reasonable notice and a reasonable opportunity to be heard. *Department of Public Works & Buildings v. Lanter,* 413 Ill. 581, 110 N.E. 2d 179; *Petition of Burnquist,* 220 Minn. 48, 19 N.W. 2d 394; *Opinion of the Justices,* 99 N.H. 505, 105 A. 2d 924; *State Roads Com. v. Franklin,* 201 Md. 549, 95 A. 2d 99; *People v. Thomas,* 108 Cal. App. 2d 832, 239 P. 2d 914; *State ex rel. State Highway Com. v. James,* 356 Mo. 1161, 205 S.W. 2d 534; *Neuweiler v. Kauer,* (1951 C.P.) Ohio, 107 N.E. 2d 779; Anno. 43 A.L.R., p. 1072 *et seq.; Liddick v. City of Council Bluffs,* 232 Iowa 197, 5 N.W. 2d 361; 29 C.J.S., Eminent Domain, secs. 105 and 122; 18 Am. Jur., Eminent Domain, secs. 183 and 185; Restatement, Property, Servitudes, secs. 450, 453, 455, 456, 497, 507, 508. See: 3 Stanford Law Review, pp. 298 *et seq.* "Freeways and Rights of Abutting Owners"; Washington Law Review, Vol. 27, pp. 111 *et seq.* "The Limited-Access Highway."

In 29 C.J.S., Eminent Domain, sec. 105, it is written: "An easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured. Thus the owner of land abutting on a street or highway has a private right in such street or highway, distinct from that of the public, which cannot be taken nor materially interfered with without just compensation, and this is so, although another owns the fee in the highway." In support of the text many cases are cited, among them four of our own.

In *Petition of Burnquist, supra,* it was held that easements of access on a highway which had been designated as a freeway were property rights which could be taken under the power of eminent domain upon the payment of proper compensation. The Court held that the delegation to the highway commissioner of the power to acquire "land" and the necessary "right of way" for highway purposes and for the proper and safe maintenance thereof included the right to condemn rights of access, there being no necessity for special legislation specifically providing for the condemnation of such easements.

Opinion of the Justices, supra, sustained the constitutionality of a statute providing that when an existing highway was converted to a limited-access highway, pre-existing commercial facilities should be permitted to retain their right of access to the highway, while such rights as to other property should be condemned.

In *Department of Public Works & Buildings v. Lanter, supra,* the Illinois Supreme Court rejected the contention that the statute conferred no authority to condemn rights of access alone, where there was no actual taking of any land.

It is to be noted that the easement of access extinguished, or sought to be extinguished, here lies completely within the definite limits of the right of way of Highway 29, 70 and 52. In this respect the case here is distinct from those cases which seek to extinguish easements outside of the highway limitations, such as those involving billboards, snow fences and the like, and cases which relate to such outside easements like *Preston v. City of Newton,* 213 Mass. 483, 100 N.E. 641, and *Doon v. Inhabitants of Natick,* 171 Mass. 228, 50 N.E. 616, have no application to the instant case.

The General Assembly of North Carolina has vested the State Highway and Public Works Commission, an agency or instrumentality of the State, with the following authority and powers:

G.S. 136-18(b) vests the State Highway and Public Works Commission with the power "to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State highway system."

G.S. 136-19 vests the State Highway and Public Works Commission with the power to condemn such private property "as it may deem necessary and suitable for road construction, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work." This Court said in *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479: "When land is appropriated under this power of eminent domain for the right of way for a road, the general public acquires an easement only in the land so taken, and the fee to the property remains in the landowner, who may subject the land to any use which is not inconsistent with its use for the purpose for which it is taken."

G.S. 136-18(e) vests the State Highway and Public Works Commission with the power "to make rules, regulations and ordinances for the use of, and to police traffic on, the State highways . . ."

G.S. 136-1 states in part: "The intent and purpose of this section is that there shall be maintained and developed a State-wide highway system commensurate with the needs of the State as a whole and not to sacrifice the general state-wide interest to the purely local desires of any division."

Plaintiff states in his brief, "the Legislature has the plenary power not only to grant or withhold the right to exercise the power of eminent domain, but also to define the *quantum* of interest or estate which may be acquired, whether an easement or the fee or some estate intermediate these two." However, plaintiff contends that the powers of eminent domain granted to the State Highway and Public Works Commission do not include the power to condemn plaintiff's right of access to U. S. Highway 29, 70 and 52, and the General Assembly had no

intent to grant such power, because a limited-access highway "was inconceivable at the time of the enactment of the statutes" vesting such Commission with the power of eminent domain, and because such lack of intent is further shown by the fact that at the 1951 Session of the General Assembly the House of Representatives passed a bill to establish limited-access highways and to acquire lands therefor (House Journal 1951, pp. 927, 944), and this bill was reported unfavorably by the Senate Committee on Public Roads (Senate Journal, p. 653) and was not passed by the Senate. The plaintiff contends that the 1951 General Assembly refused to grant the State Highway and Public Works Commission authority to establish limited-access roads, though at the same session it granted such authority to Municipal Corporations operating Toll Roads, G.S. 136-89.6(j) and to the North Carolina Turnpike Authority, G.S. 136-89.16(j).

This Court said in *In re Barnes*, 212 N.C. 735, 194 S.E. 499: " 'Where a statute is expressed in general terms and in words of the present tense, it will as a general rule be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation, by which it will apply to such as come into existence thereafter.' 59 C.J., 1105."

In *Cain v. Bowlby*, 114 F. 2d 519, *certiorari* denied, 311 U.S. 710, 85 L. Ed. 462, it is said: "And it is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms and prospective in operation, apply to persons, subjects and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them." Abundant authority is cited in support.

The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted. *U. S. v. Stewart*, 311 U.S. 60, 85 L. Ed. 40; *Summer v. State Highway Com.*, 143 S.C. 196, 141 S.E. 366; 50 Am. Jur., Statutes, p. 224.

In 50 Am. Jur., Statutes, p. 225, it is written: "On the other hand, the fact that a situation is new, or that a particular thing was not in existence, or was not invented, at the time of the enactment of a law, does not preclude the application of the law thereto. The language of a statute may be so broad, and its object so general, as to reach conditions not coming into existence until a long time after its enactment."

The power and authority vested in the State Highway and Public Works Commission, by virtue of the statutes enacted by the General Assembly, "to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or *other property whatsoever* that may be necessary for a State Highway system," to condemn private property "as it may deem necessary and suitable for road construction," "to make rules, regulations and ordinances for the use of, and to police

traffic on, the State highways," and to have "such powers as are necessary to comply fully with the provisions of the present or future federal aid grants," are expressed in language broad and extensive and general and comprehensive enough and the object so general and prospective in operation as to authorize the Commission to exercise the power of eminent domain to condemn or severely curtail an abutting landowner's right of access to a State public highway adjacent to his property for the construction or reconstruction, maintenance and repair, of a limited-access highway upon the payment of just compensation, and we so hold. We are fortified in our position by the language of the General Assembly set forth in G.S. 136-1: "The intent and purpose of this section is that there shall be maintained and developed a State-wide highway system commensurate with the needs of the State as a whole."

The failure of the 1951 Session of the General Assembly to enact into law a bill introduced to provide for limited-access roads by the Commission does not change our opinion. The statutes we have set forth above conferring the power of eminent domain upon the Commission are not ambiguous or of doubtful meaning, but are so clear and plain, so general and comprehensive in nature and the object so general and prospective in operation that there can be no reasonable doubt as to their meaning as we have held above. Perhaps, the Senate thought that the Commission had the power under existing statutes to construct limited-access roads, and that was the reason it declined to pass the House Bill. Certainly, the 1951 General Assembly was not opposed to limited-access roads as shown by the enactment of G.S. 136-89.6(j) and G.S. 136-89.16(j). The 1951 rejected bill as set forth in appellant's brief provided that in connection with a limited-access highway the highway authorities might, in their discretion, acquire an entire lot, block, or tract of land, if by so doing, the interests of the public will be best served, even though said entire lot, block, or tract is not immediately needed for the right of way proper. That provision may have caused its rejection.

But passing on from speculation as to why the 1951 Bill was rejected, this Court said in *Raleigh v. Bank*, 223 N.C. 286, 26 S.E. 2d 573: "As a rule in determining the proper construction to be given legislative enactments, the courts are not controlled by what the Legislature itself apparently thought the proper interpretation should be, but the language employed, taken in connection with the context, the subject matter and the purpose in view must be considered in order to ascertain the legislative intent, which, after all, is the primary purpose of all judicial construction."

In *U. S. v. Missouri P. R. Co.*, 278 U.S. 269, 73 L. Ed. 322, 377, the Court said: "Where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable

consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

It is also a well known fact that some 170 miles of limited-access roads constructed by the State Highway and Public Works Commission are complete and open to traffic, and that the 1955 General Assembly did nothing to stop such work on the Commission's part. Such acquiescence in the practical interpretation by the Commission of the statutes authorizing it to exercise the power of eminent domain in constructing limited-access roads and taking an abutting landowner's right of access thereto is entitled to some weight. *S. v. Emery,* 224 N.C. 581, 31 S.E. 2d 858; 157 A.L.R. 441; *Hannah v. Commissioners,* 176 N.C. 395, 97 S.E. 160.

The complaint does not state facts sufficient to constitute a cause of action for injunctive relief against the defendants, nor against the State Highway and Public Works Commission, if it had been sued, and the demurrer was properly sustained.

For any damage plaintiff has sustained, he has an adequate remedy at law by virtue of Chapters 136 and 40 of G.S.

It is not necessary for us to pass upon the other ground of the demurrer.

Affirmed.

JOHNSON, J., not sitting.

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

MRS. MYRTLE W. BENNETT, ADMINISTRATRIX OF THE ESTATE OF A. C. BENNETT, DECEASED, v. SOUTHERN RAILWAY COMPANY, A CORPORATION.

(Filed 11 January, 1957.)

1. Master and Servant § 26—

Recovery under the Federal Employers' Liability Act must be based upon negligence of the employer which constitutes the proximate cause or one of the proximate causes of injury or death, the employer not being an insurer under the Act.

2. Master and Servant § 27—

Assumption of risk by whatever name called is not applicable to an action under the Federal Employers' Liability Act.

3. Master and Servant § 28—

Contributory negligence of the employee is not a bar to recovery under the Federal Employers' Liability Act.

4. Master and Servant § 25b—

An action under the Federal Employers' Liability Act is governed by the Federal rules of law.

5. Negligence § 3½—

Lightning is an act of God, but if there is negligence of defendant which joins with an act of God so that the negligence of defendant operates as an efficient and contributing cause of injury, defendant is liable.

6. Master and Servant § 26: Trial § 31—

In an action under the Federal Employers' Liability Act, motion for compulsory nonsuit is the proper procedure to present the question whether the evidence, with all reasonable inferences therefrom, is sufficient to show that defendant was guilty of negligence which constituted a proximate cause or one of the proximate causes of the injury or death. G.S. 1-183.

7. Master and Servant § 26—

Under the Federal Employers' Liability Act, it is the duty of the employer to use reasonable care to provide his employees with a safe place to work, and the reasonableness of the care must be commensurate with the danger of the business.

8. Same—

The evidence favorable to plaintiff tended to show that her intestate, a brakeman on a freight train, was ordered, while a violent electrical storm was still in progress, to leave shelter and resume work, and that he was struck and killed by a bolt of lightning while walking beside the tracks in the performance of his duties: *Held:* The evidence is insufficient to show negligence on the part of the railroad employer as a concurring proximate cause of the injury and death, and therefore nonsuit was properly entered.

9. Negligence § 9—

A defendant is not required to foresee events which are merely possible, but only those which are reasonably foreseeable.

10. Master and Servant § 26—

As a general rule, a railroad company is not liable to its employees for injuries resulting from climatic conditions.

11. Evidence § 49—

In an action to recover for death of an employee resulting from lightning, testimony of a witness to the effect that weather conditions were too bad for a person to be out in, is incompetent as invading the province of the jury.

12. Appeal and Error § 41—

Where the evidence admitted and the evidence excluded over plaintiff's objection are insufficient, considered together, to make out a case, the

exclusion of the evidence cannot be held prejudicial on appeal from judgment as of nonsuit.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Campbell, J.*, March Civil Term 1956 of MECKLENBURG.

Civil action for damages for alleged wrongful death of A. C. Bennett on 8 July 1947 instituted on 6 July 1948, under the provisions of the Federal Employers' Liability Act, by his widow as administratrix of his estate, for the benefit of herself and his dependent child.

On 8 July 1947 defendant operated a double-track railroad from Charlotte, North Carolina, to Spartanburg, South Carolina, which passed through Kings Mountain, North Carolina. Just south of Kings Mountain there was situate a plant of Superior Stone Company, and at or near this plant was a sidetrack or siding with two tracks serving the plant. About 11:30 a.m. on this day a freight train of defendant in transit from Spartanburg, South Carolina, to Charlotte, North Carolina, backed into this siding to clear the main line for a first class freight train to pass, preparatory to picking up some cars there loaded with stone. Plaintiff's intestate A. C. Bennett was a member of the train crew as a brakeman. Defendant admitted in its answer that at the time and place plaintiff's intestate was engaged in interstate commerce.

When the first class freight train had passed, the freight train came out of the siding, and the rear end of the freight train and the caboose were set out on the north bound main track. On the siding were some empty cars ahead of cars loaded with stone, which loaded cars were to be attached to the train for movement to another destination. The engine with some boxcars went into the siding to switch the empty cars, and get the loaded cars to connect with the train. While this work was going on, a severe storm with thunder, lightning, hail and rain came up in the vicinity, and the work was stopped.

J. R. Hardin, the conductor, who was dead at the time of the trial, was in charge of the train crew. While the work was stopped, F. W. Pickard, the flagman, and A. C. Bennett stayed for a time under a car. Pickard got wet, and both went and got in the cab of the engine. In a few minutes Bennett said: "I am going over to the cab," and went to the caboose on the north bound main track. A witness testified Bennett said he was going to the caboose for a raincoat. When he arrived, he and the conductor were in the caboose, and the rest of the train crew were in the cab of the engine.

J. B. Murphree, a brakeman on the train, on his adverse examination by plaintiff, testified in substance as follows: He saw J. R. Hardin, the conductor, get out of the caboose ahead of A. C. Bennett. Hardin came

to the cab of the engine where the other members of the train crew were, and Bennett went another way. Hardin said, "we'd make a move, and pull the loads out, and we'd clear the main line, and let the north bound go, we'd get those loaded cars." Bennett's duties in connection with moving this train were about the same as his: checking the couplings and brakes on the loaded cars to be connected and moved. Murphree went in the same direction Bennett was going, only he was on the side-track and Bennett was on the main line. Murphree testified: "The storm had slacked up when we all went to work there." He did not see Bennett struck, but there was a bolt of lightning and thunder, and he saw Bennett down and lying east of the north bound main line, with a fusee in his hand. He had heard no conversation between Hardin and Bennett immediately prior to Bennett's being struck.

M. G. Gordon, the engineer, who was adversely examined by plaintiff, testified the lightning and thunder had slackened up, when he saw Bennett down on the ground.

F. W. Pickard, the flagman, who was adversely examined by plaintiff testified on cross-examination: "The storm had slackened up when this thing happened; it had stopped . . . The lightning that struck Mr. Bennett was not the last lightning that occurred. It had been raining and thundering and lightning, I'd say, about 15 minutes prior to the time he was struck." Pickard testified he could not say that Bennett received an order from the conductor.

S. H. Ware, the fireman, upon his adverse examination by plaintiff, testified he saw Bennett falling, and his fall was preceded by a loud crash of thunder, but he does not remember any flash of lightning. He further testified that when the conductor got out of the caboose and started to the engine, Bennett started walking to the cars to be loaded. He also testified, "this storm had slackened up when this thing occurred."

Robert Dawkins, a witness for plaintiff, testified he was hauling gravel to be loaded in boxcars. A storm came up while they were loading, and the belt was cut off. There was a path on the east side of the main line where Bennett was walking, a little bit down below the end of the cross ties, and the ground sloped from the end of the cross ties down to the path. When he first saw his body, his feet were in the path and the upper half of the body was lying up on the rock bed near the cross ties. It was raining hard, and Bennett's clothing was "wringing wet." It was thundering and lightning all around, sort of like it was striking close by.

Carl Mayes testified for plaintiff he was superintendent for Superior Stone Company. That the storm this day was severe or violent, and they had closed down their operations at the plant, due to the storm.

John Setzer, a witness for plaintiff, testified that at the time Bennett was put in a car to go to a doctor, it was pouring rain, and there was a lot of thundering, lightning and hail.

Amos Stacy testified as a witness for plaintiff that it was raining, thundering and lightning when Bennett was killed.

Plaintiff alleged in her complaint that her intestate was killed either by an explosion of a fusee or by lightning, and the defendant in its answer admitted that he was killed by lightning.

H. E. Fulcher, Professor of Physics at Davidson College, where he had taught a course dealing with lightning for 31 years and a course in meteorology for 11 years, was held by the court to be an expert witness as a physicist. Immediately prior to such holding by the court, the court asked Mr. Fulcher this question: "Do you consider yourself as a physicist or an expert in lightning?" He replied: "No, sir, I'm a physicist." Mr. Fulcher testified in substance as follows: Lightning coming from the clouds to the ground takes the path of least resistance, and the path is shortened for a place that is higher than the surroundings, so a higher place increases the hazards there considerably. A steel rail is a conductor of electricity. Such a rail laid on cross ties with the cross ties having a ballast of stone some 12 inches thick increases the hazards from electricity from a storm in which there is lightning. It is common knowledge one should not during an electrical storm be near telephone wires or piles of steel. If a person is out in a storm with lightning, and is on the ground at a point elevated above the ground close by, and steel rails of a railroad are on this elevated place, it is a more hazardous position for a person to be in than in a railroad caboose. Any shield, whether it be metal or wood, deflects lightning. The human body is classified as a conductor of electricity. If a person's clothing is wet and he is walking on wet ground, that would increase the conductibility of the human body. A ballast of stone is a poor conductor. All rock is a good insulator. A stone ballast under a rail would have a tendency to keep electricity in a rail from getting from the rail to the ground.

No burnt marks were seen on Bennett's body. His right trousers' leg was torn a bit on the bottom, and scorched, his raincoat was split, a shoe was knocked off, and the sock on the foot with the shoe off was scorched.

S. H. Ware testified he saw Bennett fall to the ground, and the fill on which he fell was about 12 to 15 feet above the natural ground around. There was other evidence the fill was 16 to 18 feet above the ground.

There was a line of telephone poles running along the railroad track, and between the sidetrack and main line. The poles were 22 to 25 feet high. The poles between the sidetrack and main line were in a ravine,

and there was not much difference in the elevation between the height of the top of the railroad track and the wires on the poles.

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

William H. Abernathy, Guy T. Carswell and James F. Justice for Plaintiff, Appellant.

W. T. Joyner and Robinson, Jones & Hewson for Defendant, Appellee.

PARKER, J. The Federal Employers' Liability Act, as set forth in U.S.C.A. Vol. 45, sec. 51, provides that every common carrier by railroad, while engaged in interstate or foreign commerce, shall be liable in damages, in case of the death of one of its employees, to his or her personal representative, for the benefit of certain enumerated persons, for such death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

By the explicit words of the Act the basis of liability of the carrier is negligence, however much Judges may disagree as to what facts are necessary to constitute negligence. Although the decisions under the Act are most liberal in allowing employees to recover, it has been held time and again that the Act does not make the carrier an absolute insurer against personal injuries or death suffered by its employees, and that recovery lies solely upon the concurrence of negligence on the part of the carrier and injury or death as cause and effect. *Wilkerson v. McCarthy*, 336 U.S. 53, 93 L. Ed. 497; *Tiller v. A. C. L. R. Co.*, 318 U.S. 54, 87 L. Ed. 610.

The 1939 amendment to this Act released the employee from the burden of assumption of risk by whatever name it was called. *Tiller v. A. C. L. R. Co., supra.*

The Act, as set forth in U.S.C.A. Vol. 45, sec. 53, provides that contributory negligence shall not bar a recovery of damages by an injured employee, or by his personal representative where such injuries have resulted in death.

In *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 87 L. Ed. 1444, the Court said: "The rights which the Act creates are federal rights protected by federal rather than local rules of law." See Anno. U. S. Supreme Court Reports, 96 L. Ed. 408, *et seq.*

Plaintiff's intestate was killed by lightning. Lightning, or a bolt or stroke of lightning, occurring in the atmosphere during storms is an act of God. *Gleeson v. Virginia Midland Railway Co.*, 140 U.S. 435,

35 L. Ed. 458, 462; *Sauer v. Rural Co-op. Power Assn. of Maple Lake,* 225 Minn. 356, 31 N.W. 2d 15; Words and Phrases, Permanent Ed., Vol. 2, Act of God, pp. 287-288, Lightning.

In *Ferebee v. R. R.,* 163 N.C. 351, 79 S.E. 685, *Hoke, J.,* writing for the Court said, quoting from Shearman and Redfield on the law of negligence, 6th Ed., sec. 16b: " 'The rule is the same when an act of God or an accident combines or concurs with the negligence of the defendant to produce the injury, or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his own negligent act or omission.' " See also: *Ridge v. R. R.,* 167 N.C. 510, 83 S.E. 762; *Comrs. v. Jennings,* 181 N.C. 393, 107 S.E. 312; *Lawrence v. Yadkin River Power Co.,* 190 N.C. 664, 130 S.E. 735.

In *Kindell v. Franklin Sugar Ref. Co.,* 286 Pa. 359, 363, 133 A. 566, 568, the Supreme Court of Pennsylvania tersely said: "He whose negligence joins with the act of God in producing injury is liable therefor."

Legal responsibility for negligence joined with an act of God depends upon the fact that the negligence operated as an efficient and contributing cause of injury. Otherwise, the case will fall within the rule that no action lies for an injury attributable to an unavoidable accident. "One who is under a duty to protect others against injury cannot escape liability for injury of such others on the ground that it was caused by an act of God unless the natural phenomenon which caused the injury was so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against, and it is not sufficient that such phenomena are unusual or of rare occurrence." 65 C.J.S., Negligence, p. 433.

In *Brady v. Southern R. Co.,* 320 U.S. 476, 88 L. Ed. 239, the Court said: "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury. Citing authority. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

In *Tennant v. Peoria & Pekin Union R. Co.,* 321 U.S. 29, 88 L. Ed. 520, it is said: "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Citing authorities. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for proba-

tive facts, after making due allowance for all reasonably possible inferences favoring the party whose cause is attacked.'" Citing authorities.

In *A. C. L. R. Co. v. Craven,* 185 F. 2d 176, *certiorari* denied, 340 U.S. 952, 95 L. Ed. 686, the Court said: "Dangers are implicit in such occupations as railroading, and railroads are not insurers of their employees."

The precise question we have for decision is this: Considering the plaintiff's evidence as true and in the light most favorable to her, and giving to her all reasonably possible inferences to be drawn therefrom, has she produced evidence that the defendant was negligent, and that such negligence joined with an act of God was the proximate cause in whole or in part of the death of plaintiff's intestate? If so, her case should have been submitted to the jury. If not, the judgment of nonsuit below is correct. A motion for a compulsory nonsuit under G.S. 1-183 is the proper procedure to test the legal sufficiency of the evidence to carry the case to the jury.

Plaintiff does not contend that her intestate's death was caused by reason of any defect or insufficiency, due to defendant's negligence, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment. Plaintiff's contention is that defendant negligently failed to exercise ordinary care to provide her intestate a reasonably safe place to work by requiring him during a severe storm accompanied with lightning to leave the caboose and to go out on the tracks to couple boxcars.

At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. Such rule is deeply embedded in federal jurisprudence, and applies to the Federal Employers' Liability Act. *Bailey v. Central Vermont R. Co., supra.* In *Patton v. Texas & P. R. Co.,* 179 U.S. 658, 45 L. Ed., 361, 365, the Court said: ". . . there is no guaranty by the employer that place and machinery shall be absolutely safe. . . . Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery." The last sentence was quoted in *Bailey v. Central Vermont R. Co., supra.* In other words, the standard of care must be commensurate to the danger of the business.

Under the defendant's Book of Operating Rules, the conductor J. R. Hardin had charge of the train and all employees thereon, and he was responsible for the performance of their duties by the train employees. The duties of the operating crew of a freight train require them to expose themselves off the train and on the tracks in all sorts of inclement weather, in pouring rain, in storms with lightning, in hail, sleet and

snow, in freezing cold and torrid heat. The conductor and plaintiff's intestate left the caboose together, while, taking the evidence in the light most favorable to plaintiff, it was still pouring rain, thundering and lightning. However, it is significant that there is no evidence that the lightning of the storm struck any person or object, with the exception of the tragic death of plaintiff's intestate, and further that while the storm was going on plaintiff's intestate left the engine on the sidetrack, and walked through the storm to the caboose on the main track to get his raincoat. The conductor walked to the engine on the sidetrack, where the other members of the train crew were, and said, "we'd make a move, and pull the loads out." The conductor was dead when the trial took place. There is no evidence as to what he said to plaintiff's intestate about leaving the caboose. But it would seem to be a fair inference from the evidence that he told plaintiff's intestate, "we'd make a move and pull the loads out," or spoke words of similar meaning, and that plaintiff's intestate considered it an order he was bound to obey, and went on the tracks to perform his duty as a flagman in coupling the loaded cars on the sidetrack. There is no evidence that defendant was the owner or had anything to do with the telephone poles and wires near its track at the site. It is common knowledge that telephone and telegraph poles and lines are frequently run parallel with railway tracks.

The narrow question we have is whether the conductor telling or ordering plaintiff's intestate to get out of the caboose and go outside to perform his duties was negligence, that is a failure to exercise reasonable care depending upon the danger attending the place and time. Where lightning will strike, to use a Mohammedan phrase, God knows. The Texas Court of Civil Appeals said in *Western Telephone Corp. v. McCann,* 69 S.W. 2d 465:

> "It may be technically true, as appellant and its experts contend, that the phenomena of lightning is 'highly complex,' rather than 'freakish.' As a practical matter, the uncertainties inherent in a bolt of lightning may not be encompassed in either or both of those terms, or in any term of any known language. It is known, only, that it is all-powerful, all-embracing, inconsistent, inscrutable, searching, terrifying, beautiful, deadly. It is no respector of persons, places, or occasions."

A railroad must operate its trains through fair weather and foul, and cannot stop all switching operations until all electrical storms are over, if it is efficiently to operate its business. The test is whether reasonable men, examining the circumstances there and then and the likelihood of injury from lightning, would have ordered the train crew and plaintiff's

intestate to make a move and pull the loaded cars out. In our opinion, after considering all the evidence in the light most favorable to plaintiff, and accepting it as true, and giving her the benefit of all reasonable inferences to be drawn therefrom, the only reasonable conclusion at which fair-minded men could arrive is that the danger at the time and place of being struck by lightning was so remote as to be beyond the requirement of due care, and, therefore, the death of plaintiff's intestate was not caused in whole or in part by any negligence on defendant's part. Bare possibility is not sufficient. *Milwaukee & St. P. Ry. Co. v. Kellogg,* 94 U.S. 469, 24 L. Ed. 256. "Events too remote to require reasonable prevision need not be anticipated." *Brady v. Southern R. Co., supra.* To hold otherwise would be to make defendant an insurer.

In *Fort Worth & Denver City Ry. Co. v. Smith,* 206 F. 2d 667, the Court said: "It is a general rule that a railway company is not liable to its employees for injuries resulting from climatic conditions, such as ice and snow; but within its yard limits it must exercise a degree of care commensurate with the risks to prevent the accumulation of snow and ice in such quantity, form, and location as to be a menace to the safety of its employees working in its yards."

Amos Stacy, a witness for plaintiff, testified that on the day Bennett was killed, he was down in a pit at the crusher of the Superior Stone Company plant. That the plant was not in operation for sometime before lunch on account of the storm, lightning, thunder and rain. He was asked by plaintiff's counsel to what extent it was thundering and lightning at the place where Bennett was killed, when he arrived there. He answered: "It was still thundering and lightning. It was too bad to be out insofar as walking and doing anything was concerned. The plant had not been operating for the last hour or so on account of the rain." Defendant's counsel made a motion "to strike out the statement that the conditions were too bad." The court allowed the motion, and plaintiff excepted, and assigns this as error. The evidence was properly excluded.

In *Parks v. Sanford & Brooks, Inc.,* 196 N.C. 36, 144 S.E. 364, it was held that whether or not the place at which plaintiff's intestate was at work was unsafe is a question for the jury, and the opinion of witnesses with respect to this matter was not competent, and was properly excluded as evidence. In *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797, testimony of non-experts that the wire cable furnished was unsuitable and improper for the work was held erroneously admitted in evidence. In *Marshall v. Telephone Co.,* 181 N.C. 292, 106 S.E. 818, the opinion of a witness that the place was not safe was improperly admitted and constituted reversible error. See also: *Marks v. Cotton*

Mills, 135 N.C. 287, 47 S.E. 432; *Phifer v. R. R.,* 122 N.C. 940, 29 S.E. 578.

Plaintiff assigns as error the exclusion as substantive evidence of the report of the conductor, which was signed by other members of the train crew, to the defendant as to plaintiff's intestate's death. The court permitted the plaintiff to read this report to the jury for the purpose of corroborating the testimony of S. H. Ware, the fireman. Such report is to a large extent similar to evidence admitted without objection, and the reasonable inferences to be drawn therefrom. However, if it were improperly rejected as substantive evidence, such report considered as substantive evidence in connection with all the other evidence in the case would be insufficient to take the case to the jury.

Plaintiff also assigns as error the refusal of the court to permit the witness H. E. Fulcher to answer certain hypothetical questions and other questions. This is in substance the answer of Mr. Fulcher to one hypothetical question: My opinion is that lightning from the rail killed Mr. Bennett. As he walked south, his right foot was nearest the rail. Now, no evidence has been brought out that he was walking on the end of the cross ties, but that is the way railroad men walk. I have been with them, and have seen them. They walk on the end of the cross ties. They don't walk off, unless there is a good path. I have gone over there and measured these cross ties, and if he was walking normally on the end of the cross ties, his right foot was any-where from 4 to 6 inches away from the rail. His right shoe was torn, his sock charred. This is the substance of other testimony of Mr. Fulcher, which was excluded: Electricity from a bolt of lightning can jump from one conductor to another for 12 or 15 feet. My opinion is that the lightning that killed Mr. Bennett came from the steel rail of the track, though I do not rule out the possibility it could have come from above. The bolt of lightning being carried by the steel rail could have come from several miles away, north or south. The excluded testimony of Mr. Fulcher has been carefully considered, and, if it were competent in whole, which we do not concede, such testimony considered with all the other evidence would not make out a case for the jury.

If the excluded testimony of Carl Mayes were competent, it would not strengthen plaintiff's case.

In *Metropolitan Railway Company v. Jackson,* 3 App. Ca., House of Lords, 193, Law Reports 1877-78, the eminent Lord Chancellor, *Lord Cairns* said: "It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner,

if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

Plaintiff's intestate's death was a tragic accident. Hard cases make bad law. It is our duty not to make law, but to administer it. In our opinion the judgment of nonsuit below under the Act as written and the evidence was correct.

Affirmed.

JOHNSON, J., not sitting.

COUNTY OF FRANKLIN v. MRS. C. A. JONES AND HUSBAND, C. A. JONES; MRS. LAURA JONES WILKES AND HUSBAND, JIMMIE WILKES; MRS. HETTIE JONES DENTON AND HUSBAND, BUSTER DENTON; MRS. HATTIE JONES JEANES AND HUSBAND, E. L. JEANES; MRS. MATTIE JONES PERRY AND HUSBAND, ELBERT PERRY; ZOLLIE JONES AND WIFE, MRS. MARGARET P. JONES; MRS. MARY JONES DENTON AND HUSBAND, CREAMEY DENTON; DAVIS JONES AND WIFE, MRS. AUDREY C. JONES; MARTHA JONES, UNMARRIED, AND BLONIE JONES, UNMARRIED, AND JAMES E. MALONE, JR., GUARDIAN AD LITEM OF JIMMIE WILKES, NON COMPOS MENTIS, AND THE UNBORN CHILDREN OR HEIRS IN POSSE OF MRS. EMMA JANE JONES; AND JAMES E. MALONE, JR., GUARDIAN AD LITEM OF DAVIS JONES, MARTHA JONES AND BLONIE JONES, MINORS.

(Filed 11 January, 1957.)

1. Taxation § 40c—

Where the true owners are served with summons in an action to foreclose a tax lien, the fact that the land had not been properly listed in the name of the true owners does not defeat the jurisdiction of the court. G.S. 105-391.

2. Same: Taxation § 42—

The fact that sale of land for taxes was postponed for six days, rather than postponed from day to day for a period of six days, does not render the sale void, but is at most an irregularity which does not affect the title of the purchaser, C.S. 690, C.S. 692, the sale not being held on a Sunday, since there is nothing in the record to give the purchaser notice.

3. Judicial Sales § 5—

Confirmation of a judicial sale by a court of competent jurisdiction with knowledge of an irregularity ends the right to complain of the defect.

4. Infants § 15½—

In an action against an infant, the failure to appoint a guardian *ad litem* is an irregularity, but is not a jurisdictional defect, and therefore judgment rendered against the infant is not void.

5. Judgments § 27d—

One who seeks relief from an irregular judgment must show that he has been prejudiced by the judgment and that he has acted diligently.

6. Taxation §§ 40c, 42—Decree of confirmation of tax sale may not be attacked for mere irregularity except upon showing of prejudice and diligence.

This suit was instituted to sell lands to satisfy a lien for taxes. After interlocutory order of foreclosure was entered, the commissioner, upon learning of the minority of some of the parties, continued the sale for six days, and reported to the clerk, who thereupon appointed as guardian *ad litem* for the minors the same guardian who represented persons *in posse*. The guardian *ad litem* filed answer and the sale was held at the expiration of the six-day period. Thereafter judgment of confirmation was entered upon the court's finding *inter alia* that the price bid was just and adequate and that the sale should be confirmed. *Held:* The sale was not void, and judgment granting motion in the cause to set aside the decree of confirmation some five years after its rendition without a showing of prejudice to and the exercise of due diligence by movants, is error.

7. Same—

Failure to list land for taxation does not relieve the land from liability for taxes but limits the period for which liability can be imposed to five years.

8. Judicial Sales § 7—

The purchaser at a judicial sale is the equitable owner, and the decree of confirmation entered by a court of competent jurisdiction may not be set aside as to the purchaser when the proceedings are merely irregular except for mistake, fraud or collusion.

JOHNSON, J., not sitting.

APPEAL by respondents from *Seawell, J.*, February 1956 Term of FRANKLIN.

In 1945 the County of Franklin brought suit against Mrs. C. A. Jones and other named defendants. The complaint alleged that for the years 1929 to 1943, both inclusive, except for the years 1933 and 1934, a tract of land therein specifically described and containing 34.25 acres was listed for taxation in the name of C. A. Jones, and for the years 1933 and 1934 was listed for taxation in the name of Mrs. C. A. Jones; that said land was listed as 38 acres Massey; that the Board of Commissioners of Franklin County had duly levied taxes thereon for each of said years; that the taxes so levied, amounting to $258.63, were due, unpaid, and constituted a first lien on said land, and in addition to said taxes, taxes had been levied thereon for 1944; that the 1944 taxes were due but not delinquent, and taxes had been levied for 1945, but these taxes were not then due, and the taxes levied for 1944 and 1945 were likewise

a lien on said land. The complaint further alleged "that the title to the said real estate described above is vested in the defendants Laura Jones Wilkes, Hettie Jones Denton, Hattie Jones Jeanes, Mattie Jones Perry, Zollie Jones, Mary Jones Denton, Davis Jones, Martha Jones and Blonie Jones, who, as this plaintiff is informed and believes and therefore avers, are all of the children of Emma Jane Jones, who is the same and identical person as Mrs. C. A. Jones, subject to such interest as may be acquired by the future children of Mrs. C. A. Jones; and this plaintiff respectfully prays the court that on account of the circumstances set forth above, an order be made making the unborn children or heirs *in posse* of Mrs. C. A. Jones, or Emma Jane Jones, parties to this action, and that some suitable person be appointed guardian for the unborn children or heirs *in posse*." The parties named in the quoted section, with their respective husbands and wives, as well as Mrs. C. A. Jones and husband, C. A. Jones, were personally served with summons and a copy of the complaint. The complaint also alleged, upon information and belief, that all persons having any interest in or lien on the land were named as parties defendant. It alleged that plaintiff was entitled to collect the taxes owing to it and to foreclose its lien as provided in G.S. 105-391.

Upon petition and affidavit that the unborn children of Mrs. C. A. or Emma Jane Jones might have some interest in said land and hence were proper parties and should be duly represented, the clerk, on 23 July 1945, appointed James E. Malone, Jr., who he found to be "a fit, suitable and discreet person," as guardian *ad litem* to represent and defend the interest of the unborn children or heirs *in posse* of Mrs. Emma Jane Jones. Summons issued for Malone as guardian *ad litem* on 23 July and was served on 25 July 1945. On 7 September 1945 Malone, as guardian *ad litem* for the unborn children of Mrs. Emma Jane Jones, filed an answer. He did not deny any of the allegations of the complaint. In answer to section 6 of the complaint he said that he was informed that the lands had been devised to one Massey for life and upon his death to the children of Emma Jane Jones; that Massey was dead, and he concluded as a matter of law that the title was vested in the children of Emma Jane Jones, who were then living. The prayer is that the court render such judgment as might be appropriate in the situation.

On 12 September 1945 the clerk of the Superior Court entered an interlocutory judgment of foreclosure in which he recited that all parties defendant were properly before the court by personal service of process; that the only answer filed was the answer of Malone, guardian *ad litem*, which raised no issue of fact. After these recitals the court adjudged that plaintiff had a tax lien on the land described for the amount asserted. He allowed defendants until 18 September 1945 to

pay the tax and directed if the amount adjudged was not paid by that date that the land be sold on 13 October 1945 by a commissioner therein named.

Prior to noon, 13 October 1945, the time fixed for the sale, Matthews, the commissioner, learned that the defendants Davis Jones, Martha Jones, and Blonie Jones were minors without guardian. At the time fixed for the sale, the commissioner announced that the sale was continued for a period of six days during which time a guardian would be appointed. On 15 October 1945 the commissioner reported to the clerk of the Superior Court of Franklin County that he had continued the sale which was to have been held on 13 October 1945 for a period of six days and petitioned the court for the appointment of guardian *ad litem* for the three minors. Thereupon the clerk appointed James E. Malone, Jr., as guardian *ad litem* for the three minors. On 18 October 1945 Malone, as guardian *ad litem,* filed an answer for the minors. He asserted that no child thereafter born to Emma Jane Jones could have any interest in the land. Otherwise, there was no denial of any of the allegations of the complaint. The guardian *ad litem* for the three minors, having answered *seriatim* the allegations of the complaint, concluded his answer by stating he "submits the interests of his said ward, or wards, to the Court and prays that such orders and decrees may be entered herein as will properly protect any interest, or interests, his said ward or wards may have in the subject matter hereof." On the day he filed his answer as guardian *ad litem* for the minors he wrote on the interlocutory judgment: "I hereby consent to the foregoing Judgment."

On 19 October the commissioner reported that he had that day offered the land for sale at public auction in conformity with the judgment and advertisement, and H. E. Stallings was the highest bidder therefor at $450. The commissioner recommended that the sale be confirmed unless an increased bid was offered within twenty days.

On 19 November 1945 the sale was confirmed and the commissioner was directed to convey the land to Stallings upon payment of his bid. The commissioner was directed from the purchase price to pay the costs, the taxes theretofore adjudged to be owing, including the 1945 tax and "the residue of the said proceeds of sale into the hands of the Clerk of this Court, for disposition according to law. And this cause is retained for further orders." From 1929 through 1945 the title to the lands described in the complaint "was vested in Laura Jones Wilkes, Hettie Jones Jeanes, Mattie Jones Perry, Zollie Jones, Mary Jones Denton, Davis Jones, Martha Jones, and Blonie Jones." In April 1952 Laura Jones Wilkes and the remaining owners of the property filed a motion to set aside the interlocutory judgment of foreclosure of 12 September 1945, the decree of confirmation of 19 November 1945, and the deed to

H. E. Stallings, executed pursuant to said decree for that they were all void.

The clerk, after notice to the interested parties, heard the motion and denied the same. Movants thereupon appealed to the Superior Court. Judge Seawell, on the appeal, made findings of fact based on the judgment roll and affidavits submitted by the respective parties. In addition to the facts hereinabove stated, Judge Seawell found:

"Said lands were not listed in the name of the true owner. A tax scroll for 1933 was signed by Mrs. C. A. Jones, who listed her own land as '38 Ac. Massey.' The remaining tax scrolls relative to this land were unsigned."

"That the lands sought to be foreclosed in this proceeding contained in excess of 30 acres, and in excess of 3 acres tobacco allotment, and contained one dwelling house."

Based on the record and findings made by him, Judge Seawell concluded: "The lands described in the complaint herein were not properly listed for taxation and the Court was without jurisdiction in this case; that the attempted sale of said lands on Saturday, 19 October, 1945, was and is void for failure to properly advertise and continue same from day to day until time of sale; that the interlocutory judgment rendered herein on the 12th day of September, 1945, by the Clerk of the Superior Court of Franklin County was and is void for that: the minor defendants, Davis Jones, Martha Jones and Blonie Jones, were not duly and properly represented before the Court; that the purchase price of said lands was unjust and inadequate." He adjudges the judgment and decree of the clerk and the deed executed pursuant thereto void. From this judgment respondents County of Franklin and H. E. Stallings appealed.

G. M. Beam for movant appellees.

John F. Matthews for H. E. Stallings and wife and Edward F. Yarborough and B. H. Cooke for Franklin County.

RODMAN, J. If any of the four pillars on which the judgment rests suffice to support it, the judgment must be affirmed. This necessitates an examination of each of the reasons given.

Was the jurisdiction of the Superior Court to determine the liability of the land for taxes defeated by a finding that the owners—defendants in the action—had not listed the property for taxes?

The answer is no. The court was invested by statute with the power to determine the tax liability and to foreclose any tax lien G.S. 105-391. The owners of the property were before the court by the service of process. Whether the land was properly listed and the amount of taxes for which the land was liable were factual matters to be made the

subject of an issue upon proper traverse of the allegations of the complaint. An admission of liability of the land for the amount of the taxes asserted to be due, either by answer or by default, does not divest the court of jurisdiction if it subsequently develops that the admission was not correct. A judgment appropriately rendered on such an admission is conclusive. *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909; *Stelges v. Simmons,* 170 N.C. 42, 86 S.E. 801; *Turnage v. Joyner,* 145 N.C. 81.

Movants cite in support of the assertion that the court was without jurisdiction because of the failure to properly list the land for taxes. *Rexford v. Phillips,* 159 N.C. 213, 74 S.E. 337; *Stone v. Phillips,* 176 N.C. 457, 97 S.E. 375; *Phillips v. Kerr,* 198 N.C. 252, 151 S.E. 259; and *Wake County v. Faison,* 204 N.C. 55, 167 S.E. 391. The cases cited and relied upon are not authority for the position taken. The first three cases were under the old statute where the holder of a sheriff's certificate of sale could obtain a tax deed without invoking judicial process and without an opportunity to the owner to have the tax liability judicially determined. C.S. 8030. All then necessary was that the certificate holder should serve notice on the person in whose name the land was listed. A compliance with that statute was no notice to the true owner where the land was improperly listed. The philosophy of those cases is indicated by the following quotation from *Rexford v. Phillips, supra:* "The Legislature has never provided that a person without authority in law or in fact may enter on the lists an indefinitely described number of acres in a township containing many thousand acres, not in the name of the owner, but of someone else, and thereby confer authority to sell lands thus listed, and by the sheriff's deed pass the title to the lands of another person whose name does not appear in the list, and whose lands are not described therein, and who has never authorized the listing of his land by another, and whose land has not been listed by the chairman of the county commissioners, as required by law in case of the owner's default. . . . The provisions of the law are adequate for the proper listing of property and the collection of taxes, and *the Legislature did not intend that it should be confiscated without notice.*" (Emphasis added.) It was the taking without notice and an opportunity to be heard which formed the basis of decision in those cases.

As pointed out in *Travis v. Johnston,* 244 N.C. 713, *Wake County v. Faison, supra,* must be interpreted in the light of the facts of that case. When so viewed, it is no authority for the proposition that one served with process and a complaint in which it is alleged that the land he owns is liable for taxes and should be sold to satisfy the tax lien can ignore the court and years later say that the court was without authority to determine the question of tax liability. The presence of

the defendants, owners of the property, and the authority of the court to inquire as to the liability of the land for the taxes suffices to permit a valid adjudication of that question. The judgment is not void because of a mistake as to a fact which might have been put in issue.

Did the continuance of the sale from 13 October to 19 October render the sale void and deprive the court of the power to act on the bid then made?

The statutes in effect in October 1945 permitted the sale of real property under judicial decree on any day except Sunday, C.S. 690. Statutory authority was given by which the commissioner might "postpone the sale from day to day, but not for more than six days in all . . ." C.S. 692. The sale was not in fact continued from day to day. The continuance was for a period of six days. The assertion that the failure to postpone each day for the six-day period rendered the sale absolutely void and deprived the court of any power to act on the bid made cannot be sustained. The failure to follow the letter of the statute was, at most, an irregularity which could not affect the purchaser. The language of *Ruffin, J.* (later *C. J.*), in *Mordecai v. Speight,* 14 N.C. 428, is appropriate: "It would be dangerous to purchasers, and ruinous to defendants in execution, to require bidders to see that the sheriff had complied with all his duties. It is said, however, that this will allow sales to be made at other places besides the courthouse, as the same section fixes both the place and the day. The difference is this: a purchaser knows, and is bound to take notice, that the sheriff cannot sell but at the courthouse, and that a sale elsewhere must be void. But the sheriff may sell on Monday, or in certain cases, and under certain regulations; he may also sell the next day. Now, a bidder can no more know whether those provisions have been complied with than whether the sale has been duly advertised." *Williams v. Dunn,* 163 N.C. 206, 79 S.E. 512; *Wade v. Saunders,* 70 N.C. 270; *Brooks v. Ratcliff,* 33 N.C. 321.

An irregularity in conducting a judicial sale does not render the sale void. It is, of course, voidable. Confirmation by the court with knowledge of the irregularity and with jurisdiction of the subject matter and of the interested party ends the right to complain of the defect. The confirmation is an adjudication that what was done conforms to the directions of the court. *Upchurch v. Upchurch,* 173 N.C. 88, 91 S.E. 702; *Voorhees v. Jackson,* 10 Peters 449; Judicial Sales, 31 Am. Jur. 470; 50 C.J.S. 622; 1 A.L.R. 1446.

Was the judgment decreeing the foreclosure void because of the minority of three of the defendants? It is difficult to perceive how the minority of three of the defendants could serve as a shield for the adult defendants or excuse their neglect to defend. Each cotenant had a right to pay that part of the tax liability constituting a lien on his share of

the land, G.S. 105-411. A judgment rendered by a court against a person under disability who is not properly represented is an irregular judgment. When courts are informed of the disability of a party, they properly make provision for appropriate representation of the party under disability. When this action was instituted, there was nothing to show that any of the movants were under disability. Process regularly issued for and was served on each defendant. They were properly before the court. When the court acquired knowledge of the disability of some of the parties, it was proper for the court to appoint some competent and discreet person to act for those under disability. *Hoke, J.*, in *Houser v. Bonsal,* 149 N.C. 51, quotes from 14 Enc. Pl. & Pr. as follows: " 'Where the proceedings are conducted without the intervention of a next friend, or a guardian *ad litem,* in a case where one is required or where the appointment is irregular, the judgment is irregular and voidable. But, while a failure to appoint a next friend or guardian *ad litem* or to sue by one is irregular, it is only that. The defect is not a jurisdictional one, and hence the judgment is not void.' " *Cox v. Cox,* 221 N.C. 19, 18 S.E. 2d 713; *Syme v. Trice,* 96 N.C. 243; *Burgess v. Kirby,* 94 N.C. 575; *Fowler v. Poor,* 93 N.C. 466; *England v. Garner,* 90 N.C. 197; *Larkins v. Bullard,* 88 N.C. 35; *Turner v. Douglass,* 72 N.C. 127; *Marshall v. Fisher,* 46 N.C. 111; *Keaton v. Banks,* 32 N.C. 381; *Williamson v. Hartman,* 92 N.C. 236, 43 C.J.S. 279, 280; 37 Am. Jur. 842.

When the disability was called to the attention of the court, it acted promptly and appointed a guardian *ad litem.* The one appointed had been previously appointed guardian *ad litem* for others. Presumably he had already investigated the factual situation. There is no allegation or suggestion that the guardian *ad litem* did not in fact act in good faith. When he accepted the appointment, it was his duty not only to act in the utmost good faith, but to act diligently. For any failure to properly perform the duty he undertook, he became liable to those he represented for any loss that they might sustain. He was not, however, required to perform the impossible nor to manufacture a defense if none existed. If, as is now asserted, the lands were not in fact properly listed, the guardian *ad litem* should have made that defense. True, upon such a defense, the lands could have been properly listed, but only for a period of five years, and taxes assessed for that period instead of the period of some seventeen years for which the county sought collection. One who would seek relief from an irregular judgment must show that he has been prejudiced by the judgment and that he has acted diligently. *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709; *Gough v. Bell,* 180 N.C. 268, 104 S.E. 535; *Carter v. Rountree,* 109 N.C. 29; *Harris v. Bennett,* 160 N.C. 339, 76 S.E. 217. Nearly seven years elapsed from the date of the decree of confirmation

before the minors moved to vacate the judgment. When did they reach their majority? What excuse do they now give for their delay? The record is silent. The Legislature has fixed the time within which a motion can be made to vacate decrees in tax foreclosure actions. G.S. 105-393. This statute would not apply to the minors so long as the disability existed. G.S. 1-17.

There is neither allegation nor suggestion of fraud on the part of Stallings, who purchased, or, forsooth, on the part of anyone.

Does the finding that the purchase price was unjust and inadequate render the sale void notwithstanding confirmation by the court?

In seeking an answer to the question it is proper to look to the decree of confirmation to see what, if anything, was said with respect to the price in 1945. The decree recites the sale on 19 October, that Stallings was the high bidder at $450, that the sale was duly reported to the court, that more than twenty days had elapsed from the sale, and that no upset bid "or objections have been filed or made by any person; and the Court further finding that the price of $450.00 is a just, fair and adequate price for the said lands, and that the same should be confirmed." Here then was an express finding by the court authorized to act that the price was just and adequate. The parties now complaining were then before the court. Some, as noted, were under no disability. As to them it would seem manifest that the decree of confirmation could not now be attacked because of any asserted inadequacy in price. To grant to one whose property is sold by decree of court the right, five years after the sale and confirmation, to attack the sale because of asserted inadequate price would destroy all respect for judicial sales. Decrees of confirmation entered by courts of competent jurisdiction are entitled to greater respect. With respect to the effect to be given a decree of confirmation, it is said in *Upchurch v. Upchurch, supra:* "The purchaser is then regarded as the equitable owner, and the sale, as it affects him or his interests, can only be set aside for 'mistake, fraud, or collusion' established on petitions regularly filed in the cause." *Duplin County v. Ezzell,* 223 N.C. 531, 27 S.E. 2d 448; *Land Bank v. Garman,* 220 N.C. 585, 18 S.E. 2d 182; *Sumner v. Sessoms,* 94 N.C. 371; Judicial Sales, 31 Am. Jur. 529; 50 C.J.S. 677, 678.

The findings of fact and conclusions drawn from the record are insufficient to support the judgment. Neither the judgment directing the sale, the sale made by the commissioner, nor the decree of confirmation is void. The judgment is

Reversed.

JOHNSON, J., not sitting.

SOLON LODGE No. 9 KNIGHTS OF PYTHIAS COMPANY, TWIN-CITY LODGE No. 5 KNIGHTS OF PYTHIAS COMPANY, AND MASEO KNIGHTS OF PYTHIAS LODGE No. 14 COMPANY v. IONIC LODGE FREE ANCIENT AND ACCEPTED MASONS No. 72 COMPANY.

(Filed 11 January, 1957.)

1. Associations § 4—

Where all the members of an association concur in transferring the property to a corporation created by the association for the purpose of taking title, and have the corporation issue stock to the association and its individual members, *held*, the corporation acquires the legal title and the interest of the members of the association in the property is sufficient consideration for the issuance of the stock to them by the corporation.

2. Reference § 3—

In an action to establish a trust in real property of a value in excess of $500, the court may of its own motion order a compulsory reference. G.S. 1-189(5).

3. Reference § 14b—

Where a party objecting to a compulsory reference complies with all procedural requirements for a jury trial upon exceptions to the referee's report, it is error for the court to deny the demand for jury trial and to proceed to consider the evidence and to pass upon the exceptions.

4. Reference § 4—

The rule that a plea in bar which extends to the whole cause of action so as to defeat it entirely precludes a compulsory reference until the plea in bar is first determined, applies only when there are two distinct controversies, one as to the right to recover and the other as to the amount of recovery in the event the right to recover is established, as for an accounting. But where the cause of action is entire and indivisible so that the party asserting the right is entitled to recover entirely or not at all, pleas in bar of statutes of limitation, laches and estoppel will not preclude compulsory reference.

5. Reference § 14c—

Trial by jury upon exceptions to the referee's report is only upon the written evidence taken before the referee, and the referee's findings of fact and conclusions of law are not competent evidence before the jury.

6. Estoppel § 11b—

A party pleading estoppel by way of an affirmative defense has the burden of proof upon the issue.

7. Limitation of Actions § 9—

The statute of limitation begins to run against an action to establish a trust as of the date it is shown the trust was in some manner repudiated.

8. Equity § 3—

The court may not dismiss an action on the ground of laches except upon facts disclosed by the evidence of the complaining party or the verdict of a jury.

9. Reference § 14e—

Upon appeal from the referee's report in a compulsory reference where right to jury trial has been preserved, the court cannot determine as a matter of law, prior to the introduction of evidence, the defenses of pleaded statutes of limitation, laches and estoppel, since only after the introduction of evidence can the court ascertain if plaintiff's own evidence establishes these defenses or if defendant's evidence entitles him to a peremptory instruction thereon.

JOHNSON, J., not sitting.

CROSS APPEALS by Respondent and Intervenors from *Phillips, J.*, 19 March, 1956, Term, of FORSYTH.

When instituted 21 August, 1952, this was a special proceeding for a partition sale of the realty described below. The controversy herein, engrafted on said proceeding, is between the intervenors and the respondent; and when their pleadings were filed the subject of the controversy was the ownership of an undivided one-fourth interest in the realty.

The realty has been sold by a commissioner. Each of the three petitioners has received its one-fourth of the proceeds, and has no further interest. The remaining one-fourth, $2,902.06, now held by the Clerk for disposition in accordance with final judgment herein, is now the subject of the controversy.

In respect of said controversy, the intervenors' status is that of plaintiffs. They are named officers and members of Ionic Lodge No. 72 Free, Ancient and Accepted Masons, an unincorporated fraternal organization, hereinafter called the Lodge; and they intervene and plead in behalf of the Lodge and all members thereof. The status of respondent, hereinafter called the Corporation, in respect of said controversy, is that of defendant. By the terms of its original charter, issued in 1901 by the Secretary of State, it was a non-stock corporation, the stated object being "to mutually aid and provide for its members during sickness, and perform charitable acts . . ." In addition to general powers with reference to the purchase, mortgage and conveyance of real and personal property, it was expressly provided that it was "authorized to hold real and personal property to the amount of Twelve Thousand and No/100 Dollars ($12,000.00) for charitable purposes only."

The record title to the undivided one-fourth interest in controversy was in the name of the Corporation.

The intervenors, upon facts stated in detail, alleged that the legal title, if any, of the Corporation, was held by it in trust for the Lodge and its members, they being the equitable owners thereof; and their intervention was to establish such trust. The respondent, answering, *denied* the intervenors' allegations; and, predicated upon facts alleged

to have occurred in 1929 and thereafter, pleaded in bar of intervenors' right to establish such trust, (1) the three-year and ten-year statutes of limitations, (2) laches, and (3) estoppel.

On 3 September, 1954, an order was signed by Phillips, J., wherein "the Court of its own motion and in its discretion" appointed Oscar O. Efird, Esq., as referee, to hear the evidence and report his findings of fact and conclusions of law. The intervenors objected and excepted to this order of compulsory reference and renewed their objections, exceptions and demand for jury trial before proceeding with evidence before the referee.

On 2 November, 1955, the referee made his report. Apparently, the evidence offered by the respective parties was voluminous; for the referee, in support of his findings of fact, cites *inter alia* "R 190." But the only portion of the evidence included in the record on appeal consists of the testimony of two witnesses and of certain exhibits, a total of some fourteen pages. Hence, the referee's report (findings of fact) is the principal source of our information as to the facts.

There appears to be little, if any, controversy as to these facts: In 1895 a group of individuals organized the Lodge under a charter therefor from the State Grand Lodge of the Masonic Order. In 1901 the Lodge, together with three other fraternal lodges, purchased the realty, then a vacant lot. The Lodge directed the seller to convey the undivided one-fourth interest purchased by it to the Corporation, which was chartered at the instance of the Lodge so that it could borrow money and secure payment by an acceptable mortgage. The owners constructed a three-story building on said lot. The four fraternal lodges used the second and third floors for their meetings. In addition to said lodge facilities, there were storerooms (on the first floor) and offices. These, and occasionally the lodge rooms, were rented to outsiders. Each of the four lodges elected representatives to serve on a joint board of trustees; and these trustees managed the building, rented the storerooms and offices, collected the rents, and applied the proceeds to the maintenance, upkeep and expenses of the building, and the liquidation of the indebtedness against it.

Upon his findings of fact, including those stated above, the referee concluded, as a matter of law, that prior to 1928 the Corporation held legal title to said one-fourth interest in the realty as trustee for the Lodge. The respondent did not except to the findings of fact or conclusions of law made by the referee. The apparent reason is that the further findings of fact and conclusions of law, relating to respondent's said pleas in bar, were favorable to respondent and constituted the real basis of respondent's position.

The referee's further findings of fact included the following: In 1928, interest was at a low ebb; and the then members became fearful

that the Lodge might become inactive and its charter suspended so that, by reason of the provisions of the State Masonic Code, its property would vest in the State Grand Lodge. To forestall such contingency, the then members, on 13 January, 1928, "voted to cut up the hall into shares, divide it up, issue shares to the members and give the brethren something they could have for the future." Accordingly, the Corporation, without amending the charter, issued shares of stock to each member of the Lodge in good standing and issued seven shares to the Lodge. And at said meeting of 13 January, 1928, the then members of the Lodge voted to have two treasurers, one to hold its regular funds and the other to hold the rents from said realty; and it was provided that "there be declared a semi-annual apportionment of funds accruing on the stock at the option of the certificate holding members only . . ." On 22 May, 1929, when it came to the attention of the brethren that the Corporation's charter provided that it was a non-stock corporation, the said charter was amended so as to provide: "That the authorized capital stock of this corporation is $5,325.00 divided into 106½ shares of the par value of $50.00 per share. Said shares of capital stock to be issued to members of Ionic Lodge Free, Ancient and Accepted Masons No. 72 Company only." Thereupon, new certificates of stock were issued and delivered in exchange for those first issued. The first issue was on 13 February, 1928. The second issue was on 24 May, 1929.

And, according to the referee's findings of fact, thereafter the Corporation managed the property; collected rents from the tenants; borrowed money for repairs and improvements on the building and executed deeds of trust as security; paid dividends on the stock to the holders of said certificates; and the Lodge paid rent to the Corporation from 1928 to 1947 for the use of the lodge facilities. Apparently, the ownership of said one-fourth undivided interest has been the subject of controversy since 1947.

The referee concluded that, upon his findings of fact, the Lodge was estopped to deny the validity of said transactions of 1928-1929; that the intervenors' cause of action, if any, is barred by (1) the pleaded statutes of limitation, (2) laches, and (3) estoppel; and that the members of the Lodge who became such after the transactions of 1928-1929 had no cause of action.

The intervenors, in apt time, excepted to each of the adverse findings of fact and conclusions of law made by the referee, and tendered appropriate issues of fact raised by the pleadings and by their exceptions to the findings of fact and demanded a jury trial on each issue so tendered.

When the cause came before Phillips, J., the court denied intervenors' said demand for a jury trial and proceeded to consider the evidence and pass upon each of the intervenors' said exceptions.

The court, while otherwise confirming and adopting all findings of fact made by the referee and overruling intervenors' exceptions thereto, made two additional findings of fact, viz.: The court found as a fact that the action taken by the Lodge on 13 January, 1928, was "by a vote of 13 for and 12 against, out of a total membership of approximately 60 members." The court further found as a fact: "That when the certificates of stock in the Respondent corporation were issued in 1928 and 1929 and distributed to the then members of the Ionic Lodge No. 72, Free, Ancient and Accepted Masons, the said members who received such certificates of stock paid no consideration and incurred no liability therefor, and that the entire transaction was without any consideration."

The court agreed with the referee in holding that in 1928 and prior thereto the Corporation held the legal title in trust for the Lodge and its members; but the court concluded that the facts found by the referee, as supplemented, were insufficient to establish respondent's said pleas in bar.

Accordingly, the court entered judgment in favor of intervenors, adjudging that the said $2,902.06 be paid to the Lodge for use "toward providing a lodge hall for the purposes of the Lodge."

Both respondent and intervenors excepted to the judgment and appealed therefrom.

The respondent brings forward two assignments of error, (1) to the signing and entry of the judgment, and (2) to the additional finding by the court (set out above) to the effect that the issuance of certificates to the then members was without consideration.

The judgment being in their favor, the appeal of the intervenors is conditional, that is, for consideration only in the event this Court, upon the findings of fact, should be of opinion that respondent should prevail. For consideration in such event, the intervenors perfect their appeal, bring forward their objections and exceptions to the reference and to the court's denial of their demand for a jury trial on the issues raised by the pleadings and by their exceptions to the referee's findings of fact.

William S. Mitchell for intervenors, appellants and appellees.

Ingle, Rucker & Ingle for respondent, appellant and appellee.

BOBBITT, J. A prior action, commenced 12 March, 1949, was instituted *sub nomine* Ionic Lodge #72 F. & A. A. M. against the respondent herein and others. It involved the identical realty and essentially the same controversy. *Ionic Lodge v. Masons*, 232 N.C. 252, 59 S.E. 2d 829; *S.c.* on rehearing, 232 N.C. 648, 62 S.E. 2d 73. The final decision affirmed dismissal of the action on the ground that under the statutory

provisions then in force the plaintiff lacked legal capacity to sue in its common or collective name. Prior to the enactment of the statute (1955) now codified as G.S. 1-69.1, to wit, on 26 November, 1952, the intervenors were made parties to this proceeding and thereupon pleaded in behalf of the Lodge and its members.

In considering *respondent's appeal,* we must assume the facts to be as found by the referee and by the court; and, upon these facts, *Lodge v. Benevolent Asso.,* 231 N.C. 522, 58 S.E. 2d 109, would control decision here. The facts in the cited case resemble closely the facts under consideration. The applicable principles of law are clearly and fully stated therein by *Ervin, J.*

Suffice to say: If *all* of the members of the Lodge at the time of the transactions of 1928-1929, and the Lodge itself in respect of said seven shares, accepted certificates of stock issued by the Corporation in exchange for their interest in the realty, and continuously thereafter until 1947 recognized the Corporation's ownership of the realty as set forth in the referee's findings of fact, the intervenors cannot prevail. The interest of the members of the Lodge in the property at the time of the transactions of 1928-1929 was a sufficient consideration for the issuance to them by the Corporation of said certificates of stock. The "finding of fact" made by the court, quoted above, to the effect that these transactions were without consideration, must be regarded an erroneous conclusion of law.

As to the intervenors' contention that the property owned by the Corporation was for use, under its charter, for charitable purposes only, suffice to say that the only question presented herein is *their* alleged ownership of it.

Since our decision on intervenors' appeal reopens the case as to the issues of fact, we refrain from further discussion as to the law applicable to the facts found by the referee and by the court.

We consider now the appeal of the intervenors. They seek to enforce equitable rights, that is, to establish a trust in real property. In such action, when "the matter or amount in dispute is not less than the sum or value of five hundred dollars," the court, of its own motion, may order a compulsory reference. G.S. 1-189(5); *Reynolds v. Morton,* 205 N.C. 491, 171 S.E. 781. But, in the absence of waiver, the parties to such action are entitled to a jury trial on the issues of fact raised by the pleadings. *Erickson v. Starling,* 235 N.C. 643, 654, 71 S.E. 2d 384, and cases cited.

The intervenors have complied carefully with all procedural requirements to preserve their right to a jury trial. *Bartlett v. Hopkins,* 235 N.C. 165, 69 S.E. 2d 236; *Brown v. Clement Co.,* 217 N.C. 47, 6 S.E. 2d 842; *Booker v. Highlands,* 198 N.C. 282, 151 S.E. 635. Indeed, a stipulation to that effect appears in the record.

The intervenors insist that, when the respondent interposed its said pleas in bar, they were entitled to a jury trial on the issues raised thereby before the court had authority to order a compulsory reference; and that, since the order of reference was erroneously made, the proceedings before the referee should be set aside and the cause remanded for trial *de novo* before a jury on the issues raised by respondent's said pleas in bar. If the position is otherwise sound, *Ward v. Sewell*, 214 N.C. 279, 199 S.E. 28, is authority for intervenors' right to invoke the rule of law upon which the position is based.

This Court has held repeatedly that "a plea in bar which extends to the whole cause of action so as to defeat it absolutely and entirely will repel a motion for a compulsory reference and no order of reference should be entered until the issues of fact raised by the plea is first determined." *Brown v. Clement Co., supra*, and cases cited. And, estoppel, laches, and statutes of limitation have been held to constitute such pleas in bar. *Grady v. Parker*, 230 N.C. 166, 52 S.E. 2d 273; *Graves v. Pritchett*, 207 N.C. 518, 177 S.E. 641; *Garland v. Arrowood*, 172 N.C. 591, 90 S.E. 766; *Bank v. Evans*, 191 N.C. 535, 132 S.E. 563; *Oldham v. Rieger*, 145 N.C. 254, 58 S.E. 1091; *Duckworth v. Duckworth*, 144 N.C. 620, 57 S.E. 396.

Even so, it seems appropriate, in respect of a case such as this, to consider the reason underlying the stated rule and the limits of its application; and in doing so we advert to the fact that the rule rests upon court decisions, not upon statute.

In limine, attention is called to the fact that the sole purpose of the intervenors' action was to establish a trust in real property; presently, it is to recover said fund of $2,902.06. It is not alleged that they are entitled to an accounting, for rents collected by the Corporation or otherwise.

The rule under consideration had its origin in actions on an account or for an accounting. This Court held that a plea in bar, *e.g.*, a plea of full settlement, should be disposed of before an order of compulsory reference was made. The obvious reason was that, if the plea was established, only delay, expense and futility would result from an inquiry to determine *the exact amount* otherwise due by defendant to plaintiff.

The rule was adopted prior to the enactment of The Code. *Royster v. Wright*, 118 N.C. 152, 24 S.E. 746; *Dozier v. Sprouse*, 54 N.C. 152; *Douglas v. Caldwell*, 64 N.C. 372. After enactment of The Code, the rule was continued in effect. *Royster v. Wright, supra; Price v. Eccles*, 73 N.C. 162; *Smith v. Barringer*, 74 N.C. 665; *R. R. v. Morrison*, 82 N.C. 141; *Cox v. Cox*, 84 N.C. 138; *Sloan v. McMahon*, 85 N.C. 296; *Neal v. Becknell*, 85 N.C. 299; *Commissioners v. Raleigh*, 88 N.C. 120; *Clements v. Rogers*, 95 N.C. 248; *Jones v. Beaman*, 117 N.C. 259, 23

S.E. 248; *Jones v. Wooten,* 137 N.C. 421, 49 S.E. 915; *Haywood County v. Welch,* 209 N.C. 583, 183 S.E. 727; *Grimes v. Beaufort County,* 218 N.C. 164, 10 S.E. 2d 640; *Lithographic Co. v. Mills,* 222 N.C. 516, 23 S.E. 2d 913; McIntosh, N. C. P. & P. sec. 523, op. cit. Second Edition, sec. 1394.

As stated by *Ashe, J.,* in *Cox v. Cox, supra:* "When a case involves both an account and the trial of an issue by a jury, they cannot be investigated at the same time—the one must precede the other—and it would be needless to increase the expense and trouble by a reference, when the case might result adversely to the plaintiff upon the finding of the jury." In such case, if the plea in bar is decided adversely to the defendant, there remains for determination, by reference or otherwise, the separate phase of the controversy, to wit, the exact amount due on the account or upon an accounting. In later cases, the rule is expressed as follows: "If the plaintiffs are not entitled to recover at all, it is useless to ascertain *what amount* they might recover if they had an enforceable cause of action." (Italics added.) *Stacy, C. J.,* in *Grady v. Parker, supra; Preister v. Trust Co.,* 211 N.C. 51, 188 S.E. 622; *Bank v. Fidelity Co.,* 126 N.C. 320, 35 S.E. 588.

An examination of the decisions cited above and others in which the stated rule has been applied involved situations in which, if the plea in bar were decided adversely to defendant, there remained a controversy as to the amount. In *Alston v. Robertson,* 233 N.C. 309, 63 S.E. 2d 632, an action in ejectment, while no reference thereto is made in the reported case, the record therein discloses that plaintiff's action also was to recover the reasonable rental value of the land as damages on account of defendant's alleged wrongful possession. See: *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692.

In an action on an account, or for an accounting, or other action where plaintiff's claim is a composite of various items, there are two separate and distinct controversies: first, the plea in bar, which if established would preclude plaintiff entirely; and second, the exact amount of plaintiff's recovery in the event the issue arising on defendant's plea in bar is decided in plaintiff's favor. The fundamental idea is to avoid two separate trials when one *may* suffice to terminate the litigation.

But here the intervenors' cause of action is entire and indivisible. The sole issue is whether they can establish the alleged trust. Manifestly, they must prevail entirely or not at all. To establish the trust and to defeat respondent's pleas in bar, they must rely on substantially the same evidence. To apply the rule, under the circumstances disclosed here, would forsake the reason therefor; for to do so would raise the possibility of two separate and distinct trials when it appears clearly that one *will* suffice to dispose of the entire controversy.

Hence, the cause being a proper one for a compulsory reference, we conclude that the order of compulsory reference, under the pleadings herein, was not erroneous because of respondent's pleas in bar.

Even so, the order of compulsory reference does not deprive the intervenors of their constitutional right to a jury trial on the issues of fact raised by the pleadings and by their exceptions to the referee's findings of fact. However, such trial is only upon the written *evidence* taken before the referee. The referee's report, consisting of his findings of fact and conclusions of law, are not competent as evidence before the jury. *Moore v. Whitley,* 234 N.C. 150, 66 S.E. 2d 785, and cases cited.

Respondent asserts that the intervenors' cause of action is barred by *the undisputed evidence.* But, as stated above, the evidence is not before us. By stipulation, except for a fragment thereof, it was not brought forward. Moreover, as to estoppel, the burden of proof is on the respondent. *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745. As to laches, no conclusion of law in respondent's favor can be reached otherwise than on the particular facts disclosed either by the intervenors' *evidence* or established by the jury. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83. And, with reference to the pleaded statutes of limitation, if and when the trust is established, the limitation begins to run as of the date it is shown the trust was in some manner repudiated. *Teachey v. Gurley, supra; Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806; *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289. Whether, upon the evidence taken before the referee, the respondent is entitled to peremptory instructions on the issues raised by all or any of its pleas in bar, is a matter to be passed on by the trial judge before whom the case comes for jury trial.

The foregoing disposition requires that the judgment of the court below be vacated. It is so ordered. And the cause is remanded for jury trial as indicated above.

Judgment vacated and cause remanded.

JOHNSON, J., not sitting.

A. C. JORDAN, FOR AND ON BEHALF OF HIMSELF AND OTHER RESIDENTS AND TAXPAYERS OF THE HOPE VALLEY SCHOOL DISTRICT OF DURHAM COUNTY v. THE BOARD OF COMMISSIONERS FOR DURHAM COUNTY, GEORGE F. KIRKLAND, FRANK H. KENAN, DEWEY S. SCARBORO, S. LEROY PROCTOR AND EDWIN B. CLEMENTS AND THE DURHAM COUNTY BOARD OF ELECTIONS, JOHN E. MARKHAM, O. C. WELLS AND J. D. BOBBITT.

(Filed 11 January, 1957.)

Schools § 3a—

Where a proper petition, signed by a majority of the qualified voters of an area less than a school district, for the annexation of the area to an adjoining city administrative unit, is approved by such city unit, the commissioners of the county have the ministerial duty, enforceable by *mandamus*, to call an election upon the question, even though the county board of education does not approve the petition, since the approval of the county board is necessary only in the absence of such petition. G.S. 115-116(3), G.S. 115-120, G.S. 115-121, G.S. 115-118. Continuance of a temporary order restraining the holding of such election is error.

JOHNSON, J., not sitting.

BOBBITT, J., dissenting.

RODMAN, J., dissenting.

APPEAL by defendants from *Mallard, J.*, May Term 1956 of DURHAM.

This is an action instituted in the Superior Court of Durham County by the plaintiff, A. C. Jordan, for and on behalf of himself and other (unnamed) residents and taxpayers of the Hope Valley School District of Durham County, against the defendants.

In September 1955, the Durham City School Board received a petition requesting that, pursuant to G.S. 115, Subchapter V, Article 14, an election be called to ascertain the will of the voters in the area designated by the petition regarding the enlargement of the Durham City School Administrative Unit. After due consideration, the Board, on 12 September 1955, approved the petition by endorsement of its chairman and secretary and recorded it in its minutes. The petition fully complied with G.S. 115-116(3); 115-118; 115-119 in that it contained the following:

(1) A statement of the purpose of calling the proposed election—namely, to ascertain the will of the voters in the area as to whether the affected area should be consolidated with and annexed to the Durham City School Administrative Unit and whether there should be levied a special tax of the same rate as that in the Durham City School Administrative Unit.

(2) A description of the area, by metes and bounds, in which the proposed election was requested.

(3) That the maximum rate of tax proposed to be levied was 40 cents per 100 dollar valuation.

(4) That if a majority of those who voted thereon in such new territory voted in favor of a "local tax of the same rate" the said territory should become part of the Durham City School Administrative Unit, and that the term "local tax of the same rate" included in addition to the 40 cents current expense levy any tax levy to meet the interest and sinking funds of any school bonds heretofore issued by the Durham City School Administrative Unit.

(5) That the area proposed to be annexed to the Durham City School Administrative Unit is adjacent to said unit and could be included in a common boundary with said unit.

(6) That the petition was duly signed by a majority of the qualified voters who had resided for the preceding twelve months in the affected area.

The petition, as endorsed and approved by the Durham City School Board, was presented to the Durham County Board of Education on 3 October 1955, which, after due consideration of it, refused to endorse and approve same.

The Board of Commissioners of Durham County received the petition on 17 October 1955, and after full consideration thereof, adopted a resolution on 19 April 1956 calling for a special school election, as requested in the petition, to be held on 29 May 1956, in the affected area, pursuant to G.S. 115-120 and 115-121.

The plaintiff obtained a temporary restraining order on 24 April 1956 to the effect that the "defendants herein be and they are hereby restrained, enjoined and forbidden until further orders of this court, to further proceed with the preparation for or the holding of said election and that the said defendants are hereby forbidden to do anything toward the preparation for and holding of said election until further ordered by this court."

Upon notice to the defendants to show cause, if any, why the temporary restraining order should not be continued until the final hearing of this action, the court at the hearing on 10 May 1956 continued the restraining order until the final hearing. The defendants appeal, assigning error.

Reade, Fuller, Newsom & Graham for defendant appellants.

No counsel for plaintiff appellee.

DENNY, J. No question has been raised as to the form or substance of the petition, the endorsement of it by the Durham City School Board, or the validity of the signatures or the fact that such signatures are

those of a majority of the qualified voters who resided in the affected area for the required length of time. The sole issue in this case is whether the Board of Commissioners of Durham County had authority to call an election in the affected area in spite of the fact that the petition had not been endorsed by the Durham County Board of Education.

The pertinent parts of the relevant statutes read as follows:

"To Enlarge City Administrative Units and Districts. Elections may be called in any district or districts, or other school areas, of a county administrative unit to ascertain the will of the voters in such areas as to whether there shall be levied a special tax of the same rate as that voted in an adjoining city administrative unit or district with which unit or district such territory is to be consolidated." G.S. 115-116(3).

"The board of education to whom the petition requesting an election is addressed shall receive the petition and give it due consideration. If, in the discretion of the board of education, the petition for an election shall be approved, it shall be endorsed by the chairman and the secretary of the board and a record of the endorsement shall be made in the minutes of the board. Petitions for an election to enlarge a city administrative unit shall be subject to the approval and endorsement of both county and city board of education which are therein affected: *Provided, that when such petition is endorsed by the city board of education and signed by a majority of the voters in the affected area, the election shall be called.*" G.S. 115-120. (Emphasis added.)

"Petitions requesting special school elections and bearing the approval of the board of education of the unit shall be presented to the board of county commissioners, and it shall be the duty of said board of county commissioners to call an election and fix the date for the same." G.S. 115-121.

G.S. 115-118 sets out various ways by which such petitions may be presented to the county board of commissioners, to wit: "County and city boards of education may petition the board of county commissioners for an election in their respective administrative units or for any school area or areas therein.

"In county administrative units, for any of the purposes enumerated in G.S. 115-116, the school committee of a district or a majority of the committees in an area including a number of districts, or a majority of the qualified voters who have resided for the preceding twelve months in a school area less than a district, and which area is adjacent to a city unit or a district to which it is desired to be annexed and which can be included in a common boundary with said unit or district. . . ."

It would seem necessary to have the petition for an election approved by both the county and the city board of education in order to authorize the county board of commissioners to call the election as requested in

the petition, except where "a majority of the qualified voters who have resided for the preceding twelve months in a school area, less than a district, and which area is adjacent to a city unit or district to which it is desired to be annexed and which can be included in a common boundary with said unit or district," it is only necessary that the city board of education endorse the petition. G.S. 115-120.

In our opinion, upon the facts disclosed on this record, the duty imposed on the Board of Commissioners of Durham County, under G.S. 115-121, to call the election, is purely ministerial and might be enforced, in the event of a refusal to do so, by *mandamus*, and we so hold. *Board of Education v. Commissioners*, 189 N.C. 650, 127 S.E. 692.

The court below committed error in granting the temporary restraining order in this action, as well as in ordering the continuance of such order until the final hearing. The restraining order is hereby dissolved and the action will be dismissed.

Reversed.

JOHNSON, J., not sitting.

BOBBITT, J., dissenting: I agree with the Court's interpretation of the proviso in G.S. 115-120; but, as I see it, neither the findings of the court below nor the evidence sufficiently identifies the "affected area" as a "school area" or a "school area less than a district" within the meaning of these terms as used in G.S. 115-116(3) and G.S. 115-118.

The "affected area" is identified only as "the Lakewood-Rockwood" section of the Durham County Hope Valley School District. The record contains no plat or description disclosing the metes and bounds of the "affected area." The majority of the qualified voters in this "affected area" signed the petition; and the election would be confined to this "affected area." Whatever may be the precise meaning of "school area" or "school area less than a district," I am convinced that these terms contemplate more than *any* area adjoining the City of Durham, irrespective of size, shape or relationship to present school facilities. Hence, in my opinion, the showing made in the court below was not sufficient to bring this case within the proviso of G.S. 115-120; and for that reason I vote to affirm.

RODMAN, J., dissenting: My examination of our statutes dealing with public education convinces me that the opinion of the majority does not conform to legislative intent and is apt to create serious problems in our effort to provide an adequate system of public education for all our children—both urban and rural.

A petition asking for an election on the question of amputating "an area known as the Lakewood-Rockwood section of the Durham County Hope Valley School District" and skin grafting this area to Durham City Administrative Unit has been approved by the city unit, notwithstanding the objections and protests made by the Durham County Administrative Unit.

In view of the objections and protests, it is only fair to assume that the proposed amputation will create problems for the body from which the limb is to be severed. The scope and extent of those problems are not delineated in the record, but no vivid imagination is required to visualize some which are apt to arise.

But the fact that the proposed severance will create problems is no justification for denying it if authorized by law. The undeniable fact that serious administrative problems will be created merely emphasizes the need for careful examination of the law which is claimed as authority for the operation.

It is said that the petition asking for the election "fully complied with G.S. 115-116(3); 115-118; 115-119 in that it contained the following:" Then follows an enumeration of six particulars in which the petition is said to meet the requirements of the statutes. There is missing from the enumeration the basic fact on which the petition must rest, a designation of the area. Petitions may be filed for and elections held in "any district or districts, *or* other *school areas*," G.S. 115-116(3). (Emphasis supplied.)

"In county administrative units, for any of the purposes enumerated in G.S. 115-116, the school committee of a district, or a majority of the committees in an area including a number of districts, or a majority of the qualified voters who have resided for the preceding twelve months in *a school area* less than a district . . ." may file a petition. G.S. 115-118. (Emphasis supplied.)

Thus it appears by express statutory language that elections can only be held in (1) an administrative unit, (2) a school district, (3) an area including several districts, or (4) a *school area* less than a district.

Unless the area in which it is proposed to hold the election can qualify under one of these four classifications, there is no authority for the proposed amputation, and the election should not be held.

It is readily apparent that the area cannot meet the descriptive test of any of the first three classes.

An administrative unit is either county or city. It is set up for convenience in administering State funds and policies. G.S. 115-4.

The term "district" as used in the State school law is "defined to mean any convenient territorial division or subdivision of a county, created for the purpose of maintaining within its boundaries one or more public schools. It may include one or more incorporated towns

or cities, or parts thereof, or one or more townships, or parts thereof, all of which territory is included in a common boundary." G.S. 115-7.

The Constitution vests the State Board of Education with authority to divide the State and counties into school districts, Art. IX, sections 3 and 9.

The only remaining unit in which an election can be held is "a school area." G.S. 115-116 & 118. What is a school area? The statutes do not expressly define the term, but I think when we look at the whole school law and look for the reasoning back of the legislation we should have no difficulty in determining what areas the Legislature had in mind.

In our effort to provide better school facilities, local school units had, during the 1920s, created school obligations beyond their ability to meet. After a protracted session, the 1933 Legislature made provision for a uniform, statewide school system. It provided funds to operate all the schools on a standard fixed by it. It abolished all school districts, special tax districts, and special charter districts for administrative and tax purposes. P.L. 1933, c. 562. Each county was declared a school administrative unit. Authority was granted the State School Commission to set up city administrative units, c. 562, P.L. 1933, G.S. 115-11(11). The State School Commission was required, upon recommendations of local boards of education, to divide each county into a convenient number of school districts, G.S. 115-11(3). By definition, a school district may comprise one or more townships. A district may have only one school in it, or it may have several schools in it. The size of the districts and the number of schools in each district vary in accord with local conditions. It is a fact of which judicial notice may be taken that many districts have more than one school and in many districts there are several schools. It is necessary to make provision for the operation of each of these schools and the assignment of pupils to a particular school. Appropriately the Legislature gave to county boards of education authority to set up attendance areas, G.S. 115-35. Was it not these attendance areas which the Legislature had in mind when it authorized an election in a "school area less than a district"? As noted, there is no statutory definition of "school area," but assuredly the word "school" when used to modify the word "area" should be given some significance. The phrase occurs too often to assume that it was accidental and without significance. See G.S. 115-116(1)(3)(5), 115-118, 115-76.

If "school area" merely means an area which a group of patrons may wish to take out of the school system set up for them and into another school system, it is the only instance in the school law where a few can effectively disrupt the administration of our public school system. Will the annexation proposed and approved by Durham City Schools neces-

sitate the abandonment of a High School in Hope Valley? It must maintain an average daily attendance of at least sixty if it is to keep its high school, G.S. 115-76. Teachers are allotted on the basis of average daily attendance. What effect will the change have on the allotment of teachers? What transportation problems will arise to plague the State School Commission as well as the Durham County Board of Education? These merely illustrate some of the problems certain to arise out of the Pandora Box which I think is now being opened.

I call attention to G.S. 115-77 which permits "real property" contiguous to a city administrative unit to be annexed to the city under these conditions: (1) the city board must approve; (2) the State Board of Education must give its approval; (3) the county board must approve; (4) there must be unanimous approval of the owners of the property and of the taxpayers of each family living on such property. Thus provision is made for annexation of an area less than a "school area." It will be noted that when an area less than a district or "school area" is transferred, all of the boards responsible for the administration of our public school system are required to give their consent; but if the law is as the majority interprets it, a part of Hope Valley can be detached without the approval of the State Board of Education or Durham County Board of Education, leaving what had been Hope Valley and its attendant problems in the lap of the Durham County Board of Education who has protested in vain.

"School area," as I read the law, is an area served by a particular school. When it is detached, the whole must be taken, not merely a part. An area defined by bounds, but not a "school area," wants to hold the election. There is in my opinion no authority for it.

It may be that I see dangers where none exist, but I am impressed with the problems growing out of an effort to provide education for more than a million children under the diverse conditions which exist in North Carolina. The State expends annually for that purpose in excess of $125,000,000. Local communities make substantial supplemental appropriations. If we are to effectively maintain and operate our schools for the benefit of all children—rural as well as urban—it must be a carefully planned operation. When a plan has been developed, it cannot be changed to gratify the whim of a few.

If the decision carries, as I think, hazard to our school system, and particularly the rural school, the Legislature, soon to convene, can correct the situation.

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION v. FLOYD CASEY, JR., ROBERT S. SULLIVAN AND OTHERS, PROTESTANTS, AS SHOWN IN THE RECORD.

(Filed 11 January, 1957.)

1. Utilities Commission § 2—

The Utilities Commission has the jurisdiction and the duty to pass upon a contract between a power company and a municipality which maintains its own electric generating and distributing system, under which the city proposes to purchase the power company's facilities for electric service to an area annexed by the city. G.S. 62-27, G.S. 62-29, G.S. 62-96.

2. Same: Electricity § 4—Public utility may, with the approval of the Utilities Commission, sell to a municipality facilities for servicing territory annexed by the municipality.

A power company and a municipality maintaining its own electric generating and distributing system contracted for the sale to the city of the power company's equipment and facilities for furnishing electric service in an area annexed by the city. Protestants, residents of the annexed area, objected on the ground that the municipal electric rates were higher than those of the power company. The Utilities Commission approved the contract and issued its order for the sale upon its finding that the transfer was in accord with the public convenience and necessity, it being specifically found that the municipal facilities were adequate and so situated as to serve properly all residents within the annexed territory. *Held:* The public convenience and necessity involved relates to the public and not to an individual or individuals, and the order of the Commission authorizing and directing the sale of the facilities upon its findings, supported by evidence, was properly affirmed.

3. Utilities Commission § 5—

By provision of statute, an order of the Utilities Commission is *prima facie* just and reasonable. G.S. 62-26.10.

JOHNSON, J., not sitting.

APPEAL by protestants from *Bone, J.*, February Civil Term 1956 of LENOIR.

This is a proceeding instituted before the North Carolina Utilities Commission (hereinafter called the Commission) by the Carolina Power and Light Company (hereinafter called the Power Company) on 25 February 1955.

The essential facts found by the Commission are as follows:

1. That prior to 29 February 1952 the Spence Drive and Lawrence Hill Sections, then outside the corporate limits of the City of Kinston, were served by the Tidewater Power Company; that the Tidewater Power Company extended service to these areas at the request of the City of Kinston because at that time the City's generating facilities

were inadequate to provide proper service to these and other sections outside of its corporate limits.

2. That on 29 February 1952, the Power Company acquired by purchase all of the properties of the Tidewater Power Company, and as owner continued to provide electric service to all sections theretofore served by the Tidewater Power Company, including the Spence Drive and Lawrence Hill sections now within the corporate limits of the City of Kinston.

3. That by an ordinance duly passed by the City of Kinston, which became effective on 9 April 1952, as authorized by Article 36 of Chapter 160 of the General Statutes of North Carolina, the City of Kinston annexed and incorporated within its corporate limits the areas referred to herein as the Spence Drive and Lawrence Hill Sections.

4. That the City of Kinston owns and operates its own electric generating plant and electric distribution system as it is authorized to do by Chapter 160, Section 282 of the General Statutes.

5. That the Power Company does not have and never has had any franchise from the City of Kinston to distribute and sell electricity to any citizen residing within the corporate limits of the City of Kinston.

6. That the Power Company, realizing that it had no authority from the City of Kinston to serve electrically customers within the City of Kinston, entered into a contract on 20 January 1955 (which is a part of the record) to sell all of its electric distributing facilities and distribution system within the corporate limits of Kinston to the City of Kinston for the price of $20,000, subject to the approval of the Commission.

7. That if said contract of sale is approved, there will be no cessation of electric service to the customers now served by the Power Company as the electric lines are so located that the City of Kinston can immediately connect same with its own distribution system.

8. That the rates charged by the Power Company are lower than the rates charged by the City of Kinston.

9. That the City of Kinston receives 65% of its revenue from the sale of electricity, a large part of which is used to provide street improvements, street lighting, water and sewerage, playgrounds, and recreational facilities, and police and fire protection, all of which services are available to the annexed areas in question.

10. That the City of Kinston owns and operates its own electric generating plant as well as distribution facilities for the sale of power and electrical energy to its residents and customers, and the said City of Kinston in the operation of its own public utility for such purposes is in a position to provide proper, sufficient and adequate electric service to the residents and consumers of the Spence Drive and Lawrence Hill Sections and desires to do so.

11. That public convenience and necessity do not require and are no longer served by the ownership and operation by the Power Company of its electrical distribution system leading to and within the said Spence Drive and Lawrence Hill Sections which are now within the corporate limits of the City of Kinston.

12. That the City of Kinston has agreed to purchase all the electrical distributing facilities and distribution system of the Power Company within the Spence Drive and Lawrence Hill areas; that the agreement for the purchase and sale of these facilities is made a part of these findings of fact; that said sale is for a reasonable and adequate consideration, in the public interest, and that public convenience and necessity require that said sale should be made to the end that the City of Kinston may furnish adequate service to the areas heretofore annexed and referred to and to the end that all of the customers within the present corporate limits of the City of Kinston, including the annexed areas, may receive adequate and proper electrical service.

From the foregoing findings of fact, the Commission concluded as a matter of law:

"(a) That the Carolina Power and Light Company has no franchise or any certificate of public convenience and necessity to operate within and furnish electrical energy and services to the residents and customers residing within the corporate limits of the City of Kinston, and upon annexation of the areas heretofore referred to, the Company's certificate of public convenience and necessity ceased to exist and should be formally discontinued; that the Carolina Power and Light Company under the statutes and laws of the State of North Carolina cannot acquire any right, authority, franchise or certificate of public convenience and necessity to furnish electrical energy and services to consumers and residents within the corporate limits of the City of Kinston since the City of Kinston owns its own facilities for the generation and distribution of electrical energy and has the legal right to distribute and furnish electrical energy and services to consumers and residents within its corporate limits and within the territories annexed to the said corporate limits as the same have been and may be extended from time to time.

"(b) That under the statutes of the State of North Carolina, as well as the laws of said State, the City of Kinston is authorized to own and operate its own plant and facilities for the generation and distribution of electrical energy and services to the consumers and residents within its corporate limits, and as long as the said City of Kinston continues to operate its said plant and to serve its residents and consumers no privately owned or managed public utility can acquire any authority, franchise or certificate of public convenience and necessity to operate, generate and/or sell or serve residents and consumers with electrical

energy services within the said corporate limits of the said City of Kinston.

"(c) That inasmuch as the said City of Kinston maintains its own facilities for the generation and distribution of power or electrical energy to its consumers and residents within its corporate limits, and inasmuch as the City of Kinston has adequate facilities and is so situated that it can adequately and properly serve all of the consumers and residents within its corporate limits, including these protestants, and said services can and will be furnished at reasonable rates, public convenience and necessity is no longer required and is no longer served by the ownership and operation of the Carolina Power and Light Company of its electrical distribution system within the corporate limits of the said City of Kinston, and the same should be discontinued and the sale of said distribution facilities to the said City of Kinston as set forth in the proposed contract should be, and is hereby, in all things approved and confirmed, and said sale is authorized and as a matter of law is held to be in accord with public convenience and necessity in the interest of the public, including the protestants and all consumers and residents within said corporate limits of the said City of Kinston."

An appropriate order was entered by the Commission on 4 October 1955 authorizing the Power Company to transfer, sell and assign to the City of Kinston its electrical distribution system within the areas of the Spence Drive and the Lawrence Hill Sections of the City of Kinston, in accordance with the provisions of the contract entered into between the Power Company and the City of Kinston.

The protestants filed a petition to rehear, which was denied. Whereupon, they appealed to the Superior Court upon the exceptions which had been overruled by the order denying the petition to rehear.

In the hearing in the Superior Court upon the record as certified by the Commission to the Superior Court of Lenoir County, his Honor found and concluded "that the findings of fact and conclusions of law, with the exception of the two conclusions of law contained in separate paragraphs designated as (a) and (b), of the Commission's order dated October 4, 1955, are supported by competent, material and substantial evidence upon consideration of the whole record, and they and said order should be approved and affirmed; and that said two conclusions of law contained in separate paragraphs designated as (a) and (b) are not relevant to the determination of this appeal."

Judgment confirming the order of the Commission was entered and the protestants appeal therefrom, assigning error.

Charles F. Rouse, attorney for Carolina Power and Light Company, appellee.

Jones, Reed & Griffin, attorneys for protestants, appellants.
George B. Greene, Amicus Curiae.

DENNY, J. The City of Kinston is not a formal party to this proceeding. However, in addition to the facts found by the Commission, it appears from the evidence introduced in the hearing below that the City of Kinston serves through its electric distribution system approximately 8,700 customers within its corporate limits, and about 2,400 customers outside its corporate limits. It further appears, if the agreement entered into by and between the City of Kinston and the Power Company on 20 January 1955 is consummated it will mean the transfer of 238 customers of the Power Company who reside in the Spence Drive and Lawrence Hill Sections to the City of Kinston.

It is conceded by the City of Kinston, appearing by counsel *amicus curiae,* and by the Power Company, that the City and the Power Company are equally equipped and qualified to furnish electric power and energy to the citizens living in the Spence Drive and Lawrence Hill areas.

In addition to the payment of the sum of $20,000 by the City of Kinston to the Power Company for the purchase and transfer of the facilities referred to herein, the City as a further consideration therefor, according to the contract, has agreed to give the Power Company an extension of its present franchise or permit for a period of thirty years for the continued maintenance and operation of certain of its power lines along and across certain designated streets and other public places within the corporate limits of the City of Kinston, which lines serve the Power Company's substations located in or near the City of Kinston.

It also appears from the record in this proceeding that since the Spence Drive and Lawrence Hill Sections were incorporated within the corporate limits of the City of Kinston in 1952, the City has expended approximately $100,000 for water, sewer, and other municipal improvements within said areas.

The City of Kinston does not concede the right of the Power Company to serve customers within its corporate limits without a franchise from the City, and the Power Company does not concede that the action of the City by incorporating the areas involved within its corporate limits, canceled or abrogated its right to continue its service in said areas. Consequently, in order to avoid a legal controversy between the parties, the agreement involved in this proceeding was entered into.

In our opinion, this appeal turns upon the answer to this question: Does the Power Company, with the consent and approval of the Commission, have the right to sell the facilities involved herein for the consideration set forth in its agreement with the City of Kinston, and thereby permit the City of Kinston to assume the obligation for meeting

the public convenience and necessity for the service heretofore rendered by the Power Company? This question, in our opinion, must be answered in the affirmative.

G.S. 62-27 provides: "The Utilities Commission shall have general power and control over the public utilities and public service corporations of the State, and such supervision as may be necessary to carry into full force and effect the laws regulating the companies, corporations, partnerships, and individuals hereinafter referred to, and to fix and regulate the rates charged the public for service, and to require such efficient service to be given as may be reasonably necessary."

In addition to the powers given to the Commission in Chapter 62 of the General Statutes of North Carolina, the General Assembly has expressly given the Commission certain implied powers as follows: "The Utilities Commission shall also have, exercise, and perform all the functions, powers, and duties and have all the responsibilities conferred by this article, and all such other powers and duties as may be necessary or incident to the proper discharge of the duties of its office." G.S. 62-29.

G.S. 62-96 provides: "Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a utility realizing sufficient revenue from the service to meet its expenses, the Commission shall have power, after petition, notice and hearing, to authorize by order any utility to abandon or reduce its service or facilities."

In our opinion, these statutes give the Commission not only the authority but impose upon it the duty to pass upon such contracts as the one under consideration and to determine whether or not it is in the public interest to permit their consummation.

"The doctrine of convenience and necessity has been the subject of much judicial consideration. No set rule can be used as a yardstick and applied to all cases alike. This doctrine is a relative or elastic theory rather than an abstract or absolute rule. The facts in each case must be separately considered and from those facts it must be determined whether or not public convenience and necessity require a given service to be performed or dispensed with. . . . The convenience and necessity required are those of the public and not of an individual or individuals." *Illinois Cent. R. Co. v. Illinois Commerce Commission*, 397 Ill. 323, 74 N.E. 2d 545; *Utilities Commission v. R. R.*, 233 N.C. 365, 64 S.E. 2d 272; *Utilities Commission v. R. R.*, 238 N.C. 701, 78 S.E. 2d 780.

Public convenience and necessity as it relates to the situation involved in this proceeding, was a question to be determined by the Commission in light of existing circumstances, including the ability of the City of Kinston to meet the public need for the services involved.

Utilities Commission v. Trucking Co., 223 N.C. 687, 28 S.E. 2d 201, and cited cases.

In the hearing below, the protestants offered no evidence except certain exhibits for the purpose of showing that electric rates of the City of Kinston are higher than those of the Power Company. The ability of Kinston to serve the areas satisfactorily otherwise was not challenged.

Certainly the mere fact that the rates of the Power Company are lower than those established by the City of Kinston is not determinative of what is for the best interest of the public as a whole, including the protestants. Neither does it have any material bearing on the question of public convenience and necessity. Moreover, according to the record, the citizens and residents of the Spence Drive and Lawrence Hill Sections were not brought within the corporate limits of the City of Kinston against their will, but at their request. Even so, the procedure followed in this respect has no legal bearing on the question or questions posed on this appeal.

In the case of *City of Indianapolis v. Consumers' Gas Trust Co.* (C.C.A., 7th Cir.), 144 F. 640, *certiorari* denied, 203 U.S. 592, 51 L. Ed. 331, the Court said: "In none of the citations, state or general, are there any reasons stated that seem inconsistent with the proposition that a corporation, engaged in a service of public utility, may contract for a sale to the municipality of all its property therein, either through a condition accepted in the franchise from the city, or through subsequent arrangement. The question whether municipal ownership is favorable to the public interest, is neither involved in, nor open to judicial inquiry."

In the 1935 Supplement to section 450, 2 Pond, Public Utilities, 4th Ed., it is said: "Where the consent of the public utility commission is necessary to the sale of the plant or its product which is necessary to render its service to the public, this consent is essential, and any attempt to make such a disposition independently of the commission exceeds the power of the public utility, and any agreement to that effect is of no force," citing *Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295, 30 P. 2d 30.

In the case of *Sweetheart Lake, Inc., v. Light Co.*, 211 N.C. 269, 189 S.E. 785, this Court, speaking through *Connor, J.*, said: "When a public service corporation, engaged in business as a public utility, has furnished service to a customer through a period of years, the customer is entitled to a continuance of such service, or in the event of a temporary suspension of such service, for good cause, to its restoration, without having first obtained an order to that effect from the State Utilities Commission. In such case, the public service corporation has no legal right to refuse to continue or to restore such service *without having*

first obtained an order to that effect from the State Utilities Commission." (Emphasis added.) 73 C.J.S., Public Utilities, Section 8, page 1001, *et seq.*

We hold the convenience and necessity involved in determining whether one utility or another will provide a specific service relates to the public and not to an individual or individuals. *Illinois Cent. R. R. Co. v. Illinois Commerce Commission, supra.*

The Commission has found that public convenience and necessity are no longer served by the ownership and operation of the Power Company of its electrical distribution system within the corporate limits of the City of Kinston. And by statute, an order of the Commission is *prima facie* just and reasonable. G.S. 62-26.10; *Utilities Commission v. Ray,* 236 N.C. 692, 73 S.E. 2d 870.

Moreover, the essential and pertinent findings of fact by the Commission are supported by uncontradicted evidence which is competent, material and substantial. Therefore, the judgment of the court below will be upheld.

Affirmed.

JOHNSON, J., not sitting.

STATE v. RALPH BURGESS, WAYNE WATSON, NEIL DAVIS, TRAVIS TRIPLETT AND FRANK MARTIN.

(Filed 11 January, 1957.)

1. Criminal Law § 8b—

An aider or abettor is one who, being present, encourages, aids or assists the commission of a crime, or who is present for such purpose to the knowledge of the actual perpetrator, or who, whether present or not, instigates or procures another to commit the offense.

2. Criminal Law § 52a(1)—

Upon motion to nonsuit, the evidence must be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable inference to be drawn therefrom.

3. Assault and Battery § 14—Evidence held sufficient for jury on question of defendant's guilt as aider and abettor.

The State's evidence tended to show that the prosecuting witness was entrusted with a large sum of money by his employer for the purpose of buying a truck load of whiskey in another state, that the money was lost on the trip, and that upon the return of the witness he was taken by the other defendants to a secluded cabin and repeatedly beaten and hung by his wrists from the rafters while his hands were handcuffed behind him.

The evidence further tended to show that he was advised he was being beaten because of the lost money, that his employer visited the cabin while he was hanging to the rafters and made a statement to the effect that he thought the witness had taken the money, that the employer thereafter told the witness' wife that he did not know where the witness was, and later that night drove to her home and told her the witness was in jail charged with taking the money and giving it to her, that the employer thereafter again visited the cabin and conferred with some of the assailants, and that shortly after the employer left, the prosecuting witness was driven to his home in his own car. There was no evidence that any defendants other than the employer suffered financial loss by reason of the disappearance of the money. *Held:* The evidence supports the view that the employer was the instigator of the crime and procured his codefendants to commit the offense, and his motion to nonsuit was properly denied.

4. Criminal Law § 81c(2)—

Exceptions to the charge will not be sustained if it is without prejudicial error when construed contextually.

JOHNSON, J., not sitting.

APPEAL by defendants from *Mallard, J.*, July Special Term 1956 of ALEXANDER.

This is a criminal action tried at the July Special Term 1956 of the Superior Court of Alexander County. The defendants were indicted at the 27 September 1954 Term of the Superior Court of said county on three separate bills of indictment. One bill of indictment charges the defendants with kidnapping one Kenneth Jerome Hoglen; the second bill charges the defendants with maiming the said Kenneth Jerome Hoglen; and the third bill charges the defendants with a malicious and felonious assault upon the said Kenneth Jerome Hoglen with deadly weapons, with the intent to kill said Hoglen, inflicting serious injuries not resulting in death.

The State's evidence tends to show that two or three days prior to 13 August 1954, Kenneth Jerome Hoglen (hereinafter called Hoglen), was hired by the defendants Ralph Burgess and Wayne Watson to go to Washington, D. C., and get a load of whiskey. The defendant Burgess took the defendant Neil Davis to a schoolhouse between Taylorsville and Hiddenite where Davis got into the truck with Hoglen for the trip to Washington. The defendant Burgess gave Hoglen $13,000 in cash, Bud Watts gave him $1,000 and the other unnamed parties gave him $4,000, making a total of $18,000. The money was placed under the mattress in the sleeping compartment of the cab of the truck. When they arrived in Washington, Hoglen got out of the truck to telephone the man he was to contact. When he returned to the truck, according to Hoglen's testimony, the money was missing. He then put in a collect call to Burgess, designating Burgess as Fred

Dishman and representing himself as Ray Baker. He talked to Burgess and told him the money was gone and he could not find it in the truck where he put it; that Burgess then asked to speak to Davis. After Davis talked to Burgess, Davis told Hoglen that they were supposed to stay in Washington until Burgess arrived. Hoglen and Davis got a room at a hotel and spent the night. Davis did not return to North Carolina with Hoglen, but left Washington early on the morning of 12 August and returned to Taylorsville. Hoglen left Washington on the evening of 12 August and drove the truck back to Taylorsville where he was met by Davis, Watson and Triplett.

Shortly after 2:00 o'clock on the morning of 13 August, Hoglen and the defendants Watson, Davis and Triplett drove to a cabin on the river near Oxford Lake. Hoglen was told by Davis that Burgess was at the cabin. Burgess was not there when they arrived. They sat around a table talking. All at once Watson jumped up with a pistol in his hand and began cursing, stating that he was going to kill Hoglen. The defendant Davis put handcuffs on Hoglen and drew a pistol out of his pocket, also stating that he was going to kill Hoglen. Davis took everything out of Hoglen's pockets, and Davis, Watson and Triplett ran a rope through the chain that held the handcuffs together and threw the rope over a rafter. These defendants pulled Hoglen's arms up as high as they could get them and tied the rope to the rafter. Later on, they put a Coca-Cola crate under Hoglen's feet. With the rope, they pulled the weight off his feet and hung him up after they had kicked and beaten him until he stepped up on the Coca-Cola crate. Watson, Davis and Triplett all beat the witness with pistols. They hit him in the mouth, cut his lip, knocked out one tooth and cracked two more. Watson did most of the beating. Later, the Coca-Cola crate was knocked from under him and Hoglen was left suspended in the air for five or six hours or more. When he was taken down, he was allowed to sit on a couch but he was still handcuffed. He was beaten over the side of the head with something wrapped in a white rag. Triplett threatened to cut off Hoglen's toe nails. He had an open knife in his hand when he made the threat. He jerked Hoglen's shoes and socks off but did not actually cut off his toe nails. After they had allowed him to rest for a while, Davis, Triplett and Watson strung him up to the rafter again, in the same position as before. His wrists were cut and bleeding and blood was running down his arms. At that time Burgess and Martin came in. Burgess did not stay very long. When he left, he said he was going home. Hoglen said to Burgess, "Puff, you know I didn't take the money that you sent with me up there, and he said he was afraid I did." Watson asked Hoglen if he had ever thought of praying. Hoglen said "Yes." Martin said, "Now is a good time to start, for these people are going to kill you." At that time,

Watson, Triplett, Davis and Martin were in the room. They told Hoglen the reason they were treating him the way they were was because the $18,000 was missing and they thought he had taken it. When Burgess left, Hoglen was still suspended to the rafter but there was a Coca-Cola crate under him so that his weight was not on his arms. Hoglen became unconscious; after he regained consciousness, Davis kicked the Coca-Cola crate from under him and he was once more suspended by his arms. While he was hanging there, the handcuffs came loose and dropped to the floor. That released Hoglen and he started to leave the cabin but was too weak to open the door. Watson had a pistol in his hand and Davis and Triplett put the handcuffs on Hoglen again and again strung him up to the rafter in the same position as on the two previous occasions. All the defendants, except Burgess, were present at the time. Watson sent Davis out to cut some sticks to use in beating Hoglen. Davis came in with the sticks and started to beat Hoglen. Hoglen does not know how long he was suspended the third time.

Hoglen's wife, becoming apprehensive as to the whereabouts of her husband, went to the home of the defendant Burgess on the evening of 13 August 1954. Davis was in the yard of the Burgess home when she arrived but was not present when Mrs. Hoglen had the conversation with Burgess about her husband. She testified, "I asked Ralph Burgess if he had seen Kenneth and Ralph Burgess told me that he had not seen him, but he expected to see him that night and said he would tell him that I was looking for him." She further testified that on Saturday, 14 August, about 2:00 or 2:30 a.m., Ralph Burgess came to her home at Fort Mill, South Carolina, and told her that her husband was in Baltimore in jail and was accused of taking $18,000 and giving it to her in Greensboro, North Carolina. That she told him she had not met her husband in Greensboro and had not received any money from him.

The defendant Burgess returned to the cabin near Oxford Lake Saturday afternoon, 14 August, and Hoglen was taken down. This was the third time he had been suspended to the rafter. All the defendants were present when he was taken down, including Burgess. Burgess didn't have anything to say to Hoglen at that time but he called the rest of the defendants out of the cabin, except Travis Triplett. Martin, Watson, Davis and Burgess went to the edge of the woods nearby and were talking, but Hoglen could not hear what they were saying. When they returned to the cabin, Burgess said there was a good swimming hole down there and why didn't the boys go down there and take a swim, so they said they thought they would. After the boys came back, Ralph Burgess and Travis Triplett left. It was some time after they left that Bud Watts arrived at the cabin in Hoglen's car and took him to his home in Fort Mill. Bud Watts drove the car into

the yard of Hoglen's home and left him and got in another car that had followed them from Oxford Lake, and left. According to Hoglen's testimony, he left Oxford Lake about 4:00 o'clock in the afternoon of 14 August.

Hoglen was taken to the hospital on the night he returned to his home and remained in the hospital until the following Wednesday. Several articles of clothing worn by Hoglen at the time of his experience in the cabin were introduced in evidence. The clothing had on them spots of grease and blood. After being released from the hospital, he was under the care of doctors for several weeks.

Hoglen testified that he did not know what became of the money Burgess gave him.

In addition to having one tooth knocked out and two more cracked, according to the testimony of Dr. M. A. Culp, the body of Hoglen was severely bruised, cut and lacerated; one eye was swollen closed; he had a deep cut on the lower lip, cuts on his face and neck, bruises and lacerations from his shoulders to his ankles; his hands were swollen and blue and he was unable to flex his fingers and there was a certain numbed area on his right arm.

The defendant Burgess introduced no evidence. None of the defendants testified in their own behalf. However, the other defendants introduced witnesses who testified that the general reputation of Hoglen was bad.

At the conclusion of all the evidence, a motion for judgment as of nonsuit was sustained as to the charge of maiming. The jury returned a verdict of not guilty on the charge of kidnapping. On the charge of assault with a deadly weapon, with intent to kill, the jury convicted each of the defendants of the lesser offense of "guilty of an assault with a deadly weapon." From the judgments pronounced on the verdicts, each of the defendants appeals to this Court, assigning error.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Justus C. Rudisill, Jr., McLaughlin & Battley, and Allen, Henderson & Williams for defendant Ralph Burgess.

Frank C. Patton, Wade H. Lefler, Ray Jennings, and W. H. McElwee for the other defendants.

DENNY, J. The defendants Watson, Davis, Martin and Triplett are insisting upon a new trial, while the defendant Burgess strenuously argues and contends that his motion for judgment as of nonsuit should be allowed and assigns the denial thereof as error.

The defendant Burgess takes the position that there is no evidence that Hoglen was actually assaulted by him or that he participated in

any manner in the assaults upon Hoglen or that he encouraged, aided or abetted the perpetrators of the assaults. He further contends that while there is evidence of his presence at the cabin on two occasions while Hoglen was there, there is no evidence that Hoglen was assaulted by anyone in his presence. This defendant is relying on *S. v. Ham*, 238 N.C. 94, 76 S.E. 2d 346; *S. v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5; *S. v. Holland*, 234 N.C. 354, 67 S.E. 2d 272; *S. v. Johnson*, 220 N.C. 773, 18 S.E. 2d 358, and *S. v. Hart*, 186 N.C. 582, 120 S.E. 345, to sustain his position.

In the case of *S. v. Ham, supra*, this Court, in substance, held that in order to render one who does not actually participate in the commission of the crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrators of the crime, or by his conduct made it known to such perpetrators that he was standing by to render assistance when and if it should become necessary.

An aider and abettor is defined in our decisions as one who advises, counsels, procures or encourages another to commit a crime. *S. v. Hart, supra; S. v. Holland, supra; S. v. Williams*, 225 N.C. 182, 33 S.E. 2d 880; *S. v. Ham, supra.*

In the case of *S. v. Birchfield, supra, Ervin, J.*, speaking for the Court, said: "The mere presence of a person at the scene of a crime at the time of its commission, does not make him a principal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation."

In *S. v. Holland, supra*, it is said: "It is settled law that all who are present (either actually or constructively) at the place of a crime, and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose, to the knowledge of the actual perpetrator, are principals and are equally guilty."

In the case of *S. v. Johnson, supra*, the Court said: "A person aids when, being present at the time and place, he does some act to render aid to the actual perpetration of the crime, though he takes no direct share in its commission, and an abettor is one who gives aid and comfort, or who either commands, advises, instigates or encourages another to commit a crime."

Stacy, C. J., in speaking for the Court in the case of *S. v. Hart, supra*, said: "An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime, whether personally present or not, at the time and place of the commission of the offense."

In 22 C.J.S., Criminal Law, section 79, page 143, it is said: "A person is a party to an offense if he either actually commits the offense or does

some act which forms a part thereof, or if he assists in the actual commission of the offense or of any act which forms part thereof, or directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof. To constitute one a party to an offense it has been held to be essential that he be concerned in its commission in some affirmative manner, as by actual commission of the crime or by aiding and abetting in its commission and it has been regarded as a general proposition that no one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent."

In passing upon a motion for nonsuit, the evidence must be considered in the light most favorable to the State, and it is entitled to the benefit of every reasonable inference to be drawn therefrom. *S. v. McKinnon*, 223 N.C. 160, 25 S.E. 2d 606; *S. v. Gentry*, 228 N.C. 643, 46 S.E. 2d 863; *S. v. Ritter*, 239 N.C. 89, 79 S.E. 2d 164.

There can be no conjecture about the evidence tending to show these facts: For some time prior to the occasion in question, Hoglen was employed by the defendants Burgess and Watson to drive a truck for them; that the defendant Davis and Hoglen were sent to Washington by Burgess and Watson to buy a truck load of liquor; that Burgess gave Hoglen $13,000 in cash for this purpose and Bud Watts gave him $1,000, while unnamed parties gave him $4,000; that all together Davis and Hoglen were entrusted with $18,000, and their truck. The money was lost. When Hoglen got back to Taylorsville he was met by Davis, an employee of Burgess, Watson, one of the employers of Hoglen, and one Triplett. Davis informed Hoglen that Burgess was at the cabin, which turned out to be near Oxford Lake and the place where he was assaulted. Hoglen was brutally assaulted as set out in the statement of facts. Burgess and Martin arrived at the cabin after Hoglen had been assaulted and while he was still handcuffed and hanging to a rafter in the cabin. Hoglen denied having taken the money; Burgess replied "he was afraid he did." Burgess left while Hoglen was still hanging to the rafter in the cabin. No motive or reason whatsoever was given for torturing and beating Hoglen, except that the money was missing and Davis, Martin, Watson and Triplett said they thought Hoglen had taken it and that was why he was being treated as he was. On Friday night, 13 August 1954, Burgess told Hoglen's wife that he did not know where her husband was, when, as a matter of fact, he had been in the cabin that day and talked to Hoglen and knew what was being done to him. Later that night he drove to Fort Mill, South Carolina, to Hoglen's home, and told Mrs. Hoglen that her husband was in jail in Baltimore, charged with taking $18,000 and giving it to her in Greensboro. No information that might lead to a recovery of the money was obtained from the wife of Hoglen or from the beaten and tortured Hoglen.

Finally, after Hoglen had been detained by force at the cabin from 2:00 or 3:00 o'clock on the morning of 13 August until the mid-afternoon of 14 August, Burgess showed up for the second time at the cabin and called all his co-defendants, except Triplett, out for a conference. After the conference, he suggested that they go swimming. Burgess and Triplett left the cabin. Shortly thereafter Bud Watts arrived at the cabin in Hoglen's car, and the defendant Watson told the defendant Martin to help Hoglen dress. The handcuffs were removed and Hoglen was aided in dressing and left with Watts in Hoglen's car for his home in Fort Mill, South Carolina, about 4:00 p.m.

We think the reasonable inference to be drawn from Burgess' conduct, his suppression of the truth as to the whereabouts of Hoglen when inquiry was made of him by Hoglen's wife; his appearance at the home of Hoglen in Fort Mill at 2:00 or 2:30 a.m., Saturday, 14 August; his statement to the effect that her husband was in jail in Baltimore for having taken $18,000 and delivering it to her in Greensboro; his later appearance that day at the cabin which apparently resulted in the release of Hoglen, support the view that Burgess was the instigator of the crime and procured his co-defendants to commit the crime.

There is no evidence that any of the other defendants suffered a financial loss by reason of the disappearance of the money. The defendant Burgess, and he alone, was to benefit from any confession wrung from Hoglen that might lead to the recovery of the money, in so far as the other defendants were concerned. "A man's motive may be gathered from his acts, and so his conduct may be gathered from the motive by which he was known to be influenced." *S. v. Wilcox,* 132 N.C. 1120, 44 S.E. 625; *S. v. Adams,* 136 N.C. 617, 48 S.E. 589; *S. v. Coffey,* 210 N.C. 561, 187 S.E. 754; *S. v. Church,* 231 N.C. 39, 55 S.E. 2d 792.

The attorneys for the defendant Burgess were unusually alert in safeguarding his rights with respect to the admission of evidence. And the contentions of all the defendants were presented on the appeal in this Court with commendable zeal. Even so, the State made out a case for the jury.

The record contains 29 assignments of error based on 132 exceptions. Assignments of error Nos. 3 through 22 are based on exceptions to the charge. A careful examination of the charge, however, when considered contextually, as it should be, leads us to the conclusion that it is in substantial accord with our decisions on the questions presented by the exceptions and is free from prejudicial error. *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 281. The other assignments of error are formal.

In the trial below we find
No error.

JOHNSON, J., not sitting.

W. L. BENNETT, FRANCIS E. LILES, HAL W. LITTLE AND W. BRYAN MOORE, TRUSTEES OF THE LILLIE M. BENNETT MEMORIAL FOUNDATION, V. THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA AND CLIFTON CLEMENT BENNETT.

(Filed 11 January, 1957.)

1. Appeal and Error § 21—

An appeal is in itself an exception to the judgment, presenting whether error of law appears upon the face of the record, including the pleadings, verdict and judgment, and whether the conclusions of law are supported by facts admitted or in some way established.

2. Declaratory Judgment Act § 2a: Wills § 17—

In an action under the Declaratory Judgment Act the court is without jurisdiction to nullify a duly probated will or any part thereof.

3. Wills § 33d: Trusts § 3d—It is sufficient if charitable trust designates a class of beneficiaries with power to the trustees to select members thereof.

Testatrix devised her home place and certain other property to trustees with direction that the home place be used as an old ladies' home and the other property used for its maintenance, with further provision that if in the opinion of the trustees it was not feasible to maintain the home, that the same should be sold and the proceeds added to the other trust property for the purpose of providing aid and assistance to any worthy white citizen of the county who might be blind, lame, homeless, in dire poverty, or otherwise a worthy object of charity, to be selected in the discretion of the trustees. *Held:* The designation of the purpose of the trust to members of a class, with power of the trustees to select the individuals of that class is sufficient certainty for a charitable trust, and upon findings by the court that the remodeling of the home place for the purpose of maintaining an old ladies' home would dissipate the other assets of the estate so that there would be insufficient income for the maintenance and operation of the home, the court properly authorized the trustees to sell same and devote the proceeds to the alternative purpose of the trust.

JOHNSON, J., not sitting.

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

APPEAL by defendant Clifton Clement Bennett from *Phillips, J.*, at November 1955 Term of ANSON.

Civil action under the North Carolina Declaratory Judgment Act, G.S. 1-253, for the construction of certain provisions of the last will and testament of Lillie M. Bennett, deceased, in respect to the rights, authority and duties of trustees as to the Lillie M. Bennett Memorial Foundation therein created.

These facts appear from the pleadings and case on appeal to be uncontroverted:

1. Lillie Marshall Bennett, late of Anson County, North Carolina, who signed her name as Lillie M. Bennett, died 13 May, 1952, leaving a last will and testament dated 21 May, 1949, and a codicil thereto, dated 1 September, 1950, each of which has been duly probated and recorded in office of Clerk of Superior Court of said County.

2. The testatrix, after making in her said last will and testament certain devises and bequests, and after making provision for the administration of her estate by executor named, not necessary to determination of questions here presented, made these pertinent provisions:

"Eighteenth: Subject to the foregoing provisions, I hereby set up, create and establish the Lillie M. Bennett Memorial Foundation, and hereby name, designate, constitute and appoint W. L. Bennett, Francis E. Liles, Hal W. Little, R. T. B. Little and W. Bryan Moore, and their successors as hereinafter provided for, as Trustees thereof.

"Nineteenth: Subject to the foregoing specific bequests, I hereby give, devise and bequeath all my other property, and all the rest and residue of my estate real and personal, regardless of kind, class, description and/or location, to W. L. Bennett, Francis E. Liles, Hal. W. Little, R. T. B. Little and W. Bryan Moore, Trustees, and their successors in office as hereinafter provided, absolutely and forever in fee simple for the following trusts, uses and purposes:

'A. Said Trustees shall hold all of said properties as Trustees of the aforesaid Lillie M. Bennett Memorial Foundation and use all income therefrom, and/or the principal thereof, as herein provided.

'B. Should either of said Trustees resign or die the remaining Trustees of said Foundation shall, by majority vote, elect the successor to such Trustee whose death or resignation created the vacancy on said board of trustees. It is my desire that said board of trustees be thus self-perpetuating, that is by the surviving trustees naming, by majority vote, the successor to each original trustee lost by death or resignation. Either said Trustee may resign by submitting written resignation to the then active trustees hereunder without prior application to, or Order from, any Court. Said Trustees, and their successors as herein provided, shall be and constitute the Board of Trustees of said

Lillie M. Bennett Memorial Foundation, and shall be required to file only such annual reports of the execution of their trust as may be required by the laws of North Carolina.

'C. The said Trustees shall maintain my present Home Place, residence and lot on the West side of North Greene Street in the Town of Wadesboro, as a home or refuge for worthy aged and homeless ladies of Anson County, N. C., of good character and reputation, who may be admitted after proper investigation, so long as it is practicable, judicious, reasonable, wise and proper to do so without jeopardizing the remainder of the principal of my estate, and/or when the net income to said Trust will not, in their opinion, justify the continued upkeep of said home for said purposes, in behalf of the white ladies of this community who are worthy, homeless, aged and (despondent).

'D. The said Trustees shall rent my undevised farm lands for an annual "standing rent" each year so long as it appears advisable and proper to do so, and shall use all net income therefrom for the upkeep, repair, enlargement and/or operation of said home.

'E. The said Trustees may sell my lot on the East side of North Rutherford Street directly adjoining the aforesaid Home Place, by private sale, or by public sale, and use the net proceeds of sale to maintain the aforesaid Home if, in their judgment said Home is to be maintained as herein provided; otherwise, the net proceeds of sale shall be treated as other trust funds, or said lot shall be treated as other trust assets until sold or used under the terms hereof.

'F. The said Trustees shall hold all my said properties in trust for the purpose herein provided and may sell any or all of said properties at any time, by private sale or by public sale as they may deem best, and invest or re-invest any and all net proceeds of sale, or sales, as investments of this trust, and shall invest, re-invest and keep invested the capital or principal of this trust, as delivered to them by my Executor and/or as acquired by them hereunder or otherwise, in such lands, stocks, bonds or securities as they may deem prudent, without limitation or restriction and without liability of any kind for or by reason of such sale, retention, exchange or investment; and with full power to purchase such investments at a then current premium or discount, to make subscriptions for land, stock, bond and security exchange, privileges, allotments, transfer, purchase, sale, merger, foreclosure, re-organization, dissolution, collateral, consolidation, voting, listing, conveyance and/or distribution as they may deem necessary from time to time for the interests of their trust.

'G. The said Trustees shall use so much of the net income to said trust as may be necessary to keep and maintain the aforesaid Home so long as they may think it proper to do so in accordance with my wishes only.

'H. When it appears to the said Trustees that it is, in their exclusive judgment and opinion, not practical, judicious, reasonable, wise and/or proper to keep and maintain my said Home as herein provided, and/or if and when it appears to them that the net income to said Trust will not, in their opinion, justify the required expenditures for purposes of keeping said Home, the said Trustees may rent or sell said property, as other trust assets, and hold or use the net proceeds of rental or sale as other trust assets under the terms hereof.

'I. The said Trustees may, at such time as they deem best, discontinue to, maintain my said Home for the aged, by making sale as herein provided, and shall then use such part of the net income to said trust for the transfer, and placing, admission, and/or keeping of such worthy, aged, homeless and dependent white ladies of Anson County, N. C., of good character and reputation, to, at and in the Methodist Home for the Aged near Charlotte in Mecklenburg County, N. C. as may be reasonably necessary and required therefor, and/or the said Trustees may use such part of said net income to said trust, and/or a part of the capital or principal of said trust if necessary, to provide such aid and assistance to any worthy white citizen of Anson County, N. C., who may be blind, lame, homeless, in dire poverty, the victim of any disaster or emergency, or otherwise a worthy object of the charity not provided by the laws of North Carolina, as said Trustees may, in their opinion, after due investigation, deem entitled to such aid and assistance from said trust. I have selected able Trustees who are conversant with my ideas, ideals, desires, wishes and plans, and I am confident they will use excellent judgment in executing their trust under this Will. Therefore, I specifically confer upon said Trustees, and their successors as herein provided the special powers and authorities, in addition to but not in any sense in limitation of the general powers and authorities vested in them by law hereunder, or under the laws of North Carolina, all of which shall be exercised by them without application to, or Order from, any Court, to have full and unlimited discretion in the administration of this trust and in determining such person, organization and/or institution as may, from time to time, receive assistance from this trust. Nothing herein contained shall prevent said Trustees from accepting gifts, funds and/or assistance from

others to strengthen this Lillie M. Bennett Memorial Foundation, and nothing herein contained shall prevent said Trustees from making such gift, grant, award, expenditure, or donation as they, in their opinion, may consider worthy and justified as a proper assistance to any white person of Anson County, or to any organization or institution operated for the benefit of citizens of Anson County, of the white race.

'J. The said Trustees shall, after discontinuing to maintain said Home, (if they find it necessary and advisable to do so), and after making suitable provision for the then admission of the aforesaid ladies to the said Methodist Home for the Aged, if necessary and advisable, then use all net income to said trust for the other aforesaid purposes of aid and assistance to such extent, and in such manner as they, by majority vote at any time, deem best. To that end, the said Trustees are further empowered to use their best judgment in determining who, or what organization, shall be entitled to aid and assistance from said trust funds or Foundation.

'K. The said Trustees shall exercise any and all of the foregoing powers and authorities during the continuance of this trust, for any purpose or purposes whatever incident to the execution of said trust; it being my will that my said Trustees, and their successors as herein provided for, shall have at all times and for all purposes, the most full and ample powers in dealing with this trust and with all properties in said trust (income and principal), and that no such powers or authorities shall at any time be deemed to have lapsed, or be exhausted, so long as it is possible for my properties to do good for me after my death, or until said trust properties are not productive of beneficient income.

'L. The said Trustees, and/or their successors, may terminate said trust and divest themselves of the properties therein only at such time as the net income therefrom shall cease and they shall have first exhausted the properties remaining in said trust as herein provided.

'M. The said Trustees shall receive only such reasonable compensation as fixed by law, in addition to reasonable counsel fees for their attorney.' "

3. Plaintiffs are the trustees of the Lillie M. Bennett Memorial Foundation appointed under the terms of the Last Will and Testament of Lillie M. Bennett, deceased, and have duly qualified as such and are now acting and serving in said capacity.

4. Plaintiffs allege in their complaint, *inter alia,* the following:

"11. That since the qualification of the plaintiffs as Trustees as aforesaid it has been determined by them, and they now so allege, that in order to carry out the provisions of the Will in establishing the Home of the said Lillie M. Bennett, deceased, on North Green Street in the Town of Wadesboro, N. C., as a Home for the Aged as in said will specified, that the cost of placing said Home in a usable condition for said purposes would be extremely costly and would result in the depletion of the personal assets belonging to said Trust; that upon depletion of said personal assets, the remaining portion of both personal and real assets in said Trust would not be sufficient to maintain said Home on the standard and for the purpose set forth under said Last Will and Testament.

"12. The plaintiffs are advised, informed, and believe, and being so advised, informed and believing, allege, that because of changed conditions, and on account of situations beyond the control of plaintiffs, it is not practicable, judicious, reasonable, wise and proper to attempt to establish, keep and maintain as a home or refuge for aged and homeless ladies of Anson County, North Carolina, the Home Place, residence and lot on the West side of North Green Street in the Town of Wadesboro belonging to the late Lillie Marshall Bennett, as suggested or directed by testatrix in the creation of the Lillie M. Bennett Memorial Foundation, and that, to attempt to do so would seriously involve, serve as a hazard, and completely jeopardize the Trust Estate.

"13. That the plaintiffs are of the opinion, and being of said opinion, allege, that it would be to the best interest and most advantageous to all concerned, and specifically for the Trust Estate, that said Home on North Greene Street and the lots adjacent thereto be sold under orders of this court and that the proceeds from said sale be deposited in and made a part of the *corpus* of said Trust, and invested as by law provided, and that the total income and/or *corpus* of said Trust Fund be utilized by the plaintiffs as Trustees, as provided for under paragraph 19-I of said Last Will and Testament hereinabove set forth in paragraph IX of this complaint.

"14. That the plaintiffs are of the opinion, and being of such opinion, allege, that the dominant intent and purpose of the said Lillie M. Bennett, deceased, in the establishment of the Lillie M. Bennett Memorial Foundation, was to have said Foundation aid aged and needy white female persons of Anson County,

North Carolina, and in the consummation of said intent and purpose this court would have ample authority to direct the Trustees to use said Trust for the purposes expressed in said paragraph 19-I of the Last Will and Testament of Lillie M. Bennett, deceased.

"Wherefore, plaintiffs pray the court:

(1) That the court construe the Last Will and Testament of the said Lillie M. Bennett, deceased, and the law applicable to such cases, and advise and instruct the plaintiffs herein, as Trustees of the Lillie M. Bennett Memorial Foundation, as to their rights and authority under said Last Will and Testament and that the court order the Home on North Green Street in the Town of Wadesboro and the lots adjacent thereto sold in such manner as the court may deem to be the best interest of said Foundation, and direct that the net proceeds therefrom be deposited and merged with the *corpus* of the funds belonging to said Foundation and be invested by said Trustees as by law provided.
(2) That the court further direct the plaintiffs herein as Trustees as aforesaid to maintain the funds belonging to said Foundation for the uses and purposes as set forth in paragraph 19-I of said Last Will and Testament.
(3) And for such other and further relief as to the court may seem just and proper, and to which plaintiffs may be entitled either in law or in equity."

5. The Attorney General of the State of North Carolina was made party defendant (it being alleged in the complaint that the Lillie M. Bennett Memorial Foundation, as constituted under the last will and testament of Lillie M. Bennett, deceased, is a public trust and as such the said Attorney General acquires an interest therein and maintains same on behalf of the State for the duration of said trust), and, answering he admits each allegation of the complaint, and joins in plaintiffs' prayer for relief as hereinabove set forth.

6. Clifton Clement Bennett, petitioning as the sole heir at law and distributee of Lillie M. Bennett, was permitted to intervene and be made a defendant in this action, and to file an answer so as to protect his right and interest. And the said intervenor, answering, *seriatim*, the allegations of the complaint, admits *inter alia* the allegations of paragraph 11 of the complaint hereinabove set forth, and joins plaintiffs in asking for advice, instructions and declaratory judgment, but prays that the provisions of paragraph 19 of the will of testatrix be declared void, and the assets remaining in the estate be disposed of

according to law, and such further orders and decrees as the court may find necessary in the premises.

7. The record shows that thereafter an order was entered by written consent of all the parties, setting the cause for hearing in Chambers at designated time and place, before the Resident Judge of, and holding the courts of the 20th Judicial District; it being agreed that "following said hearing such orders and decrees as may be entered herein shall be as binding and conclusive and to the same force and effect as though made and entered" in term time in Anson County. Upon such hearing, all parties and their attorneys being present, and at the conclusion of all arguments, the court informed intervenor and his counsel that this action was brought by the Trustees of the Lillie M. Bennett Memorial Foundation under the Declaratory Judgment Act, G.S. 1-253, and that from the brief submitted by the intervenor and the argument made by counsel for intervenor, the court is of opinion that he has no authority under the instant proceeding to go outside the terms and authority of said Act, and thereupon allowed intervenor until 28 December, 1955, within which to file such brief as might be deemed necessary as to the authority of the court to find for the intervenor in accordance with the pleadings herein filed by him; and that, intervenor having failed to file such brief, the court entered final order in this proceeding on 24 March, 1956.

8. And the record further shows in the final order so entered the judge finds these facts:

"4. . . . that under the provisions of the Will of the late Lillie M. Bennett ample power and authority was granted therein to the Trustees of the Lillie M. Bennett Memorial Foundation to use the income and/or *corpus* of the Trust Estate, to sell the Home Place on North Green Street in the Town of Wadesboro and the lots adjacent thereto and that such funds therefrom be merged with the remaining *corpus* of the Trust, and that the said Trust as thus supplemented be administered under the alternative provisions of said Will.

"5. . . . from the total contents of the Last Will and Testament of the said Lillie M. Bennett, deceased, that it was the intent of the testatrix that said Trustees 'shall have at all times and for all purposes the most full and ample powers in dealing with this Trust and all properties in said Trust . . .' as is set forth in paragraph 19K of said Last Will and Testament; and the court further finding as a fact that it was the intent of the testatrix to leave the administration of said Trust Estate within the sole discretion of the Trustees appointed by her within the limits set forth in her Last Will and Testament.

"6. . . . that it is impracticable to remodel the home on North Green Street so as to make said home adequate and suitable for an 'Old Ladies' Home,' and that should this remodeling be done a large portion of the *corpus* of the Trust would be consumed, and that the income from the remaining Trust assets would not be adequate to carry out the terms and provisions as set forth in one of the alternatives in the last Will and Testament of the said Lillie M. Bennett, and that under the authority granted the Trustees it is to the best interest of all parties concerned that the said Trustees sell the Home Place on North Green Street in the Town of Wadesboro and the lots adjacent thereto at public auction to the highest bidders for cash and that the net proceeds derived therefrom be merged with the *corpus* of said Trust Estate, to be used by said Trustees within their discretion under the remaining alternatives set forth in the Last Will and Testament of the said Lillie M. Bennett.

"7. . . . as a fact, and as a matter of law, that the plaintiff Trustees are entitled to the relief sought in this proceeding."

And therefore the court "ordered, adjudged and decreed that under the terms of the Last Will and Testament of the late Lillie M. Bennett, the Trustees therein named and their successors have the authority thereunder to sell the Home Place on North Green Street and the lots adjacent thereto and to merge the net funds derived therefrom with the remaining *corpus* of said Trust Estate as referred to in the Petition," and "further ordered that the plaintiff Trustees shall preserve the funds belonging to said Foundation and administer the same for the uses and purposes set forth in paragraph 19-I of the Last Will and Testament of the late Lillie M. Bennett, and that the Trustees are hereby authorized to pay the costs and expenses of this proceeding including $1,000.00 to A. P. Kitchin, attorney for said Trustees, for services rendered in connection with the many hearings of this proceeding."

Thereafter in apt time Clifton Clement Bennett gave written notice to the Judge that he "appeals to the Supreme Court of the State of North Carolina, from the judgment rendered therein by you on the 24th day of March, 1956, wherein judgment was entered by you in favor of the plaintiffs and against this defendant, including an award of costs in favor of the plaintiff, and that this appeal is founded upon the ground that the said judgment was contrary to law and evidence."

Taylor, Kitchin & Taylor for Plaintiffs, Appellees.

Clifton Clement Bennett, Attorney pro se.

Frank S. Katzenbach, III, of Counsel for Defendant, Appellant.

WINBORNE, C. J. Let it be noted at the outset that the record and case on appeal do not contain any express exception to any ruling of the trial judge. Nevertheless the appeal to the Supreme Court is itself an exception to the judgment. *Holden v. Holden, ante,* 1, 95 S.E. 2d 118; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; *Lowie Co. v. Atkins, ante,* 98, 95 S.E. 2d 271.

Indeed an exception to the judgment rendered raises the question as to whether error in law appears upon the face of the record. See *Lowie & Co. v. Atkins, supra; Horn v. Furniture Co., ante,* 173, 95 S.E. 2d 521, and cases cited. And the record, in the sense here used, refers to the essential parts of the judgment roll, such as pleadings, verdict and judgment. See *Thornton v. Brady,* 100 N.C. 38, 5 S.E. 910, and citations of it as shown in Shepard's North Carolina Citations. And a judgment, in its ordinary acceptation, is the conclusion of law upon facts admitted or in some way established. *Gibson v. Ins. Co.,* 232 N.C. 712, 62 S.E. 2d 320; also *Lowie & Co. v. Atkins, supra.*

Hence in the light of these principles, applied to the case in hand, is there upon the face of the record error in matters of law?

Appellant first assigns as error the ruling of the trial judge in determining that the relief prayed by the intervening defendant is beyond the scope of the Declaratory Judgment Act, and hence the court did not have jurisdiction to consider his claim. The ruling finds support in decisions of this Court. See *Farthing v. Farthing,* 235 N.C. 634, 70 S.E. 2d 664, and cases cited.

In this connection it is provided under the Declaratory Judgment Act, G.S. 1-253, that "courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations . . ."; and it is also provided in G.S. 1-254 of said Act that "any person interested under a deed, will, written contract or other writings constituting a contract, . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder . . ." And this Court, in interpretation of these statutes, has declared in the *Farthing case, supra,* in opinion by *Barnhill, J.,* later *C. J.,* that "The court below was without jurisdiction to entertain this action to nullify any part of the duly probated will which is the subject of the action . . ." And, continuing, it is there further stated that "The Declaratory Judgment Act, G.S. Ch. 1, Art. 26, is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of the parties thereunder. It is not a vehicle for the nullification of such instruments. Nor is it a substitute or alternate method of contesting the validity of wills." See also *Howland v. Stitzer,* 231 N.C. 528, 58 S.E. 2d 104.

Appellant also contends that the trial judge erred in construing the provisions contained in paragraph 19-I of the will as having force and effect in an event other than a cessation of operating the aged ladies' home after it had once been created and maintained. That is, it is the contention of appellant that it is clearly "the intent of the testatrix as expressed in her will, that a Lillie M. Bennett Memorial Foundation is to be created only in connection with and for the purpose of establishing a home for aged women."

This contention is untenable. See *Woodcock v. Trust Co.*, 214 N.C. 224, 199 S.E. 20, where in a comprehensive opinion *Devin, J.*, later *C. J.*, treats of the subject of charitable trusts. There this Court held that a charitable trust may be created for almost any purpose that tends to promote the well-being of social man unless forbidden by law or public policy. Indeed it is there said that indefiniteness of beneficiaries is a characteristic of charitable trusts, and that the designation of the purpose of the trust to members of a class, with power in the trustees to select individuals of that class as specific beneficiaries is sufficient. Moreover, the declared policy of the State of North Carolina is "that gifts, transfers, grants, bequests and devises for . . . charitable or benevolent uses or purposes . . . are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, G.S. 36-23.1, and it is specified that this section shall be construed liberally to effect the policy therein declared. See also G.S. 36-23.1(2).

In the light of these principles and declarations, the provisions of the will of Lillie M. Bennett in respect to the creation of the Lillie M. Bennett Memorial Foundation clearly constitute a valid charitable trust. The intent and meaning is manifest.

Moreover, the provisions of the paragraph 19 of the Will of Lillie M. Bennett are sufficiently broad and explicit to authorize the Trustees to refrain from dissipating the estate by remodeling and opening the Old Home, and to authorize them to sell same, and devote the proceeds to purposes within the purview of the provisions of the trust, as so created.

Therefore this Court holds that error in matter of law upon the face of the record is not made to appear. Hence the judgment from which appeal is taken is

Affirmed.

JOHNSON, J., not sitting.

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

STATE v. ALVIS MANGUM.

(Filed 11 January, 1957.)

1. Homicide § 16—

The State's evidence establishing an intentional killing with a deadly weapon raises the presumptions that the killing was unlawful and that it was done with malice, casting the burden upon defendant of showing to the satisfaction of the jury matters in mitigation or excuse.

2. Criminal Law §§ 42f, 52a(4)—

The introduction by the State of statements or a confession made by defendant does not entitle defendant to nonsuit because of exculpatory averments therein when the State introduces other incriminating evidence, since the State is not precluded from showing facts in contradiction of the exculpatory statements, and the jury is not required to believe the whole of a confession, but may believe a part and reject a part.

3. Homicide § 25—

The State's introduction of statements of defendant that he was assaulted and threatened with death, ran in an attempt to get away from his assailant, who was pursuing him with an open knife, and finally shot his assailant in self-defense, does not entitle defendant to nonsuit when the State also introduces evidence tending to show that defendant shot deceased as they were standing still, facing each other a car's length distant, since the State's evidence does not bring the defendant within the principle of self-defense exculpating him as a matter of law.

4. Criminal Law § 78c—

While ordinarily an assignment of error must be supported by an exception duly taken, where the exception relates to remarks of the court in the absence of defendant's counsel so that no exception could then be taken, and exception is taken immediately after the discussion of the matter by the attorney with the court upon the attorney's coming into court, the exception will be considered.

5. Criminal Law §§ 49, 50d—

Where a defendant is late for the opening of court for the resumption of his trial, the court has the discretionary power to order the defendant into custody, and the court's action in doing so in the presence of the jury will not be held for error on defendant's exception when it is apparent that the jury understood the reason for the court's action and that the court's action could in no way be regarded by them as a reflection upon the credibility of the defendant as a witness.

6. Criminal Law § 81c(4)—

Where defendant is convicted of a lesser degree of a crime, error in the charge relating to a higher degree thereof cannot be prejudicial when there is nothing to show that the verdict was affected thereby.

JOHNSON, J., not sitting.

APPEAL by defendant from *Mallard, J.*, February-March Criminal Term 1956 of DURHAM.

Prosecution upon a bill of indictment charging the defendant with murder in the first degree of John L. Parrish.

At the beginning of the trial the solicitor for the State announced that he would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree or of manslaughter, as the facts might justify.

The defendant pleaded Not Guilty. The jury returned a verdict Guilty of manslaughter.

From judgment of imprisonment, the defendant appeals.

George B. Patton, Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.

Blackwell M. Brogden for Defendant, Appellant.

PARKER, J. The defendant assigns as error the failure of the court to grant his motion for judgment of nonsuit, renewed at the close of all the evidence.

The evidence viewed in the light most favorable to the State presents this story:

On the night of the homicide, which the bill of indictment charges occurred on 10 September 1955, a crowd of people, about 50 or 60, were assembled in and around two places in Durham County—one known as the Chicken Shack and the other as Big John's. These places are about 200 feet apart. Some were drinking, some dancing, and some otherwise amusing themselves. The defendant was there with a pistol in his pocket. The deceased, John L. Parrish, a brother-in-law of the defendant was present.

In response to a call about 3:15 a.m. on Sunday 18 September 1955, L. R. Watson, a deputy sheriff of Durham County, went to the Chicken Shack arriving about 15 minutes after the call. It seems apparent from the evidence in the Record, including the testimony of the defendant, that the homicide occurred on the night of 17 September 1955, or shortly after midnight on that night, instead of on 10 September 1955, as charged in the indictment. He found the body of John L. Parrish lying in the center of the road almost half way between the Chicken Shack and Big John's. John L. Parrish was dead. His body was lying partially face down. The officer turned the body over, and found a knife about 2½ or 3 inches long with the blade open under the right side of the body by the hips. A lot of blood was on the ground. The defendant was not present. About a mile from the body defendant's automobile was found abandoned in a ditch. A search was made

that night for the defendant at his home, his mother's home, and elsewhere, and he could not be found.

About 4:00 a.m. on 18 September 1955 Dr. R. A. Harton, coroner of the county, examined the dead body of John L. Parrish. He had two pistol shot wounds: one almost in the center between the eyes, and one in the lower part of his chest. The fatal wound was the one between the eyes. The time of death was between midnight and 3:30 a.m., because *rigor mortis* had not set in.

The defendant told T. C. Leary, a deputy sheriff of the county, in jail on 19 September 1955, about the homicide. He said he was in Big John's place, and a girl he did not know gave him $5.00 to get changed. He went over to the Chicken Shack to get it changed. He got the change, and when he stepped out of the Chicken Shack, he met the girl and gave her the change. John L. Parrish walked up with a knife in his hand, cursed him, and said he was going to kill him. They had had no words before, and he didn't know Parrish was there. He ran around an automobile two or three times trying to get out of Parrish's way, and then he pulled out his pistol, and shot him twice. Parrish was running him at the time he fired—reaching for him. The first time he shot, Parrish did nothing; the second time he shot, Parrish fell to the ground. After the shooting, he got in his car and left. About a mile down the road he ran in the ditch. He got out of the car, and spent the night in the woods. Later the defendant told Leary he and Parrish the day of the homicide had had some trouble about flue wood to cure tobacco: it was a little argument that didn't amount to anything. On cross-examination Leary testified the defendant told him Parrish grabbed at him with the knife as he came out of the Chicken Shack before he started running around the car; that he didn't think he was going to be able to get away from him, and he pulled his pistol, and that Parrish was on him with the knife, when he shot. He didn't say how close Parrish was on him when he shot.

James M. Grady, a witness for the State, arrived at the Chicken Shack about 9:00 or 10:00 o'clock that night. At the time of the shooting he was on the back steps of the Chicken Shack talking to two men. He heard one shot, and in a short time two more shots. Then he saw Parrish fall. At the first shot he saw two men. Then he heard two shots, and saw one fall, and the other run. He saw the two men at an angle to the car. One was standing to the front and one to the rear. He did not see anybody running around the car. They were standing still. On cross-examination Grady testified: "They were standing in the road. I heard a shot and looked up and saw two people, one standing with the gun at one end of the car and a man falling at the other end. The one who fell was John L. Parrish."

J. M. Mangum, a deputy sheriff and witness for the State, testified the defendant told him as follows:

"He said he was up there that night, and he had been over to the Chicken Shack to get some change. When he started out the door, he saw John L. standing there, and John L. told him to wait a minute, he wanted to see him. He said to him, 'John L., I haven't got time to see you, wait,' or something like that. Said John L. made a break after him—said he ran around the car two or three times, then he broke loose and started running over to Big John's. And this boy got up close to him. Then he turned and said, 'I ain't running any more,' and jerked his pistol out and shot twice. Said Parrish fell, he reckoned. He ran."

The evidence shows that the defendant intentionally killed John L. Parrish with a deadly weapon, to-wit, a pistol. An intentional killing with a deadly weapon raises two presumptions against the killer: first, that the killing was unlawful, and, second, that it was done with malice. *S. v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402; *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Howell,* 239 N.C. 78, 79 S.E. 2d 235; *S. v. Benson,* 183 N.C. 795, 111 S.E. 869. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *S. v. Crisp, supra; S. v. Street,* 241 N.C. 689, 86 S.E. 2d 277; *S. v. Benson, supra.*

"The law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury (*S. v. Carland,* 90 N.C. 675), the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident, or misadventure. *S. v. Little,* 178 N.C. 722." *S. v. Benson, supra.* To the same effect see: *S. v. Howell, supra; S. v. Terrell,* 212 N.C. 145, 193 S.E. 161.

The defendant contends that the State's evidence makes out for him a complete defense on the ground of self-defense, and that the court erred in denying his motion for judgment of nonsuit. If the defendant's contention were correct, which it is not, the court should have nonsuited the State upon authority of *S. v. Jarrell,* 233 N.C. 741, 65 S.E. 2d 304.

The State offered in evidence the statements of the defendant about the killing, but that did not prevent the State from showing the facts concerning the homicide were different from what the defendant said about them. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904; *S. v. Bright,* 237 N.C. 475, 75 S.E. 2d 407.

It is elementary learning that the jury is not compelled to believe the whole of a confession. They may, in their sound discretion, believe

a part and reject a part, because they are the triers of fact. *S. v. Henderson,* 180 N.C. 735, 105 S.E. 339; *S. v. Ellis,* 97 N.C. 447, 2 S.E. 525; *S. v. Overton,* 75 N.C. 200.

The State's evidence shows different statements as to the killing made by the defendant to Deputy Sheriff Mangum and Deputy Sheriff Leary, the testimony of James M. Gray, "they were standing in the road, I heard a shot and looked up and saw two people, one standing with the gun at one end of the car and a man falling at the other end, the one who fell was John L. Parrish," and other facts. The State's evidence does not bring the defendant within the principle of self-defense exculpating him as a matter of law and dispensing with any determination of the facts by the jury. *S. v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620; *S. v. Terrell, supra; S. v. Koutro,* 210 N.C. 144, 185 S.E. 682; *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427; *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; *S. v. Robinson,* 188 N.C. 784, 125 S.E. 617.

The court properly overruled defendant's motion for judgment of nonsuit.

Defendant states in his brief, "the defendant's second assignment of error is based on Exception No. 18 (R. pp. 41, 42) and relates to certain remarks made by the Court in the presence of the jury." The trial lasted more than one day. While the trial was in progress, one morning upon the opening of court the following occurred in the presence of the jury: "COURT. Is the defendant or his counsel in court? Has any one seen Mr. Brogden (counsel for defendant) this morning? Is Alvis Mangum in the courtroom? If any one is interested in him, you had better see if you can find him. Call the defendant Alvis Mangum to come into court." Whereupon, the court directed the sheriff to go and get the defendant, and keep him in custody until the end of the trial.

After this had taken place, Mr. Brogden came in, and asked to be heard in the absence of the jury. The jury was sent from the courtroom, and in its absence the Record shows this:

> "MR. BROGDEN: If your Honor please, I am well aware court opens at 9:30; I realize it is 9:35. I am fully aware your Honor may do so, but I feel this and would like for the record to show that upon the calling of the case the defense and their witnesses were ready. I think the defendant has been fair. I realize that yesterday morning as Court started it was 9:40 waiting for the Solicitor and the Sheriff. COURT. Court opened at 9:30 yesterday morning. The Court has not been late in opening at all. When the case was called for trial day before yesterday morning there was some discussion about the defendant's witnesses being present. Then when the defendant's witnesses were available at 2:30, the State's witnesses were not. But the first discussion about the case was that

one of the defense witnesses could not be found. It was held open until 2:30. Then the defendant was ready; the State was not. We waited until about 4:30.

"MR. BROGDEN: By the same token, yesterday morning Mr. Gantt and Mr. Mangum sat in that room . . .

"COURT: The true facts are that the Court permitted the Solicitor and Mr. Bane to examine some witnesses at the beginning of court yesterday morning. I am not commending anyone for being late. The Court asked some of the defendant's friends to go out in the hall and get him. Nobody moved. I had to have him called and have him brought in. The defendant paid no attention to court opening. He was wandering around in the hall. The Court could not go get him. The Court had to have him called and had him brought in. I have not taken advantage of the defendant at any stage of the trial. Have you stated all that you desire to state?

"MR. BROGDEN: Yes, sir. I don't think there is any need to say any more.

"OBJECTION. EXCEPTION #18."

An assignment of error must be supported by an exception, or it will be disregarded. *S. v. Wiley*, 242 N.C. 114, 86 S.E. 2d 913; *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223; *Suits v. Ins. Co.*, 241 N.C. 483, 85 S.E. 2d 602; *S. v. Bittings*, 206 N.C. 798, 175 S.E. 299. The Record does not definitely show what Exception 18 refers to. Defendant in his brief says it "relates to certain remarks made by the court in the presence of the jury." However, as defendant's counsel was not in court when the judge made the remarks and placed the defendant in custody, and could not then and there make an exception, we shall consider both questions.

In *S. v. Simpson*, 233 N.C. 438, 64 S.E. 2d 568, after the defendant and his two witnesses Green and Hurlocker had testified, court took a recess for lunch. Immediately upon recess, some of the jurors, being still in the courtroom, the judge ordered the sheriff to take the defendant and his two witnesses into custody. They were immediately arrested in the courtroom and placed in jail. Later in the day the court instructed the solicitor to draw indictments against the defendant and his two witnesses for perjury in connection with the case. This Court said: "A new trial must be granted, however, because of the impeachment and depreciation by the court of the defendant's evidence and that of his witnesses, Green and Hurlocker. This was done, first, by ordering the defendant and his two witnesses into custody during the trial,

which action by the court came to the attention of the jury trying the case, *S. v. McNeill*, 231 N.C. 666, 58 S.E. 2d 366; and secondly, by the manner in which the court's charge was given to the jury." The decision is sound. This Court said in *S. v. Swink*, 151 N.C. 726, 66 S.E. 448: "But the committing of a witness, in either a criminal or a civil action, into immediate custody for perjury in the presence of the jury is almost universally held to be an invasion of the rights of the party offering the witness, and an intimation of opinion upon the part of the judge, prohibited by the statute."

In *S. v. McNeill*, 231 N.C. 666, 58 S.E. 2d 366, the court in the presence of the jury ordered the sheriff to take a witness of the defendant into custody immediately after the witness had testified, without giving any reason therefor. In awarding a new trial this Court said: "Undoubtedly, the jury must have concluded that the court thought the witness was guilty of perjury or of criminal relations with a female juvenile, either of which, we apprehend, was calculated to weaken his testimony in the eyes of the jury."

In *S. v. Slagle*, 182 N.C. 894, 109 S.E. 844, one of the defendants, on trial for murder, had been granted a nonsuit. Whereupon, the judge in the presence of the jury ordered him arrested for illicit distilling of spirituous liquor. The Court held that it was not an expression of opinion by the judge upon the weight or credibility of the evidence, as it would have been if he had been held for perjury.

In *S. v. Hart*, 186 N.C. 582, 120 S.E. 345, no reason was assigned for putting the defendant in custody in the presence of the jury, though the court stated in the presence of the jury that putting him in custody did not mean that the court thought he was guilty. In this case there were many exceptions to the charge on the ground that the court had expressed an opinion on the evidence. This Court said: "As the case goes back for another hearing, by reason of what we conceive to be an erroneous expression of opinion by the trial court . . ."

In *S. v. Smith*, 237 N.C. 1, 74 S.E. 2d 291, the Court quoted from 6 Am. Jur., Bail and Recognizance, Sec. 101, as follows: "In the absence of constitutional or statutory provisions to the contrary, the general rule is that the inherent power of the court to insure itself of the presence of the accused during trial may, in its discretion, be exercised so as to order a person who has been at liberty on bail, into the custody of the sheriff during trial of the case . . ." In the same case the court quoted from 23 C.J.S., Criminal Law, Sec. 977, as follows: "In a criminal prosecution the State is the plaintiff and may have custody of accused, this being essential for the protection of society. It is within the discretion of the trial court whether accused should be placed in custody; and the court's proper exercise of discretion is not

error where the jury were unaware that accused had been placed in custody, or were not influenced by that fact."

In *Hood v. U. S.*, C. C. A. Okl., 23 F. 2d 472, *certiorari* denied, 277 U.S. 588, 72 L. Ed. 1002, the Court committed the defendant Bowdry to the custody of the marshal, because he had absented himself from the courtroom during the progress of the trial. The Appeals Court said: "The demand for the exclusion of witnesses and the committal of defendant Bowdry to the custody of the marshal were matters addressed to the sound discretion of the trial court, and we do not find that that discretion was abused."

In *S. v. Smith*, 202 N.C. 581, 163 S.E. 554, during the trial the Court ordered the defendant into custody. This Court said: "The conduct of the defendant called for drastic action. His continued absence impeded the trial." The trial court found that the jury knew nothing of the order placing the defendant in custody.

It is perfectly plain from the Record that the judge's remarks and placing the defendant in custody was caused by the defendant's absence from the courtroom after court had opened and his trial should be resumed, and that the jury so understood it. There is no suggestion or intimation in the slightest degree that the committal of the defendant was for perjury. The judge's remarks and action had absolutely no reference as to any opinion of his as to the strength of the evidence, or as to the credibility of the defendant, or that he had any opinion whatever in respect to the case, and could not convey to the jury the slightest intimation that the judge had any opinion to such effect. The placing of the defendant in custody was within the discretion of the trial court, and under the circumstances as they appear in the Record we do not find that that discretion was abused. Assignment of error No. 2 is overruled.

We have carefully considered the charge of the court to the jury in its entirety, and the brief of the defendant as to his assignments of error to the charge. After such consideration error sufficient to justify a new trial does not appear. Many of these assignments of error refer to the instructions on the law of self-defense. The law in that respect has been so clearly and fully stated by the Court in numerous decisions that it would be supererogatory to repeat it. All assignments of error to the charge are overruled.

The defendant assigns as error the court's denial of his motion that the jury be instructed to disregard the charge of second degree murder. This assignment of error is without merit. The assignments of error to the charge in reference to second degree murder are untenable. The court's charge on second degree murder was correct, but whether it was or not, is not material on this appeal, because the defendant was convicted of the lesser offense of manslaughter, and there is nothing to show

that the verdict of guilty of manslaughter was thereby affected. *S. v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218; *S. v. Messer,* 192 N.C. 80, 133 S.E. 404; *S. v. Evans,* 177 N.C. 564, 98 S.E. 788.

The assignment of error to the remarks to the jury by counsel for the private prosecution in his speech is without merit.

In the trial below we find

No error.

JOHNSON, J., not sitting.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, A CORPORATION, v. THAD EURE, SECRETARY OF STATE, AND GEORGE B. PATTON, ATTORNEY GENERAL.

(Filed 11 January, 1957.)

1. Pleadings § 19b—

A defendant may demur to a complaint when it appears on the face thereof that two or more causes of action have been improperly united. G.S. 1-127.

2. Pleadings § 2—

Several causes of action arising out of the same transaction or transactions connected with the same subject of action may be united in the complaint provided all the causes of action affect all the parties to the action. This proviso is not applicable to actions to foreclose a mortgage. G.S. 1-123(1).

3. State § 1a—

The Attorney General has no specific enforcement duty in regard to the initiation of a prosecution for the violation of a criminal statute in the absence of express provision therefor in the statute, since his duties in regard to the solicitors of the State are purely advisory and he has no constitutional authority to issue a directive to any of them, and the solicitors have the constitutional and statutory duty to prosecute criminal actions in the Superior Courts. Constitution of North Carolina, Art. III, sec. 13; Art. IV, sec. 23; G.S. 114-2; G.S. 7-43.

4. Constitutional Law § 8d—

The Attorney General has no specific enforcement duty in connection with G.S. Ch. 120, Art. 10, requiring organizations engaged in the activity of influencing public opinion or legislation in this State to register with the Secretary of State.

5. Pleadings § 20½—

The court, upon sustaining demurrer for misjoinder of causes of action, has the power to sever the causes for trial.

6. Declaratory Judgment Act § 6—

The court, in a proceeding under the Declaratory Judgment Act, has the discretionary power, upon its finding that a decision based on one of the alleged causes of action would not settle the controversy, to dismiss that cause. G.S. 1-257.

7. Pleadings § 19b—

This action was brought under the Declaratory Judgment Act against the Secretary of State and the Attorney General to obtain a declaration as to the applicability to plaintiff of G.S. Ch. 120, Art. 10, and G.S. 55-118. *Held:* The court properly sustained a demurrer for misjoinder of parties and causes of action, since the Attorney General is not affected by the cause of action relating to the registration of persons and organizations engaged in influencing public opinion or legislation, and therefore the causes do not affect all the parties.

8. Declaratory Judgment Act § 6: Corporations § 2—

This action was brought against the Secretary of State and the Attorney General to determine the applicability to plaintiff of G.S. Ch. 120, Art. 10, and G.S. 55-118. *Held:* Upon severance of the causes upon demurrer, the court in its discretion properly dismissed the first cause of action on the ground that a declaration would not settle that controversy since it would not be binding on the solicitors, and retained the second cause for trial, the Attorney General being a proper nominal party thereto since he is empowered to prosecute for the penalty provided by G.S. 55-118 for failure of a foreign corporation to register in accordance with its mandate.

JOHNSON and RODMAN, JJ., not sitting.

APPEAL by plaintiff from *Hobgood, J.*, March Civil Term 1956 of WAKE.

Proceeding under the Declaratory Judgment Act (G.S. 1-253 *et seq.*) heard upon demurrer.

During the pendency of the appeal the Honorable William B. Rodman, Jr., Attorney General of North Carolina, was appointed a member of this Court, and the Honorable George B. Patton was appointed to succeed him as Attorney General. By virtue of Rule 20(4), Rules of Practice in the Supreme Court, 221 N.C. 544; G.S. Vol. 4A, pp. 157, *et seq.*, the Court ordered the proceeding to be amended by deleting the name of the Honorable William B. Rodman, Jr. as a party defendant, and by substituting in lieu thereof the name of the Honorable George B. Patton, now Attorney General of North Carolina, as a party defendant.

This appeal presents for determination a question of procedure. Therefore, we summarize below only those facts alleged in the complaint, which are essential for a decision upon the one question presented.

Plaintiff is a membership New York corporation created and existing to promote equality of rights among the citizens of the United States and for other purposes set forth in its certificate of incorporation attached to the complaint. Thad Eure is Secretary of State of North Carolina, and William B. Rodman, Jr. is Attorney General of North Carolina.

On 14 November 1955 defendant Thad Eure, acting as Secretary of State of North Carolina, wrote plaintiff directing its attention to G.S. Ch. 120, Art. 10, which requires that every organization, which is principally engaged in the activity or business of influencing public opinion or legislation in the State, shall, prior to engaging in such activity, cause its name to be entered upon a docket in the office of the Secretary of State of North Carolina, which docket shall contain certain information, and also to G.S. 55-118, which requires that every foreign corporation before being permitted to do business in the State shall file in the office of the Secretary of State a copy of its charter and certain specified facts.

Plaintiff contended by letters that it was not required to register under either of these two statutes. On 30 January 1956 William B. Rodman, Jr., as Attorney General of North Carolina, wrote plaintiff that in his opinion plaintiff had subjected itself to the laws of North Carolina, and repeated the request that plaintiff comply with the requirements of the statutes to which its attention had been directed.

If plaintiff is required to register by virtue of these two statutes and does not do so, plaintiff will be subject to the civil penalty imposed by G.S. 55-118, and will be guilty of a misdemeanor by virtue of G.S. Ch. 120, Art. 10.

Plaintiff is doing no business in North Carolina, which makes it subject to the provisions of G.S. 55-118. Plaintiff's activities are protected by the U. S. Constitution from State interference in that they constitute interstate commerce, protected by Art. 1, Sec. 8 of that constitution, and are the exercise of the right of freedom of speech and of the right to petition for redress of grievances protected by the Federal Constitution. To require plaintiff to register under these two statutes would constitute a denial of due process of law guaranteed to it by the 14th Amendment to the U. S. Constitution.

G.S. Ch. 120, Art. 10, is not applicable to plaintiff, because it is not principally engaged in influencing public opinion or legislation in North Carolina. However, if it is applicable, it violates the 14th Amendment to the U. S. Constitution in that it interferes with freedom of speech, and is vague to the extent of denying due process of law.

A controversy exists between the parties to the action.

Plaintiff prays that the court enter judgment declaring that the State of North Carolina has no power to require it to register under

G.S. 55-118, because such requirement would violate Art. 1, Sec. 8, and the 14th Amendment, of the U. S. Constitution, and that G.S. Ch. 120, Art. 10, does not apply to plaintiff, but that if it does, it denies freedom of speech, and is so vague that it denies due process of law guaranteed by the 14th Amendment to the U. S. Constitution.

Defendants demurred to the complaint upon the following grounds: Plaintiff seeks to assert two unrelated causes of action, which cannot be joined. A cause of action calling for a construction of the validity of and the application of G.S. 55-118 to plaintiff, a violation of which carries a civil penalty. A cause of action involving the criminal laws of the State of North Carolina, G.S. 120-48, *et seq.* Plaintiff cannot test in a civil action its criminal responsibility for violating a criminal statute, if it has violated it. The Declaratory Judgment Act has no application to criminal actions. The validity of a criminal statute cannot be determined under the Act. Plaintiff has stated no cause of action as to G.S. Ch. 120, Art. 10, and the State of North Carolina has not given its consent to such a suit. The court, in its discretion, should enter an order requiring plaintiff to delete from its complaint all references to G.S. Ch. 120, Art. 10. Wherefore, the defendants pray that their demurrer be sustained, that the court order a severance of the actions, and dismiss the action asserted, or attempted to be asserted, under G.S. Ch. 120, Art. 10, and that the pleadings be reformed so as to be applicable only to G.S. 55-118.

On a hearing upon the demurrer the court entered judgment sustaining the demurrer; and being of opinion that a decision on the action in reference to G.S. Ch. 120, Art. 10, would not settle the controversy between the parties, and that the court should, in its discretion, dismiss that action, the court dismissed that action, and gave plaintiff 20 days to reframe its complaint by striking therefrom all reference to G.S. Ch. 120, Art. 10, thereby leaving for determination the applicability of G.S. 55-118 to plaintiff.

From the judgment plaintiff appeals.

George B. Patton, Attorney General, and Robert E. Giles, Assistant Attorney General, and F. Kent Burns, Staff Attorney, for the State.

William A. Marsh, Jr., Conrad O. Pearson, Robert L. Carter and Thurgood Marshall for Plaintiff, Appellant.

PARKER, J. On this appeal we have for decision solely a question of procedure. The defendant may demur to a complaint when it appears on the face thereof two or more causes of action have been improperly united. G.S. 1-127.

Joinder of two or more several causes of action in the same complaint must meet the requirements of G.S. 1-123.

Plaintiff contends the present joinder is authorized by the provisions of G.S. 1-123, because that statute provides that "plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—1. The same transaction, or transaction connected with the same subject of action." But plaintiff in his brief fails to take into consideration this further explicit language in G.S. 1-123; "But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated." G.S. 1-123 authorizes the joinder of certain causes of action, "but each of them must affect *all* the parties to the transaction (Section 267(7)). 'It is not sufficient that some of the defendants be affected by each of them. All of the defendants must be affected by each of them to warrant the union of them in one suit.'" *R. R. v. Hardware Co.*, 135 N.C. 73, 47 S.E. 234. See: McIntosh N. C. Prac. & Proc., 2nd Ed., sec. 1165.

It is manifest that both defendants are not affected by each cause of action plaintiff has alleged and joined in its complaint, or in other words the two alleged causes of action do not affect both defendants. In respect to the alleged cause of action to determine the applicability to plaintiff of G.S. 55-118—foreign corporation required to file certain instruments in the office of the Secretary of State before being permitted to do business in the State—it would seem that the Secretary of State and the Attorney General are proper parties defendant and the action in varying degrees affects both, because the Secretary of State has certain ministerial duties to perform under G.S. 55-118, and because the statute provides that "every corporation failing to comply with the provisions of this section shall forfeit to the State five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the Attorney General, who shall prosecute such actions whenever it appears that this section has been violated." In respect to the alleged cause of action to determine the applicability of G.S. Ch. 120, Art. 10—Registration in the office of the Secretary of State of persons and organizations principally engaged in influencing public opinion or legislation—it is plain that the Attorney General is not affected. A violation of this article is a misdemeanor, punishable by fine or imprisonment in the discretion of the court. There is no reference in any part of G.S. Ch. 120, Art. 10 to the Attorney General. He has no specific enforcement duty in connection therewith, as he has with G.S. 55-118.

The North Carolina Constitution, Art. III, sec. 13, provides that the duties of the Attorney General "shall be prescribed by law." Our Constitution, in Art. IV, sec. 23, provides for the creation of solicitorial districts, for each of which a solicitor shall be elected, who shall "prosecute on behalf of the State in all criminal actions in the Superior

Courts." G.S. 7-43 provides that a solicitor shall be elected for each solicitorial district, and shall "prosecute on behalf of the State in all criminal actions in the Superior Courts." Statutory duties of the Attorney General are set forth in G.S. Ch. 114. G.S. 114-2 provides that it shall be the duty of the Attorney General: "1. To defend all actions in the Supreme Court in which the State shall be interested, or is a party; and also when requested by the Governor or either branch of the General Assembly to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested. 2. At the request of the Governor, Secretary of State, Treasurer, Auditor, Utilities Commission, Commissioner of Banks, Insurance Commissioner or Superintendent of Public Instruction, he shall prosecute and defend all suits relating to matters connected with their departments . . . 4. To consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office." G.S. 114-6 provides: "The Attorney General shall continue to perform all duties now required of his office by law and to exercise the duties now prescribed by law as to civil litigation affecting the State, or any agency or department thereof."

This Court said in *S. v. Loesch*, 237 N.C. 611, 75 S.E. 2d 654: "The Attorney General and the several solicitors of the State are constitutional officers and their duties are set forth in the Constitution and the statutes. In Article III, Section 18, of the Constitution of North Carolina, the General Assembly is authorized and empowered 'to create a Department of Justice under the supervision and direction of the Attorney General, and to enact suitable laws defining the authority of the Attorney General and other officers and agencies concerning the prosecution of crime and the administration of the criminal laws of the State.' Pursuant to the above authority, the General Assembly enacted G.S. 114-2 prescribing the duties of the Attorney General. Subsection 4 of this section reads as follows: 'To consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office.' Therefore, the duty of the Attorney General in so far as it extends to the solicitors of the State is purely advisory. The Attorney General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties."

G.S. 159-40 prosecution by Attorney General for violations of Ch. 159—Local Government Acts—has no application.

There is no language in G.S. Ch. 120, Art. 10 to deprive the solicitor of his constitutional and statutory duty to prosecute violations of this Article. This Court said in *S. v. McAfee*, 189 N.C. 320, 127 S.E. 204: "A solicitor is the most responsible officer of the court and has been spoken of as 'its right arm.' He is a constitutional officer, elected in

his district by the qualified voters thereof, and his special duties prescribed by the Constitution, Art. IV, sec. 23."

There is no allegation in the complaint that the Governor, or either branch of the General Assembly, or the Secretary of State, or any of the other officers enumerated in G.S. 114-2, has requested the Attorney General to prosecute plaintiff for any violation, if there has been such, of G.S. Ch. 120, Art. 10, by plaintiff. A careful examination of our statutes discloses no grant of power or authority which would authorize the Attorney General, in his official capacity, to prosecute plaintiff for any alleged violation of G.S. Ch. 120, Art. 10, if it has committed such, and to take over the constitutional power and duty of the solicitor of the district, in such prosecution, and no such statute has been called to our attention. See: *Railroad Cases,* 136 F. 233; *Parker v. Murry,* 221 Ark. 554, 254 S.W. 2d 468; *Davis v. Pelley,* 230 Ind. 248, 102 N.E. 2d 910; 7 C.J.S., Attorney General, p. 1223; 7 Am. Jur., Attorney General, pp. 235-236.

The demurrer was properly sustained for a misjoinder of causes for the reason that the two alleged causes of action do not affect both defendants.

The court below being of the opinion that a decision based on the alleged cause of action in respect to the applicability of G.S. Ch. 120, Art. 10, would not settle the controversy between the parties, and that the court should, in its discretion, dismiss that alleged cause of action, dismissed it. The court had such discretion by virtue of the provision of G.S. 1-257, and we do not find that it abused its discretion. If the court in respect to such alleged cause of action had rendered a decision in plaintiff's favor, it would not be binding on the solicitors for the State, who are not parties in any respect.

Although the court sustained the demurrer, it had the power to sever the two alleged causes of action, and retain the one in respect to the applicability of G.S. 55-118 to plaintiff. *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345; *R. R. v. Hardware Co., supra.*

G.S. 55-118 provides that the Attorney General shall prosecute actions for a violation of this section, whenever it appears that the section has been violated. This duty calls for the exercise of some discretion and judgment on his part. It seems that it cannot be successfully contended that our Declaratory Judgment Act authorizes a proceeding against the Attorney General to determine the permissible scope of his official duty under a given statute. It would seem that the Attorney General is not a real party defendant, but that he should be retained as a nominal defendant with the Secretary of State, as the constitutionality of G.S. 55-118 is being challenged.

The last sentence of the Attorney General's brief states: "The judgment of the trial court should be affirmed, and the case remanded for

hearing on the merits to determine whether plaintiff is required to comply with G.S. 55-118."

Plaintiff has failed to comply with G.S. 1-123 in that his two alleged causes of action have not been separately stated. *Tart v. Byrne*, 243 N.C. 409, 90 S.E. 2d 692; *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893; Rules of Practice in the Supreme Court, Rule 20(2), 221 N.C. 557.

The judgment below is

Affirmed.

JOHNSON and RODMAN, JJ., not sitting.

STATE v. ROY SAUNDERS.

(Filed 11 January, 1957.)

1. Criminal Law § 51a(2)—

The unsupported evidence of an accomplice is sufficient to sustain a conviction in this State if it satisfies the jury of guilt beyond a reasonable doubt.

2. Robbery § 3—

Testimony of a State's witness to the effect that defendant joined in making plans for a robbery, furnished the perpetrators a pistol, gave his accomplices the name of the victim and was nearby when they induced the victim to go with them to a secluded spot in the victim's car, where they robbed him, together with incriminating admissions of defendant as to his meeting and being with the other conspirators, and corroborative evidence of the accomplice's testimony, *held* sufficient to be submitted to the jury in a prosecution of defendant for conspiracy to rob and for armed robbery.

3. Criminal Law §§ 27, 31m: Evidence § 47g—

It is competent for a witness to testify from her own knowledge gained from official maps over a period of years as travel counsel as to distances between important cities and towns in this and another state. Further, such matters are within common knowledge of which the courts may take judicial notice.

4. Criminal Law § 78e(2)—

Inadvertence of the court, in stating the contention of the State that the testimony of defendant should be scrutinized in the light of his interest, that defendant "still maintains some hope that he may not be" convicted, will not be held for prejudicial error in the absence of apt objection when the jury could not have understood the instruction as anything more than a statement of the State's contentions, the misstatement not being sufficient to take the matter out of the general rule that a misstatement of contentions must be brought to the court's attention in apt time.

5. Appeal and Error § 24—

As a general rule, objections to the statement of contentions and review of the evidence must be made before the jury retires or they are deemed to have been waived.

JOHNSON, J., not sitting.

APPEAL by defendant from *Sharp, S. J.*, 6 February, 1956 Term, FORSYTH Superior Court.

Criminal prosecution upon two bills of indictment, consolidated and tried together. The bill in case No. 287 charged the defendant with the robbery of B. B. Price by the use of firearms, and taking from him the sum of $2,000 in cash and an automobile of the value of $3,200. The bill in No. 356 charged the defendant together with "Walter Wilson, *alias* Walter Kraeuter," and Domenico Calabria with conspiracy to rob B. B. Price of the money and automobile described in the indictment for the substantive offense. The defendant entered a plea of not guilty to both charges. "Walter Wilson, *alias* Walter Kraeuter," entered a plea of *nolo contendere* to the conspiracy count and also to a bill charging him individually with the substantive offense. The offenses are alleged to have occurred near Winston-Salem on 28 July, 1951.

Kraeuter was the principal witness for the State. The substance of his testimony follows: Prior to July, 1951, the witness and Domenico Calabria worked as stevedores on the same pier in New York harbor. On a Monday morning the latter part of July, 1951, as a result of a telephone call from one Waldemaier, a friend of Kraeuter's, in Washington, D. C., Kraeuter and Calabria left New York by train, arrived in Washington in the early afternoon. They were met at the station by Waldemaier who immediately drove them to the home of Roy Saunders on Trinidad Avenue. After the introductions the parties went to a basement room in the home of Saunders, who proposed that Kraeuter and Calabria accompany him to Winston-Salem, North Carolina, for the purpose of robbing a farmhouse near Winston-Salem in which the owner kept a safe and a large sum of money. Saunders delivered to Kraeuter a Luger pistol to be used in the robbery.

Saunders had lived and worked in Winston-Salem, dealt in second-hand automobiles there, and, in addition to his home in Washington, also maintained an apartment in High Point, North Carolina. On that same afternoon or early evening the witness (Kraeuter), Calabria, and Saunders left Washington together by bus and arrived in Winston-Salem early Tuesday morning. Saunders took the witness and Calabria to the Zinzendorf Hotel where he later picked them up and drove them out to a place about one-half mile from the house to be robbed, for the purpose of having them look over the place. Children were playing

about the yard. Carpenters were at work on the house. When Saunders came back to pick them up they told him they did not like the looks of the set-up and they wanted to go back to New York; that they were broke. Saunders gave them ten or twenty dollars, told them he expected to have a car for delivery in New York soon. They planned to ride back with him.

Calabria said he needed some money to take to his wife in order to pacify her about his absence. Whereupon, Saunders suggested there might be an easy hold-up job available a little later on. He said he knew of a second-hand dealer in automobiles who usually carried about $2,000 in cash. On Saturday morning, 28 July, 1951, Saunders drove them to a filling station near a parking lot and pool room on South side and told them to inquire for B. B. Price, propose to buy a second-hand car, ask for a demonstration, and while out, rob him, tie him up, and return to the parking lot where he (Saunders) would pick them up. They would divide the money and he would take them to New York.

Late in the afternoon the witness and Calabria met Price. While testing the car, Calabria drove. Price sat by him in the front seat and the witness sat in the rear seat. Calabria asked to test the car on a rough, dirt road, and after driving to a place where no houses were in sight, Kraeuter held the pistol on Price, told him to hand over his money and he would not be harmed. Price resisted and Kraeuter hit him several times with the pistol, inflicting somewhat serious head wounds. Price feigned unconsciousness and the two carried him to the bushes near the road, left him, and as they drove off they saw him running toward a delivery truck in a nearby field. They attempted to get away in the car but drove into a dead-end road near a fish pond. In attempting to turn around, the car got stuck in the mud. They abandoned it, walked through the woods and on the railroad track nearly all night, and arrived in Lexington early Sunday morning. They divided $1,480 taken from Price, and separated. Kraeuter went to Washington by train. On Tuesday, Kraeuter called Saunders in his home in Washington and was told to come to his house. Saunders knew all about the hold-up and said Calabria had been caught. The witness then gave Saunders $250 of the $740 he got from Price.

B. B. Price testified he had not known Kraeuter or Calabria but on 28 July, 1951, just before the hold-up, these two men came to the car lot and inquired for B. B. Price. A Mr. Hatcher pointed out the witness. His story of the hold-up was essentially the same as that told by Kraeuter.

After the defense attorney cross-examined Kraeuter in an effort to break down his story, the State offered W. C. Burton, a police officer of Winston-Salem, for the purpose of corroborating Kraeuter. The officer was permitted to testify to the story of the robbery as told to

him by Kraeuter, which was essentially the same as that told by Kraeuter on the stand. The court instructed the jury that the evidence of the officer was not substantive evidence but was offered for the purpose of corroborating the witness Kraeuter and for no other purpose.

The State offered evidence that on the afternoon of the robbery the defendant Saunders was at or near the garage and parking lot where Kraeuter and Calabria met Price. Two witnesses testified that Saunders on that afternoon had made inquiry for Price.

The defendant testified and denied any participation in, or knowledge of a plan to rob a farmhouse or B. B. Price. He denied meeting with Kraeuter and Calabria on Saturday morning, 28 July, as testified to by Kraeuter. He testified and offered evidence of witnesses that he was in Abingdon, Virginia, on his way to Charlotte, North Carolina, in the late afternoon of the 27th, and that he was in Charlotte in the morning of the 28th—the day Price was robbed.

On cross-examination, however, he admitted he had a house in Washington in July, 1951; that he knew Waldemaier and at one time they jointly owned a truck; and that Waldemaier brought Kraeuter and another man by the defendant's house on Trinidad in Washington; that he had previously known Kraeuter as Walter Ryan; that Kraeuter wanted to go to the restroom and he took him to the basement; that no discussion took place there and no plans were made for any hold-up. The defendant admitted Waldemaier took the defendant, Kraeuter and the other man to the bus station and that they bought tickets and rode the bus together to Winston-Salem. The defendant admitted that on the day of the robbery he inquired for B. B. Price at the filling station on South side; that he knew of some boys who wanted to buy a car and he recommended they contact Price. Later that evening he found out Price had been assaulted and robbed.

In rebuttal, the State offered Miss Nellie Caldwell who testified that she had been travel counsel for the Winston-Salem Automobile Club for 18 years; and over objection she was permitted to testify as to the distances between Bristol, Virginia, and Winston-Salem, North Carolina, and between Bristol and Charlotte. She said she had never measured these distances but that she got her information from official maps. The defendant objected to the testimony on the ground she had not made the measurements herself. The defendant offered a number of witnesses who testified as to his good character.

At the close of all the evidence the defendant renewed his motion to dismiss and excepted to the refusal of the court to grant it. The jury convicted the defendant on both charges. From a judgment that the defendant be confined in the State's prison for 10 years in each case, the sentences to run concurrently, the defendant excepted and appealed.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

H. Bryce Parker and Wesley Bailey for defendant, appellant.

HIGGINS, J. The State's evidence relative to the plans to commit the offenses charged and the means by which they were carried out consisted of the testimony of Kraeuter, the accomplice, and of B. B. Price, the victim. However, the defendant, on cross-examination, made many admissions tending to support Kraeuter's story. He admitted he and Waldemaier had been in partnership; that Waldemaier took Kraeuter and another man to the defendant's home in Washington on Monday preceding the hold-up; that the defendant took Kraeuter to his basement (where Kraeuter testified the plans were made). He admitted riding the bus with Kraeuter and the latter's companion from Washington to Winston-Salem as Kraeuter testified. He admitted making inquiry for Price at the Southside Poolroom and Filling Station just before Kraeuter and Calabria took Price out to rob him. While the story told by Kraeuter and that told by the defendant are in harmony in many points, they are in conflict with respect to the defendant's participation in the plan to rob Price or to commit any other violation of the law. The defendant contends, therefore, Kraeuter's story of the defendant's participation is unsupported and the State's evidence was insufficient to justify conviction.

The courts of the several states are not in agreement as to whether the testimony of an admitted accomplice is sufficient to convict. Our Court, however, adheres to the rule that such evidence, even if unsupported, is sufficient if it satisfies the jury of guilt beyond a reasonable doubt. *S. v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473, citing cases. Therefore, the defendant's motions to dismiss were properly overruled.

The defendant assigns as error the admission of the evidence of Miss Caldwell that the distance from Bristol, Virginia, to Charlotte, North Carolina, and from Bristol to Winston-Salem is the same—157 miles; and from Charlotte to Winston-Salem is 79 miles. These facts were within her knowledge obtained over a period of 18 years as travel counsel and her testimony with respect thereto was properly admitted. *Jordan v. Glickman,* 219 N.C. 388, 14 S.E. 2d 40. However, we think the court should have taken judicial notice of these distances without proof. In the early case of *Furniture Co. v. Express Co.,* 144 N.C. 639, 57 S.E. 458, decided in 1907, this Court said: ". . . It is generally held that the courts will take judicial notice of the placing of the important towns within their jurisdiction and especially of county seats and their accessibility by railroads connecting them with trunk lines of the country; and there is well considered authority to the effect that courts may also take such notice of the distance to prominent business centers

of other states, etc." A much stronger case for taking such notice can be made out today when almost every town in the country is connected by a ribbon of concrete or asphalt over which a constant stream of traffic flows. Every filling station has maps available to the traveler without charge. Highway signs at road crossings give both distance and direction. In fact, so complete and so general is the common knowledge of places and distances that the court may be presumed to know the distances between important cities and towns in this State and likewise in adjoining states. Am. Jur., Vol. 20, sec. 57, p. 80; 32 C.J.S., sec. 730; Wigmore on Evidence, 3rd Ed., Vol. 9, sec. 2575 (see pocket supplement, 1955); *Chappell v. Stallings*, 237 N.C. 213, 74 S.E. 2d 624; *Mallard v. Housing Authority*, 221 N.C. 334, 20 S.E. 2d 281; *Hart v. Commonwealth*, 131 Va. 726. The objection to the testimony of Miss Caldwell is without merit.

Exceptions were interposed to parts of the charge. The court reviewed the evidence for the State and then gave the State's contentions arising on the evidence. Likewise, the court reviewed the defendant's evidence and gave his contentions arising on the evidence. In reviewing the State's evidence, the Court said:

> "The State says and contends that Mr. Kraeuter has not denied that he has interest in this case, but the State says and contends that the defendant is just as much interested in the outcome of this case and even more so than the witness Kraeuter; that Kraeuter has plead guilty, or has entered a plea of *nolo contendere*, which, so far as punishment is concerned, amounts to the same thing; that the defendant has not yet been convicted; (that he still maintains some hope that he may not be, so the State says and contends that your scrutiny of the defendant's testimony should be made in the light of his present very substantial interest in this case.)"

The defendant assigns as error that portion of the statement in perenthesis. The clause objected to was a part of the court's recital of the State's contentions. No objection was interposed, and no request was made for correction. The court had fully charged the jury to scrutinize the evidence of Kraeuter for the reason that he was an admitted participant in the commission of the crimes charged. It is difficult to see how the jury could have understood the statement objected to as anything more than a contention on the part of the State. The court concluded the charge with the following admonition to the jury:

> "I have tried not to stress one side's contentions in this case more than the other, but you understand, of course, that one person cannot think of everything that can be said for either the State or the defendant, and I have made no attempt to time my statement

of the contentions. I simply say to you that if I have stressed one side more than the other, I am unconscious of having done so; I have not meant to, and you will attach no importance to any apparent emphasis. It is your duty to give both the State and the defendant the benefit of any reasonable contention which arises in its behalf or his behalf, in your deliberations before you arrive at this verdict."

Before the jury retired, attorneys for the State and the defendant indicated that the charge covered their contentions. As a general rule, objections to the statement of contentions and to the review of the evidence must be made before the jury retires or they are deemed to have been waived. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *Moore v. Bezalla*, 241 N.C. 190, 84 S.E. 2d 817; (for further authorities, see Index to North Carolina Reports, Appeal and Error, sec. 24, footnote 289.) The part of the charge objected to does not come within the exceptions to the general rule.

A review of all exceptive assignments fail to reveal error of law committed in the trial.

No error.

JOHNSON, J., not sitting.

STATE v. DEL ADAMS.

(Filed 11 January, 1957.)

1. Homicide § 25—

The State's evidence tending to show that defendant sought out and shot the deceased with a pistol because of his belief that deceased had reported him for the illegal manufacture of liquor, *held* sufficient to overrule defendant's motions for nonsuit and sustain conviction of murder in the first degree.

2. Homicide § 20—Where motive for killing is ill will resulting from indictment, State may prove indictment to establish motive.

Where the State contends that defendant's motive for killing deceased was anger over defendant's belief that deceased had reported him for manufacturing liquor, the State's evidence tending to show that defendant was under indictment for possessing nontax-paid whiskey in connection with which defendant had made a statement threatening to kill anyone who accused him of making or selling whiskey, mentioning deceased's name in connection therewith, and in connection with which defendant's wife admitted on cross-examination that he was mad about the "man

who reported him for making whiskey," *held* competent for the purpose of showing motive and ill will towards the deceased, there being nothing to indicate that the evidence relative to defendant's illegal activities was introduced for the purpose of impeaching defendant's character.

3. Criminal Law § 48c—

The general admission of evidence which is competent for a restricted purpose will not be held for error in the absence of a request by defendant that its admission be restricted.

4. Criminal Law § 29a—

Evidence of a strong motive or interest to commit the offense proved to have been committed is a circumstance competent to be shown in evidence, since a man's conduct may be gathered from the motive known to have influenced him.

5. Criminal Law § 81c(3)—

Exception to testimony of the State's witness cannot be sustained when defendant or his witness testifies to substantially the same facts or the defendant admits such facts in his own testimony.

6. Criminal Law § 53k—

Where defendant does not contend that any of his contentions were omitted or incorrectly stated, assignment of error to the statement of contentions solely on the ground that the statement of the respective contentions of the parties was not of equal length, is untenable.

7. Criminal Law § 79—

Assignments of error not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

JOHNSON, J., not sitting.

APPEAL by defendant from *McKeithen, S. J.*, February Term 1956 of JOHNSTON.

This is a criminal action in which the defendant was tried upon a bill of indictment charging him with the premeditated murder of one Raymond Hayes.

This case was here on appeal at the Fall Term 1955 from a judgment imposing the death penalty. A new trial was awarded for error of the trial judge in his instruction as to the legal effect of a recommendation of life imprisonment. See *S. v. Adams*, 243 N.C. 290, 90 S.E. 2d 383.

At the former trial, the defendant's defense was drunkenness. At the present trial, his plea was "not guilty," and a companion plea of "not guilty by reason of transitory insanity," which the defendant contends was brought about by the attentions which Raymond Hayes had been paying to the defendant's wife.

The evidence for the State discloses that around 4:00 o'clock in the afternoon of 1 July 1955 Raymond Hayes drove his car to the store of

Junie Surles, which is located about 100 yards from the home of the defendant, in Johnston County. Raymond Hayes entered the store and purchased some candy and a soft drink. While he was eating his candy and drinking the soft drink, the defendant came to the door of the store and said, "Step out of there, Raymond"; and Raymond said, "What in the world is the matter, Del?"; and Del said, "Come out, I am going to kill you." The defendant had a pistol in his hand, pointed at the deceased. Mrs. Surles, who was in charge of the store, said, "Del, please don't do that," and the defendant said, "Mrs. Surles, step aside." Mrs. Surles left by the door near which the defendant was standing, and ran for help. Just as she left the store, Hayes said to the defendant, "Don't shoot me, Del, don't shoot me." Immediately thereafter Mrs. Surles heard a pistol shot and Raymond Hayes holler, "Oh, you have killed me."

The State's evidence further tends to show that the defendant's motive in killing Raymond Hayes was his belief that Hayes had reported him to the Federal officers for making liquor. About two weeks before the defendant killed Raymond Hayes, he said, in the presence of Junie Surles and some other men, "If anybody got into his business, about his liquor business, . . . he was going to take his gun and blow their d . . . heads off." In connection with this statement, he called Raymond Hayes' name. After the shooting, the defendant disposed of the pistol he used and it has never been found. He went to Smithfield around 5:00 p.m. on 1 July and surrendered to a deputy Sheriff of Johnston County. The defendant, according to this officer's testimony, informed him that he had shot Raymond Hayes with a .32 automatic pistol he bought about eighteen months ago to kill him; the officer asked if he had killed him, and he said, "If I didn't kill him I didn't do what I intended to do." According to this officer, the defendant had been drinking but he was not drunk. "I asked Del where his still was and he told me where it was and I went and got it."

The defendant's wife testified in his behalf, and her evidence tends to show that the deceased had tried to get familiar with her, but without success. She testified that her husband spent Wednesday night at home but left early Thursday morning; "he was nervous when I woke him up; he acted upset and nervous and I knew something was wrong with him; . . . he didn't come back Thursday but came back to get a flashlight Thursday night and left; I next saw him Friday, July 1, about 4:00; he was driving his car and came back to the house; . . . I thought he was drinking; . . . Del said something about Raymond coming over there so much when he wasn't there; he had a gun in his hand; he said, 'Raymond Hayes has been over here and tried to get you to go out with him . . .'; he said he knew it and I might as well tell the truth; he had the gun in his hand and I knowed I had to tell

the truth and I said, 'Yes, he has.' It seemed to go over him and he left the house immediately; he just looked wild and seemed to just make him go crazy for that moment; . . . he went toward the store and I heard a shot just a few minutes later."

On cross-examination this witness testified that her husband acted like he was drinking, or she thought he was drinking; but that she didn't know whether he was drunk or mad. "I testified at the former trial that I didn't know of a reason in the world why my husband shot Raymond Hayes and I said that was the truth; . . . and Del said he didn't know why he killed Raymond; . . . I decided to tell the truth this time; . . . I don't know whether Del got mad cause he was reported to Officer Coats, the Federal Officer, or not. I heard him mention it but he was ranting about the man who reported him for making whiskey. I didn't see the whiskey still; . . . he might have sold whiskey from the house; I found out he had been reported about the distillery; . . . I might have told Mrs. Ethan Hayes that liquor was at the bottom of the killing."

The defendant, at his specific request, went on the stand and testified in his own behalf. On direct examination, after testifying as to his motive for shooting the deceased, the defendant stated to the jury: ". . . I went to the store and said, 'Raymond, you come out of the store, I am going to kill you,' and Mrs. Surles stepped in the way and I told her to get out of the way; Raymond asked what was the matter and I said, 'You know what's the matter'; 'you get out'; he wheeled and ran . . . and I shot him and said, 'I'll learn you to go out and keep taking over my home'; . . . I have been in trouble before; started out about the time I was 21 operating a still and have been convicted five or six times, including two times in the Federal Court; I was in prison for 12 months one time and 18 months the other; when I was 16 or 17 I was convicted of assault and was given 60 days; . . . I have been convicted of driving drunk somewhere about 1947 and 1950; at the time of the shooting I had a 100 gallon copper still over in the old Cole field and I told the officers about it."

On cross-examination the defendant testified, "I started on the career of crime when I was about 18; never been convicted of anything except whiskey and driving drunk; been convicted of assault once; . . . been sentenced to prison but it didn't stop me from bootlegging; . . . at the time I was put in jail I had $475.00; that was liquor money; I was raised up in the liquor business."

The jury returned a verdict of guilty as charged, without recommendation of mercy, and, upon a sentence imposing the death penalty, the defendant appealed to the Supreme Court, assigning error.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

L. L. Levinson and Harry C. Canady for defendant.

DENNY, J. Assignments of error Nos. 3 and 5 are based on the defendant's exceptions to the failure of the court below to sustain his motion for judgment as of nonsuit. The evidence disclosed by the record in this case is ample to sustain the verdict rendered by the jury in the trial below. These assignments of error are without merit.

Assignment of error No. 1 is based on a number of exceptions, each one having been taken to the admission of evidence relating to the defendant's activities as a dealer in and manufacturer of illicit whiskey, or to the defendant's statements in connection therewith. The defendant contends that this evidence constitutes an attack on his character and was inadmissible unless the defendant testified and offered evidence of his good character, citing Stansbury, North Carolina Evidence, section 104; *S. v. Nance,* 195 N.C. 47, 141 S.E. 468; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *S. v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537.

We concede that if the State had offered the evidence complained of for the purpose of showing the bad character of the defendant, the objection raised would have some merit. However, it is apparent from the record in this case that the evidence was offered for the purpose of showing ill will towards the deceased and a motive for the killing. The evidence complained of was admissible for that purpose, and the defendant made no request that it be so restricted. *S. v. Walker,* 226 N.C. 458, 38 S.E. 2d 531; *S. v. Turberville,* 239 N.C. 25, 79 S.E. 2d 359; *S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774. There is nothing to indicate that the evidence under discussion was introduced or used for the purpose of showing the character of the defendant or to prejudice him before the jury. *S. v. Moore,* 104 N.C. 743, 10 S.E. 183; *S. v. Artis,* 227 N.C. 371, 42 S.E. 2d 409. Furthermore, Rule 21 of the Rules of Practice in the Supreme Court, 221 N.C. 558, among other things, provides, "Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted."

In the case of *S. v. Wilcox,* 132 N.C. 1120, 44 S.E. 625, this Court said: "In the administration of the criminal law any fact shedding light upon the motives of the transaction will not be excluded from the consideration of the jury, whether it goes to the attestation of innocence or points to the perpetrator of the crime . . . A man's motive may be gathered from his acts, and so his conduct may be gathered from the motive by which he was known to be influenced. Proof that the party accused was influenced by a strong motive of interest to

commit the offense proved to have been committed, although weak and inclusive in itself, yet it is a circumstance to be used in conjunction with others which tend to implicate the accused."

It will be noted that about two weeks before the defendant killed the deceased, he made a statement to a number of persons that if anybody accused him of making or selling whiskey he was going to "blow their d . . . heads off"; and the defendant mentioned the name of the deceased in connection with that statement or threat. *S. v. Smith,* 225 N.C. 78, 33 S.E. 2d 472; *S. v. Artis, supra; S. v. Fowler, supra; S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664.

Moreover, when the defendant went on the stand he testified on direct examination with respect to the number of times he had been convicted for violation of the liquor laws, and also stated that at the time of the shooting he had a 100 gallon copper still over in the Cole field. His evidence, when compared with the matters complained of, went far beyond the State's evidence. The State offered no evidence of a former conviction of the defendant of any specific crime; its evidence did show that the defendant was under indictment, charged with having nontax-paid whiskey in his possession, and that it was in connection with this charge that the defendant made the statement threatening to kill anyone who accused him of making or selling whiskey. The evidence also tends to show that it was in connection with this charge that the defendant's wife admitted on cross-examination that he "was ranting about the man who reported him for making whiskey." She also testified that she had "found out he had been reported about the distillery."

The defendant did deny, however, having threatened to kill anyone who interfered with his liquor business, but he did not deny that he had been constantly engaged in that business; in fact, he testified that he had been "raised up in the liquor business," and that he had "been sentenced to prison, but it didn't stop me from bootlegging."

Exceptions by the defendant to evidence of a State's witness will not be sustained where the defendant or his witness testifies, without objection, to substantially the same facts. *S. v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590.

Likewise, the admission of evidence as to facts which the defendant admitted in his own testimony, cannot be held prejudicial. *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804. This assignment of error is overruled.

The assignments of error relating to the statement of the contentions by the trial judge are, in our opinion, feckless. The defendant does not contend that any of his contentions were omitted or incorrectly stated. *S. v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218; *S. v. Smith,* 238 N.C. 82, 76 S.E. 2d 363; *S. v. Sparrow,* 244 N.C. 81, 92 S.E. 2d 448.

A careful study of the evidence and the charge leads us to the conclusion that the trial judge sufficiently and fairly reviewed the contentions of the defendant.

Other assignments of error based on exceptions in the record have not been brought forward and argued in the defendant's brief. Under Rule 28, Rules of Practice in the Supreme Court, 221 N.C. at page 562, they are deemed abandoned.

In our opinion, the defendant has had a fair trial and the result of the trial below will not be disturbed.

No error.

JOHNSON, J., not sitting.

GENEVA GOULD, ADMINISTRATRIX OF THE ESTATE OF ELEANOR RUSH, DECEASED, v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 11 January, 1957.)

Convicts and Prisoners § 3: State § 3b—

Evidence *held* sufficient to support findings of the Industrial Commission that death of intestate resulted from negligence of State employees while acting in the scope of their employment in administering corrective measures at the prison, and that intestate was not guilty of contributory negligence, and award of damages under the State Tort Claims Act is upheld.

JOHNSON, J., not sitting.

PARKER, J., dissenting.

APPEAL by defendant from *Mallard, J.*, at March Civil Term 1956, of WAKE.

Proceeding instituted before North Carolina Industrial Commission under State Tort Claims Act, Article 31 of Chapter 143 of General Statutes, on claim of plaintiff, Geneva Gould, Administratrix of the Estate of Eleanor Rush, deceased, for wrongful death of intestate alleging negligence on the part of defendant's employees while acting within the scope of their employment in administering corrective measures at the Woman's Prison in Raleigh, North Carolina.

The Deputy Hearing Commissioner, passing jurisdictional facts, found facts, "based upon the stipulations and all the competent evidence," summarily stated: (1) That Eleanor Rush, a prisoner in the Women's Prison, in Raleigh, came to her death on 20 August, 1954, by reason of negligence of employees of defendant acting within the scope of their employment and without contributory negligence on her part.

G.S. 143-291; (2) and that as a result thereof plaintiff has been damaged in the amount of $3,000.00, for which award was made to plaintiff.

Defendant filed certain exceptions to findings of fact and conclusions of law and to the award of the Deputy Hearing Commissioner, and appealed to the Full Commission.

Upon such appeal the Full Commission, by majority vote, amended the Findings of Fact of the Deputy Hearing Commissioner by adding thereto the following Findings of Fact:

"1. That the death of Eleanor Rush resulted and arose exclusively from, and was proximately caused and produced by, the negligence of said defendant's employees above named, while acting within the scope of their authority at the time, place, and in the manner herein described.

"2. That there was no contributory negligence on the part of Eleanor Rush."

And the Full Commission being of opinion that the assignments of error are without merit and should be overruled, adopted the Findings of Fact and the Conclusions of Law of the Deputy Hearing Commissioner, as so amended, and the order based thereon, and affirmed same in all respects.

Defendant appealed therefrom to Superior Court, assigning as error same matters covered by the exceptions theretofore filed to the Findings of Fact and Conclusions of Law and Award made by the Deputy Hearing Commissioner. And on such appeal the trial Judge overruled each and all of the exceptions, and affirmed the award of the Full Commission.

Defendant appealed from the judgment of Superior Court to Supreme Court purportedly upon same exceptions theretofore filed, as hereinabove set forth, and assigns same as error.

Taylor & Mitchell and John H. Rennick for Plaintiff, Appellee.

R. Brookes Peters and Kenneth Wooten, Jr., for Defendant, Appellant.

WINBORNE, C. J. A careful reading of the record and case on appeal, here presented, reveals evidence from which the findings of fact made by the Deputy Hearing Commissioner and by the Full Commission clearly appear, or may be fairly inferred. The conclusions of law follow as a matter of course. Therefore elaboration of the evidence, and discussion of legal principles seem unnecessary.

And while there is a motion in this cause to dismiss the appeal for failure of appellant to comply with our rules as to assignments of error, which motion is not without merit, we have concluded that the appeal should be disposed of as hereinabove indicated—rather than by dismissal.

Hence, after giving due consideration to the record and case on appeal as presented, the judgment from which appeal is taken is

Affirmed.

JOHNSON, J., not sitting.

PARKER, J., dissenting: These facts were found by the Hearing Commissioner, which facts the Full Commission adopted as its own: Plaintiff's intestate, Eleanor Rush, during her life was never gainfully employed for any period of time, with the exception of two weeks that she worked as a domestic servant, and for a certain period of time that she worked on Saturdays. Eleanor Rush served two sentences in the State's Prison for violating the criminal laws of this State, and while serving these two sentences she was a most unruly prisoner. Sometime prior to 20 August 1954, she was confined in an isolated cell of the prison for violating the prison rules. This cell was situate in a wing of the hospital at the prison. Prior to the night of 20 August 1954, the furnishings of this cell, with the exception of a mattress which was left lying on the floor, had been removed, because Eleanor Rush had endeavored to damage the furnishings. About 10:00 p.m. on 20 August 1954, Eleanor Rush and another inmate in an isolation cell began yelling and cursing in a loud and boisterous manner. I. D. Hinton, Superintendent of the Prison, heard the yelling and cursing of Eleanor Rush and the other inmate, and went to the isolation ward, and ordered them to be quiet as they were disturbing other prisoners, especially those who were ill and in the hospital. After Hinton left, Eleanor Rush and the other prisoner again began to yell and curse in a boisterous manner. Whereupon Hinton, with other prison employees, returned to the two cells with restraining belts. One of the guards applied a metal cuff to the wrist of the deceased, thereby bringing her under submission. Then a leather restraining belt was placed about her body, and her two arms were buckled to the belt. After this was done, Eleanor Rush continued boisterous. Whereupon a hand towel about 18 inches wide and 32 inches long was made into a gag, and placed in her mouth between her teeth, and tied behind her head. During the entire time that the gag was being applied, Eleanor Rush was violently resisting, and due to her resistance two guards had to hold her, one on either side. Thereafter a restraining belt and gag were also applied to the other prisoner, who had been causing the disturbance. After the belt and gag had been applied to the other prisoner, Eleanor Rush removed the gag from her mouth, and began again to yell and curse. Whereupon Hinton and other employees of the prison returned to her cell, and two towels were placed in her mouth and each was tied behind her head slightly tighter than the first gag. After the two towels were applied, Hinton

had a nurse to check to see that they were not interfering with her breathing. While one of the gags was being applied to the mouth of Eleanor Rush, the person applying the same negligently injured her neck, thereby causing her to suffer a dislocation of the neck. The dislocation at the time did not cause a compression of the spinal cord. After the two gags had been applied, Hinton and the employees left the cell. As they left, Eleanor Rush turned and walked to the window of the cell. Shortly thereafter Eleanor Rush, in a movement of her head, caused the dislocation of her neck to increase, thereby causing compression of the spinal cord and death.

The finding that the person applying the gag negligently injured Eleanor Rush's neck, thereby causing her to suffer a dislocation of her neck, is a pure conclusion. No facts have been found to show in what respect, if any, that this person was negligent. Upon those facts the Hearing Commissioner and two members of the Full Commission, with one Commissioner dissenting, found that the death of Eleanor Rush arose exclusively from, and was proximately caused by, the negligence of the employees of the defendant, and that there was no contributory negligence on the part of Eleanor Rush. Upon such findings and conclusions the Full Industrial Commission by a two to one decision upheld the Hearing Commissioner, and made an award of $3,000.00.

The Hearing Commissioner found, and the Full Commission adopted these findings as its own, that on 20 August 1954 the State Highway and Public Works Commission had in full force and effect certain rules and regulations governing the management of prisoners under its control. A portion of Section 207 of these rules and regulations is as follows: "Maintaining Discipline—Officers and employees shall be responsible for maintaining discipline at all times and under all circumstances among inmates who are under their direct supervision." This rule further provides that, as set forth in G.S. 148-46, when any prisoner shall disobey any lawful command, the officer, overseer, or guard, shall use any means necessary to enforce the observance of discipline. The rule further provides no officer or employee shall strike or lay hands on an inmate, unless it be necessary to quell a disturbance, or to prevent escape, etc., and in such cases only the amount of physical force necessary to accomplish the desired result is authorized.

If it be conceded that the defendant's employees were negligent, which, in my opinion, is very doubtful, I cannot escape the conclusion that, upon the facts found by the Hearing Commissioner, and adopted as its own by the Full Commission, Eleanor Rush was guilty of contributory negligence, which contributed to her death as a proximate cause, or as one of the proximate causes of her death. Upon the facts found, the acts and conduct of Eleanor Rush clearly show that she did not exercise the care and prevision which a reasonably prudent person

would employ in the same circumstances for her own safety. In my judgment, the facts found are so plain on that question that reasonable minds can draw no other inference.

"A plaintiff's negligence to bar recovery need not be the sole proximate cause of injury. It suffices, if it contributes to his injury as a proximate cause, or one of them." *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733.

In my judgment, the findings of fact made by the Hearing Commissioner, and adopted as its own by the Full Commission, do not support the conclusion of the two members of the Full Commission that there was no contributory negligence on the part of Eleanor Rush. In my opinion, the defendant's assignment of error to the finding and conclusion that there was no contributory negligence on the part of Eleanor Rush is good, and should be sustained.

The findings of fact show that Eleanor Rush was a person who would not work, a criminal and an incorrigible prisoner. The prison authorities in the performance of their legal duties were required to prevent her yelling and cursing and disturbing the other prisoners, especially those who were ill in the hospital. By reason of her incorrigibility, her continued yelling and cursing, and her legal contributory negligence, she contributed proximately to her own death, and, in my opinion, the taxpayers of North Carolina should not be required to pay $3,000.00 to the administratrix of her estate. To do so, permits a recovery squarely based upon Eleanor Rush's wrong and misconduct, yelling and cursing, her incorrigibility, and her legal contributory negligence.

An appeal to the Supreme Court is an exception to the judgment. *Bennett v. Attorney General, ante,* 312, 96 S.E. 2d 46. "The exception to the judgment entered presents for decision only two questions: (1) Do the facts found support the judgment, and (2) does any error of law appear upon the face of the record?" *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53. In my opinion, the facts found do not support the judgment. I vote to reverse.

KRAMER BROTHERS, INC., v. O. R. McPHERSON, INDIVIDUALLY AND T/A SOUTHERN ELECTRONICS, AND RONNIE QUALLS, INDIVIDUALLY AND T/A RONNIE'S HOBBY & MODEL SHOP.

(Filed 11 January, 1957.)

Sales § 23½—Evidence held sufficient for jury on question of sale in bulk void under G.S. 39-23.

Evidence, taken in the light most favorable to plaintiff, tending to show sale by a retailer of a sufficiently large part of his stock in trade, for which

he had not paid his wholesaler, to enable his transferee to start a like business of his own, without notice to the wholesaler or otherwise complying with the provisions of the statute, *held* sufficient to make out a case against the transferee to recover the value of the goods sold by the transferee in the ordinary course of his business or to recover the specific merchandise, when it can be identified in the transferee's hands, a sale within the definition of the statute being void. G.S. 39-23.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Hall, J.*, at 31 May, 1956 Term, of ALAMANCE.

Civil action to recover on contract for merchandise sold and delivered.

Plaintiff alleges in its complaint that defendant O. R. McPherson is indebted to it in the sum of $2,076.96 for certain goods, wares and merchandise sold and delivered by it to him, after maturity, and demand, and payment neglected, and that there are no offsets, credits, counterclaims or allowances to which McPherson is lawfully entitled.

And plaintiff also alleges in its complaint that subsequent to the sale of the merchandise by plaintiff to O. R. McPherson, "McPherson sold his entire business in bulk to defendant Ronnie Qualls; that said sale was and is void as against this plaintiff in that said sale was made in violation of, and not in compliance with the provisions of G.S. 39-23; that this plaintiff had no notice whatsoever of the sale and learned of it indirectly some time after it had been made."

It is also set forth in the complaint: "That this plaintiff is informed and believes, and thereupon alleges that the defendant, Ronnie Qualls, has commingled the merchandise acquired from O. R. McPherson in his business known as Ronnie's Hobby & Model Shop; that plaintiff has made demand upon the said defendant, Ronnie Qualls, for the payment of said indebtedness, but that payment has been refused."

Thereupon plaintiff prayed:

(a) That it recover of defendant, O. R. McPherson, the sum of $2,076.96 with certain interest thereon;

(b) That the bulk sale made by O. R. McPherson to Ronnie Qualls be declared null and void as against creditors of McPherson, and said sale set aside;

(c) That Ronnie Qualls be adjudged personally liable for any and all assets acquired from McPherson and sold or otherwise disposed of;

(d) For costs, and

(e) For such other and further relief as the court may deem just and proper.

The defendant, O. R. McPherson, failed to answer, and, as to him, judgment by default final, for the amount alleged in the complaint, was entered.

But defendant Ronnie Qualls, individually and t/a Ronnie's Hobby & Model Shop, answering, denied the material allegations of the complaint.

And the cause coming on for trial in Superior Court, plaintiff called and examined as its witnesses both O. R. McPherson and Ronnie Qualls.

O. R. McPherson testified in pertinent part: ". . . I have had occasion to be in hobby or electronic business. I was in such business about one year and a half ago. The trade name . . . was Southern Electronics. As to what I sold in that business, what the nature of the business was, it was mainly electronic shop, repairing televisions and radios and as a side line we put in some hobby goods, model airplanes and trains, etc. . . . In the course of my business I did have occasion to purchase some merchandise from Kramer Brothers, the plaintiff here . . . I have not paid them for all the merchandise. I owe them somewhere in the neighborhood of $2,000.00 . . . I received several statements . . . Looking at that paper there, I can refresh my memory or recollection as to how much I owe them, I think that is approximately it. It says $2,076.96. As to whether I still owe that now, I think so, yes. As to whether, after I had bought this merchandise from Kramer Brothers, and while I was still owing this money I say I owe, I ever had occasion to dispose of my business or my stock of merchandise in Southern Electronics . . . I did dispose of most of the equipment. Yes, I sold most of my stock of goods too . . . I sold over half of it. Mr. Qualls purchased some of it . . . the material was inventoried by Mr. Qualls and we saw what the value came up and I offered him the material he had inventoried if he desired to purchase for a specific price . . . I sold it to him for somewhere between $845.00 and $865.00, as well as my memory serves me . . . there was money value put on it. As to whether Mr. Qualls put any value on it . . . my best recollection, it was $1,700.00 gross. I don't know that Mr. Qualls was in any kind of business when he purchased this merchandise. Yes, he was in business since then. The name of his business he was in since then is Ronnie's Model Shop . . . I sold the merchandise to him in June of last year . . . 1955. Yes, I believe the merchandise I sold to him included some of the material I purchased from Kramer Bros. I know it contained some of the materials . . . After I sold the merchandise to Mr. Qualls I sold some to somebody else. I sold to different individuals, I don't know how much . . . I don't know how much I got for it . . . No, at the time I sold this merchandise to Mr. Qualls, I did not notify Kramer Brothers before that that I was selling it. I didn't prepare any papers appointing a trustee or putting any money in the hands of a trustee . . . I did not give any bond . . . I have not seen any given by anybody else."

Then Ronnie Qualls testified: ". . . I am a defendant in this action . . . I operate Ronnie's Hobby & Model Shop. I started operating this shop in July 1955 . . . I purchased some merchandise from Mr. McPherson about that time . . . It was some of the merchandise he had in the store—just the hobby merchandise . . . I used that merchandise in the store I opened up; that helped to start my stock . . . It started the stock in my store . . . I have been selling the stock I bought from him. . . . I took an inventory of what he had in stock and what I wanted. I have that inventory here . . . You may see it . . . I have not checked this inventory against my present stock to see if any material I bought from Mr. McPherson is still there. When the stock was brought up to my store we added it in with all the rest of it . . . I bought this stuff from Mr. McPherson and started off my store and made an inventory . . . I sold from that to my customers . . . I made inventory of the stuff I brought into my store . . . This is the inventory I took shortly after I put it in the store . . . When I put it in the store, that is what I had right there . . . I haven't checked to see everything I had bought from him. A lot of stuff is still up there. I couldn't tell exactly what is and what isn't. I can go by that book and see and pick it out if I have to because lots of things we replenished the stock as I take it out I put it right back in . . . I have been buying the same things . . . about the same basis . . . hobby merchandise . . . I trade with Kramer Brothers—with them and other companies. I bought my first stock from Kramer Brothers to start with. As to whether I really know what I got from Mr. McPherson and what I bought from Kramer Brothers to replace items, the only way I could tell is put it back on the book. I could tell the old boxes from the new boxes."

Plaintiff introduced in evidence the summons as appears in the record proper showing that the action was instituted on 15 September, 1955, and that summons was served on 16 September, 1955.

Thereupon plaintiff rested its case.

Motion of defendant Ronnie Qualls for judgment as of nonsuit was allowed. The court entered judgment in accordance therewith as to him.

Plaintiff excepted thereto, and appeals therefrom to Supreme Court and assigns error.

W. D. Madry and W. R. Dalton, Jr., for Plaintiff Appellant.
John D. Xanthos for Defendant Qualls Appellee.

WINBORNE, C. J. Does the evidence offered by plaintiff in the trial below, as set forth in the case on appeal, taken in the light most favorable to plaintiff, make a case for the jury for violation of the sale in

bulk statute, G.S. 39-23? In view of the language of the statute, and decided cases in this State, this Court is of opinion that the evidence does make out such a case, and so holds.

The statute, G.S. 39-23, declares that the "sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller," unless the seller makes an inventory as specified and gives timely notice to the creditors of the proposed sale, or executes bond, all as is therein specified.

"Merchandise," within the intent and meaning of this sale in bulk statute, is declared by this Court in *Swift & Co. v. Tempelos,* 178 N.C. 487, 101 S.E. 8, to be "limited to things which are ordinarily bought and sold, in the way of merchants, and as the subjects of commerce and traffic." Full discussion of the term is there set forth in opinion by *Walker, J.,* writing for the Court.

Tested by the terms of the sale in bulk statute, the evidence in the instant case tends to show, or is reasonably susceptible of the inference that defendant McPherson, as a side line to his electronic shop, repairing televisions and radios, "put in hobby goods model airplanes and trains, etc."; that in the course of his business he purchased more than $2,000.00 worth of merchandise from Kramer Brothers, the plaintiff, for which he has not paid; that in the language of McPherson, "I sold most of my stock of goods . . . over half of it—Mr. Qualls purchased some of it . . . I sold it to him for somewhere between $845.00 and $865.00 . . ."; that Qualls prepared an inventory—$1,700.00 gross: and that McPherson did not notify Kramer Brothers, his creditor, or otherwise comply with provisions of the sale in bulk statute.

And the evidence further tends to show that the stock of goods purchased by Qualls was sufficiently large to enable him to start a business of his own; and that, quoting Qualls, "When the stock was brought up to my store we added it in with all the rest of it . . ." Qualls says he made an "inventory of the stuff I brought into my store . . . A lot of the stuff is still up there. I couldn't tell exactly what is and what isn't. I can go by that book and see and pick it out if I have to . . ."

Indeed headnote #2 in *Rubber Co. v. Morris,* 181 N.C. 184, 106 S.E. 562, epitomizes the decision there in this manner: "When a sale of merchandise in bulk is avoided for non-compliance with the statute, C.S. 1013 (now G.S. 39-23), the goods can be made available by direct process or levy and sale in the hands of the original purchaser, or such purchaser may be held liable for their value when they are disposed of by him, and either remedy is available to the creditors of the vendor against subsequent purchasers as long as the goods can be identified.

or until they have passed into the hands of a *bona fide* purchaser for value without notice."

The sale in bulk statute has been the subject for consideration by this Court in several cases. See *Pennell v. Robinson,* 164 N.C. 257, 80 S.E. 417; *Gallup v. Rozier,* 172 N.C. 283, 90 S.E. 209; *Whitmore v. Hyatt,* 175 N.C. 117, 95 S.E. 38; *Armfield Co. v. Saleeby,* 178 N.C. 298, 100 S.E. 611; *Swift & Co. v. Tempelos, supra; Rubber Co. v. Morris, supra,* and possibly others. And it may be noted that these decisions were written in the light of the wording of the statute at the time. Hence it is appropriate to bear in mind these matters in connection therewith.

The sale in bulk statute was enacted by the 1907 session of the General Assembly as Chapter 623 P.L. 1907, and has since been amended, and codified, (1) as C.S. 1013, and (2) now G.S. 39-23. As originally written the first line of Section 1 read "that the sale in bulk of a large part of the whole of a stock of merchandise . . ." But in an act P.L. 1913 Chapter 30, the preposition "of" appearing between the word "part" and the word "the" in the phrase just quoted was stricken out and the conjunctive word "or" inserted in lieu thereof,—so that the phrase was made to read "that the sale in bulk of a large part or the whole . . ."

Lastly, the General Assembly, 1945 Session Laws of North Carolina, Chapter 635, Section 1, sub-section (26) amended G.S. 39-23 by striking out the words *"prima facie* evidence of fraud, and" appearing in lines five and six, so that the sale in bulk as set forth in Section 1 instead of reading *prima facie* evidence of fraud is made to read "shall be void as against creditors of the seller." So it is now.

In the meantime other amendments were enacted by General Assembly, P.L. 1913, Extra Session, Chapter 66, and P.L. 1933, Chapter 190, all of which are embodied in G.S. 39-23 as it now appears.

The judgment from which appeal is taken will be set aside, and the cause submitted to a jury upon issues arising on the pleadings, and under proper charge by the court.

Reversed.

JOHNSON, J., not sitting.

D. R. BURNS v. LAWRENCE CRUMP AND WIFE, RUBY CRUMP.

(Filed 11 January, 1957.)

1. Adverse Possession § 15—

Where the land in dispute is not embraced within the description of the deed under which defendant claims, defendant may not use such deed as color of title to the disputed land, since a deed is color only as to the land designated and described therein.

2. Appeal and Error §§ 24, 42—

A statement of contentions which presents an erroneous view of the law applicable to the case constitutes prejudicial error.

3. Deeds § 15—

A statement after the description that the grantor "is to have a home on and full possession of said land as long as he lives," is insufficient to reserve a life estate in the grantor, the deed being otherwise a regular fee simple warranty deed.

4. Adverse Possession § 6—

Where the deed does not embrace within its description the land in dispute, the grantee is not entitled to tack possession of his grantor.

5. Same—

Where a grantor joins in the deed of his grantee to a third person under the mistaken assumption that he had reserved a life estate in the lands, his act in pointing out corners embracing the land in dispute, but not covered by the description, creates no privity between him and the second grantee upon which the doctrine of tacking possession may rest.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Sink, E. J.*, April-May Term 1956 of CALDWELL.

This is a civil action instituted by the plaintiff to recover for alleged trespass and damages against the defendants.

The plaintiff alleges that he is the owner in fee and in possession of the tract of land described by metes and bounds in his complaint, consisting of 80/100 of an acre, being a part of the land conveyed to Torrence Philyaw and wife, Cora Philyaw, by deed from G. W. Robbins and wife, Luna Robbins, dated 24 October 1939, recorded in the Registry of Caldwell County in Book 206, page 616. The plaintiff further alleges that since on or about 1 January 1954 the defendants have trespassed upon a part of said lands after having been notified verbally and in writing not to do so.

The defendants' answer denies title in the plaintiff and alleges ownership and title by adverse possession under color and that the defendants and their predecessors in title have owned, occupied and possessed said

disputed area of land adversely, under known and visible lines and boundaries continuously for more than twenty years.

The plaintiff introduced in evidence a deed from Torrence Philyaw and wife, Cora Philyaw, executed 21 September 1953, conveying to him the land described in the complaint, which deed was duly registered on the day of its execution in the office of the Register of Deeds of Caldwell County in Book 292, page 227. The plaintiff also introduced in evidence a deed dated 9 March 1920 from H. C. Gragg and wife, Viola Gragg, to G. W. Robbins, registered on the day of its execution and recorded in Book 99, page 392, in the Caldwell County Registry, conveying a 16-acre tract of land, which the plaintiff alleges the land in dispute is a part. Plaintiff likewise introduced in evidence a deed dated 24 June 1919 from W. C. Newland to H. C. Gragg for this same 16-acre tract of land, which deed was duly recorded in Caldwell County on 3 November 1922 in Deed Book 111, page 483.

The plaintiff's evidence tends to show that his immediate predecessors in title, Torrence Philyaw and wife, occupied and used the land now in dispute while they owned it and that the plaintiff has occupied and used it since he obtained his deed thereto on 21 September 1953, and that the deeds introduced by the plaintiff contain within their respective descriptions the land in dispute, which is less than one-tenth of an acre.

The defendants contend they own the land in dispute and that it is valuable to them because it is their only access to Gragg's Prong Creek to water their cattle.

The defendants claim title under deed dated 1 June 1944 which purports to be from J. P. Gragg, widower, and Effie Sims, widow, to Lawrence Crump, which instrument was duly recorded in Caldwell County on 12 June 1945 and described by metes and bounds a tract of land containing 45 acres, more or less. The defendants offered this deed in evidence. It clearly appears from the description contained in this deed and the court survey thereof, as shown on the map prepared by the court surveyor (Plaintiff's Exhibit No. 2), that the land conveyed in this deed, under which the defendant claims title, does not lie adjacent to the land in dispute. The nearest corner called for in the deed to the defendants is approximately 15 poles from the nearest corner in the disputed area.

The defendant also offered in evidence a deed dated 8 June 1938 from J. P. Gragg to Effie Sims conveying to her the identical 45-acre tract of land referred to above and in which deed the grantor, J. P. Gragg, inserted after the description of the land conveyed the following: "The above J. P. Gragg is to have a home on and full possession of said land as long as he lives." Otherwise, the deed is a regular fee simple warranty deed.

The defendants' evidence tends to show that their deed to the 45-acre tract of land does not cover the disputed area, but they contend that an error was made in the description in their deed and that it was intended to cover the disputed area. They were permitted to offer evidence to the effect that they and their predecessor in title, J. P. Gragg, have held the disputed area in open, notorious, and adverse possession for more than twenty years.

The parties agreed to omit any issue as to damages. Issues were submitted and answered as follows:

"1. Is the plaintiff the owner of and entitled to the possession of that parcel of land identified on the court map as A to 2 to 3, and back to A? Answer: No.

"2. "Is the defendant (Lawrence Crump) the owner of and entitled to the possession of that parcel of land identified on the court map as A to 2 to 3, and back to A? Answer: Yes."

From the judgment entered on the verdict, the plaintiff appeals, assigning error.

L. H. Wall and Hal B. Adams for plaintiff.
Townsend & Todd for defendants.

DENNY, J. The plaintiff sets out in his case on appeal 38 assignments of error. We shall not undertake a *seriatim* discussion of them. In our opinion, the appeal may be disposed of by a consideration of only one of these assignments of error.

Assignment of error No. 24 is based on an exception to the following portion of the charge: "These defendants contend that the condition of their land discloses that error has been made in the description of boundaries and in the survey; that in truth and in fact the boundaries of their land go to a large rock on the East bank of Gragg's Fork or Prong of Johns River, to a large rock testified to, they contend, by numerous witnesses as being the corner of a tract of land that they contend they hold under color of title, and the Supreme Court says that color of title is defined as a paper writing (usually a deed) which professes and appears to pass the title, but fails to do so."

When the above instruction is considered in light of the contentions recited therein, coupled with the statement that "the Supreme Court says that color of title is defined as a paper writing (usually a deed) which professes and appears to pass the title, but fails to do so," we think it is susceptible to the construction that although the description in the deed does not include the disputed area, it may be considered as color of title thereto.

A deed which is color of title is such only for the land designated and described therein. *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E. 2d 673:

Williams v. Robertson, 235 N.C. 478, 70 S.E. 2d 692. Hence, the law with respect to color of title is not applicable to lands not embraced in the description in such deed.

A statement of contentions which presents an erroneous view of the law applicable to the case, constitutes prejudicial error. *S. v. Grayson*, 239 N.C. 453, 80 S.E. 2d 387, and cited cases. This assignment of error will be upheld.

Ordinarily, we do not undertake to chart the course of a new trial. In the instant case, however, we think it is well to note that the plaintiff objected to and assigns as error the admission of certain testimony by Lawrence Crump to the effect that he bought the 45-acre tract of land from J. P. Gragg in June 1944 (as a matter of fact, he did not buy the land from J. P. Gragg but from Effie Sims), and that Gragg showed him where the corners were. The witness was permitted to testify with respect to the location of lines and corners which he contended should have been included in his deed and which would have embraced the land in dispute. Most of the lines and corners about which this defendant testified were not referred to in the deed to defendants; in fact, the description in the defendants' deed, according to the court survey thereof, appears to be a complete and accurate description of the 45 acres of land purported to be conveyed therein.

This evidence would have been admissible on the question of adverse possession if the defendants were in a position to tack the possession of their predecessors in title to their own claim of adverse possession. The evidence on this record tends to show that they have no such right. However, the case appears to have been submitted to the jury on the theory of tacking the adverse possession of predecessors in title without objection by the plaintiff.

There is no evidence which tends to show that Effie Sims ever claimed title to any land from 8 June 1938 until she conveyed the 45-acre tract of land to the defendants on 1 June 1944, except that described in her deed. Moreover, J. P. Gragg, under our decisions, retained no right, title or interest in the 45-acre tract of land he conveyed to Effie Sims on 8 June 1938, since the manner in which he attempted to retain a life interest in the land conveyed was ineffective. *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228; *Pilley v. Smith*, 230 N.C. 62, 51 S.E. 2d 923; *Johnson v. Barham*, 232 N.C. 508, 61 S.E. 2d 374; *Jeffries v. Parker*, 236 N.C. 756, 73 S.E. 2d 783. Therefore, on 1 June 1944, when J. P. Gragg joined with Effie Sims, widow, in the deed conveying the 45-acre tract of land to the defendants, he had no interest in the land conveyed.

A grantee in a deed is not entitled to tack the adverse possession of his predecessors in title as to a parcel of land not contained within the description in his deed, unless privity exists between the parties. No privity exists, under our decisions, between the defendants and their

predecessors in title as to the disputed area on the facts disclosed by the record on this appeal. *Boyce v. White,* 227 N.C. 640, 44 S.E. 2d 49; *Ramsey v. Ramsey,* 229 N.C. 270, 49 S.E. 2d 476; *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79; *Locklear v. Oxendine, supra; Newkirk v. Porter,* 237 N.C. 115, 74 S.E. 2d 235. Our decisions in this respect are in accord with the view expressed in 1 Am. Jur., pp. 880-882, and cited with approval in *Boyce v. White, supra:* "Several successive possessions cannot be tacked for the purpose of showing a continuous adverse possession where there is no privity of estate or connection of title between the several occupants . . . Privity, therefore, is essential. . . . A deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, although the grantee enters into possession of the land not described and uses it in connection with that conveyed."

Several other assignments of error are not without merit. However, since there must be a new trial, and the errors pointed out may not recur on another hearing, we deem it unnecessary to discuss them.

New trial.

JOHNSON, J., not sitting.

CHARLES LAYTON WHITE v. THOMAS HENRY LACEY.

(Filed 11 January, 1957.)

1. Appeal and Error § 51—

When defendant introduces evidence, the review of refusal to nonsuit relates to all the evidence favorable to plaintiff.

2. Negligence § 17—

Defendant has the burden of proof on the issue of contributory negligence.

3. Automobiles § 11—

A motorist, until he sees or should see to the contrary, has the right to assume that another vehicle will not approach him along the highway at nighttime without lights. G.S. 20-129.

4. Automobiles § 8—

The statutory requirement that a driver, before turning, shall first ascertain that such movement can be made in safety does not preclude a left turn unless the circumstances render such movement absolutely free from danger, but merely imposes upon the driver the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made in safety to himself and others, without requiring

him to anticipate the violation of statutory duty on the part of other motorists.

5. Automobiles § 42h—Whether negligence in turning left without passing beyond center of intersection was proximate cause of collision held for jury.

The evidence tended to show that plaintiff, traveling north, stopped at an intersection, gave the left-turn signal, waited until a car with lights, traveling south, had cleared the intersection, then turned left and collided with defendant's car, which was traveling south without lights immediately behind the car with lights. The evidence tended to show that the collision occurred somewhat to the south and west of the intersection, but that plaintiff's left turn was entirely within the intersection. *Held:* Even though the evidence tends to show that plaintiff failed to pass beyond the center of the intersection in making the left turn, G.S. 20-153(a), and failed to see defendant's car, G.S. 20-154, the evidence does not warrant nonsuit on the issue of contributory negligence as a matter of law, since whether such negligence was a proximate or contributing cause of the collision was for the determination of the jury under the rule of reasonable prevision.

6. Negligence § 9—

Reasonable foreseeability is an essential element of proximate cause.

7. Trial § 22c—

Discrepancies and contradictions, even in plaintiff's evidence, are to be resolved by the jury and not the court.

8. Appeal and Error § 35—

Where the charge of the trial judge is not in the record, it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts.

JOHNSON, J., not sitting.

APPEAL by defendant from *Hall, J.*, March Term, 1956, of CHATHAM.

Civil action growing out of automobile collision that occurred on 30 December, 1953, at night, at the intersection of Second Avenue (Highway 421) and Fifth Street in Siler City, North Carolina, between a 1941 Mercury, owned and operated by plaintiff, and a 1949 Ford, owned and operated by defendant. Each alleged that the collision was caused by the negligence of the other.

Plaintiff's action was to recover damages for personal injuries and for the damage to his car. Defendant, by answer, alleged that he was entitled to recover $300.00 from plaintiff for damages to his car.

The issues submitted, without objection, related (1) to the alleged negligence of defendant, (2) to the alleged contributory negligence of plaintiff, and (3) to the alleged damages to plaintiff. No issue was tendered or submitted bearing on defendant's alleged right to recover from plaintiff.

The jury answered all issues in favor of plaintiff, awarding damages of $100.00 for personal injuries and of $250.00 for the damage to plaintiff's car. From judgment in favor of plaintiff, in accordance with the verdict, defendant appealed.

Since defendant's only exceptions and assignments of error are to the denial of his motions for judgment of nonsuit, the pertinent evidence will be narrated in the opinion.

T. F. Baldwin for plaintiff, appellee.
H. F. Seawell, Jr., for defendant, appellant.

BOBBITT, J. Defendant offered evidence. Hence, the only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. *Murray v. Wyatt, ante,* 123.

It is quite clear that the evidence was sufficient to support a finding that defendant's negligence proximately caused the collision. Defendant, in his brief, makes no contention that the evidence was insufficient to support the verdict as to the negligence issue.

Defendant's appeal rests solely on his contention that the undisputed evidence, taken in the light most favorable to plaintiff, established plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion could be drawn therefrom. *Dennis v. Albemarle,* 243 N.C. 221, 90 S.E. 2d 532. In last analysis, decision turns on the distinctive circumstances of this case. *Weavil v. Myers,* 243 N.C. 386, 391, 90 S.E. 2d 733.

The collision occurred between 7:30 and 8 p.m. It was "a very dark night,"—"misty raining and foggy." An officer, who investigated the collision, testified: "This is a bad intersection and you have to be careful in approaching it." He didn't explain what made it a bad intersection. Another witness testified that there was "a rise up the road, just in front of the place this happened"; but his testimony along this line is not sufficiently clear to indicate the significance, if any, of this "rise" in the road.

Defendant was driving south on his right side of Second Avenue. While denied by defendant, there was plenary evidence that he "didn't have any lights." His speed, according to various estimates, was between 25 and 35 miles per hour.

Plaintiff was driving north on his right side of Second Avenue. He brought his car to a complete stop when he reached the Fifth Street intersection. He waited there with his "left hand out for a left turn." Three cars headed north stopped behind him, waiting for him to make his left turn.

Specifically, plaintiff was waiting for a car traveling south to pass. He observed the lights on this approaching car. After this car passed,

plaintiff cut to his left, and was "partly up over the line when I got hit on my front end, one wheel was over the line; all that was hit on my car was one wheel." The driver of one of the cars behind plaintiff testified that plaintiff "moved a car-length" right after the southbound car passed.

The officer testified that the collision occurred "right about the center of the intersection," to the south and to the west thereof. When he arrived, so he testified, he observed that defendant's car was wholly on the right side, going south; and that the right wheel of plaintiff's car was very near the center (white) line at a 45-degree angle and interlocked with defendant's car.

There was evidence that defendant, without lights, was driving "pretty close behind" a car that had lights. Defendant testified that the cars "must have been within five feet of each other" when plaintiff turned left in front of him.

On cross-examination, plaintiff testified that he had good lights on his car and "could see up the road 100 yards with my lights." However, there was evidence that, when the car with lights, traveling south, approached the intersection, plaintiff's lights were on dim and, on account of the mist and fog, "did not shine up the road very far at this time," and that you "could not see but about 30 feet." The record is silent as to whether the lights of the car traveling south were bright or dim.

Plaintiff and the two occupants of his car testified that they did not see defendant's car because it had no lights on it. The said driver, who was behind plaintiff, did not see defendant's car before the collision. Moreover, defendant testified that he did not see plaintiff's car, stopped and waiting to make a left turn, until he actually made the left turn.

The evidence stated was sufficient to support a finding that defendant was driving without lights, close behind another car that had lights, bright or dim; and that visibility was bad at this "bad intersection."

While no reference is made in defendant's answer to any specific statutory provision, the gist of his allegations as to the negligence of plaintiff is that he "cut the corner" and "failed to observe the traffic on said road." These allegations and the evidence in support thereof called for consideration of G.S. 20-153(a) and G.S. 20-154.

It is well to bear in mind that the defendant had the burden of proof on the contributory negligence issue. *Murray v. Wyatt, supra.* Also, it should be noted that until plaintiff saw, or by the exercise of due care should have seen, the approach of defendant's car, he was entitled to assume and to act upon the assumption that no motorist would be traveling south on Second Avenue without lights in violation of G.S. 20-129 *et seq. Weavil v. Myers, supra.*

In considering G.S. 20-153(a), it is noted that there was no evidence as to the width of Second Avenue or of Fifth Street or as to whether one was wider than the other. True, the officer's testimony, quoted above, tended to show that the collision occurred about the center of the intersection but somewhat to the south and west thereof. Plaintiff testified: "I did not cut across the inside corner to make the turn." In either event, the "car-length" movement of plaintiff was entirely within the intersection; and we think the inference may be fairly drawn that, if plaintiff's conduct may be considered a violation of G.S. 20-153(a), such violation did not proximately cause or contribute to the collision.

The gravamen of defendant's position, and the only basis therefor argued in his brief, is that plaintiff violated G.S. 20-154 and in so doing was guilty of contributory negligence as a matter of law. The evidence is positive that plaintiff stopped and gave the signal for a left turn. The crucial question is whether, under the circumstances disclosed by the evidence, plaintiff was contributorily negligent as a matter of law in driving a car's length to his left.

The applicable principle is well stated by *Ervin, J.*, in *Cooley v. Baker*, 231 N.C. 533, 58 S.E. 2d 115, in these words: "The statutory provision that 'the driver of any vehicle upon a highway before . . . turning from a direct line shall first see that such movement can be made in safety' does not mean that a motorist may not make a left turn on a highway unless the circumstances render such turning absolutely free from danger. It is simply designed to impose upon the driver of a motor vehicle, who is about to make a left turn upon a highway, the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others before he actually undertakes it. (Citations omitted.)"

Under the distinctive circumstances of this case, when plaintiff is given the benefit of every inference favorable to him that can be legitimately drawn from the evidence, it was for the jury to say whether plaintiff failed to exercise due care before making his left turn and in doing so violated G.S. 20-154.

If plaintiff violated G.S. 20-153(a) or G.S. 20-154, and was guilty of (contributory) negligence *per se*, it was for the jury to say whether such negligence proximately caused or contributed to plaintiff's injuries and damage, bearing in mind that reasonable foreseeability is an essential element of proximate cause. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331.

Certainly, there was evidence upon which the jury could have answered the contributory negligence issue in favor of defendant; but the jurors, who saw and heard the witnesses, saw fit to resolve the inferences in favor of plaintiff.

Discrepancies and contradictions in the evidence, even though such occur in the evidence offered in behalf of plaintiff, are to be resolved by the jury, not by the court. *Cozart v. Hudson*, 239 N.C. 279, 78 S.E. 2d 881.

The charge of the trial judge was not included in the record on appeal. Hence, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. *Hatcher v. Clayton*, 242 N.C. 450, 88 S.E. 2d 104.

We find no error in the submission of the issues to the jury.

No error.

JOHNSON, J., not sitting.

J. R. BARNES AND WIFE, SADIE M. BARNES, v. JOHN J. DORTCH, THE GUARDIAN AD LITEM OF THE POSSIBLE UNKNOWN AND UNBORN CHILDREN OF CHESTER H. PRINCE, AND THE UNKNOWN AND UNBORN HEIRS AT LAW OF E. C. PRINCE.

(Filed 11 January, 1957.)

1. Partition § 4f—

Partition by the life tenants is not binding on the remaindermen who are not parties.

2. Wills § 33c—

Where testator dies without children and his will devises lands to his brothers and sister for life, and then to their children, the remaindermen must be ascertained upon the falling in of the particular estate, but upon the happening of the contingency, the remaindermen as then ascertained take from the testator and not as heirs of the life tenants, so that upon the death of a life tenant without children his share would go by operation of the will to the heirs of testator living at the death of the life tenant.

3. Estates § 11—All living persons who would take upon happening of contingency must be parties to proceeding to sell for reinvestment.

Testator died without children. His will devised the lands to his brothers and sister for life, and then to their children. The life tenants partitioned the land, and later all of the then living children of deceased life tenants and one of the surviving life tenants and her children conveyed the land partitioned to the remaining survivor of the life tenants to him, who in turn conveyed to petitioners. Petitioners brought this proceeding for sale for reinvestment under G.S. 41-11, in which the possible unborn children of their grantor and the unborn and unknown heirs of testator were represented by guardian *ad litem*. *Held:* Order of sale without the joinder of the then living heirs of testator must be reversed, notwithstanding their deed and the partition between the life tenants acquiesced in by them, since their interest would not vest until the death of the life tenant

without children, and then they would take as heirs of testator and not as heirs of the life tenant.

JOHNSON, J., not sitting.

APPEAL by Phil C. Howell from *Parker, J.*, November Term, 1956, of WAYNE.

This was a special proceeding instituted by petitioners to authorize the sale for reinvestment under G.S. 41-11 of certain land in which there are contingent interests.

From the petition and the exhibits and affidavits offered, the following facts were made to appear: In April, 1913, E. C. Prince died leaving a last will and testament wherein he devised all his property, including the land involved in this proceeding, to his five brothers and sisters and one nephew "for their lives, and then to their children." The devisees living at that time were Chester Prince, Frances Pate, Naomi Early, David Prince, Amos Prince and nephew Rufus Satterfield. In December, 1913, by special proceeding *ex parte* the life tenants partitioned the land into six equal shares (designated as lots 1 to 6) and each of the brothers and sisters and nephew entered into possession of the shares of land thus allotted, and they and those claiming under them have continued to hold possession of their respective shares as their own separate property to the present time. The remaindermen were not made parties to the partition.

In the partition, lot #6, containing 30 acres of land, was allotted to Chester Prince, who is 75 years of age and has no children. It is for the sale of a portion of lot #6 that this proceeding was instituted.

On the 3rd day of February, 1945, of the original devisees under the will of E. C. Prince only Chester Prince and Naomi Early were living. Frances Pate was dead leaving six children; David Prince was dead leaving four children; Amos Prince was dead leaving four children; and Rufus Satterfield was dead leaving two children. On that date all these living children of the devisees, including Naomi Early and her two children, executed a deed with warranty to Marjorie C. Prince, wife of Chester Prince, conveying to her all their right, title and interest in and to lot #6, and in June, 1945, Marjorie C. Prince and Chester Prince conveyed lot #6 to the petitioners J. R. Barnes and Sadie Barnes.

The petitioners introduced as an exhibit the record and decree in the special proceeding in the Superior Court of Wayne County entitled "Crawford-Norwood Company *vs.* Herman M. Pate and others," instituted in 1949 to adjudicate the title to lot #1 in the partition of 1913. In this proceeding all the then living heirs of E. C. Prince were made parties and all other persons whether *in esse* or not who might claim interest in the land were represented by guardian *ad litem*. In the pro-

ceeding in 1949 it was adjudged that the partition of 1913 had been followed by possessing in severalty of their respective shares by the partitioners and by their children, and those claiming under them, since that time, and the partition had been acquiesced in and ratified, approved and accepted by all the heirs of the testator. The record in the Crawford-Norwood case was offered for the purpose of establishing an estoppel as against the heirs of E. C. Prince. The petitioners J. R. and Sadie Barnes instituted the instant proceeding before the clerk 12 March, 1956, setting out these facts in their petition, and the further fact that Phil C. Howell had offered to buy 18 acres of the 30 acres in lot #6 for $26,000 and that a sale thereof for reinvestment would enhance the interests of all parties. Upon their petition guardian *ad litem* John J. Dortch was appointed to represent the unborn children of Chester Prince and the unknown and unborn heirs of E. C. Prince. The clerk entered order in accordance with the petition and appointed a commissioner to execute deed, and ordered Phil C. Howell to comply with his bid. Phil C. Howell appealed to the Superior Court in term, and Judge Parker at November Term "upon consideration of the pleadings herein, including the exhibits attached to the petition" held that the commissioner had power and authority to convey to Phil C. Howell a good marketable title in fee simple to the land described in the petition, and thereupon affirmed the order of the clerk.

Phil C. Howell excepted and appealed to this Court.

James N. Smith for appellant.

J. Faison Thomson & Son for appellees.

DEVIN, J. The petitioners are seeking the sanction of the court for the sale for reinvestment of land in which there are contingent interests in accord with the provisions of the statute, G.S. 41-11. To achieve this end, on 12 March, 1956, they instituted a special proceeding before the clerk. Ch. 96, Session Laws 1951.

This proceeding relates to land known as lot #6, which had been allotted to Chester Prince in the partition of the lands devised by E. C. Prince. It appears that the partition was made in 1913 in a special proceeding in which only the life tenants were parties. The partition decree therefore would not have bound the remaindermen. But the petitioners rely upon the evidence of separate and long continued possession of the shares of land allotted in the partition, and the ratification and acceptance of the allotments by all persons having any interest therein from 1913 to the present time. Petitioners also call attention to the record and judgment in the Crawford-Norwood proceeding in 1949, relating to lot #1 in this partition, wherein all the heirs of E. C. Prince *in esse* and *in posse* were parties, as sufficient to establish the

validity and binding effect of the partition of 1913 by estoppel. They contend that the adjudication of the validity of this partition in the Crawford-Norwood case, in which the same persons as those involved in this proceeding were parties and concerning the same subject matter, would constitute *res judicata* in accord with the principle stated in *Current v. Webb,* 220 N.C. 425, 17 S.E. 2d 614; *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Worthington v. Wooten,* 242 N.C. 88, 86 S.E. 2d 767. This is conceded by appellant. The petitioners also call attention to the provisions of the curative statute, G.S. 46-14.

But we think there was a defect of parties in this proceeding which renders it ineffective for the purpose contemplated.

The petition for authority to sell the land under G.S. 41-11 was filed only by J. R. Barnes and his wife Sadie Barnes. There were no other parties. On their motion, a guardian *ad litem* was appointed to represent possible unborn children of Chester Prince and unknown and unborn heirs of E. C. Prince. The heirs of E. C. Prince living at that time (March, 1956) were not made parties. The petitioners proceeded on the theory that by their deed of 1945 they owned the interests of all the living heirs of E. C. Prince at that time, and that all the heirs of E. C. Prince and their descendants are estopped by this deed to claim any interest in lot #6.

But the statute under which this proceeding was instituted requires that summons be served on all persons then in being who may have any interest in the land. The proceeding must be brought by a person having a vested interest in the land and those who on the happening of the contingency would presently have an estate in the property at the time the proceeding is commenced, made parties and served with summons. *Dawson v. Wood,* 177 N.C. 158, 98 S.E. 459.

Under the will of E. C. Prince the land was devised to his five brothers and sisters and a nephew for their lives, and then to their children. Chester Prince has no children. Upon his death without issue the land would revert to the heirs of E. C. Prince living at that time. Who will ultimately take could not be determined in 1945. The children of deceased brothers and sister of E. C. Prince, upon the death of Chester Prince without issue, would take as heirs of E. C. Prince, by descent from him and not from the devisees. *Burden v. Lipsitz,* 166 N.C. 523, 82 S.E. 863; *Whitfield v. Garris,* 134 N.C. 24, 45 S.E. 904; *Elmore v. Austin,* 232 N.C. 13 (21), 59 S.E. 2d 205. For instance, should one of David Prince's children, who in 1945 conveyed his interest in lot #6 to the petitioners, predecease Chester Prince and Chester Prince should die without issue, the heir of such child would acquire an interest in lot #6 as heir of E. C. Prince and not as heir of his immediate ancestor and hence would not be bound by the deed of such ancestor. *Daly v. Pate,* 210 N.C. 222, 186 S.E. 348.

Upon the happening of the contingency of Chester Prince's dying without issue, the heirs of the grantors in the deed of 1945 would take directly from the testator as his heirs at law, and the contingent event by which the interest in the land would be determined would be referred not to the death of the testator but to that of Chester Prince. *Burden v. Lipsitz, supra.* The ultimate takers could not be ascertained until the preceding estate terminated.

We do not think the execution of the deed of 1945 by the grantors named was sufficient to authorize the prosecution of this proceeding on the *ex parte* petition of the grantees therein without having summons served on all persons now *in esse* who might have an interest in the land, as required by the statute, G.S. 41-11.

The remedial purpose of this statute may be served where there are contingent remainders over to persons not in being, or the contingency has not happened which will determine who the ultimate remaindermen are, but to achieve the desired result the provisions of the statute must be observed.

We have re-examined the cases cited and relied on by the petitioners, but find nothing that militates against the views here expressed. In *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625, the well considered opinion of *Denny, J.,* was based upon testamentary language and attendant facts which differentiate that case from the one at bar. The result reached in *Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641, was based upon the facts of that case and is not controlling on the facts here made to appear.

The judgment of the Superior Court is

Reversed.

JOHNSON, J., not sitting.

H. B. ROBERTS AND WIFE, ELLIE JANE ROBERTS, v. TOWN OF CAMERON, HUBERT NICKENS, MAYOR OF TOWN OF CAMERON AND INDIVIDUALLY; MITCHELL WEST, WILL McNEIL, MRS. W. G. PARKER, R. L. LAUBSCHER AND J. A. PHILLIPS, JR., MEMBERS OF THE BOARD OF ALDERMEN OF THE TOWN OF CAMERON AND INDIVIDUALLY.

(Filed 11 January, 1957.)

1. Appeal and Error § 50—

On appeal from an order dissolving or continuing a temporary restraining order to the final hearing, the findings of fact as well as the conclusions of law are reviewable by the Supreme Court.

2. Dedication § 4—

Where dedication of streets to a municipality is made by the recording of a map showing such streets, no lapse of time precludes the municipality from accepting such dedication in the absence of withdrawal of the offer, G.S. 136-96, and therefore in the absence of such withdrawal the municipality is not barred from accepting the dedication unless it has lost title by adverse possession.

3. Injunctions § 8—

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter, and ordinarily a temporary order will be continued to the hearing if plaintiff has made out a primary equity and there is reasonable apprehension of irreparable loss to plaintiffs if the order is dissolved or continuance is necessary to protect plaintiffs' rights.

4. Same—Continuance of temporary order is error upon failure to show probability of establishing primary equity and irreparable injury.

In this action to restrain a municipality from opening and improving certain streets dedicated to it, it appeared that at the time of the issuance of the temporary order the streets had been graded and were practically ready for hard surfacing. It further appeared that the sole ground for injunctive relief was that plaintiff had acquired title to the streets by adverse possession. *Held:* The evidence being insufficient to show probable cause for supposing plaintiffs would be able to show title by adverse possession, and it being apparent that if plaintiffs should prevail on that issue they would have an adequate remedy to recover damages for the taking, the continuance of the restraining order to the hearing is error.

JOHNSON, J., not sitting.

APPEAL by defendants from *Crissman, J.*, at Chambers in Rockingham, North Carolina, 26 July 1956. From MOORE.

This is an action to restrain the defendants from opening, improving, and paving certain streets as shown on the map of what is known as the McPherson Addition to Cameron, North Carolina.

In 1910, H. P. McPherson subdivided into lots, blocks, streets, and alleys, a tract of land within the corporate limits of the Town of Cameron and during that year caused a map or plat of the subdivision to be recorded in the office of the Register of Deeds of Moore County, in Map Book 1, section 2, at page 91. Thereafter, lots were sold by the owner by reference to the plat to various purchasers, among which were lots Nos. 3 and 4 in Block B, and lots Nos. 1, 2, 3, and 4 in Block E, abutting McPherson and Fifth Streets. In 1933 or 1934, J. E. Snow, who had acquired title to the above numbered lots by *mesne* conveyances from H. P. McPherson, the original subdivider, enclosed a portion of the street right of ways, which is the subject of this action, by placing a fence across McPherson and Fifth Streets and thereafter used the area as a pasture in connection with his adjoining lots.

Snow, in his affidavit filed in the hearing below, stated that neither he nor his various predecessors in title to the lots involved herein, at any time occupied or used all or any portion of McPherson and Fifth Streets on which the above described lots abut, adversely to the rights and ownership thereof by the Town of Cameron and that his use of said areas was permissive; and that when he sold the lots to the plaintiffs he carefully pointed out to H. B. Roberts the boundaries of McPherson and Fifth Streets where they adjoin the lots, and explained to him that they were streets and that he neither owned nor claimed any right, title or interest therein; and that he has at no time conveyed or attempted to convey to the plaintiffs or to any other person any portion of the areas designated as McPherson and Fifth Streets on the map entitled "McPherson Addition to the Town of Cameron, North Carolina."

The defendants introduced in evidence the deed dated 16 February 1948 from J. E. Snow and wife to H. B. Roberts and his wife, Ellie Jane Roberts, conveying the lots referred to herein, which deed is recorded in Book 155 at page 530 in the office of the Register of Deeds of Moore County. The lots conveyed by the above deed are designated by number and block as shown on the map of McPherson Addition to the Town of Cameron, and reference is made to the map for a better description. This deed does not purport to convey to the plaintiffs any right, title or interest in and to the disputed areas.

According to the record, the Town of Cameron had for many years opened, used, and maintained as public streets the greater portion of McPherson and Fifth Streets as designated on the above plat, and at a regular meeting of the Board of Aldermen of the Town of Cameron in January 1956 a resolution was adopted directing that the remaining portions of the streets be opened, which action was known to the plaintiffs. Thereafter, employees of the Town, without objection from the plaintiffs, went upon the unopened portion of the street right of ways and set stakes and markers in preparation for the clearing and grading thereof. On 23 May 1956, the plaintiffs were notified by the Town of Cameron to remove the fences and all other property claimed by them on the right of ways of McPherson and Fifth Streets; and thereafter, about 15 June 1956, the Town of Cameron, through its agents or employees, proceeded with the clearing, grading and opening of the unopened portions of said streets. Some twenty days thereafter, on or about 6 July 1956, at a time when the streets were practically ready for hard surfacing, the plaintiffs procured an order based on their complaint used as an affidavit, alleging ownership of the street areas, temporarily restraining the defendants from further entry on the said portions of McPherson and Fifth Streets.

Upon the hearing thereafter, held at Chambers in Rockingham, his Honor found certain facts and continued the restraining order until the final hearing. From this order the defendants appeal, assigning error.

T. J. McPherson, H. F. Seawell, Jr., and Gavin, Jackson & Gavin for plaintiffs.

Orton J. Cameron and George M. McDermott for defendants.

DENNY, J. Upon an appeal from an order dissolving a temporary restraining order, or from one continuing it to the final hearing, the findings of fact as well as the conclusions of law are reviewable by this Court. *Deal v. Sanitary District, ante,* 74, 95 S.E. 2d 362; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452; *Arey v. Lemons,* 232 N.C. 531, 61 S.E. 2d 596; *Woolen Mills v. Land Co.,* 183 N.C. 511, 112 S.E. 24.

Among the findings of fact, his Honor found, "That the public or Town of Cameron has never at any time taken any action to accept said offer of dedication of the portions of said streets in dispute until April 1956 (January 1956), forty-six years after the offer of dedication was made; . . ."

We do not understand that mere delay in accepting an offer of dedication of streets and alleys, in a subdivision which lies within a municipality, constitutes a bar to the acceptance of such offer unless in the meantime such streets and alleys have been occupied and used adversely for more than twenty years for purposes inconsistent with their use as streets and alleys. *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664; *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104.

It is not contended on this appeal that the original offer of dedication by McPherson has been withdrawn or attempted to be withdrawn pursuant to the provisions of G.S. 136-96, as amended by Chapter 1091 of the Session Laws of 1953. Neither is it contended that the Town of Cameron has at any time by express action rejected the offer of dedication as was done in the case of *Lee v. Walker, supra.*

It is quite clear from the record that the plaintiffs have no record title to the portions of McPherson and Fifth Streets which they are now claiming. Therefore, it appears that if they prevail when the case is tried on its merits, they must do so by establishing adverse possession by themselves and their predecessors in title for more than twenty years.

In *Hughes v. Clark,* 134 N.C. 457, 46 S.E. 956, it is said: "Where lots are sold and conveyed by reference to a map or plat which represent a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept

open; *and it makes no difference whether the streets be in fact opened or accepted by the governing boards of towns or cities if they lie within municipal corporations.* There is a dedication, and if they are not actually opened at the time of the sale they must be at all times free to be opened as occasion may require." (Emphasis added.) *Broocks v. Muirhead,* 223 N.C. 227, 25 S.E. 2d 889; *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 7 S.E. 2d 13, and authorities cited.

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter. *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116. In the instant case, contrary to finding of fact No. 4, to the effect "that the portion of McPherson and Fifth Streets in dispute in McPherson Addition was and is woodland and growing in timber, bushes and undergrowth," the record discloses that prior to the issuance of the temporary restraining order, on 6 July 1956, the defendant, Town of Cameron, had proceeded with the clearing, grading and opening of the theretofore unopened portions of McPherson and Fifth Streets and that such streets were practically ready for hard surfacing when the order was signed.

Ordinarily, a temporary restraining order will be continued to the hearing if there is "probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined." *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80; *Seip v. Wright,* 173 N.C. 14, 91 S.E. 359; *Boushiar v. Willis,* 207 N.C. 511, 177 S.E. 632; *Porter v. Insurance Co.,* 207 N.C. 646, 178 S.E. 223; *Hare v. Hare,* 207 N.C. 849, 178 S.E. 545; *Little v. Trust Co.,* 208 N.C. 726, 182 S.E. 491; *Bailey v. Bryson,* 214 N.C. 212, 198 S.E. 622; *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319.

Hence, whatever the evidence may be on the crucial question of adverse possession when this case is heard on its merits, in our opinion, the evidence on the hearing below does not show probable cause for supposing that the plaintiffs will be able to make good their allegations to the effect that they own a fee simple title to the land in controversy, nor does it appear that there is a reasonable apprehension of irreparable loss unless the restraining order remains in force. After all, the Town of Cameron is a municipal corporation and has statutory powers of condemnation. General Statute 160, sections 204, 205 and 206. Consequently, if the plaintiffs should prevail at the trial on the merits of the controversy, they have an adequate remedy at law to recover compensation for any loss they may sustain by reason of the taking of the property for street purposes. *Greenville v. Highway Commission,* 196

N.C. 226, 145 S.E. 31; *Roper Lumber Co. v. Coppersmith,* 191 N.C. 217, 131 S.E. 575; *Jones v. Lassiter,* 169 N.C. 750, 86 S.E. 710; *Griffin v. Southern R. Co.,* 150 N.C. 312, 64 S.E. 16.

For the reasons herein stated, the action in the court below continuing the restraining order to the final hearing, is

Reversed.

JOHNSON, J., not sitting.

MINNIE BAKER LOCKLEAIR AND HUSBAND, GEORGE S. LOCKLEAIR, v. EBBY MARTIN AND WIFE, PEARL MARTIN.

(Filed 11 January, 1957.)

1. Tenants in Common § 1—

Tenancy in common is characterized by the single unity of possession or right to possession of the common property, and cannot arise when several persons own distinct portions of a tract of land.

2. Wills § 33a—

Where the will devises 100 acres on the west of a described tract of land to one devisee and the balance of the tract on the east to another devisee, the devisees take in severalty and not as tenants in common, since a surveyor can take the will and locate the respective tracts without other aid.

3. Partition § 1a—

Tenancy in common in land is the necessary basis for the maintenance of partition proceedings.

4. Estoppel § 4—

Where the pleadings, theory of trial and consent order are based upon partition of the land between the parties as tenants in common, the parties are estopped by the record from maintaining that partition was not applicable.

5. Appeal and Error § 19—

Even when the exceptions to the findings of fact and conclusions of law are too general to comply with the Rules of Practice, the appeal itself constitutes an exception to the judgment and raises the questions whether the facts found support the judgment and whether error appears on the face of the record.

6. Appeal and Error § 40—

Where the court erroneously holds that tenants in severalty were tenants in common, but the judgment correctly locates the true dividing line between the lands of the parties as in a processioning proceeding, the error is harmless and cannot be ground for a new trial.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Hobgood, J.*, January, 1956 Civil Term, WAKE Superior Court.

On 1 October, 1952, Mrs. Minnie Baker Lockleair instituted a partition proceeding, in which her husband joined, against Ebby Martin, in which his wife was joined, for the purpose of partitioning a tract of land containing 120 acres described by metes and bounds. The petition alleged: (1) That the petitioner and defendant are tenants in common, seized in fee, and are in possession of the tract containing 120 acres in Wake County; (2) that the plaintiff is the owner of twenty acres lying on the east end and that the defendant is the owner of 100 acres on the west end of the described land. The prayer is for the appointment of commissioners to make the partition.

The defendant, by answer, denied the parties are tenants in common. He set up the defense that a dividing line was agreed upon 35 years before the proceeding was instituted and he alleged that he had been in adverse possession under color of title and under known and visible lines and boundaries for more than seven and more than 20 years, and plead the statutes of limitations. It may be inferred the cause was placed on the civil issue docket for trial by reason of the issues raised by the answer. Chronologically, the next step in the proceeding appears to have been a consent order entered by Judge Hubbard of the Superior Court in term, reciting (1) the parties are tenants in common of the described land, (2) actual partition can be made without injury to either party. The order named two commissioners and provided that they should select a third who were directed to make partition by first allotting 100 acres from the west end of the tract to the defendant and the remainder, if any, to the petitioner. The order was consented to by both parties and their counsel. Numerous supplemental orders followed, all entered by a Superior Court judge in term, culminating in a report filed by the commissioners on 27 May, 1955, with map attached, in which they allotted 99.55 acres on the west end of the tract to the respondent and the remainder to the petitioner. The dividing line was designated as, "Beginning at a point on Watery Branch designated as '2' running thence south one degree and 00 minutes west 2838 feet to the center of the Hopkins Chapel Road." The report was signed by two of the three commissioners. The other commissioner refused to join in the report, although he participated in the proceedings. The petitioner filed exceptions to the report and the defendant replied thereto. The one degree variation from true north and south line was to take care of the variation between the magnetic north to which the compass needle points and the true north produced by the interval of time between the original and the present surveys.

The proceeding came on for hearing at the January Term of Superior Court. A jury trial was waived by both parties and it was agreed in open court that the judge should hear the evidence, find the facts and state his conclusions of law. The court heard the testimony of 18 witnesses, nine for each party, including a number of surveyors. Upon the evidence offered, the court made extensive findings of fact, among them that both parties traced their title back to Charles R. Baker who had been allotted the 120-acre tract of land in the partition of his father's estate. Charles R. Baker's will provided:

> "I give and bequeath to my beloved brother A. L. Baker (100) one hundred acres of land on the west and adjoining the lands of R. C. Mitchell and as a part of the land allotted by will from John R. Baker to me in fee simple."
>
> "I give and bequeath to my beloved sister Mary Simon Baker 20 acres of land more or less it being the balance of land allotted to me and on the east end adjoining that of her own."

A. L. Baker devised his 100 acres to the respondent. Mary Simon Baker died intestate, leaving the petitioner as her sole heir at law.

The court overruled all exceptions to the commissioner's report, confirmed it in all respects, and ordered the report, the judgment, and the map certified by the clerk to the register of deeds to be recorded and indexed. The court ordered the true dividing line between the lands of the parties be located and permanently marked, "Beginning at a point on Watery Branch designated as number '2' and running thence south one degree and 00 minutes west 2838 feet more or less to the center of the Hopkins Chapel Road."

From the judgment, the plaintiff made the following appeal entries:

> "To the foregoing findings of fact and conclusions of law, and to the judgment, plaintiffs except and give notice of appeal to the Supreme Court in open Court; further notice waived. Plaintiffs allowed until July 15, 1956, to serve case on appeal; defendants allowed until October 1, 1956, to serve exceptions or counter-case. Appeal bond fixed at $200.
>
> /s/ HAMILTON H. HOBGOOD, Judge."

W. H. Yarborough for plaintiff, appellant.
William T. Hatch for defendant, appellee.

HIGGINS, J. Both parties concede the respondent, Ebby Martin, is entitled to have allotted to him 100 acres of the described land on the west end of the tract and that the petitioner is entitled to the remainder.

Both parties concede the proper way to divide the tract is to run a north-south line at such location as will cut off 100 acres on the west which shall be the property of the respondent, and the remainder of the tract on the east shall be the property of the petitioner.

What appears to have been a rather simple legal problem of locating the true dividing line between the adjoining landowners has been complicated by instituting a partition proceeding rather than a processioning proceeding. The petitioner charted the course of the proceeding by alleging the parties are tenants in common. This allegation is denied in the answer, but the consent order signed by the parties stipulates they are tenants in common. Also, the petition alleges, and the consent order confirms the allegation, that the defendant is the owner of 100 acres on the west end of the tract by reason of the devise in the will of A. L. Baker and the petitioner is the owner of the remainder of the 120-acre tract by inheritance from her mother.

It is certainly open to question whether the parties were ever tenants in common. Tenancy in common is characterized by a single essential unity—that of possession, or the right to possession of the common property. Tenancy in common does not arise when several persons own distinct portions of the same tract of land. Am. Jur., Vol. 14, sec. 16, pp. 87-88. "The general rule seems to be that when the will locates the lands devised . . . with such certainty that a surveyor can take the will and locate them without other aid, then the devisees would hold in severalty and not as tenants in common." *Midgett v. Midgett,* 117 N.C. 8, 23 S.E. 37; *Mitchell v. Hoggard,* 108 N.C. 353, 12 S.E. 844. "Tenancy in common in land is necessary basis for maintenance of special proceeding for partition." *Murphy v. Smith,* 235 N.C. 455, 70 S.E. 2d 697; *Gregory v. Pinnix*, 158 N.C. 147, 73 S.E. 814; G.S. 146-1; G.S. 146-3.

While we call attention to the form of tenancy in order that the Court may not be understood as agreeing that the parties are tenants in common, yet by the petition, the consent order, and the theory upon which both parties tried the case, they are estopped to deny that they are tenants in common and consequently they cannot contest the validity of the proceeding.

The petitioner's real objection is that the commissioners did not properly survey and locate the north and south perimeter lines. She contended that Watery Branch on the north was in fact a swamp and the thread of the stream is now south of its location at the time the original tract was surveyed; and that the Hopkins Chapel Road on the south has been relocated and is now north of its original location. These changes, she contended, had the effect of causing the dividing line to be located farther east than it should have been, thus reducing the acreage left to her. She contended marked lines were found cor-

roborating her claim. She offered parol evidence of these changes in the outside lines.

The defendant, on the other hand, contended there had been no change either in Watery Branch or in the Hopkins Chapel Road since the execution of the Baker will under which document both claim title. The defendant offered parol evidence to support his contention.

Judge Hobgood found facts, stated his conclusions of law, and rendered judgment confirming the report and fixing the dividing line between the lands of the parties. The plaintiff appellant did not take any exceptions in the course of the trial. However, at the time judgment was signed she gave notice of appeal in which she attempted to take exception to the findings of fact and conclusions of law. They are in such general terms as do not comply with the Rules of Practice in the Supreme Court, 221 N.C. 546 (see Rules 19(3) and 21); *Steelman v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829. However, the appeal itself is an exception to the judgment and raises the questions (1) whether the facts found are sufficient to support the judgment, and (2) whether errors appear upon the face of the record. *Cannon v. Wilmington*, 242 N.C. 711, 89 S.E. 2d 595; *Ellis v. R. R.*, 241 N.C. 747, 86 S.E. 2d 406; *Casualty Co. v. Green*, 200 N.C. 535, 157 S.E. 797.

The findings of fact cover five pages of the record. They are abundantly sufficient to support the judgment. If error appears in the record, it was induced by the type of proceeding brought by the petitioner and the theory upon which the trial was conducted and by the consent order entered providing for partition. Both parties are estopped to deny the validity of the proceeding, which has been both long and expensive. This case and *Mitchell v. Hoggard, supra*, are strikingly similar, both in the facts and the questions of law involved. The concluding paragraph in the opinion of *Merrimon, C. J.*, in the latter case is appropriate here: "It is true, as we have seen, that the court erroneously said on the trial that the parties were tenants in common of the land, but the opinion thus expressed was immaterial and not at all pertinent. It did not in its nature mislead or distract the minds of the jury as to the issue submitted to them. It had no application. It is not suggested nor does it appear that it did. It was harmless, and therefore not ground for a new trial."

The judgment of the Superior Court of Wake County is

Affirmed.

JOHNSON, J., not sitting.

C. M. WOOD v. MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY.

(Filed 11 January, 1957.)

1. Appeal and Error § 60—

Where the Supreme Court holds that the evidence, exclusive of opinion testimony improperly admitted, was sufficient to take the case to the jury, the decision is the law of the case upon the subsequent trial upon substantially the same evidence, with the exclusion of the incompetent opinion testimony.

2. Trial § 31c—

It is the duty of the court to declare the law applicable to each factual situation relevant to the question of liability presented by the evidence, and the court's action in so doing cannot be erroneous on the ground that the charge gave abstract statements of legal principles not applicable to the case.

3. Insurance § 52—If risk covered is efficient cause of damage and excluded risk is insufficient in itself to have produced damage, insurer is liable.

The policy of windstorm insurance in suit provided that insurer should not be liable for loss caused directly or indirectly by "tidal wave, high water, overflow or ice, whether driven by wind or not." *Held:* Insurer is liable for loss resulting from windstorm as the efficient and predominating cause which produced the damage without any new or intervening cause sufficient of itself to produce the damage, and it is immaterial that the damage may have been indirectly and incidentally enhanced by high water, and further if the loss was caused by the windstorm, the fact that rains may have created a condition which permitted destruction of the property by wind, would not relieve insurer of liability, the policy not excluding from its terms rains, no matter how heavy.

4. Trial § 36—

Where the issue submitted comprehends the question in controversy, the fact that the court formulates the issue in its own phraseology rather than that suggested by a party is not ground for objection.

5. Appeal and Error § 41—

The admission of testimony over objection is not prejudicial when testimony of the same import is admitted without objection.

6. Evidence § 37—

Testimony as to the contents of weather bureau records is properly excluded, since the records themselves should have been put in evidence.

7. Appeal and Error § 41—

The exclusion of testimony of a witness is not prejudicial when the same witness is permitted to testify to the same fact a few moments later.

JOHNSON, J., not sitting.

APPEAL by defendant from *Patton, J.*, 18 June, 1956 Civil Term of FORSYTH.

This case was here at the Fall Term 1955. It is reported 243 N.C. 158. As there appears, plaintiff, the owner of a building under construction, insured it against damage by windstorm. It was damaged during hurricane Hazel 15 October 1954. A new trial was then awarded because of the reception of incompetent opinion evidence.

The evidence recited in the report of the prior appeal was substantially repeated on the trial forming the basis of this appeal. It is not deemed necessary to repeat it here.

The jury answered the issues submitted to it in accordance with the contention of plaintiff. Judgment was rendered on the verdict, and defendant appealed.

Buford T. Henderson for plaintiff appellee.
Deal, Hutchins & Minor for defendant appellant.

RODMAN, J. Defendant's first assignment of error is to the refusal of the court to allow its motion for nonsuit. On the prior appeal defendant asserted that its motion for nonsuit should be allowed. This Court held the evidence sufficient to take the case to the jury. The only reason now assigned for changing the conclusion then reached is the fact that the present case does not include the opinion evidence then held incompetent. It was held on the prior appeal that the testimony of plaintiff, as recited, sufficed to take the case to the jury. The opinion evidence was in no way made the basis for the ruling on the motion. It was said the credibility of the witnesses was for the jury. The conclusion then reached is the law of this case.

Defendant assigns errors of commission in the charge and omission for failure to give requested instructions. The brief in support of the asserted errors of commission is based on the contention that the court gave abstract statements of legal principles not applicable to the case, and therefore misleading to the jury.

The insurance policy was by endorsement "extended to include direct loss by WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOTION, AIRCRAFT, VEHICLES, AND SMOKE." With respect to these various hazards, the policy contained separate limitations. Applicable to this case were: "PROVISIONS APPLICABLE ONLY TO WINDSTORM AND HAIL: This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather, or (b) snow storm, tidal wave, high water, overflow or ice, whether driven by wind or not."

The evidence was sufficient to permit the jury to reach the conclusion that the damage to the building was the result of any of three conditions. It could find in accordance with the contentions and testimony

of plaintiff that the damage to the building was caused solely and exclusively by winds of hurricane velocity and that the heavy rains occurring that day came after the loss had been sustained. It could find, as defendant contends, that the torrential rains saturated the earth and filled the ditch and openings adjacent to the foundation of the building, creating a hydrostatic pressure which the foundation was unable to withstand, and the damage was the result of high water in the ditch and pockets adjacent to the building. The jury might seek to harmonize the conflicting testimony. It could find that the foundations had only been erected some three weeks, that the mortar had not fully set, that the heavy rains had saturated the earth parched by long drought, that neither of these sufficed to cause damage to the building and under these conditions the building would withstand winds of normal velocity, but under the conditions then existing the building could not stand against the winds of the hurricane, whether the maximum velocity was 40 to 50 m.p.h., as limited by the testimony of defendant's witness, or a much higher velocity, as could be inferred from the testimony of plaintiff and his witness.

It was the duty of the court to declare the law applicable to each factual situation which the jury might accept as correct.

Defendant's brief supporting the exceptions to the charge says the instructions given by the court were prejudicial because they incorporated abstract principles which had no application to the facts. The policy provided protection against "direct loss by windstorm." The court defined windstorm. The court then told the jury that to be entitled to indemnity the loss must result from a peril which was the efficient and predominating cause and which produced the damage without any new or intervening cause sufficient of itself to produce the damage. The language used fitted the insuring portion of the policy and accords with the law as it has been declared. *Miller v. Insurance Association*, 198 N.C. 572, 152 S.E. 684. It is apparent that case was made the basis of the charge.

The judge then proceeded to declare the law applicable to the supposition that the jury would find that the rains had saturated the earth and thereby reduced the capacity of the building to withstand the windstorm. As to that, he told the jury in effect that if a cause not excluded, illustrated in this case by the rain which soaked and softened the earth, enabled the wind to destroy the building, plaintiff could, notwithstanding the contributing cause, recover; but if the cause insured against (windstorm) and an excluded cause (high water) combined to create the damage, plaintiff could not recover. The error, if it exists in the charge, is not one as to which defendant can complain. The rule applicable to policies of this character and to the factual situation presented by this case is, we think, correctly stated in *Anderson*

v. Connecticut Fire Ins. Co., 43 N.W. 2d 807 (Minn.): "Where an insurance policy expressly covers the risk of loss to a building from windstorm, liability for such loss is established where it is shown that the windstorm by its own unaided action was of sufficient violence to be the efficient and proximate cause of the damage or where, as the efficient and proximate cause—though not the sole cause—it brings about such a material weakening of the building that it collapses from the weight of accumulated snow, and which collapse would not have taken place had not the structure first been weakened by the wind. It is immaterial that the damage following from the efficient and proximate cause may have been indirectly and incidentally enhanced by another cause expressly excluded from coverage."

Defendant's assignments of errors of omission are the refusal of the court to give instructions as requested. These requests proceed upon the theory that if water was a contributing cause to plaintiff's loss, he could not recover. The policy does not so provide. If plaintiff's loss was caused by the windstorm, the fact that the rains may have created a condition which would permit the destruction by the windstorm would not relieve defendant from liability. The policy does not exclude from its terms rains, no matter how heavy. It is the high water or overflow which would excuse defendant. *Trexler Lumber Co. v. Allemannia Fire Ins. Co.*, 136 A. 856 (Pa.); *Pearl Assur. Co. v. Stacey Bros. Gas Const. Co.*, 114 F. 2d 702; *Pennsylvania Fire Ins. Co. v. Sikes*, 168 P. 2d 1016 (Okla.); *Gerhard v. Travelers Fire Ins. Co.*, 18 N.W. 2d 336 (Wis.); *Fidelity Phenix Fire Ins. Co. v. Anderson*, 130 N.E. 419 (Ind.).

That the court preferred its own phraseology to that suggested by defendant in formulating the issues is not error. It is not suggested that the issue submitted did not comprehend the question in controversy.

The exception and assignment of error to the question and answer: "Q. And to what extent was the wind blowing, if you have a way of describing it? A. Well, it was just blowing too hard for me to get outdoors and face it . . ." is without merit. The witness had previously testified: "The wind sure was blowing that day." There was other testimony: "The wind was blowing so terrific that it was almost impossible to stand up on the outside . . ."

Wiley Sims, a witness for defendant, in charge of the Weather Bureau at the Smith Reynolds Airport near Winston-Salem, had testified as to the amount of rain which fell that day. He testified that the Weather Bureau kept records at the airport since February 1944 and at Salem since 1895. He was then asked how the rain that day compared with the previous rains during that time. Plaintiff's objection was sustained. He would have testified: "That is the greatest amount

we ever had in a 24-hour period, as far as we know." The records had not been introduced in evidence. If, as seems, defendant was referring to contents of the records, they should have been put in evidence. All of the witnesses testified to extremely heavy rain that day. The exclusion of the evidence was not error.

Finally defendant excepts for that the court declined to permit the witness Griset to testify in response to a question that a simple means of testing wind pressure would be "By sticking your hand out of the window of your car when you are driving along." But the record discloses that this very witness testified to that fact just a few moments later. We find

No error.

JOHNSON, J., not sitting.

DAVID M. CLARK v. DALE EMERSON, G. C. EMERSON AND LEE KIRKMAN.

(Filed 11 January, 1957.)

1. Automobiles § 25—

Excessive speed is negligence.

2. Automobiles § 7—

The operator of a motor vehicle must be reasonably vigilant and anticipate the use of the highways by others, and his failure to maintain a reasonable lookout is negligence.

3. Automobiles § 21—

The failure to use the brakes when such use would prevent a collision is negligence.

4. Automobiles § 14—

A violation of G.S. 20-149(a) in overtaking and passing a motor vehicle is negligence.

5. Automobiles § 41d—Negligence and proximate cause in hitting parked car held for jury as to driver attempting to pass truck on its right.

Plaintiff's evidence tended to show that a tractor-trailer pulled out of a filling station on the east side of the street and turned left, that defendant, traveling south through the green light at an intersection, was confronted with the tractor-trailer in his line of travel, attempted to pass to the right of that vehicle, and collided with defendant's car, which was parked on the west side of the street. The evidence further tended to show that the driver of defendant's vehicle acknowledged he was at fault. *Held:* Under the evidence, whether the collision resulted from excessive

speed of defendant driver, his failure to maintain a proper lookout and apply his brakes after he saw or should have seen the tractor-trailer in his lane of travel, and whether he should have attempted to pass to the left rather than to the right of the tractor-trailer, are for the determination of the jury, and nonsuit was error.

6. Automobiles § 55—

A father who keeps a motor vehicle for the use and benefit of his minor son is liable for the negligent operation of the vehicle by his son.

7. Automobiles §§ 16, 41i—

Evidence that defendant drove his tractor-trailer into the street from a filling station and turned left into the street directly in the path of a car traveling south at a lawful speed along the street only 200 feet away, so that the driver of the car was forced to turn right and attempt to pass to the right of the tractor-trailer, causing him to collide with a vehicle parked on the west side of the street, *is held* sufficient to overrule motion for nonsuit in an action by the owner of the parked car to recover damages to his vehicle.

8. Damages § 12: Trial § 23a—

Failure to prove the monetary loss sustained to plaintiff's property as a result of concurring negligence of defendants does not justify nonsuit but only precludes an award of compensatory damages.

9. Trial § 22c—

The credibility of the testimony and the resolution of conflicts therein is not to be determined by the judge.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Sink, E. J.*, July 1956 Term of SURRY.

The complaint alleges that plaintiff's automobile was in a parking zone on the west side of South Main Street in the town of Mount Airy; that it was struck and damaged to the amount of $500 by a pickup truck owned by defendant G. C. Emerson, driven by Dale C. Emerson, minor son of the owner, for whose use and benefit the motor vehicle was kept. The complaint alleges that the automobile was parked in a 35-mile-per-hour speed zone, that it was damaged by the concurrent negligence of defendants Emerson and Kirkman. The allegations of negligence as to the defendants Emerson are: failure of the driver to keep a proper lookout, attempting to pass to the right of another vehicle traveling in the same direction in violation of G.S. 20-149, and reckless driving as defined by G.S. 20-140.

Relating specifically to the defendant Kirkman, the complaint alleges that Kirkman was the owner and operator of a tractor-trailer; that this vehicle came from a filling station on the east side of Main Street and 100 feet north of the point where plaintiff's car was parked and drove to the west side of Main Street in the path of the Emerson

vehicle which he saw approaching and which he knew had the right of way; and that the defendant Kirkman failed to keep a proper lookout and entered the highway in violation of G.S. 20-156(a).

Defendants Emerson answered, admitting all of the allegations in the complaint except the allegations that Dale Emerson was negligent and the allegation as to the amount of damage. They deny that Dale Emerson was negligent in any manner, averring that he was forced to act in an emergency created by the negligent conduct of the defendant Kirkman, and averring that the damage done to plaintiff's automobile when it was struck by the Emerson car amounted to only $250 instead of $500 as alleged by plaintiff.

Defendant Kirkman avers that the speed limit where plaintiff's car was parked was 20 m.p.h. He admits he was the owner and operator of a tractor-trailer which entered Main Street from a filling station located on the east side thereof. He admits plaintiff's automobile was struck and injured by the pickup truck driven by Dale Emerson and all allegations relating to Emerson. He denies that he was negligent in any manner or in any manner responsible for any damage which plaintiff might have sustained.

At the conclusion of plaintiff's evidence, defendants severally moved for judgment of nonsuit. The motions were allowed and plaintiff appeals.

Foy Clark for plaintiff appellant.

Folger & Folger, by Fred Folger, Jr., for defendant appellee Kirkman.

RODMAN, J. The evidence, when viewed in the most favorable aspect for plaintiff, would permit the jury to find these facts: Main Street in Mount Airy lies in a north-south direction. It is intersected by Wilson Street. The intersection does not form a continuous line. The intersection of West Wilson and Main is north of the intersection of East Wilson and Main Streets. Haymore's Service Station is located at the intersection of Main and East Wilson Streets and on the south side of Wilson Street. Plaintiff's car was parked about 8:15 p.m. on the west side of Main Street, 80 to 100 feet south of the point where East Wilson Street intersects Main Street. It was raining. Street and service station lights were burning. There was a traffic light at the intersection of Main and West Wilson. Dale Emerson, driving his father's pickup truck, was traveling southward on Main Street. Defendant Kirkman, whose truck-trailer loaded with tobacco had been parked in Haymore's Service Station, pulled into Main Street and crossed it to travel in a southerly direction. When Kirkman drove from the filling station to cross Main Street, the Emerson car was plainly visible. It was traveling at a speed estimated at from 20 to 30

m.p.h. It "was close to 100 feet north of the stop light. The pickup truck was approximately 200 feet north of where Mr. Kirkman pulled into South Main Street when I first saw it." The traffic light was green, giving Emerson the right of way at the intersection.

Kirkman entered Main Street at an angle to travel in a southward direction. The tractor portion was in the west lane of the street and the trailer in the east portion of the street. Emerson, in his attempt to avoid a collision with the Kirkman vehicle, pulled to his right and collided with plaintiff's parked car. He did not attempt to apply his brakes. "Dale Emerson acknowledged to the police that the accident was his fault and he would take the responsibility for it." Speed in the area where the collision occurred was, Kirkman alleged, limited to 20 m.p.h.

The only evidence as to damage was: "The whole left side of the plaintiff's car was damaged from the back up to the front part. I don't know how far . . . ." "I went out and looked at my car and found the left rear quarter panel and the left door both damaged." No one placed a monetary value on the damage inflicted.

The foregoing recapitulation of facts which the jury might accept would suffice for it to conclude as to defendant Emerson and as his admissions of fault would indicate (a) that he was driving at an excessive and unreasonable rate of speed; (b) proper attention to the highway should have disclosed the presence of Kirkman's truck in time for him to stop by the application of his brakes; or (c) that Emerson could and should have passed Kirkman's truck on the east or to the left instead of the right as Emerson attempted to do.

Excessive speed is negligence. *Riggs v. Motor Lines*, 233 N.C. 160, 63 S.E. 2d 197; *Rollison v. Hicks*, 233 N.C. 99, 63 S.E. 2d 197; *Hoke v. Greyhound Corp.*, 226 N.C. 692, 40 S.E. 2d 345. One who operates a motor vehicle must be reasonably vigilant and anticipate the use of the highways by others. A failure to maintain a reasonable lookout is negligence. *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332; *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17. Brakes are placed on cars to be used. A failure to use the brakes when such use would prevent a collision is negligence. *Daniel v. Packing Co.*, 215 N.C. 762, 3 S.E. 2d 282. A violation of G.S. 20-149(a) in overtaking and passing a motor vehicle is negligence. *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565. If the jury should conclude that defendant Dale Emerson was negligent in any or all of these respects, it could find that his negligence was the proximate cause of plaintiff's damage. It was for the jury to find the facts and draw the conclusions. If Dale Emerson's negligence was one of the proximate causes of plaintiff's damage, thereby imposing liability on him, liability was also, under the admissions in this case, imposed on G. C. Emerson.

As touching the liability of the defendant Kirkman, it is appropriate to inquire where the Emerson car was when Kirkman drove into the street. The jury might find that Emerson was only 200 feet away and that he was plainly visible, that he had a green light beckoning him on, that he was traveling 30 m.p.h., a lawful speed under existing conditions, that the Kirkman truck was loaded and starting from rest would move slowly across the street and directly into the path of the Emerson car. If the jury should find from the testimony that these are in truth the facts, it could well conclude that a reasonably prudent man would have heeded the statute (G.S. 20-156(a)) and waited the necessary five seconds for Emerson to pass. If impatience caused Kirkman to disregard the statute and venture where a reasonably prudent person would not have gone, he would be negligent and such negligence, if the proximate cause of the injury, would create liability. It was a question for the jury, not the court. *Gantt v. Hobson,* 240 N.C. 426, 82 S.E. 2d 384; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377.

Failure to prove the monetary loss sustained by plaintiff resulting from the collision would prevent the jury from awarding compensatory damages. *Lieb v. Mayer,* 244 N.C. 613. Plaintiff could not, however, be deprived of such damage as he was entitled to by nonsuit. *Hutton v. Cook,* 173 N.C. 496, 92 S.E. 355.

What credit the jury will give to the evidence and how it will resolve the conflicts in the testimony is not to be determined by the judge.

New trial.

JOHNSON, J., not sitting.

ANNIE LAURA BARWICK v. HERMAN ROUSE AND WIFE, ANNIE LEE ROUSE.

(Filed 11 January, 1957.)

1. Easement § 2—

An easement by implication is created upon separation of title when a use has been so long continued and is so obvious as to show it was meant to be permanent, and the easement is necessary to the beneficial enjoyment of the land conveyed.

2. Same—

The owner of land, in dividing same among his children, conveyed a part of one tract to his daughter and the remainder of that tract to his son. Defendants acquired the son's land by *mesne* conveyances. The daughter claimed an easement appurtenant to the highway over defend-

ants' land upon evidence tending to show the existence of a road or cartway thereover for a number of years before and after the severance of title. Defendants' evidence tended to show there never had been such road or cartway. *Held:* The verdict of the jury in defendants' favor as to the existence and use of the road is conclusive.

3. Appeal and Error § 42—

When the charge, read contextually, is free from prejudicial error, an exception thereto cannot be sustained.

4. Trial § 31c—

Where plaintiff tries her case solely on the claim of an easement appurtenant, she may not complain that the court failed to charge upon the questions of a right of way by prescription or by adverse possession, since these contentions are not embraced in the theory of trial.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Bone, J.*, at February 1956 Civil Term of WAYNE.

Civil action to require defendants to open alleged private road leading from certain land of plaintiff across certain land of defendants.

These facts appear to be uncontroverted:

1. On and prior to 27 September, 1927, W. H. Barwick owned a tract of land which embraced the land of plaintiff, and the land of defendants, described in the complaint. And on said date he made a division of his land among his children,—conveying to his daughter, the plaintiff, the 16-acre tract described in the complaint, and to his son Arthur Barwick the 34.25-acre tract also described in the complaint. The title to latter tract of land by *mesne* conveyances became vested in the defendants prior to the commencement of this action.

2. The 34.25-acre tract was adjacent to a public road, but the 16-acre tract did not adjoin any public road.

Plaintiff alleges in her complaint substantially the following: That on, and for more than twenty years before 27 September, 1927, W. H. Barwick owned and was in possession of said land as a single tract; that for said period of time, and since then, there was a road or cartway "extending northwardly and southwardly across said tract," which road or cartway had been, and was continuously used as an outlet from said land to the public highway; and that said road or cartway, having been so used continuously, was at the time of the respective conveyances by W. H. Barwick, and for many years both before and since, and still is "an appurtenance,"—a right that was conveyed to plaintiff.

Defendant answering denies in material part these allegations of the complaint.

And upon trial in Superior Court testimony of plaintiff, and of a number of witnesses introduced by her, tended to show the existence of the road or cartway and its use as alleged in the complaint.

Defendants, on the other hand, offered testimony tending to show that there never had been such a road or cartway, as contended by plaintiff.

The record discloses that the case was submitted to the jury upon the one issue raised by the pleading: "Is the plaintiff entitled to an easement in a specific roadway across the lands of the defendants, as alleged in the complaint?", and that the jury answered the issue "No."

Pursuant thereto the court signed judgment in favor of defendants. Plaintiff excepted thereto, and appeals to Supreme Court and assigns error.

J. Faison Thomson & Son for Plaintiff Appellant.

Edmundson & Edmundson and John S. Peacock for Defendants, Appellees.

WINBORNE, C. J. The record and case on appeal disclose that the theory on which plaintiff bases her cause of action is that at the time of the severance of title by W. H. Barwick there existed the essentials for the creation by implication of law of a roadway easement from her land across the land of defendants as described in the complaint.

On the other hand, defendants deny the existence of such essentials.

The principle of law involved is well established in this and other jurisdictions. In this connection it is a general rule of law that where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part. *Ferrell v. Trust Co.*, 221 N.C. 432, 20 S.E. 2d 329, and texts and cases cited.

And notwithstanding the fundamental principle that a person cannot have an easement in his own land, "it is a well settled rule that where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of the severance, is in use and is reasonably necessary to the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law . . . The underlying basis of the rule is that unless the contrary is provided, all privileges and appurtenances as are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant." 17 Am. Jur. 945; Easements

Implied, Section 33. *Ferrell v. Trust Co., supra. Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323.

Indeed there are three essentials to the creation of an easement by implication upon severance of title: (1) A separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. 17 Am. Jur. 948; Easements, Section 34. *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224; *Ferrell v. Trust Co., supra; Spruill v. Nixon, supra.*

In the case in hand the trial judge, in charging the jury, declared these principles and expressly instructed the jury in respect thereto in the light of the facts as the jury should find them to be.

Appellants excepted to several portions of the charge,—particularly as it relates to the burden of proof. However, when the charge is read contextually it is clearly understandable, and is not susceptible of misunderstanding. In these exceptions, therefore, error is not made to appear.

Furthermore, appellant assigns as error the failure of the court to declare the law (1) arising on the evidence that a right of way by prescription was claimed over the land of the defendants to the land of plaintiff; and (2) arising on evidence of adverse possession and use under claim of right, for a period of twenty years. These contentions are contrary to the theory of the trial as set forth hereinabove, and are without merit.

Indeed there are numerous other assignments of error, based on various exceptions, all of which have been examined and considered, and found not to be meritorious.

Finally it may be said that the case appears to have been fairly presented to the jury under a charge free from error, and the jury has not accepted the contention of plaintiff.

Hence in judgment from which appeal is taken, there is

No error.

JOHNSON, J., not sitting.

D. BARTON v. JOHN W. CAMPBELL, ADMINISTRATOR C.T.A., D.B.N., OF THE ESTATE OF ROSE ANN BARTON, DECEASED; LUCY B. CHAVIS, MARY B. DIAL, ODOM BARTON, HESTER B. OXENDINE, MARTHA LEE SMITH, ELLA BARTON, BLANCHE OXENDINE, LEOLA BARTON, VASHTI BARTON, MAE BARTON LOCKLEAR, ALSBY BARTON, SAMUEL BARTON AND SYLVIA BARTON; AND ANY AND ALL UNBORN CHILDREN OF D. BARTON, AND ANY AND ALL UNKNOWN HEIRS OF ROSE ANN BARTON.

(Filed 11 January, 1957.)

1. Wills § 31—

The intent of testatrix is her will and must be carried out unless some rule of law forbids it.

2. Wills § 33c: Estates § 17—

A bequest of personalty to a named person with provision that should the legatee have no bodily heirs at his death, the property should go back to testator's estate, is valid, and if the legatee should die without bodily heirs, the limitation over becomes effective and his estate must account for the *corpus* of the fund, an executory limitation over in personalty not being in violation of any rule of law in this State.

3. Wills § 34c: Adoption § 6—

While adoption creates the legal relationship of parent and child as between the parties, an adoption does not make the child a lawfully begotten heir of the adoptive parent, and therefore where there is bequest of personalty with provision that if the legatee should die without bodily heirs the property should go back to the estate, the adoption of a child by the legatee does not satisfy the limitation in the will.

JOHNSON, J., not sitting.

APPEAL by defendants Lucy B. Chavis, Mary B. Dial, Odom Barton, Hester B. Oxendine, Martha Lee Smith, Ella Barton, Blanche Oxendine, Leola Barton, Vashti Barton, Mary Cattie Locklear and Coree Oxendine from *Hall, J.*, September, 1956 Civil Term, ROBESON Superior Court.

This action was instituted under the Declaratory Judgment Act (G.S. 1-26) for the purpose of having the court construe the will of Rose Ann Barton. The will was executed 23 April, 1936. The testatrix died 14 July, 1955. The dispositive items of her will are:

"First. I hereby give and devise to my son, D. Barton, 25 acres of land, including the dwelling house where I now live and all barns, stables, and outhouses; and all personal property that I may own *and* the time of my death. If he should never have any bodily heirs at his death the property above described shall then go back to my estate.

"Second. I hereby give my household goods to my two daughters Mary Dial and Lucy Chavis.

"Third. All other property that I may own at the time of my death other than the above described shall be equally divided among my heirs."

The testatrix owned a tract of land containing 50 acres on which was situated the dwelling house and other buildings. The controversy involves only the personal property bequeathed in item First. The sum of $3,965 was on deposit in the Scottish Bank of Pembroke. It seems to be conceded the description of the twenty-five acres of land in item First (it being a part of a larger tract) is insufficient to identify the land attempted to be devised, and that the devise is void for uncertainty. The trial court so held and from that holding there was no appeal.

There is no controversy over items Second and Third of the will. The court found as a fact that D. Barton is not the natural father of a child or children, but that on 8 April, 1954, he adopted Sylvia and Samuel Barton for life. The trial court held that all personal property except household goods passed absolutely to D. Barton under item First of the will and the attempt to place a limitation or restriction upon the bequest was void for repugnancy. From the judgment, certain of the defendants appealed.

N. L. Britt for plaintiff, appellee.
Hackett & Weinstein,
By: Robert Weinstein for defendants, appellants.

HIGGINS, J. Two questions are presented for decision: (1) Does item First of the will place a limitation upon the title to personal property bequeathed to the plaintiff? (2) If so, is the limitation satisfied and removed by the adoption of Sylvia and Samuel Barton?

In finding the answer to question (1), we must recognize that the intention of the testatrix is her will. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888. The intent must be carried out unless some rule of law forbids it. *Hummell v. Hummell,* 241 N.C. 254, 85 S.E. 2d 144; *Trust Co. v. Green,* 238 N.C. 339, 78 S.E. 2d 174.

When the testatrix said the property bequeathed "shall go back to my estate" if the legatee "shall never have any bodily heirs," the expressed intent does not violate any rule of law. "The rule is well established that personal property as well as real estate is a proper subject of executory interest and limitation, provided the contingency operating to defeat the estate of the first taker is no more remote than

the law allows." (Rule against Perpetuities.) *Woodard v. Clark,* 236 N.C. 190, 72 S.E. 2d 433; Thompson on Wills, 433, sec. 357; *Zollicoffer v. Zollicoffer,* 20 N.C. 574; *Jones v. Spaight,* 4 N.C. 157.

"The rule has been applied in like manner where there was a gift generally to the first taker of (1) specific personal property, or (2) the entire estate of testator, or (3) the residue of the estate with a limitation over to others in the event the original donee should die without issue or upon some other contingency." (Citing cases.) "When such future interest is created by will it is valid and vests in the ulterior taker an enforceable title either vested or contingent, depending on the condition or event upon the happening of which the right of possession is made to rest." *Woodard v. Clark,* 236 N.C. 190, 72 S.E. 2d 433.

From the foregoing we conclude the provision in the will is valid and in the event D. Barton dies without bodily heirs, the personal property bequeathed to him must go to the ulterior legatees.

Proceeding to the second question: Does the adoption for life of Sylvia and Samuel Barton satisfy the limitation in the will by making them bodily heirs of D. Barton? By the laws of adoption, for the purposes of inheritance and distribution, they became the children of D. Barton. They are his children not by birth, that is by blood relationship, but by law. Adoption did not make them the bodily heirs of their adopting father. *Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632; *Smyth v. McKissick,* 222 N.C. 644, 24 S.E. 2d 621; *Grimes v. Grimes,* 207 N.C. 778, 178 S.E. 573. *Bradford v. Johnson* was decided in April, 1953, since the 1947 Amendment.

"And regardless of any provisions that may be contained in an adoption law with respect to the parent and child relationship, or the right of the adopted child to take by, through, and from its adoptive parents, the adoption of a child under such law does not make such adopted child a lawfully begotten heir of the bodies of the adoptive parents." *Bradford v. Johnson, supra. Trust Co. v. Green, supra.* The words, "bodily heirs," "heirs of the body," "lawfully begotten heirs of the body," are synonymous. *Albright v. Albright,* 172 N.C. 351, 90 S.E. 303.

The laws of adoption can create a legal relationship but they cannot create a blood relationship. A testator has the right to give his property exclusively to those of his own blood. The children of D. Barton by adoption do not meet and satisfy the limitation in the will.

We conclude the plaintiff is entitled to receive from the administrator *c.t.a., d.b.n.* all the personal estate of the testatrix, except the household goods, and to use the income therefrom. And in the event he has a bodily heir, his ownership shall become absolute. But if he should die without a bodily heir, the limitation becomes effective and his estate

must account to the legatees of the testatrix for the *corpus* of the fund. *Woodard v. Clark, supra.*

The provision in the judgment of the Superior Court of Robeson County that D. Barton shall be the absolute owner of the personal property bequeathed in item First of the will is modified in accordance with this opinion. As thus modified, the judgment is affirmed.

Modified and affirmed.

JOHNSON, J., not sitting.

DAPHNE (MRS. BRYANT) HAZELWOOD v. DR. P. Y. ADAMS.

(Filed 11 January, 1957.)

1. Physicians and Surgeons § 14—

A dentist, under the same rules of liability applicable to physicians and surgeons, is required to bring to his patient's case a fair, reasonable and competent degree of skill, which others similarly situated ordinarily possess, and to apply that skill with ordinary care and diligence in the exercise of his best judgment.

2. Physicians and Surgeons § 20—

Evidence that defendant dentist in extracting two molars from plaintiff's mouth left imbedded roots, that infection in and around the broken roots was permitted to continue for some five months with two or three weekly operations which did nothing more than drain the infected area, that defendant then sent plaintiff to a specialist, who located the position of the roots by X-ray and removed them, is sufficient to be submitted to the jury on the issue of defendant's liability, and involuntary nonsuit was error.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Gwyn, J.*, September, 1956 Civil Term, GUILFORD Superior Court (High Point Division).

Civil action for damages for alleged negligence on the part of the defendant in the extraction of plaintiff's teeth and in the subsequent treatment. The plaintiff alleged the defendant (1) lacked the requisite skill, (2) failed to use reasonable care and skill in treating the plaintiff, and (3) failed to use his best judgment in the course of the treatment; and that as a consequence of defendant's negligence the plaintiff had been damaged in the sum of $30,455.32.

The defendant admitted accepting employment as plaintiff's dentist and treating her for a period of about five months. He denied that he

lacked the requisite skill as a dentist or that he failed to apply that skill or to use his best judgment in the plaintiff's case.

The plaintiff testified in considerable detail both as to the operation and the course of treatment thereafter. Her testimony in material substance may be summarized: She became the defendant's patient on 13 May, 1954. The defendant advised the extraction of two upper molars. In making these extractions the defendant broke off the roots, probed for them but left them imbedded in the jawbone. Three or four days after the operation the plaintiff returned to the defendant's office in great pain. The defendant, by means of a probe with a hook on the end, opened the infected area and drained a considerable amount of pus and blood. He instructed the plaintiff to go home and go back to work. Thereafter, two or three times each week, because of the terrible pain, she returned to the defendant's office where the treatment was repeated. On each occasion the infected area was opened and the accumulated pus drained. Except for a short time after each drainage operation she was constantly in pain. When asked if the roots were still imbedded, he said, "Possibly, possibly, possibly," but made no effort to remove them. This course of treatment continued for five months. At the end of that time plaintiff complained that something else had to be done. The defendant became angry and told her he would send her to a medical doctor to have the opening sewed up.

On 22 October, 1954, the plaintiff consulted Drs. Leath and Hinson, eye, ear, nose and throat specialists, who sent her to the hospital. Dr. Leath testified in part:

> "She was admitted to the hospital with a complaint of pain in the region of the left antrum, extending into the left temple, a bad taste in her mouth, and at times some blood from the left side of her nose. Prior to the time Dr. Hinson and I had her hospitalized, at the time of the examination, all of the upper left pre-molar and molar teeth had been removed. A probe could be passed into the antrum. A probe could be passed through a sinus into the antrum. The antrum is a common name for the maxillary sinus, or air pocket, of the cheek. I'm sure that Dr. Hinson, prior to the time she was hospitalized, took some x-rays. After we had her in the hospital, we did operate upon her." . . .
>
> "Dental x-rays had shown roots of teeth, and, of course, that was one of the reasons why the operation. . . . (X-rays) had shown two roots of teeth, and the x-ray of the sinuses had shown a polyp, or condition of a swollen membrane inside of the sinus. In the course of this operation these teeth, or roots, were removed. The root of the tooth located in the region of the sinus, through which

we could first pass a probe, was lying through the bony wall, but not through the mucous membrane, and this root was removed by passing a probe from inside of the antrum, and pushing it out into the mouth. The second root was imbedded in the bone, not into the antrum, and Dr. Hinson removed that through the first incision." . . .

"I think probing is a rather blind procedure for such a condition. I think it ought to be opened and removed."

Dr. Hinson testified in part: "Well, it's accepted practice to remove all the root; however, there may be occasion when you have a small fragment of root, when it would be inadvisable to intervene to remove a small flake of a tooth where surgical intervention might cause more damage than the root would be worth to recover. . . . I would say that is a little larger than a flake, that root in there that I am referring to is a little larger." (The above in reference to x-ray picture No. 1.) "That is a larger root there," (indicating x-ray No. 2). Referring to a dark line in the picture, "Well, this is a fistula, a track, a little track draining from an infected area. This is the little track opening from the infected area here into the mouth proper. That track comes from the area which I have surrounded as No. 1."

At the close of the plaintiff's evidence, judgment of involuntary nonsuit was entered, from which the plaintiff appealed.

Schoch and Schoch,
By: Arch K. Schoch for plaintiff, appellant.
York, York & Hutchens,
By: C. A. York, Jr., for defendant, appellee.

HIGGINS, J. "A physician or surgeon who undertakes to render professional service must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; (3) he must use his best judgment in the treatment and care of his patient." *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762; *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E. 2d 57; *Wilson v. Hospital*, 232 N.C. 362, 61 S.E. 2d 102; *Smith v. McClung*, 201 N.C. 648, 161 S.E. 91; *Nash v. Royster*, 189 N.C. 408, 127 S.E. 356; *Long v. Austin*, 153 N.C. 508, 69 S.E. 500. "If the physician or surgeon lives up to the foregoing requirements, he is not civilly liable for the consequences.

If he fails in any particular and such failure is the proximate cause of injury and damage, he is liable." *Hunt v. Bradshaw, supra.*

The rules of liability applicable to physicians and surgeons apply likewise to dentists. *Grier v. Phillips,* 230 N.C. 672, 55 S.E. 2d 485; *McCracken v. Smathers,* 122 N.C. 799, 29 S.E. 354. The dentist is liable if injury proximately results either from a want of skill or from a want of its application. *Nash v. Royster, supra.* One who holds himself out to practice dentistry, by implication agrees to bring to his patient's case a fair, reasonable and competent degree of skill and to apply that skill with ordinary care and diligence in the exercise of his best judgment. The rule in relation to learning and skill does not require that extraordinary learning and skill which belong only to a gifted few of rare endowments, but such as is possessed by the average member of the profession in good standing. The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and to render a physician or surgeon liable it is not enough that there has been a lesser degree of care than some other medical man might have shown, or less than even he, himself, might have bestowed. But there must be a want of ordinary and reasonable care leading to a bad result. This includes not only diagnosis, but treatment. *Nash v. Royster, supra.*

The plaintiff's medical evidence shows that good medical practice requires that broken roots should be removed at the time of the extraction. That infection in and around the broken roots should be permitted to continue for five months with two or three weekly operations which did nothing more than drain the infected area, would seem to be enough to permit the plaintiff to submit determinative issues to the jury. The evidence in the case of *Love v. Zimmerman,* 226 N.C. 389, 38 S.E. 2d 220, certainly is not stronger than the evidence in this case. We think the plaintiff was entitled to go to the jury, and to that end the judgment of nonsuit is

Reversed.

JOHNSON, J., not sitting.

STATE v. EDITH POE.

(Filed 11 January, 1957.)

1. Intoxicating Liquor § 9b—

The presumption arising under G.S. 18-11 from the possession of more than one gallon of intoxicating liquor does not apply to a charge of unlawful possession of intoxicating liquor, but only to a charge of possession for the purpose of sale, G.S. 18-50, and relates solely to purpose of the possession.

2. Intoxicating Liquor § 2—

Unlawful possession of intoxicating liquor, G.S. 18-48, and unlawful possession of intoxicating liquor for the purpose of sale, G.S. 18-50, are separate and distinct offenses of equal dignity, and neither charge includes the other.

3. Intoxicating Liquor § 9g: Criminal Law § 56—

Where the warrant charges unlawful possession of taxpaid liquor for the purpose of sale, and the court submits only the charge of unlawful possession of taxpaid liquor, the action of the court has the effect of withdrawing from the jury the only charge before it and is equivalent to a verdict of not guilty on the charge of possession of taxpaid liquor for the purpose of sale, and judgment upon verdict of guilty as charged must be arrested.

JOHNSON, J., not sitting.

APPEAL by defendant from *Sharp, S. J.*, May, 1956 A Criminal Term, CHATHAM Superior Court.

This criminal prosecution originated in the Chatham County Criminal Court upon a warrant charging that on 4 July, 1955, Edith Poe did unlawfully, wilfully have in her possession for the purpose of sale a quantity of taxpaid liquors, to-wit: One and one-half gallons of liquor and 37 cans of beer, contrary to the form of the statute, etc. The defendant entered a plea of not guilty and from the judgment imposed, she appealed to the Superior Court of Chatham County. In the Superior Court the defendant entered a plea of not guilty.

The State offered evidence that the Sheriff on the date named searched the house where the defendant lived and found three pints of whiskey in the front bedroom, two pints in the side bedroom, and "seven pints sitting in a sack right by the door, underneath the house. . . . All the whiskey we found there was taxpaid." The seals were unbroken. The following appears from the minutes of the court:

"Court proceeds to business in the following manner, to-wit:

May 10, 1956.

State vs Edith Poe — Charge: Unlawful possession of taxpaid liquor and thirty-seven cans of beer for the purpose of sale.

PLEA AND VERDICT

The defendant in open Court, through her counsel Mr. Seawell, entered a plea of Not Guilty.

The Jury is sworn, chosen and impaneled as follows: E. E. Clark and eleven others (naming them).

With the evidence in this case closed as announced in open court by counsel for State and defendant, Court takes overnight recess. Let the record show that both sides rested the case before the close of Court.

/s/ SUSIE SHARP
Judge Presiding."

"VERDICT

May 11, 1956

State vs Edith Poe — The Court submitted only the charge of unlawful possession of one and one-half gallons of taxpaid whiskey to the jury.

The jury returned into open court and for their verdict announced that they find the defendant guilty as charged. Upon request of the defendant's counsel the jury was polled in due form and each juror in turn reaffirmed his verdict of guilty."

From a verdict of guilty and judgment of imprisonment, the defendant appealed.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Herbert F. Seawell, Jr., for defendant, appellant.

HIGGINS, J. In this State it is unlawful for any person to have in possession intoxicating liquor *for the purpose of sale.* G.S. 18-50. When the possession is for the purpose of sale, it makes no difference whether the liquor is taxpaid or nontaxpaid. *S. v. Hill,* 236 N.C. 704, 73 S.E. 2d 894.

It is not unlawful to possess taxpaid whiskey in one's private dwelling, provided it is for the use of the owner, his family and guests. G.S. 18-11. The *prima facie* evidence rule under the section applies to the

possession of more than one gallon of taxpaid liquor, even in the home. The rule applies where the charge is unlawful possession *for the purpose of sale* and relates solely to the purpose of the possession. *S. v. Hill, supra; S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904.

This Court has held that where the offense charged is unlawful possession *for the purpose of sale* (G.S. 18-50), a conviction cannot be sustained *for unlawful possession.* Likewise, when the charge is unlawful possession (G.S. 18-48), a conviction cannot be sustained for unlawful possession *for the purpose of sale. S. v. Daniels,* 244 N.C. 671, 94 S.E. 2d 799. The two crimes are separate and distinct—made so by different legislative enactments. They are of equal dignity and carry the same punishment. Neither charge includes the other. The crime of unlawful possession is not a part of the crime of unlawful possession for the purpose of sale.

In this case the warrant charged the unlawful possession of one and one-half gallons of taxpaid liquor *for the purpose of sale.* The minutes of the court show that the defendant was placed on trial, "Charge: Unlawful possession of taxpaid whiskey . . . for the purpose of sale." The minutes further show that after the evidence was closed, the court "submitted only the charge of unlawful possession of one and one-half gallons of taxpaid whiskey to the jury." When the court removed from the warrant the charge the possession was for the purpose of sale, it removed from the jury an essential element of the offense upon which the defendant was put to trial. Under the rule stated in the *Daniels case,* a conviction under the warrant could not be had for unlawful possession. The action of the court had the effect of withdrawing from the jury the only charge before it. This action took place after the jury was impaneled and was equivalent to a verdict of not guilty of the charge of unlawful possession of taxpaid liquor for the purpose of sale.

The facts here disclosed appear upon the face of the record and require that the judgment be arrested. The defendant is entitled to a discharge, and it is so ordered.

Judgment arrested.

JOHNSON, J., not sitting.

IN THE MATTER OF: ROY B. STUTTS, P. O. BOX 184, LIBERTY, NORTH CAROLINA, S. S. NO. 241-18-0298,

and

VUNCANNON HOSIERY MILLS, INC., P. O. BOX 148, ASHEBORO, NORTH CAROLINA,

and

BUNTING FULL FASHION HOSIERY MILL, ASHEBORO, NORTH CAROLINA.

and

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA.

(Filed 11 January, 1957.)

Master and Servant § 60—

Where the findings of the Employment Security Commission that at the time of filing claim claimant was unemployed because of his misconduct connected with his work, are supported by the evidence, such findings are conclusive and support decision that claimant was disqualified for unemployment benefits for nine consecutive weeks. G.S. 96-14(b), G.S. 96-4(m).

JOHNSON, J., not sitting.

APPEAL by claimant from *Patton, S. J.*, May-June (A) Civil Term 1956 of RANDOLPH.

This proceeding arises out of a claim for unemployment compensation filed with the Employment Compensation Commission of North Carolina by Roy B. Stutts, a former employee of Vuncannon Hosiery Mills, Inc.

The Employment Security Commission found from the evidence that claimant was employed by Vuncannon Hosiery Mills, Inc., as a full fashion knitter, that the night before he was discharged he had changed the weights on his machine, that prior to that time he had made other changes, all in disregard of the instructions of his employer, that such changes made by claimant caused the machine to run bad work, and as a result of having violated the instructions of his employer, he was discharged. The Commission concluded that claimant was discharged for misconduct in connection with his work because it appears he wilfully and knowingly violated a reasonable rule of his employer that he should not make any changes in the machine he was operating, but that such changes were to be made by the fixer; that such wilful disregard of the instructions of his employer constituted misconduct in connection with his work, and makes him subject to disqualification as a result of having been discharged by his employer. The Commission further found that since filing his claim, claimant has been able to work and has sought work, with the exception of the weeks ending 16 January 1956 and 23 January 1956.

The Commission decreed that claimant was disqualified from receiving benefits for a period of nine weeks, beginning 22 November 1955 and continuing through 23 January 1956, that claimant is eligible for benefits beginning 24 January 1956 and continuing through 6 February 1956, and he shall thereafter be paid or denied benefits in accord with his claims record.

Upon appeal to the Superior Court the decision of the Commission was affirmed in all respects, and judgment was rendered accordingly.

From the judgment claimant appeals to the Supreme Court.

Jerry M. Shuping for Claimant, Appellant.

W. D. Holoman, R. B. Billings, R. B. Overton and D. G. Ball for Employment Security Commission of North Carolina, Appellee.

PER CURIAM. There is competent evidence in the Record to support the Employment Security Commission's findings of fact that claimant at the time his claim was filed, is unemployed, because he was discharged for misconduct connected with his work. Such a finding supports its conclusion and decision that claimant was disqualified for benefits for nine consecutive weeks. G.S. 96-14(b). Such findings of fact by the Commission supported by competent evidence are binding upon review. G.S. 96-4(m); *Employment Security Com. v. Smith,* 235 N.C. 104, 69 S.E. 2d 32.

The ruling of the Commission was affirmed in all respects on appeal to the Superior Court. It is supported by the language of the statute and the evidence. No reason appears to disturb the judgment below.

Affirmed.

JOHNSON, J., not sitting.

STATE v. THEODORE M. DANZIGER.

(Filed 11 January, 1957.)

Automobiles § 3½ —

Where there is no accident, a person is required to exhibit his driver's license only when he is operating or is in charge of a motor vehicle and is requested to do so by an officer. Therefore, warrant charging defendant with refusal to show his operator's license to a public officer does not charge the offense, and judgment upon such warrant must be arrested. The warrant should also charge the name of the officer who demands the right to inspect the license.

JOHNSON, J., not sitting.

APPEAL by defendant from *Hall, J.*, February 1956 Term of ORANGE.

Defendant was tried and convicted in the recorder's court on a warrant issued by the mayor *pro tem* of Carrboro. The warrant charged "on or about the 10 day of January, 1956, Theodore M. Danziger did unlawfully, willfully, fail and refuse to show his Operators license to a public officer in uniform in violation of section 20-29 of the motor vehicles laws of North Carolina, contrary to the form of the statute . . ." Defendant appealed to the Superior Court from the judgment rendered by the recorder. He was tried in the Superior Court on the warrant issued by the mayor *pro tem*. The jury found him guilty of failing to show his operator's license as charged in the warrant. Sentence was imposed and from this judgment defendant appealed.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

W. Harold Edwards for defendant appellant.

PER CURIAM. The holder of a driver's license is only required to exhibit his license upon request, when he is operating or in charge of a motor vehicle, G.S. 20-29. The warrant does not contain this essential averment. It does not charge a criminal offense. *S. v. Gibbs*, 234 N.C. 259, 66 S.E. 2d 883; *S. v. Miller*, 231 N.C. 419, 57 S.E. 2d 392; *S. v. Cole*, 202 N.C. 592, 163 S.E. 594; *S. v. Ballangee*, 191 N.C. 700, 132 S.E. 795. The warrant should also name the officer who demands the right to inspect the license. *S. v. Eason*, 242 N.C. 59, 86 S.E. 2d 774. The judgment is

Arrested.

JOHNSON, J., not sitting.

STATE v. POLLY JONES.

(Filed 11 January, 1957.)

Homicide § 25—

Conflicting evidence as to whether defendant was the person who intentionally fired the pistol shot that killed deceased requires the submission of the issue to the jury and is sufficient to support verdict of guilty of manslaughter.

JOHNSON, J., not sitting.

APPEAL by defendant from *Carr, J.*, March Term 1956 of SCOTLAND.

The defendant was tried upon a bill of indictment charging her with the murder of one Mildred Shaw. However, at the call of the case the solicitor for the State announced that he would not ask for a verdict of guilty of the capital felony but for a verdict of guilty of murder in the second degree, or manslaughter, as the evidence might warrant.

The jury returned a verdict of guilty of manslaughter. From the judgment imposed, the defendant appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Joe M. Cox and Gilbert Medlin for defendant.

PER CURIAM. The State's evidence and that offered on behalf of the defendant was in sharp conflict as to whether or not the defendant fired the pistol shot that killed Mildred Shaw. Even so, the State's evidence was sufficient to carry the case to the jury and counsel for defendant so conceded in arguing this appeal. Moreover, the conflict in the evidence bearing on this crucial question, was for the jury to resolve and not the court. The State's evidence was sufficient to support the verdict.

We have carefully examined and considered each of the exceptions and assignments of error brought forward and argued in the defendant's brief and find no error which is sufficiently prejudicial to justify a new trial.

No error.

JOHNSON, J., not sitting.

BELL BAKERIES, INC., v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 1 February, 1957.)

1. Usury § 1: Mortgages § 11—

A provision in a deed of trust that the borrower should pay a premium, in addition to accrued interest at the legal rate, upon the exercise of its privilege of prepaying the notes before maturity, is valid. G.S. 22-4.

2. Mortgages § 11—

A provision in notes and deed of trust securing same that the borrower should maintain a working capital in a specified amount and should not pay dividends on its stock when the payment of such dividends would reduce its working capital below the minimum specified, is valid.

3. Same: Corporations § 16—

The borrower was a wholly owned subsidiary, the parent corporation being the owner of all its common stock. The subsidiary undertook to pay interest on the parent corporation's debentures. *Held:* The payment of the interest on the parent company's debentures, being based solely on the ownership by the parent corporation of the common stock of the subsidiary, is sufficiently analogous to the payment of a dividend by the subsidiary to justify the lender in asserting that such payment constituted the payment of a dividend within the terms of its loan agreement proscribing the payment of dividends by the borrower which would reduce its working capital below a specified amount.

4. Duress—

A threat to do what one has a legal right to do cannot constitute duress.

5. Mortgages § 11—Lender's threat to declare default if borrower violated conditions of deed of trust cannot constitute duress.

The notes and deed of trust in question stipulated that the borrower should not pay dividends on its stock if such payment reduced its working capital below a stipulated amount. After dispute between the borrower and lender as to whether the payment by the borrower of interest due on the debentures of the borrower's parent corporation constituted a payment of dividends by the borrower, the borrower made such payment. The lender waived the asserted breach, but advised the borrower that another such payment would be treated as a default, and suggested that if the borrower did not wish to comply, it should refinance the loan. The borrower, upon its election to refinance the loan, was required by the lender to pay the premium stipulated for the privilege of prepayment. The borrower instituted this action asserting that it was forced to refinance the loan, which was not in default, because of the irreparable injury that would result from a declaration of default, that the refinancing was thus under duress, and sought to recover the amount paid by it for the privilege of prepayment and the cost of refinancing the loan. *Held:* The lender had the right to call the borrower's attention to the terms of the agreement and to inform it that upon failure to comply, the lender would exercise its legal contractual rights, and, there being no evidence that the lender acted in bad faith in asserting its rights, nonsuit was proper.

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

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Hobgood, J.*, Second April Civil Term of WAKE.

Plaintiff seeks to recover moneys asserted to have been paid to defendant as a result of duress and in addition expenses incurred because of the asserted duress.

The complaint alleges in substance: that plaintiff, a Delaware corporation engaged in the baking business in North Carolina and several other states on 1 November 1947, borrowed from defendant the sum of $785,000; that the debt thus created was evidenced by bonds which

were secured by deed of trust conveying real and personal property of plaintiff in North Carolina and several other states; that plaintiff is the wholly owned subsidiary and sole source of income of Liberty Baking Corporation (hereafter referred to as Liberty); that prior to 1944 plaintiff had obligated itself to pay all amounts required to be paid on the outstanding preferred stock of Liberty and pursuant to its agreement had provided funds for Liberty to meets its dividend requirements in 1944, 1945, and 1946 in an aggregate sum of $68,932.50; that on 31 December 1947 dividends had accumulated on Liberty's preferred stock to the amount of $37.50, and on 1 January 1948 Liberty issued debenture bonds in exchange for its outstanding preferred stock at which time plaintiff obligated itself to pay the interest installments on the debentures; that pursuant to its agreement with Liberty plaintiff paid interest on Liberty's debentures as follows: 1948, $11,237; 1949, $29,341.80; 1950, $46,752.30; 1951, $62,974.80; that these payments were shown on financial statements furnished defendant by plaintiff; that defendant knew of plaintiff's obligation to Liberty and acquiesced in the payments made by plaintiff from 1944 to December 1951; that the deed of trust of 1 November 1947 securing the bonds issued to defendant contained covenants that plaintiff would at all times maintain a net working capital of at least $75,000 and would not, without the consent of the majority of its bondholders, pay any cash dividend on any of its capital stock or retire any of its capital stock if after such payment or retirement plaintiff's earned surplus did not equal or exceed $200,000; that in 1950 there was a deficiency in working capital, and defendant requested plaintiff not to pay dividends or retire capital stock if after such payment the working capital was less than $200,000; that plaintiff assented to the request and the deed of trust was modified accordingly; that in January 1952, when plaintiff was not in default under any provision of its deed of trust, defendant arbitrarily and without any semblance of right demanded that plaintiff agree not to make any further payments on Liberty's debentures unless after such payment plaintiff had a minimum working capital of $200,000 and demanded that plaintiff refinance its debt to defendant if plaintiff was unwilling to meet its demand; that defendant asserted that such payments would be a violation of the covenants contained in the deed of trust as amended in 1950; that plaintiff denied defendant's construction of the agreement and insisted that it had a right under the trust to make payments of the interest on Liberty's debentures; that because of defendant's arbitrary attitude and its unjust and unwarranted demand and a threat to declare a default and foreclose plaintiff's equity, plaintiff negotiated a loan to enable it to pay off the bonds held by defendant, knowing that if a default were in fact declared, irreparable damage would be done to plaintiff's financial standing; that when plaintiff had

obtained a commitment for a new loan, defendant wrongfully demanded a premium of 5% before it would accept payment of the bonds held by it and the cancellation of the deed of trust; that plaintiff, under compulsion and the threat of a declared default and to save its credit and property, yielded to the demand of defendant and paid to it $502,400, the unpaid principal of its bonds plus interest accrued thereon amounting to $3,279.56 and under protest a 5% premium wrongfully demanded in the amount of $25,120; that said premium was paid "under business compulsion, coercion, and duress, and made the payment as the only alternative to suffering great financial loss and perhaps the wrecking of its business as a result of the action threatened by defendant"; that plaintiff incurred an expense of $26,053 in obtaining a new loan, which expense was a direct result of defendant's wrongful act in threatening a foreclosure of plaintiff's properties. Plaintiff seeks to recover the sum of $51,173.

Defendant, by its answer, avers that it has no contractual relations with Liberty and has no information with respect to any payment made by plaintiff to Liberty prior to November 1947 or knowledge of Liberty's source of income or any amounts accrued on the preferred stock of Liberty in December 1947. It denies it was informed of the issuance of debentures by Liberty or of any arrangement between plaintiff and Liberty for payment of interest to accrue on the debentures, asserting that any such arrangement was subject to the provisions of the deed of trust securing the debt owing it; it admits notifying plaintiff on several occasions that it expected plaintiff to comply with the terms and provisions of the deed of trust. It denies any wrongful demand or coercion, admits that the debt owing it was paid to it before maturity and in addition a premium of 5% was paid, asserting that the payment was voluntary and the premium legal and in conformity with the provisions of the deed of trust and the notes thereby secured. The answer sets out provisions of the deed of trust which it asserts were violated by plaintiff. It avers that it sought compliance with the provisions of said deed of trust and made no threats not fully supported by the provisions of the deed of trust. It avers that the premium paid was less than the amount expressly provided for in the notes and deed of trust.

The deed of trust annexed to the complaint and admitted by the answer to be correct provides for fifty 5% first mortgage bonds, each in the sum of $15,700. The bonds are dated 1 November 1947, bear interest at the rate of 5% per annum from that date, are payable as to principal on the first days of February, May, August, and November, the first note being due 1 February 1948, interest being payable on the dates when a principal note is payable. The notes and deed of trust contain this provision:

"At any one time, or from time to time, on any interest date one of the bonds of this issue may at the option of THE COMPANY, which option shall be non-cumulative, be redeemed prior to maturity, at One Hundred (100%) per centum of the face value of the bond so redeemed plus in each case accrued interest to the date of redemption, upon thirty (30) days notice in writing in accordance with the terms and conditions set forth in said deed of trust, to which deed of trust reference is hereby made for a more particular description of such terms and conditions; the bond or bonds so redeemed shall be the last maturing bonds.

"At any one time or from time to time on or after November 1, 1950, on any interest date any or all of the bonds of this issue may at the option of THE COMPANY be redeemed prior to maturity at one hundred (100%) per centum of the face value of the bond or bonds so redeemed plus a premium of ten (10%) per centum of the face value of the bond or bonds so redeemed on or prior to November 1, 1951, which premium shall be reduced by one (1%) per centum per annum each year thereafter to and including November 1, 1955 so that said premium is five (5%) per centum of the face value of the bond or bonds so redeemed after November 1, 1955, after which date any or all of said bonds may be redeemed at a premium of five (5%) per centum of the face value of the bond or bonds so redeemed plus in each case accrued interest to the date of redemption, upon thirty (30) days notice in writing in accordance with the terms and conditions set forth in said deed of trust to which deed of trust reference is hereby made for a more particular description of such terms and conditions; the bond or bonds so redeemed shall be the last maturing bonds. In the event of a release of any of the properties from the lien of said deed of trust as therein provided, the release price shall be forthwith applied to redeem, upon at least five (5) days written notice, the last maturing bonds (*i.e.* bond numbered 50, then 49, etc.) so that they are redeemed in inverse numerical sequence, at one hundred (100%) per centum of the face value of the bond or bonds so redeemed, plus in each case a premium of five (5%) per centum, plus accrued interest to the date of redemption in accordance with the terms and conditions set forth in said deed of trust, to which deed of trust reference is hereby made for a more particular description of such terms and conditions."

Article II, sec. 2 of the deed of trust reads:

"At any time, without notice, in case of involuntary liquidation of THE COMPANY, the entire amount of said bonds which are then outstanding shall at once become due and payable at par value."

Plaintiff is referred to in the deed of trust as "THE COMPANY."

Article X of the deed of trust provides:

"The following specific acts shall be deemed a default for the purpose of this Article:

. . .

"(f) Any default in the due observance or performance of any other covenant or condition hereof which is by the terms of this indenture expressly made obligatory upon THE COMPANY, after thirty (30) days notice thereof in writing to THE COMPANY."

In the event of a foreclosure sale the proceeds were distributable:

"SECOND: To the payment of the whole amount of the principal of the bonds issued hereunder, at that time unpaid and outstanding, and of the interest which shall then be owing and unpaid thereon, with interest on the principal of such bonds and on the overdue installments of interest, or, in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid on the said bonds, then to the payment of the principal and interest due on said bonds ratably, without preference or priority of principal over interest or interest over principal, or of any installment of interest over any other installment of interest."

Article IV entitled "General Covenants of the Company" provides in part:

"Section 7.—Maintenance of Net Working Capital.

"THE COMPANY covenants that it will at all times maintain net working capital (as generally classified by good accounting practice) of at least Seventy-five Thousand ($75,000.) Dollars.

"Section 8.—Restriction on Payment of Dividends.

"THE COMPANY covenants that it will not without the consent of the majority of the bondholders pay any cash dividends on any class of its capital stock or retire any of its capital stock, unless after such payment or retirement the earned surplus of the Company shall be not less than the sum of Two Hundred Thousand ($200,000.) Dollars." Section 8 was amended 16 May 1950 by adding at the end a provision that the Company would not, without the consent of the majority of the bondholders, pay any dividends on its capital stock or retire any stock, if after such payment or retirement the working capital of the Company would be less than $200,000.

Plaintiff, in June 1952, obtained a loan of $600,000 at 4½% interest. It used a part of the proceeds of this loan to pay the bonds held by defendant, the interest accrued thereon, and the premium of $25,120 demanded as a consideration for the payment of the bonds and cancellation of the deed of trust.

At the conclusion of plaintiff's evidence, the court sustained defendant's motion to nonsuit. Plaintiff appealed.

Smith, Leach, Anderson & Dorsett for plaintiff appellant.
Arendell & Green and Charles G. Powell, Jr., for defendant appellee.

RODMAN, J. Plaintiff's assertion that the evidence supports its allegations that it was unlawfully forced to make the premium payment to save itself from great financial loss necessitates a review of the evidence. The evidence is very largely documentary, consisting principally of the deed of trust and correspondence between the president of plaintiff and the assistant treasurer of defendant.

E. L. Farris, president of plaintiff and of Liberty, testified that in the fall of 1951 defendant made a complaint about the loan. On 30 November 1951 Farris wrote M. H. Crocker, assistant treasurer of defendant, replying to a letter from Crocker dated 16 November. In that letter Farris stated that plaintiff's operation had not shown the result hoped. He attributed this to problems created by the Office of Price Stabilization. On 5 December 1951 Crocker wrote Farris referring to a conversation had on 3 December. Crocker's letter stated: "We feel that before we can reach a definite decision, we should have the following additional information:

"1. How do you justify payment of interest on the debentures of Liberty Baking Corporation by its subsidiary, Bell Bakeries Inc.? We have noted the reason given by your auditors but that is an inadequate explanation."

The letter requested copies of operating and financial statements. On 10 December Farris replied and enclosed financial and operating statements through 24 November 1951. These statements showed an excess of disbursements over receipts of $101,617.21 for forty-seven weeks, a loss incurred in the operation of seven of plaintiff's plants, but a net profit of $69,647.58 which was transferred to surplus; net working capital of $58,414. In response to the inquiry as to payment of Liberty's obligations by Bell, the letter said: "You have requested also that we justify payment on interest of Liberty Baking Corporation debenture bonds by its subsidiary, Bell Bakeries, Inc. Liberty Baking Corporation has no other source of income except through its subsidiary, Bell Bakeries, Inc., of which it, Liberty Baking Corporation, is the sole owner. It has long been the considered opinion of management and our auditors that the operating company, Bell Bakeries, Inc., should be required to pay to Liberty Baking Corporation interest on its invested capital for use of operating facilities enjoyed by the subsidiary. It was therefore determined, at the time the Liberty Baking Corporation preferred stock was exchanged for Liberty Baking Corporation debenture bonds, that this expense would be an obligation of the operating company, Bell Bakeries, Inc. and this expense has been absorbed since 1948, at which time the debenture plan became operative. We

therefore feel that this charge for interest expense against the subsidiary is justifiable and in order." On 19 December 1951 Crocker replied to Farris' letter of 5 December. He stated that the company's working capital on 10 March 1951 was $173,000; 19 May 1951 it had been reduced to $112,000; 23 June 1951 it had been reduced to $81,000. He then said: "Your working capital at November 24, 1951 amounted to $53,400, which is a violation of the Indenture requirement that it be maintained at $75,000.

"The dual violation of this contract justifies an immediate declaration of default and calling the issue. We are disposed to take that action unless you will assure us at once:

"1. That working capital has been restored to $75,000 or more.

"2. That your Company will enter into a supplemental indenture duly authorized by your directors and if necessary, your stockholders, providing among other things that Bell will pay no dividends on its stock, will make no interest or principal payments on its long-term debt other than the bonds of this issue, or that of Liberty Baking Corporation, and will make no disbursements to Liberty Baking Corporation, or loans or advances to any person, firm or corporation except in the due course of business, unless after such payment or disbursement working capital amounts to $200,000 or more." On 27 December 1951 Farris acknowledged receipt of this letter and stated that working capital was then in excess of $75,000. He stated further: "Regarding the paragraph numbered 2 of your letter, it is our interpretation that interest and principal payments on the debentures of Liberty Baking Corporation are excepted from the $200,000. working capital requirement. With this understanding our Directors have authorized the making of a supplemental Indenture in substance as set forth by you." He further stated that he would exercise his best efforts to maintain a working capital in excess of $200,000 and expressed appreciation for cooperation which has been given by Jefferson.

On 28 December Crocker, by telegram, replied to Farris' letter of the 27th. The telegram read: "PARAGRAPH TWO MY LETTER DECEMBER 19 DOES NOT EXCEPT INTEREST OR PRINCIPAL PAYMENTS ON THE DEBENTURES OF LIBERTY BAKING CORPORATION FROM THE $200,000 WORKING CAPITAL REQUIREMENT." Farris testified that upon receipt of this telegram he discussed it with counsel for Bell Bakeries. Farris testified: "The wire from Jefferson Standard indicating that they had made an exception to their letter which threw an entirely different light on the interpretation or pertaining to the paying of interest to Liberty on the bonds, naturally it was the most serious thing that had confronted us in quite some time. We didn't see how we could fail to pay the interest on those bonds, and they had agreed in their letter originally to accept

it." Notwithstanding the insistence by Jefferson that Bell should not make any payments to Liberty except in the ordinary course of business, Bell, on 1 January 1952, paid the interest accrued on Liberty's debentures.

On 7 January Farris conferred in Greensboro with Crocker about the loan and the position of their respective companies. On 8 January 1952 Crocker wrote Farris. In that letter he said: "We construe payment by Bell Bakeries, Inc. of interest or principal on the obligations of Liberty Baking Corporation, owner of the common stock of Bell Bakeries, Inc., to be a dividend on that common stock. Any other payment from Bell to Liberty, except in the due course of business, would bear the same classification. Therefore, such payments violate the agreement of May 16, 1950 unless after they have been made Bell Bakeries, Inc. has net working capital of $200,000 or more.

"We do not intend to protest interest payments already made by Bell on the Debentures of Liberty, but we will not permit such payments in the future in violation of the Indenture of November 1, 1947 and the letter agreement of May 16, 1950. If your Company will not be able to abide by those restrictions, I suggest that you arrange to refinance and retire the bonds we own." The letters and telegrams quoted above are the evidence on which plaintiff relies to show that it acted under duress. Farris testified that after his conference in Greensboro on 7 January and receipt of the letter of 8 January he began to make arrangements to refinance the loan. Farris testified that on 2 April he went to Greensboro, expecting to see Mr. Crocker to discuss the preliminaries as to what would be required of Bell Bakeries in order to pay off the loan, that he indicated to Mr. Crocker that he felt the payment of the interest to date of retirement and the principal amount would be the amount required by the insurance company to which Crocker replied: ". . . he wasn't sure of that, that he would have to discuss the matter with his committee, and that he would give me an answer later." On 10 April 1952 Crocker wrote Farris: ". . . we will accept full payment of this loan at 105 and accrued interest at any time on or before August 1, 1952."

On 15 April 1952 counsel for Bell wrote counsel for defendant reciting the relationship between Liberty and Bell and stated that Liberty had no source of income except such payments as might be made by Bell, that Bell obligated itself to service Liberty's debentures on 1 January 1948, that: "The consideration for this was the large amount of money which Liberty Baking Corporation had already invested in Bell and for which it did not exact or receive any return except as stated." He stated that the amount necessary to meet Liberty's obligations on its debentures was $62,000 per year and that these payments had been made since 1948 without protest until December 1951. Speaking with

respect to the amendment of May 1950 to the deed of trust, the letter said: "As Bell had no intention of paying any dividends to its stockholders unless its working capital was at least $200,000 we agreed to this request. It was not then stated by Mr. Crocker, and we did not have the faintest inkling, that this provision was intended to prevent the payment of the amount which had been paid for Bell to Liberty to service the Liberty indentures since January 1948. . . . As we have no intention of bringing about a default in the Liberty Baking Corporation debenture issue, and as the management would expose itself to severe criticism if not legal liability for such action, we are endeavoring to follow Mr. Crocker's demand to replace the loan although we deny any violation of any provision of the indenture by our action. We have sought to make arrangements to refinance the loan and we are confident that we can effect such an arrangement were it not for the fact that in his letter of April 10, 1952, Mr. Crocker informs us that Jefferson will insist on a premium of 5% in payment of the balance of this loan."

The response to this letter is not in the record, but on 29 May 1952 counsel for Bell wrote Crocker disagreeing with the position taken by defendant that payments by Bell to Liberty violated the provision of the deed of trust as amended in May 1950. He said: "Under the circumstances Bell has no alternative except to protest your position and pay the five point premium in order to avoid the irreparable damage set forth in my letter of April 15th." It was stated that Bell had arranged a loan and would pay Jefferson on 16 June.

Plaintiff obtained a loan of $600,000 and paid the debt owing defendant plus the premium of $25,120. It incurred expenses in excess of $25,000 in connection with the new loan.

The positions of the respective parties, as shown by the foregoing lengthy narration, may be summarized thus: Defendant was plaintiff's secured creditor. Plaintiff, debtor, had admittedly breached some of the terms of the trust. Defendant insisted that other acts of plaintiff constituted violations of the terms of the trust. It expressly waived all past violations but notified plaintiff that it would insist on compliance in the future. There is no evidence or suggestion that defendant was not acting in good faith for the protection of the debt owing to it. The deed of trust fixed the terms on which it could be discharged before the maturity of the debt.

Plaintiff was unable to comply with the terms of its mortgage and also pay the debt of its parent corporation which it had voluntarily assumed. It said to its secured creditor that it did not deem the payments to be made on the debt of Liberty a violation of the trust agreement, but it was not willing to test its position in court. Confronted with a choice of complying with the covenants of its deed of trust or

the prepayment of its bonds at the price fixed in the trust, it chose the latter course. It says that it was forced by business necessities to the path it pursued, that the premium paid was not voluntary but under duress.

We are of the opinion that plaintiff has failed to establish the duress alleged and is therefore not entitled to recover.

Since money, like other commodities, is for hire, we may safely assume that the parties had extensive negotiations with respect to the terms each deemed important before agreeing upon the terms of the loan of November 1947. Plaintiff naturally sought terms which it regarded as important, such as rental or interest rate, length of loan, prepayment privileges, if it should no longer need the money or could hire other money on more advantageous terms. Defendant, charged with responsibility of hiring out the money of its policyholders, would naturally seek such things as safety of investment, a high yield consistent with safety of investment, and having satisfied itself as to these conditions, it would wish the hiring to continue for a relatively long time.

The law prescribes the maximum rate which can be charged for the use of money, G.S. 24-1. The parties were at liberty to contract for the loan on any terms not in conflict with the statute. The deed of trust and notes fixed the rate of return at 5%. Principal and interest were payable quarterly. The loan could run twelve and one-half years or plaintiff, at its option, and without extra cost to it, could, beginning in November 1950, pay two notes on each payment date, thus reducing the time the loan would run to approximately seven and one-half years. These additional payments could be made on only 30 days' notice to the creditor. This provision enabled plaintiff to shorten the time of hiring if it did not need the money or if interest rates should decrease and it could obtain the money at a cheaper rate.

Further provision was made by which plaintiff could, whenever advantageous to it, pay the loan. This privilege could only be exercised by compensating defendant for the trouble it would incur and the loss it would probably sustain because of lower interest rates. The amount of premium to be paid was dependent on the length of time plaintiff had used the money, varying from 10% to 5%; the longer the use, the lower the premium. This provision was legal and plaintiff could not elect to repay the entire loan without complying with this provision. *Smithwick v. Whitley*, 152 N.C. 366, 67 S.E. 914; *French v. Mortgage Guarantee Co.*, 104 P. 2d 655, 130 A.L.R. 67 (Cal.); 55 Am. Jur. 359.

A loan to a company with adequate reserves and working capital is of course to be preferred to one to a company without such reserves or losing money. The provisions of the deed of trust inserted for the protection of the lender that borrower should maintain a minimum working

capital and should not pay dividends or retire stock when borrower's financial condition did not meet the minimum requirements were valid.

The insertion in the deed of trust of the provision prohibiting the payment of dividends when working capital was below a fixed sum was intended to assure the ability of plaintiff to continue in business and hence to strengthen the security held by defendant. "The word 'dividend' denotes a fund set apart by a corporation out of its profits, to be apportioned among shareholders." *Trust Co. v. Mason,* 151 N.C. 264, 65 S.E. 1015. The only claim which Liberty had on the assets of Bell was stock ownership. It did not claim to be a creditor. The moneys paid it by Bell were not asserted to be loans but were paid solely because of stock ownership and the need of the stockholder for funds. Hence it would seem that these payments met the definition of dividends as used in the deed of trust. As said in *U. S. v. E. Regensburg & Sons,* 124 F. Supp. 687: ". . . in a closely held family corporation dividends may be distributed with considerable informality and not be denominated as such in the corporate documents." That these disbursements by Bell to Liberty met the definition of dividend is in conformity with numerous decisions. *Peoples Gin Co. v. Commissioner of Int. Rev.,* 118 F. 2d 72; *Mid-west Rubber Reclaim. Co. v. Commissioner Int. Rev.,* 131 F. 2d 157; *Helvering v. Gordon,* 87 F. 2d 663; *Angelus Building & Investment Co. v. Com'r. of Int. Rev.,* 57 F. 2d 130. The officers and directors of Liberty and Bell were the same.

Even if these payments did not meet the strict definition of a dividend, there was such close analogy that it cannot be said that defendant was not justified in so asserting.

The creditor had a legal right to insist that its debtor should comply with the contract. It had a right to call the debtor's attention to the terms of the contract and to inform it that upon failure to comply creditor would exercise its legal contractual rights. If, in these circumstances, the debtor declines to comply with the contractual provisions inserted for the protection of creditor but exercises his optional rights under the contract, he is not acting under duress. "Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Smithwick v. Whitley,* 152 N.C. 369, 67 S.E. 913; *Boyles v. Insurance Co.,* 209 N.C. 556, 183 S.E. 721.

"A threat to do what one has a legal right to do cannot constitute duress." *Kirby v. Reynolds,* 212 N.C. 271, 193 S.E. 412. Illegality is the foundation on which a claim of coercion or duress must exist. Hence a threat to exercise a power of sale in a mortgage when such right exists and to compel compliance with the terms of the mortgage does not constitute duress. *Bank v. Smith,* 193 N.C. 141, 136 S.E. 358; *Luff v. Levey,* 203 N.C. 242, 165 S.E. 703; *Gunter v. Thomas,* 36 N.C.

199; *Starks v. Field,* 89 P. 2d 513 (Wash.); *Weiner v. Minor,* 197 A. 691 (Conn.); *Walvoord v. Keystone Mortgage Co.,* 140 S.W. 2d 307 (Tex.); *Ochiuto v. Prudential Ins. Co.,* 52 A. 2d 228 (Pa.); *Inland Empire Refineries v. Jones,* 206 P. 2d 519 (Idaho); *Wise v. Midtown Motors,* 42 N.W. 2d 404, 20 A.L.R. 2d 735 (Minn.); *Stott Realty Co. v. Detroit Sav. Bank,* 264 N.W. 297 (Mich.); *Boyles v. Insurance Co., supra; Carey v. Fitzpatrick,* 17 N.E. 2d 882; 17 C.J.S. 532, 13 C.J. 399, 70 C.J.S. 358.

Defendant was acting within its legal rights in insisting upon a compliance with the terms of the deed of trust as fairly interpreted by it. A breach by plaintiff of the covenants made by it for the protection of defendant did not give it any rights or advantage which it could not have asserted if it had complied with the provisions of the deed of trust.

Had defendant in January declared a default and demanded payment, it would only have been entitled to collect the debt and interest accrued thereon to the date of payment. Such is the holding in *Kilpatrick v. Germania Life Ins. Co.,* 75 N.E. 1124; *Union Cen. Life Ins. Co. v. Erwin,* 145 P. 1125, and *Steffen v. Refrigeration Discount Corporation,* 205 P. 2d 727, cited and relied upon by plaintiff. These decisions conform to our own holding in *Moore v. Cameron,* 93 N.C. 51.

Here no default had been declared. Past defaults were expressly waived. Defendant did not elect to terminate the loan. The distinction between the cases cited and relied upon by appellant and this case is pointed out in *Hamilton v. Kentucky Title Savings Bank & Trust Co.,* 167 S.W. 898.

Plaintiff was put on notice that it must in the future comply with its contract or meet a default. It had a right to comply and continue with the loan. With the right to comply or pay the debt in accordance with the terms of the mortgage, it deliberately chose to pay. Since the evidence fails to disclose that defendant was guilty of illegal conduct or acted in bad faith for the purpose of oppressing plaintiff, appellant has failed to establish duress, coercion, or business compulsion creating any liability on the part of the defendant. The judgment is

Affirmed.

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

JOHNSON, J., not sitting.

W. H. WYNNE, JR., v. F. W. ALLEN AND LELAND T. CLARKE, PARTNERS, T/A MET-L-VENT AWNING COMPANY.

(Filed 1 February, 1957.)

1. Trial § 55—

Where the parties waive jury trial and agree to trial by the court, it is preferable that the court make separate findings of fact and conclusions of law rather than render a verdict on issues submitted to itself.

2. Appeal and Error § 21—

An exception to a judgment rendered upon a verdict challenges the correctness of the judgment and whether it is supported by the verdict properly interpreted, but cannot affect the verdict.

3. Trial § 49—

A motion to set aside the verdict as contrary to the evidence is addressed to the discretion of the court.

4. Trial § 21½—

Failure to renew motion to nonsuit at the conclusion of all the evidence waives the question of the sufficiency of the evidence to be submitted to the jury.

5. Trial § 39—

The verdict rendered by the trial court upon waiver of trial by jury must be interpreted in the light of the pleadings and evidence, there being no charge to the jury.

6. Pleadings § 24—

The issues arise upon the pleadings, and recovery must be based upon the cause alleged.

7. Patents § 3—

The royalties paid by patent licensee are compensation or rent for the use of the invention, and the licensing contract creates a relationship analogous to that of landlord and tenant.

8. Same—

There is no implied warranty or covenant of quiet enjoyment in the sale or lease of a patent.

9. Same—

An eviction which deprives the licensee of the right to enjoy the patent licensed relieves him of the duty of making further payments under the license, but if, notwithstanding that the use of the license is an asserted infringement of a patent of a third person, he continues to recognize the right to use the patent under his license, he is liable for royalties.

10. Same—

Where the right of a licensee of a patent to use the patent is terminated by an eviction, the licensee is discharged from liability for royalties there-

after accruing, but is not relieved from liability for royalties that have accrued.

11. Same—

Where the licensee voluntarily pays money for the privilege of exercising rights under the licensing contract with full knowledge of all facts which may impose liability to a third person claiming infringement of a prior patent, he cannot, in the absence of an agreement to reimburse, recover the money so paid.

12. Same—Judgment for recovery of accrued royalties paid held not supported by verdict establishing payment by licensee after knowledge of all facts.

In this action by the licensor to recover royalties assertedly due under a licensing agreement, the court, under agreement of the parties, rendered the verdict on issues submitted to itself. The verdict, interpreted in the light of the pleadings and evidence, disclosed that defendants paid royalties under the agreement after full knowledge of infringement asserted by a third party, and that defendants elected to continue under the contract and accept its benefits. The pleadings failed to allege any indemnity agreement by the licensor on account of infringement. *Held:* Judgment allowing recovery on defendants' counterclaim for royalties so paid is not supported by the verdict, and a new trial is awarded.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Sink, E. J.*, Civil Term of MECKLENBURG.

On 24 August 1946 plaintiff, by writing, licensed defendants to manufacture and sell in a defined area ventilated awnings under a patent known as the Houseman patent. The awnings so manufactured were known as "Koolvent." Each awning was to have attached a tag showing it was manufactured under the Houseman patent. The license to manufacture and sell was to run for thirty-eight months with an option to renew. The consideration for the license was a cash payment of $2,000, a further payment of $2,000 on 24 September 1946, plus a royalty of 5% of the gross sales price of any awnings manufactured or sold in the authorized territory. Licensees covenanted to diligently promote the sale of Koolvent awnings by advertisement and otherwise and to pay royalties on a guaranteed minimum sales of $100,000 per annum. Licensees were obligated to report monthly the sales made and to make payments on the sales actually made in excess of the guaranteed minimum.

This action was begun in March 1950. Plaintiff alleged the licensing agreement, that defendants had, pursuant thereto, manufactured ventilated awnings under plaintiff's trade name of Koolvent awnings, that royalty payments had been made on the awnings reported as sold, but the sales as reported did not meet the minimum as guaranteed. Plain-

tiff sought an accounting to determine the sales actually made, and if such accounting showed that the actual sales did not exceed the minimum guaranteed then for the difference between the amount paid and the amount guaranteed to be paid. Plaintiff asserted this difference to be $8,735.31.

Defendants answered, admitting the execution of the licensing agreement and their failure to manufacture and sell and pay royalties on the minimum fixed in the contract. They assert by way of defense to plaintiff's claim and as a counterclaim to recover the amounts paid plaintiff that they were induced to execute the contract by fraudulent representations of plaintiff and because of total failure of consideration. They ask judgment on their counterclaim in the sum of $11,064.24, the sum of the payments made August and September 1946 and the royalties paid monthly beginning in November 1946 and ending in February 1949.

The allegations of fraud and failure of consideration are briefly stated as follows: In August 1946, when negotiations were going on between plaintiff and defendants, a suit was then pending in the Federal courts in Georgia entitled *Matthews v. Koolvent Metal Awning Co.* (reported 158 F. 2d 37) in which it was asserted that awnings manufactured under the Houseman patent infringed on prior patent rights granted Matthews; that the defendant in that action was owned and controlled by plaintiff who falsely and fraudulently represented to defendants that he had the legal right under the Houseman patent to license ventilated awnings; that defendants had no knowledge of the pending litigation and relied upon the representations so made; that it was, in January 1947, adjudged that defendant in that action had infringed the Matthews patent, whereupon plaintiff accepted a personal license to manufacture under the Matthews patent and consented to be bound by an injunction prohibiting him from questioning the infringement of the Matthews patent by the manufacture and sale of Koolvent awnings as licensed in the contract of August 1946, thereby disenabling plaintiff from assisting defendants in the litigation thereafter brought against them by the owners of the Matthews patent. Defendants were advised in April 1947 by the owners of the Matthews patent that the awnings manufactured by them under the contract with plaintiff infringed on the Matthews patent, whereupon defendants notified plaintiff of the claim asserted. Defendants, acting on the advice of plaintiff and in an effort to avoid any claims of infringement by the owners of the Matthews patent, changed to a so-called jammed lug type of construction to prevent the passage of light and air through the roof of the awning. Notwithstanding this change, defendants were, in 1948, sued in the District Court for the Western District of North Carolina by the owners of the Matthews patent and charged with an infringement.

That court held that the original method of construction did infringe, but the jammed lug method did not. Owners of the Matthews patent appealed to the Circuit Court. Defendants paid plaintiff $11,064.62 as shown in their exhibit made a part of the answer.

Following the allegations asserted to show fraud and total failure of consideration as summarized above, defendants aver that if the Circuit Court should reverse the District Court and hold the jammed lug method of construction an infringement, they would be compelled to pay the owners of the Matthews patent damages substantially equivalent to the amount they had already paid plaintiff.

The exhibit attached to and made a part of the answer shows payments for franchise and royalties aggregating $11,062.25. It shows the royalties which accrued each month on account of sales pursuant to the contract of August 1946 and the amounts paid. These payments cover royalties accrued through February 1949. The amount paid on royalties accrued from January 1947 through February 1949 amount to $6,925.50. There is no allegation that defendants ever disavowed any rights under the contract of August 1946.

The Circuit Court rendered its decision in the infringement case in June 1950 after the answer in this suit had been filed. The Circuit Court held (182 F. 2d 824) that the jammed lug construction was an infringement on the Matthews patent. Defendants did not seek to amend their answer so as to allege the amounts they have been compelled to pay or liabilities incurred as a result of the infringement litigation.

The cause came on for trial on the issues raised by the pleadings. A jury was duly empaneled. At the conclusion of defendants' evidence plaintiff moved to dismiss as upon nonsuit defendants' counterclaim and to hold that defendants had failed to establish fraud or want of consideration. The court did not immediately rule on the motion but took a recess. When the court reconvened following the recess, it directed that a juror be withdrawn and a mistrial ordered for matters occurring during the recess. Thereupon the parties "stipulated and agreed that the Court may proceed to the taking of testimony in this case to its conclusion and answer the issues arising upon the pleadings in the same manner and in the same form as would have the jury had it been submitted to them. Each party for himself, through his counsel, having waived its constitutional right to trial by jury, it is specifically agreed that the answering of the issues by the Court shall, in all respects, shall be treated and shall have the same effect and dignity as though they had been answered by the jury heretofore impaneled." The court then overruled plaintiff's motion to nonsuit defendants' counterclaim. Plaintiff offered evidence relating to the counterclaim and

the affirmative defenses. The motion to nonsuit was not renewed at the conclusion of all the evidence.

The court, acting under the stipulation of the parties, submitted issues to itself which it answered as follows:

"1. Did the plaintiff and the defendants enter into the contract dated August 24, 1946, as alleged in the Complaint?

"Answer: Yes.

"2. If so, were the defendants induced to enter into and execute said contract by fraud, as alleged in the Answer?

"Answer: Yes.

"3. If so, did the defendants thereafter waive any such fraud by electing to continue under the contract and accepting its benefits?

"Answer: Yes.

"4. Was there a failure of consideration to support the contract in that defendants were substantially evicted from its benefits?

"Answer: Yes.

"5. What amount, if any, is the plaintiff entitled to recover of the defendants under the said contract?

"Answer: Nothing.

"6. What amount, if any, are the defendants entitled to recover of the plaintiff on their counterclaim?

"Answer: $6,925.50."

Plaintiff excepted to the issues submitted by the court. He tendered issues which the court refused to submit; he excepted. The only material difference in the issues submitted and the issues tendered by plaintiff is Issue No. 4. The fourth issue tendered by plaintiff read: "Was there a total failure of consideration to support the contract, as alleged in the Answer?"

When the court answered the issues submitted to itself, plaintiff moved to set the verdict aside as being against the greater weight of the evidence. His motion was overruled and he excepted. He then moved for a new trial for errors of law and excepted to the denial of his motion. He excepted to the rendition of the judgment on the verdict and appealed.

Craighill, Rendleman & Kennedy for plaintiff appellant.

Taliaferro, Grier, Parker & Poe and Sydnor Thompson for defendant appellees.

RODMAN, J. Experience has demonstrated that respect for and adherence to our statutory methods of procedure facilitates proper disposition of litigation. Our statute provides that the court shall, when a jury trial is waived, make separate findings of fact and conclusions of

law. G.S. 1-185. Findings of fact so made may be challenged by exceptions. When not so challenged or when so challenged and supported by any evidence, they are conclusive on appeal.

The agreement to disregard the statute deprives us of the benefit of specific findings of fact, presenting to us instead a verdict.

A general verdict is not a detailed statement of facts on which the law can be pronounced but a factual conclusion based on a previous declaration of the law given by the court to the jury. This factual conclusion must be correctly interpreted before a proper judgment can be entered thereon.

Plaintiff's exceptions and assignments of error only suffice to challenge the correctness of the judgment. They cannot affect the verdict. The motion to set aside the verdict as contrary to the evidence was addressed to the discretion of the court. The sufficiency of the evidence to go to the jury was waived by the failure to renew the motion of nonsuit at the conclusion of the evidence. *Debnam v. Rouse,* 201 N.C. 459, 160 S.E. 471.

If the answers to the issues, when correctly interpreted, are sufficient in law to support the judgment, plaintiff must fail in his appeal; but if, when so interpreted, they fail to support the judgment, it must be vacated in order that the rights of the parties may be adjusted in accordance with law.

Issues arise on the pleadings. *Nebel v. Nebel,* 241 N.C. 491, 85 S.E. 2d 76; *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285. To interpret and understand the issues submitted to and answered by a jury, it is proper to examine the pleadings, the evidence, and the charge of the court when there is a charge. *Sitterson v. Sitterson,* 191 N.C. 319, 131 S.E. 641; *Jackson v. Casualty Co.,* 212 N.C. 546, 193 S.E. 703; *Taylor v. Stewart,* 175 N.C. 199, 95 S.E. 167; *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493; *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764.

It is not sufficient to allege a cause of action to recover. The recovery must be based on the cause of action alleged. It cannot rest on a different legal right. *Myers v. Allsbrook,* 229 N.C. 786, 51 S.E. 2d 629; *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648; *Simms v. Sampson,* 221 N.C. 379, 20 S.E. 2d 554.

With these well-settled legal principles in mind we look to the only sources available, the pleadings and the evidence, to interpret the verdict which the court, acting as a jury, has rendered.

The verdict states that the parties entered into a contract dated 24 August 1946. It is alleged and the evidence shows that the contract is in writing. It authorized the defendants to manufacture and sell in a designated territory for a fixed period a patented article, awnings, under a trade name, Koolvent. For the rights so granted defendants

made a cash payment and obligated themselves to make royalty payments based on the sale price of the awnings so manufactured. Defendants were to keep a record of and report the sales made. Each awning manufactured was to bear a tag showing it was manufactured pursuant to the Houseman patent.

The second issue is a finding that defendants were induced to enter into the contract by fraudulent representations of the plaintiff. The issue finds support in the allegations of the complaint.

The third issue and the answer thereto establish the fact that the defendants, with knowledge of the fraud, elected to waive the fraud *"by electing to continue under the contract and accepting its benefits."* This finding conforms with a fair interpretation of defendants' counterclaim and is established by all of the evidence.

There is no difficulty in interpreting the facts established by the answers to the first three issues. The difficulty arises in understanding what facts the court meant to establish by the affirmative answer to the fourth issue. The court finds there was a failure of consideration to support the contract in that defendants were substantially evicted from its benefits.

Standing alone, the language might justify an interpretation of complete deprivation of any benefit or rights under the contract. Such a meaning would harmonize with the assertion in the answer that there had been a total failure of consideration, but it is manifest that the finding did not have that meaning. Such an interpretation would be in direct conflict with the preceding finding that defendants acted under and enjoyed the benefit of the contract. It is of course impossible for one to be deprived of and to accept the benefits of a contract at the same moment. If the court meant total failure by its response to the fourth issue, why reject the issue tendered by plaintiff? There could be no doubt as to the meaning of that issue.

Turning to the pleadings for help in ascertaining the meaning, it is, we think, significant that defendants do not aver that they ever disavowed the contract or that they were deprived of all benefits under it. To the contrary, they assert that they acted under it with knowledge of the facts and made the payments now sought to be recovered. They allege they were induced to expect greater benefits from the contract than they obtained. Hence they claim they should be refunded all moneys paid, both those paid before the discovery of the diminished benefits as well as those voluntarily paid thereafter. There is no allegation of failure of consideration other than the allegations which charge fraud.

Looking at the evidence, it appears that defendants filed monthly reports with plaintiff showing royalties owing for awnings sold until

October 1949 when the contract terminated. In December 1948 defendants, in response to plaintiff's demands for payment of the guaranteed minimum, asserted their nonliability thus: "You had allowed us to run along for more than two years knowing that we had not sold the amount called for in the contract and you had never mentioned to us that you expected us to pay any royalties, except on what we actually sold." When this letter was written the defendants were being sued in the District Court charged with infringement of the Matthews patent. They knew of previous infringement suits.

Defendants do not allege any warranty or duty on the part of plaintiff to protect or indemnify them against claims for infringement. They do allege that they may become liable in damages because of the infringement on the Matthews patent and that the amount of their liability may equal the amount they have paid plaintiff. The absence of any allegation of plaintiff's duty to indemnify defendants for losses sustained by the infringement is significant when viewed in the light of evidence coming from defendants.

We turn to the evidence and events occurring at the trial to see what light may be thrown on the meaning of the fourth issue. It appears that defendants were notified in April 1947 of their asserted infringement on the Matthews patent. The defendant Allen went to Atlanta in May for a conference with plaintiff. Wynne advised Allen he might be forced to pay royalties to Matthews. It was then thought the jammed lug method of construction would defeat any claim of infringement. Negotiations were had with the owners of the Matthews patent for the right to use that patent. On 28 November 1947 Wynne wrote defendants, submitting an offer from the Matthews people to license defendants. He advised defendants they could exercise any of four options: (1) Meet the demands of the owners of the Matthews patent; (2) use the jammed lug method and await the results of litigation then pending on the question of whether that constituted an infringement; (3) fight the asserted infringement; or (4) quit Koolvent. The letter then stated: "Alternative (1) is rough but may offer the best solution . . . you will save part of that cost in a 1% reduction in my royalty charges. . . . Alternative (3) may possibly cost more in the long run . . . legal action is expensive and . . . if they should win . . . they can collect on back royalties and for their legal expense. Alternative (4) of course sounds to me like the worst possible solution." Again on 16 December 1948 defendants were given the right to cancel, but they did not exercise the option.

Defendant Allen testified that in January 1948 plaintiff promised "that he would reduce the royalties in the amount that the litigation would cost us." The record is barren of any evidence tending to fix the amount defendants were required to pay as a result of the infringement

litigation. The only evidence with respect thereto came from defendant Allen who testified: "Whatever we paid to the owners of the Matthews patent in 1950 was on the basis of an agreement or a consent judgment between us."

Defendants offered in evidence the opinion of the Circuit Court in the infringement suit. Counsel for defendants were called upon to state their purpose in offering the opinion. They replied: "We are not undertaking to recover for our expenses in this litigation, as such, but referring to that litigation for the purpose of showing the want of consideration. I offered it in evidence for the purpose of showing its effect on the contract."

The decree in the infringement suit instituted in Georgia was made final in January 1947. It is apparent that the court meant by its answer to the fourth issue that that decision constituted such impairment of benefits under the contract as not only relieved defendants from any obligation to continue to make royalty payments under their contract, but to permit them to recover the royalties which they had voluntarily paid after said decree was entered and when they had full knowledge of all of the facts.

Appellees in their brief maintain this as a sound principle of law. Hence the question arises: What is the law relating to licensor and licensee of patent rights with respect to moneys paid and liabilities accruing under royalty contracts?

The term royalty, when used in connection with the word patent, means the compensation or rent to be paid for the use of the invention. *Hazeltine Corporation v. Zenith Radio Corporation,* 100 F. 2d 10. The relationship existing between a licensor and a licensee of a patent has been compared with that of landlord and tenant. *Davis Co. v. Hosiery Mills,* 242 N.C. 718, 89 S.E. 2d 410; *Barber Asphalt Paving Co. v. Headley Good Roads Co.,* 284 F. 177.

There is no implied warranty or covenant of quiet enjoyment in the sale or lease of a patent right. *Hiatt v. Twomey,* 21 N.C. 315; *Cansler v. Eaton,* 55 N.C. 499; *Barber Asphalt Paving Co. v. Headley Good Roads Co., supra; Standard-Button Fastening Co. v. Ellis,* 34 N.E. 682 (Mass.). Hence covenants are frequently inserted in licensing agreements to protect the licensee against claims which may arise because of asserted infringement by licensee's use of the patent or against infringement on his right to use. *United States v. Harvey Steel Co.,* 196 U.S. 310, 49 L. Ed.. 492. In this respect the law is different from leases of realty. The tenant is protected by an implied covenant. *Poston v. Jones,* 37 N.C. 350; *Huggins v. Waters,* 154 N.C. 443, 70 S.E. 842; Landlord & Tenant, 51 C.J.S. 1005; 32 Am. Jur. 252.

Since royalties are the rents payable for the use or right to use the invention there is no obligation to make payments of rents accruing

after the right to use has terminated. Hence an eviction which deprives the licensee of the right to enjoy the license relieves him of the duty to continue making payments under the license. *Ross v. Fuller & Warren Co.*, 105 F. 510; *Drackett Chemical Co. v. Chamberlain Co.*, 63 F. 2d 853; *Patterson-Ballagh Corporation v. Byron Jackson Co.*, 145 F. 2d 786. But if what remains is of value to and is used by the licensee there has been no such eviction as to completely discharge him from liability to his licensor. So long as one recognizes the right to use a patent and acts thereunder, he is liable for royalties. *Hazeltine Research Co. v. Automatic Radio Mfg. Co.*, 77 F. Supp. 493; *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385. If he would escape liability for royalties he must disavow the contract and cease to use the right granted. *Lathrop v. Rice & Adams Corporation*, 17 F. Supp. 622; *Universal Rim Co. v. Scott*, 21 F. 2d 346; *Frost Ry. Supply Co. v. T. H. Symington & Son*, 24 F. Supp. 20; *Macon Knitting Co. v. Leicester Mills Co.*, 55 A. 401; *In re Muser's Estate*, 203 N.Y.S. 619; *Kaffeman v. Stern*, 53 N.Y.S. 260; *Ross v. Dowden Mfg. Co.*, 123 N.W. 182; *Strong v. Carver Cotton Gin Co.*, 83 N.E. 328.

While an eviction discharges the licensee from any rent thereafter accruing, it does not relieve him from liability for rents which have accrued. "The defense of a licensee in an action for royalties must, to be sufficient, consist of 'something corresponding to an eviction.' *White v. Lee* (C.C.), 14 Fed. 789; *McKay v. Smith* (C.C.), 39 Fed. 556; *Holmes, Booth & Haydens v. McGill*, 108 Fed. 238, 47 C.C.A. 296; *Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co.* (C.C.A.), 280 Fed. 753; *Birdsall v. Perego*, Fed. Cas. No. 1,435. The reason underlying this principle is fully discussed and considered in the cases cited, and need not be here repeated. As an eviction is not a defense in a suit by a landlord against a tenant for rent that became due prior to such eviction (*Smith v. Billany*, 4 Houst. (Del.) 113, 118; *American Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 17, 30, 31, 80 C.C.A. 97, 9 L.R.A. (N.S.) 557, 10 Ann. Cas. 357, so, by analogy and upon authority, an eviction is not a defense to a suit for royalties accruing before the eviction occurred." *Barber Asphalt Paving Co. v. Headley Good Roads Co., supra; Drackett Chemical Co. v. Chamberlain Co., supra; Metropolitan Trust Co. v. Fishman*, 55 N.E. 2d 837; *Monger v. Lutterloh*, 195 N.C. 274, 142 S.E. 12; 52 C.J.S. 266.

The eviction of a licensee of a patent right occurs when there has been a judicial determination that the patent is invalid or the right has been so circumscribed as to be worthless. *Jenkins Petroleum Process Co. v. Eason Oil Co.*, 43 F. 2d 663; *McKay v. Smith*, 39 F. 556; *Consumers' Gas Co. v. American Electric Construction Co.*, 50 F. 778. The analogy to landlord and tenant is applicable. *Blomberg v. Evans*, 194 N.C. 113, 138 S.E. 593; *Smith v. Nortz Lumber Co.*, 7 N.W. 2d 435.

Here the pleadings and the evidence disclose that the asserted eviction took place in January 1947, that is, the adjudication by the Circuit Court of the Fifth Circuit that the Houseman patent in some of its details infringed on the Matthews patent. Defendants were informed of this decision in April 1947. Notwithstanding that knowledge they elected to continue to operate under their contract with plaintiff. They of course had the right to require plaintiff to agree to indemnify and protect them against any losses which they might sustain by so doing. The evidence shows that this indemnity agreement was given. They continued to act under their contract with plaintiff and voluntarily made payments to him with knowledge of all of the facts. When one voluntarily pays money for the privilege of exercising a right claimed by the one to whom payment is made and the payments are made with full knowledge of all facts which may impose a liability to a third person, he cannot, in the absence of an agreement to reimburse, recover the moneys so paid. *Wells v. Foreman,* 236 N.C. 351, 72 S.E. 2d 765; *Bank v. Taylor,* 122 N.C. 569; *Guerry v. Trust Co.,* 234 N.C. 644, 68 S.E. 2d 272; *Smithwick v. Whitley,* 152 N.C. 366, 67 S.E. 914; *Pardue v. Absher,* 174 N.C. 676, 94 S.E. 414; *Jones v. Assurance Society,* 147 N.C. 540; *Barber Asphalt Paving Co. v. Headley Good Roads Co., supra; Clifton v. Curry,* 10 So. 2d 51; Notes, 53 A.L.R. 949. Hence, when a licensee voluntarily pays to his licensor royalties with knowledge that a prior patentee claims an infringement in the exercise of the licensed right, he cannot recover royalties paid if it is subsequently adjudged that the use impinged on the property rights of another unless he is protected by contract of indemnity, and in that event his right to recover will be determined by the provisions of his warranty or indemnity contract.

Defendants have testified to a contract with plaintiff to indemnify them against losses which they might incur by reason of the infringement. They may, of course, by appropriate pleading protect themselves by such contractual rights as they have.

Appellees, in support of their position, cite an unpublished opinion rendered by Judge Hayes in June 1954 in the case of *Wynne v. Aluminum Awning Products Company.* We have read that opinion with care. Defendant in that action set up and pleaded a contract to indemnify it against losses sustained as a result of asserted infringement on the Matthews patent. As we understand and interpret Judge Hayes' opinion there is nothing in that opinion which is in conflict with the views we have expressed.

We hold there was error in adjudging that defendants could recover the moneys voluntarily paid. The facts have not been sufficiently established to make any adjudication with respect to royalties asserted to be owing but not paid. There is no allegation and no finding of fact

with respect to any warranty made by plaintiff to protect or indemnify defendants against loss on account of infringement. Nothing which we have said is intended to affect the rights of the parties on these questions.

New trial.

JOHNSON, J., not sitting.

HARLEY A. PUTNAM v. TRIANGLE PUBLICATIONS, INC.

(Filed 1 February, 1957.)

1. Appeal and Error § 22—

An assignment of error to the findings of fact on the ground that the findings are not supported by the evidence is ineffectual as a broadside assignment of error, it being required that the assignment designate the particular rulings to which the exceptions were taken so that the alleged error is presented by the assignment of error itself.

2. Appeal and Error § 21—

Where the assignments of error are insufficient to present the findings of fact for review, the appeal presents the questions whether the findings support the court's inferences and conclusions of law and judgment, and whether error appears on the face of the record.

3. Constitutional Law § 20: Process § 8d—

Whether a foreign corporation is doing business in North Carolina so as to subject it to the jurisdiction of the State's Courts is essentially a question of due process of law under the 14th Amendment to the Federal Constitution, which must be decided in accord with the decisions of the U. S. Supreme Court.

4. Process § 8d—

A foreign publishing company which delivers to a common carrier in another state magazines for shipment to a wholesale dealer in this State for resale in this State by the dealer, with provision for credit to the dealer for unsold magazines, and which employs sales promotion representatives who make occasional visits in this State, *is held* not doing business in this State for the purpose of service of process by service upon the Secretary of State under G.S. 55-38.

5. Same—

G.S. 55-38.1(a)(3) in regard to an action for libel against a foreign publishing corporation which delivers magazines to a common carrier for shipment to a wholesale dealer in this State for resale by the dealer, and which employs sales promotion representatives who make only occasional visits in this State, is unconstitutional, since such corporation has no contacts,

ties or relations within this State so as to make it amenable to service of process here for the purpose of a judgment *in personam.*

6. Same: Sales § 11—

A foreign publishing corporation purchased an article from a nonresident and published same in its magazine. Its magazines were delivered by it to a common carrier in another state for shipment to wholesale dealers in this State. Plaintiff brought a suit for libel based upon the article. *Held:* The tortious act was not committed in this State, and therefore G.S. 55-38.1(a)(4) is inapplicable and does not authorize service of process on the corporation by service on the Secretary of State. G.S. 55-38.1(a) (1) and (2) are inapplicable to the facts of this case.

JOHNSON, J., not sitting.

HIGGINS, J., concurs in result.

APPEAL by plaintiff from *Preyer, J.,* June Civil Term 1956 of GUILFORD (Greensboro Division).

Civil action for libel and invasion of privacy heard upon defendant's special appearance and motion to quash the summons and purported service of process, and to dismiss the action, and upon defendant's supplemental special appearance and motion to the same effect.

From a judgment quashing the attempted service of summons and complaint upon the defendant, and dismissing the action for want of jurisdiction over the person of the defendant, plaintiff appeals.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin for Plaintiff, Appellant.

Brooks, McLendon, Brim & Holderness for Defendant, Appellee.

PARKER, J. Upon defendant's special appearances and motions to quash the service of summons and complaint and to dismiss the action, the judge heard evidence, made elaborate findings of fact, conclusions of law and rendered judgment as set forth above.

This is plaintiff's assignment of error as to the judge's findings of fact: "1. For that the Judge of the Superior Court made certain findings of fact, which findings of fact are not supported by the evidence and which findings are contrary to the evidence. EXCEPTIONS 1, 2, 3, 4, 5, 6 and 16 (R. pp. 38, 39, 40, 41, 42, 46)." This is a broadside assignment of error, which fails to point out or designate in the assignment of error the particular rulings to which exceptions are taken, so that in the assignment of error we can see the alleged error made by the judge. "When it is claimed that findings of fact, so made by the trial judge, are not supported by the evidence, the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged errors." *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351. See *Suits v. Ins. Co.,* 241 N.C. 483, 85 S.E. 2d 602.

This assignment of error does not comply with the rules and decisions of this Court. Rule 19(3) and Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 544, *et seq.; Burnsville v. Boone, supra; Vestal v. Vending Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427.

"The Court will not consider assignments not based on specific exceptions and which do not comply with its rules." *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94.

Plaintiff's assignment of error is not sufficient to bring up for review the findings of fact or the evidence upon which they are based, and leaves for decision the questions whether the findings of fact made by the judge support his inferences and conclusions of law and judgment, and whether any error of law appears on the face of the record. *Horn v. Furniture Co., ante,* 173, 95 S.E. 2d 521; *Travis v. Johnston, supra; Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Radio Station v. Eitel-McCullough,* 232 N.C. 287, 59 S.E. 2d 779; *Rader v. Queen City Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609; *Power Co. v. Moses,* 191 N.C. 744, 133 S.E. 5.

Plaintiff's assignment of error No. 2 is to the conclusions of law, and is as broadside and indefinite as his assignment of error No. 1, and is set forth in substantially the same language.

This is a summary of the judge's relevant findings of fact:

Plaintiff is a citizen and resident of Guilford County, North Carolina, and instituted this action to recover damages for an article published in a magazine called *Official Detective Stories,* which he alleges constituted a wrongful invasion upon his private life and was libelous.

Defendant is a Delaware corporation having its principal office at 400 North Broad St., Philadelphia, Pennsylvania. Defendant has not procured a certificate of authority from the Secretary of State of North Carolina to transact business in this State; it has never been licensed to do business in the State; and it has never designated or authorized anyone to act as a process agent or officer for it in the State.

Service of process on the defendant was sought to be made by serving the Secretary of State as agent for the defendant with copies of the summons and complaint, pursuant to G.S. 55-38.05, 55-38.1 and 55.38.2.

Defendant publishes and sells magazines and newspapers in wholesale lots, such as *Official Detective Stories, Seventeen, The Philadelphia Inquirer, The Morning Telegraph, Daily Racing Form* and *TV Guide.* Defendant sells one or more of these publications to 18 independent wholesale newsdealers in North Carolina. These sales are made by the defendant delivering the publications to common carriers in States other than North Carolina. Legal ownership and title to the publications pass from defendant to these independent wholesale newsdealers upon their delivery by the defendant to the common carrier. Upon receipt of these publications the wholesale newsdealers at their own

expense sell and deliver them to retail dealers. These wholesale newsdealers in the State are charged by the defendant current wholesale prices for the publications sold and shipped to them during the month, and settlement is due by the 10th day of the month for magazines purchased and shipped during the preceding month. These newsdealers are given credit for unsold copies of these publications, evidenced by returned covers mailed at their cost to defendant. The bills for these publications are paid at the offices of defendant in Philadelphia, Pennsylvania, or Washington, D. C. Defendant has authorized no person, firm or corporation to receive or collect payments of moneys for or in its behalf in North Carolina.

Defendant has no financial interest of any kind in any wholesale or retail dealer in North Carolina. It has never made any payments to them. It has never exercised, or attempted to exercise, any control, supervision or direction over the policy, management or details of the business of these wholesale newsdealers or retailers, or their personnel, or over the methods employed by them for the purpose of promoting the sales of publications, except to the limited extent that the normal relations between them result in general advice or suggestions concerning sales methods and distribution. These wholesale newsdealers do not hold themselves out to the public or the trade as being agents or representatives of defendant, and they do not do business in its behalf.

The defendant has never paid or furnished these wholesale newsdealers any money for any purpose in the operation of their business.

Some residents of North Carolina subscribe to some of the magazines published by defendant, but these subscriptions are solicited from outside the State by mail and by coupons attached to the magazines. No sales to subscribers are solicited in the State of North Carolina. Defendant has not sold any of its publications to anyone in North Carolina on a consignment basis. The cause of action alleged by plaintiff does not arise out of any business solicited in North Carolina by mail or otherwise.

Defendant has virtually no advertising from North Carolina. All advertising run in behalf of firms located in North Carolina is received at one of defendant's offices located in a foreign state, generally from an advertising agency in some other state, or occasionally from an advertiser without solicitation in North Carolina. During 1955 and up to 1 June 1956 defendant employed three persons as sales promotion representatives, who, from time to time, travelled in North Carolina in promotion of sales to newsdealers and television dealers. To be specific, James Fallon is one of these representatives who visits North Carolina newsdealers two or three times a year on behalf of *Official Detective Stories* and *Seventeen;* he picks up from independent newsdealers sales figures, statistics and information relating to its own and

competitive publications; his headquarters are in New York. Another representative is Leo Dominsky for *TV Guide,* who visits dealers in North Carolina about three times a year obtaining statistics and promoting a sale of its publications; he works out of the Philadelphia office. Another was Barry Farber, who, from May 1955 to 1 June 1956, was employed by the TV Guide Division of defendant at the home office in Washington, D. C., as a sales representative to promote publicity for that magazine with TV stations in Virginia and North Carolina. In that capacity he called on TV stations and arranged for them to promote by advertising the sale and use of *TV Guide.* In exchange *TV Guide* would advertise for the cooperating TV stations, in other words "a swap deal on advertising would be arranged," but no exchange of money. He called on nine TV stations in North Carolina about five times a year, spending at each station a few minutes to an hour. His activities were purely incidental to defendant's business, which is a publishing company, and were undertaken with the hope of increasing the circulation of its periodicals.

Defendant does not own, lease, operate or maintain any office, publishing house or place of business in North Carolina; it does not have a listing in any telephone, business, city or other directory in the State; it does not have any regularly employed person or agent in the State; and it does not own, lease, possess or otherwise control or use any property of any kind in the State.

All articles published by defendant in *Official Detective Stories* are written by freelance writers, none employed by defendant. This magazine has no staff of writers or reporters. The editorial office of defendant is in Philadelphia, Pennsylvania, to which the freelance writers send their manuscripts. If a manuscript is accepted, it is purchased by defendant. The article, which is the basis of plaintiff's action, was written by a freelance writer, who lives and has his office in Richmond, Virginia. He submitted this article to the defendant at its editorial office. The defendant accepted it. It was published by defendant in the October 1955 issue of *Official Detective Stories* in Philadelphia, Pennsylvania, and then delivered to a common carrier in that city for distribution as set forth above. Defendant did not commit, engage or enter into any tortious conduct in the State of North Carolina by reason of its publication and sale of the October 1955 issue of *Official Detective Stories* in the manner described above.

No officer, director, stockholder, managing or local agent of defendant resides or performs any duties for defendant in North Carolina. No one collects or receives money in North Carolina for defendant. No one is authorized to, or does, make contracts or representations for or on behalf of defendant in North Carolina. The causes of action

alleged by plaintiff do not arise out of any contract made in the State of North Carolina, or to be performed in this State.

Defendant published and delivered to common carriers in Philadelphia, Pennsylvania, the October 1955 issue of *Official Detective Stories* with the reasonable expectation that some of these magazines would be used or read in North Carolina, and some were.

Defendant has not transacted or done business in the State of North Carolina, and has not been present therein. The activities and contacts of its promotional employees within the State, as above set forth, are irregular, isolated, casual and insubstantial items; they are trivial and purely incidental to the ordinary publishing business carried on by defendant. The defendant does not have an authorized officer or agent in North Carolina, who carries on its publishing business.

The judge made the following conclusions of law based upon his findings of fact:

No personal service of process and complaint has been made on defendant, or any of its officers or agents. Defendant has entered a special appearance solely for the purpose of making its motion.

Defendant has not transacted or done business in the State of North Carolina, and has not been present in the State through its officers, agents, or in any other manner. The activities and contacts of defendant within North Carolina have been casual, incidental and insubstantial, and have not been such as would make it reasonable and just under traditional concepts of fair play and substantial justice to subject defendant to suit in the courts of the State of North Carolina. Defendant's activities and contacts in North Carolina, including the occasional visits of its agents, have only been promotional in nature, and have been insubstantial and negligible in quantity. The causes of action alleged by plaintiff do not arise out of nor are they connected with such activities. At no time has defendant transacted any substantial part of its ordinary business in North Carolina.

Plaintiff's alleged causes of action do not arise out of any contract made in North Carolina, or to be performed in North Carolina; do not arise out of any business solicited in North Carolina by mail or otherwise; do not arise out of the production, manufacture, or distribution of "goods" by the defendant with the reasonable expectation that such "goods" were to be "used or consumed" in North Carolina, and were so "used or consumed"; and do not arise out of tortious conduct in North Carolina.

Even if plaintiff's causes of action did arise out of any one or more of the situations set forth above in the conclusions of law, then, as applied to defendant under the facts of the instant case, the applicable provisions of G.S. 55-38.1 are void as violative of the State and Federal Constitutions, in so far as they purport to subject defendant to suit in

this State for the causes of action alleged here, for that such provisions would deprive the defendant of its property without due process of law, and deny it the equal protection of the law (U. S. Constitution, Amendment XIV(1), North Carolina Constitution, Article I, Sec. 17); would unreasonably obstruct and unduly burden interstate commerce (U. S. Constitution, Art. I, Clause 8); and would impose a prior restraint upon, and abridge the freedom of the press (U. S. Constitution, Amendment I).

The attempted service of summons and complaint on the defendant is invalid and should be quashed and set aside, and the action should be dismissed for want of jurisdiction over the person of defendant.

Whereupon, the judge entered judgment quashing the attempted service of summons and complaint upon the defendant, and dismissed the action for want of jurisdiction of the court over the person of defendant.

G.S. 55-38 provides that when a corporation has property or is doing business in North Carolina, and has no officer or agent in the State upon whom process in all actions or proceedings against it can be served, process may be served upon the Secretary of State.

Whether a foreign corporation is doing business in North Carolina, so as to subject it to the jurisdiction of the State's Courts, is essentially a question of due process of law under the U. S. Constitution, Amendment 14(1), which must be decided in accord with the decisions of the U. S. Supreme Court. *Harrison v. Corley,* 226 N.C. 184, 37 S.E. 2d 489; *American Asphalt Roof Corp. v. Shankland,* 205 Iowa 862, 219 N.W. 28, 60 A.L.R. 986 (where many cases are cited).

Our inquiry is restricted to jurisdiction for service of process, and is not concerned with jurisdiction for taxation, license or other purposes.

Recent decisions of the U. S. Supreme Court have greatly expanded the concept of a state's jurisdiction over nonresident defendants and foreign corporations. *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L. Ed. 95, 161 A.L.R. 1057; Anno. U. S. Supreme Court Reports, 96 L. Ed. p. 495 *et seq.*

In *International Shoe Co. v. Washington, supra,* the Court said: "But now that the capias *ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' . . . Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, citing authority, other such acts, because

of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. . . . It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Citing authorities. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contracts, ties, or relations."

In evaluating the decisions of the U. S. Supreme Court dealing with the question as to what facts are sufficient, or not sufficient, to support the power of the forum to subject a foreign corporation to a suit *in personam*, it must be kept in mind that the fundamental test has undergone a substantial change in *International Shoe Co. v. Washington, supra,* which in lieu of the former theories of "implied consent," "presence," or "doing business," introduces the "minimum contacts" test and the "fair play and substantial justice" rule, and this rule has been followed in subsequent cases like *Travelers Health Ass'n. v. Com. of Virginia,* 339 U.S. 643, 94 L. Ed. 1154. *Labonte v. American Mercury Magazine,* 98 N.H. 163, 96 A. 2d 200, 38 A.L.R. 2d 742, with elaborate annotation in A.L.R., pp. 747 *et seq.: Smyth v. Twin State Improvement Corp.,* 116 Vt. 569, 80 A. 2d 664, 25 A.L.R. 2d 1193.

In *Labonte v. American Mercury Magazine, supra,* the New Hampshire Supreme Court said: "Almost all cases of libel actions against foreign publishing corporations were dismissed on jurisdictional grounds before the decision in *International Shoe.* See *Street & Smith Publications v. Spikes,* 5 Cir., 120 F. 2d 895; *Whitaker v. Macfadden Publications, Inc.,* 70 App. D. C. 165, 105 F. 2d 44; *Cannon v. Time, Inc.,* 4 Cir., 115 F. 2d 423. At the present time libel actions against foreign corporations may be dismissed but the approach thereto is not as strict as formerly existed. See Note, 16 U. Chi. L. Rev. 523; annotations 96 L. Ed. 495 and 94 L. Ed. 1167, 1178."

To what extent this new concept will be applied has not yet become apparent, although a possible indication of its application was given in *Polizzi v. Cowles Magazine, Inc.,* 345 U.S. 663, 97 L. Ed. 1331, where the Court's reversal of the dismissal of a libel action against the defendant, the publisher of *Look Magazine,* was based on the technical ground that the lower court had applied the wrong venue statute. *Judge Black,* in a separate opinion, wrote that the defendant was doing business in

the State of Florida so as to be subject to suit. However, the facts in that case are different from the facts here. In that case the defendant had a regular agent in Florida, paid by the month, whose sole job was to carry on activities for the defendant in order to increase *Look's* circulation in Florida. On this agent, who managed for the defendant all the business it carried on in Florida, process was served.

Labonte v. American Mercury Magazine, supra, was an action for libel against a foreign corporate publisher of a magazine, and involved the propriety of service of process upon the Secretary of State. By contract with the defendant, the magazine was printed, assembled, bound and stored in New Hampshire by a local corporation, which also addressed and shipped copies of the magazine, and received and forwarded mail for the publisher. The editorial and most proofreading was done in New York. The Court held the defendant was doing business in the State, and sustained service of process.

Schmidt v. Esquire, Inc., 210 F. 2d 908, *certiorari denied,* 348 U.S. 819, 99 L. Ed. 646, was a stockholder's derivative action for libel. In that case the Court said: "The question of personal jurisdiction in the *Esquire case* may be quickly disposed of. Affidavits filed with the District Court disclose the following: Esquire, Inc., is a corporation foreign to the State of Indiana and is not licensed nor admitted to do business there. It publishes the *Esquire* and *Coronet* magazines, which are available in Indiana either through subscription or at the newsstand. These magazines are printed in Chicago and are mailed directly from there to Indiana subscribers. They are placed on newsstands in Indiana by the Curtis Circulation Company, an independent corporation which purchases the magazines from Esquire and effects distribution through independent wholesale organizations. Esquire has no office of any kind in Indiana, and it has no employees or agents there to gather material for publication, nor to solicit advertising, subscriptions or newsstand sales. Under these facts, we do not see how it can seriously be contended that Esquire was amenable to suit in Indiana. In the *Reader's Digest case* the plaintiff concedes, as well he must, that something more than this is required to give local jurisdiction. *Cannon v. Time, Inc.,* 4 Cir., 115 F. 2d 423; *Whitaker v. Macfadden Publications,* 70 App. D. C. 165, 105 F. 2d 44. Obviously, the necessary contacts with the state are absent here."

Cannon v. Time, Inc., 115 F. 2d 423, was an action for libel. Time, Inc., a foreign corporation, delivered its magazines to the Richmond News Company, the local branch of a foreign wholesale concern, which in turn sold to local newsstands and stores. In addition, the Richmond News Company solicited and collected for subscriptions, and based upon this activity was the contention that Time was doing such business in Virginia as to be subject to local jurisdiction. The Court held

that the News Company was an independent contractor doing business for its own account and not as an agent of Time. Therefore, Time was not doing business in Virginia, and was not subject to suit there.

Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. 2d 133, was an action for libel and invasion of privacy, and in that case it was held that a foreign publishing company is not doing business in a state merely because it ships magazines to a dealer at wholesale prices for resale in the state by the dealer, and gives a credit to the dealer for unsold magazines.

In *Watson v. J. R. Watkins Co.*, 188 Miss. 435, 193 So. 913, an agreement was executed in Minnesota to furnish the purchaser, a resident of Mississippi, the products of the foreign corporation from without the state, at wholesale for resale. In rejecting the contention that the corporation was doing business within the state, the Court said: "The requirement that sales be reported to the seller by the purchaser does not prevent the passing of the title, nor does a provision in the contract allowing the purchaser to return unsold goods, nor does the designation of the purchaser's sale territory."

After a careful consideration of the detailed findings of fact of the judge, which are set forth above, and which it would serve no useful purpose to summarize and repeat, it is our opinion that the defendant has no contacts, ties, or relations with North Carolina, so as to make it amenable to service of process from the Courts of the State for the purpose of a judgment *in personam* against it. The occasional visits of agents of the defendant to the State as sales promotion representatives, upon the facts as found by the judge, are not deemed sufficient to render the defendant liable to suit in the State Courts. Upon all the facts found by the judge, he correctly concluded that defendant has not transacted or done business in the State of North Carolina. *International Shoe Co. v. Washington, supra.*

Plaintiff contends that if the defendant is not doing business in North Carolina, service of process upon the Secretary of State was proper, because his causes of action arise under all four sub-sections of G.S. 55-38.1(a).

G.S. 55-38.1(a) provides that "every foreign corporation shall be subject to suit in this State, by a resident of this State . . ., whether or not such foreign corporation is transacting or has transacted business in this State . . . on any cause of action arising as follows":

"(1) Out of any contract made in this State or to be performed in this State." Obviously this sub-section has no application, and plaintiff's brief argument that it does, need not detain us.

"(2) Out of any business solicited in this State by mail or otherwise, if the corporation has repeatedly so solicited business." This

sub-section is not relevant, and plaintiff cites no citation to support his contention and meager argument in respect thereto.

"(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers."

The word "goods" in its broad sense has a very extensive meaning, and "the term is generally understood to mean personal estate as distinguished from realty, and to embrace every species of property which is not real estate or freehold." 38 C.J.S., Goods, p. 940. In *Pippin v. Ellison,* 34 N.C. 61, the Court said: The term "goods" "embraces things inanimate—furniture, farming utensils, corn, etc., and 'chattels,' which term embraces living things—slaves, horses, cattle, hogs, etc." In *City of Blue Island v. Kozul,* 379 Ill. 511, 41 N.E. 2d 515, the Court said: "The magazines sold by the defendant would come within the terms 'goods, wares and merchandise' used in the ordinance."

It would seem that the language of G.S. 55-38.1(a), subsection (3), is broad and comprehensive enough to sustain the attempted service of process in this case, provided this section is constitutional as applied to the facts of this case.

In the recent case of *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.,* decided by the U. S. Court of Appeals for the Fourth Circuit on 7 November 1956, 239 F. 2d 502, the Court stated the question for determination is "whether or not (G.S.) 55-38.1(a)(3) may validly subject the appellee to the jurisdiction of North Carolina for a single sale consummated in New York 'with the reasonable expectation that those goods are to be used in (North Carolina) and are so used and consumed.'" The Court said: "We agree with the conclusion of the District Court that the North Carolina statute as applied to this case is invalid."

We have stated above that it is our opinion that the defendant has no contacts, ties, or relations with the State of North Carolina, so as to make it amenable to service of process from the Courts of the State for the purpose of a judgment *in personam.* In *International Shoe Co. v. Washington, supra,* the Court said: The due process clause of the U. S. Constitution "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."

Although the due process clause of the U. S. Constitution as applied to the question of state jurisdiction over nonresidents for taxing purposes is not identical with the due process test for the exercise over them of state judicial power for the service of process, the two present a close parallel. *International Shoe Co. v. Washington, supra.* We,

therefore, deem relevant the case of *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 98 L. Ed. 744. In that case Miller Bros. Co., by its own truck or by common carrier, regularly delivered into Maryland the merchandise it had sold in Delaware. The Court held that under the due process clause the State of Maryland had no power, under the facts of the case, to impose a duty upon an out-of-state merchant to collect and remit the tax. In its opinion the Court said: ". . . due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

In our opinion, under the facts found by the judge, G.S. 55-38.1(a), sub-section 3, is unconstitutional as applied to the facts of this case, because the defendant has, and had, no minimum connection with the State of North Carolina.

G.S. 55-38.1(a), subsection (4), is where the cause of action arises "out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or non-feasance."

The magazines, designated *Official Detective Stories,* containing the article complained of by plaintiff, were brought into this State by independent contractors, by common carrier, and not by the defendant. Legal ownership and title to these magazines passed from the defendant to these independent contractors upon its delivery of these magazines to a common carrier in a foreign state. These magazines were put into circulation in North Carolina by these independent contractors, and not by the defendant. We agree with the conclusion of the judge below that plaintiff's cause of action did not arise out of any tortious conduct of the defendant in this State.

As regards nonresident individuals, it is settled by the decisions of the U. S. Supreme Court that a state has power to subject them to the jurisdiction of its courts as regards actions growing out of accidents or collisions on a highway within the state, in which the nonresident may be involved. *Kane v. New Jersey,* 242 U.S. 160, 61 L. Ed. 222; *Hess v. Pawloski,* 274 U.S. 352, 71 L. Ed. 1091. These decisions rest on the ground that "motor vehicles are dangerous machines; and even when skillfully and carefully operated, their use is attended by serious dangers to persons and property" (*Hess v. Pawloski, supra*), against which the state has a right to guard its residents.

In *Smyth v. Twin State Improvement Corp., supra,* it was held that jurisdiction over a foreign corporation may be acquired by virtue of a single tort committed within the state. The defendant, a builder and roofer by trade, endeavored to re-roof plaintiff's house in Rutland, Vermont, and put metal edgings on the sides thereof. While so doing, it negligently placed holes in the roof and sides of the building which caused it to leak with specified damage to plaintiff. In that case the

defendant was in the State of Vermont and committed the tort in the state.

In the instant case the defendant was not in the State of North Carolina, and had no minimum contacts with the State. To hold that G.S. 55-38.1(a), sub-section (4), applied to the facts of this case, would raise a serious question as to its constitutionality.

The facts found by the judge support his inferences, conclusions of law and judgment, with the exception that he erred in concluding that G.S. 55-38.1(a), sub-section (3), by its language did not apply, but he concluded correctly that if it did apply, it was unconstitutional as offending against the due process clause of the U. S. Constitution. No error of law appears on the face of the record.

The judgment below is

Affirmed.

JOHNSON, J., not sitting.

HIGGINS, J., concurs in result.

IN THE MATTER OF A FILING MADE BY THE NORTH CAROLINA FIRE INSURANCE RATING BUREAU IN REVIEW OF EXPERIENCE—FIRE INSURANCE 1950 TO 1954, INCLUSIVE.

(Filed 1 February, 1957.)

1. Insurance § 3—

Upon hearing of a petition of the Rating Bureau for review of fire insurance rates on a particular classification, the Commissioner of Insurance has no right to consider a rate which is not based on experience for a period of not less than five years next preceding the year in which the review is requested. G.S. 58-131.2.

2. Same—

Properties need not necessarily be included in the same class in order for them to have the same fire insurance rate, but separate classes may have the same rate provided the location, construction and degree of protection are substantially the same for both.

3. Same—

Upon hearing of a petition of the Rating Bureau for a change in rates upon a particular class of property, the burden is upon it to establish that the proposed rate is fair and reasonable. G.S. 58-131.

4. Same—

The fact that the Insurance Commissioner has approved classifications of property for rate making purposes does not relieve the Commissioner of

the duty to determine whether the Rating Bureau's application of an approved rating method or classification is unfairly discriminatory.

5. Same—

Application for an increase in insurance rates on unprotected farm dwellings, which would result in a higher rate from that applicable to unprotected non-farm dwellings, similar in location, construction and hazards, and having substantially the same degree of protection, is properly denied by the Insurance Commissioner, since G.S. 58-131 proscribes such discrimination.

6. Same—

Where requested increase in insurance rates is based on the loss ratio of a class as a whole, objection to a finding that the Rating Bureau failed to present the loss experience for the prior five years on a sub-classification included in the class, is immaterial.

7. Same—

An order of the Insurance Commissioner denying increase in rates upon one particular class in excess of the rates upon another class similar in location, construction and hazards, and having substantially the same degree of protection, is not tantamount to a holding that the classification upon which the increase was requested was so arbitrary and unreasonable as to be illegal and void.

JOHNSON, J., not sitting.

APPEAL by the petitioner, The North Carolina Fire Insurance Rating Bureau, from *Hobgood, J.*, June Civil Term 1956 of WAKE.

This is an appeal from a judgment of the Superior Court affirming an order of the Commissioner of Insurance wherein he refused to approve a requested increase of 25% in the fire insurance rate on farm property, including farm dwellings, proposed by The North Carolina Fire Insurance Rating Bureau, hereinafter called Rating Bureau, in its "Annual Review of Experience" report to the Commissioner of Insurance, hereinafter called Commissioner.

The Rating Bureau is an agency created pursuant to Article 13 of Chapter 58 of the North Carolina General Statutes. All companies writing fire insurance in North Carolina are required by statute to be members of the Rating Bureau. It is charged with the responsibility of making and filing rates, rating plans, classifications, schedules, rules and standards for fire insurance, subject to the approval of the Commissioner.

This cause originated before the Commissioner upon a filing made by the Rating Bureau on 21 November 1955. The filing sought a review of fire insurance experience and requested an increase in certain fire insurance rates, including specifically a request for a 25% increase in the rates on farm property, known as Class 021.

After due advertising, as required by law, a public hearing was held on the matter by the Commissioner on 11 January 1956. The North Carolina Farm Bureau Federation and the North Carolina Farm Bureau Mutual Insurance Company appeared at said hearing, both being represented by counsel, and objected to the increase in rates on farm property.

The evidence before the Commissioner at the above hearing revealed that the Rating Bureau, in arriving at the amount of the requested increase, took the total earned premiums produced by fire insurance policies on the many types of property insured and adjusted the premiums written during the five-year period of 1950-1954 inclusive to the current rates. These premiums, as adjusted, amounted to $131,254,250 for the five-year period. The fire losses covered by the policies which produced the above premiums and for the same period amounted to $68,871,975, producing a loss ratio of 52.47%.

It was determined that an adjustment to the customary 50% loss ratio would require an increase in premiums of 4.94%, or, based on premiums written and in effect in 1954, an increase of $1,489,027.

The total net adjustments made by the Rating Bureau and submitted for approval call for an increase in fire insurance rates of $1,469,986 annually. The Rating Bureau requested the Commissioner to raise the North Carolina Farm Property Schedule by increasing the rates 25% on farm property. Farm property is included in Class 021 and consists of dwellings, tobacco barns, livestock, growing crops and hay and grain in stacks, buildings and contents. For the five-year period ending with the calendar year 1954, the written premiums were $16,180,343. During that period losses were $10,395,192, giving a loss ratio of 64.25%. The 25% increase requested is based on the premiums written and rates in effect in 1954 applicable to Class 021 and which premiums amounted to $3,602,249 for the year 1954. Translated into dollars, the proposed increase would raise farm property fire insurance rates annually in the amount of $900,562, the major portion of which would fall on farm dwellings within Class 021. Increases were requested for five other groups ranging from 7% to 13½%, which increases would amount to approximately $569,424 annually.

The evidence offered by the Rating Bureau is to the effect that Class 009 includes household contents only; Class 019 includes dwellings and contents; and Class 029, dwellings. And all of these classifications contain dwellings or contents which might be physically similar to farm dwellings and contents of farm dwellings.

The loss ratio on Class 009 for the five-year period was 63.41%, and for the year 1954, 79.94%. Class 019, includes unprotected farm dwellings or contents and unprotected non-farm dwellings or contents. This class had a loss ratio for the five-year period of 53.25% and for

the year 1954 of 62.87%. Class 029 includes unprotected non-farm dwellings. The five-year loss ratio in this class was 40.98%, and for the year 1954, 46.23%. Combining these three classes and using the same formula applied to the basic over-all figure, the loss ratio was 48.65% for the five-year period.

The Rating Bureau offered witnesses who testified that the isolation of farm property, faulty electric wiring and over-loaded circuits, and the many absences of the family from farm dwellings during the crop season, make farm dwellings a more hazardous risk than unprotected non-farm dwellings.

On the other hand, testimony offered by the North Carolina Farm Bureau Mutual Insurance Company, the North Carolina Farm Bureau Federation, and W. M. Williams, who operates an insurance agency which represents only stock companies and which agency obtains about 98% of its business in the rural areas of five counties in North Carolina, was to the effect that the present rates in North Carolina are adequate; that farm bureau companies in Virginia, Tennessee and Kentucky write fire insurance on farm dwellings and unprotected non-farm dwellings in suburban areas at essentially the same rate. That in Virginia the rate on county property, including farm dwellings, is 45c. That very few fires occur in farm dwellings in May, when the farm families are away from home planting their crops, or in July and August, when they are harvesting the crops; that most fires occur in the wintertime, when extra heat is needed. That in many counties in North Carolina a meter cannot be connected to a building until it is inspected and found to be wired properly; that more and more farm families are using gas and electricity for cooking, and stoves with automatic controls are being used in greater numbers for heating.

On 20 January 1956, the Commissioner rendered a decision and denied all the requests of the Rating Bureau for an increase in rates. On 17 February 1956, the Rating Bureau filed with the Commissioner a request for a rehearing and review. Pursuant to such request, a rehearing was set for 28 February 1956, all of the parties appearing at the original hearing having waived notice and having agreed that the matter might be heard at such time. On 19 March 1956, the Commissioner rendered his decision and again disapproved the request for increased fire insurance rates on farm property. However, the Commissioner did approve the increases requested for five other groups, which increases ranged from 7% to 13½% and which are calculated to produce approximately $569,424 annually in additional premiums.

In apt time the Rating Bureau appealed the decisions of the Commissioner, dated 20 January 1956 and 19 March 1956, in so far as the same denied a rate increase on farm property, to the Superior Court of Wake County by filing a petition for review pursuant to G.S. 58-9.3.

The matter came on for hearing in the Superior Court of Wake County before his Honor, Hamilton H. Hobgood, at the June Civil Term, upon the record made before the Commissioner. His Honor entered a judgment affirming the decisions of the Commissioner, and the Rating Bureau appealed to the Supreme Court, assigning errors.

Attorney-General Patton and Assistant Attorney-General Bruton for the North Carolina Commissioner of Insurance.

Joyner & Howison for The North Carolina Fire Insurance Rating Bureau.

Broughton & Broughton for North Carolina Farm Bureau Federation and North Carolina Farm Bureau Mutual Insurance Company.

DENNY, J. It appears from the evidence in this proceeding that the Rating Bureau proposed a rate increase for farm dwellings of approximately 16% on 28 October 1954. A public hearing was held on the proposal on 17 December 1954. The Commissioner found as a fact that the evidence presented did not support the Rating Bureau's contention that the hazards are different between unprotected farm and unprotected non-farm dwellings when the farm and non-farm dwellings are similar in location, are of the same construction and subject to the same degree of fire protection.

At the above hearing, it appears the Rating Bureau furnished experience on farm dwellings for the year 1953 only. Naturally, the Commissioner had no right to consider a rate for fire insurance except one based on the experience for a period of not less than five years next preceding the year in which the review was made and the other factors enumerated in the statute. G.S. 58-131.2. The Commissioner further held, "In view of General Statutes 58-131 it is not necessary to keep statistics separating farm dwellings from non-farm dwellings unprotected because this law provides there shall be no unfair discrimination 'between risks involving essentially the same construction and hazards, and having substantially the same degree of protection.' These two classes come within that category and should, under North Carolina law, be treated as one." While the statistical data offered at that time did not meet the requirement of G.S. 58-131.2, in that it covered only one year instead of five, the ruling to the effect that it was improper to include unprotected farm dwellings and unprotected non-farm dwellings in different classes for rate making purposes but that they should be treated as one class, to that extent the ruling modified the classes involved and approved in 1947 for rate making purposes. The ruling was tantamount to a finding pursuant to G.S. 58-131.2 that the Rating Bureau's application of an approved classification "is unwarranted,

unreasonable, improper or unfairly discriminatory," and in accord with the provisions of the statute, the Commissioner left the matter open so that the Rating Bureau might have an opportunity to propose adjustments in conformance with the decision. It would seem that the Rating Bureau chose to ignore the order, took no appeal from it, and later filed the request involved in this procedure, based on the original classifications as approved in 1947.

In the hearing before the Commissioner on the present request for an increase in fire insurance rates on farm property, the Rating Bureau furnished the experience on farm dwellings sub-Class 024 for the years 1953 and 1954 which showed a loss ratio in 1953 of 93.37% and for 1954 of 96.25%. Since this was for a period of less than five years, as required under G.S. 58-131.2, the Rating Bureau based its request on the loss ratio for Class 021, which includes sub-Classes as follows: 024, Farm Dwellings; 025, Farm Property, Livestock, Growing Crops and Hay and Grain in Stacks (not including Tobacco Barns); 026, Tobacco Curing Barns; 029, Tobacco Pack Barns; 028, Tobacco-Harvested Crop-Farm Floater Form.

As we interpret the record before us, if the requested increase should be allowed, most of it would fall on farm dwellings, sub-Class 024. Moreover, under the present methods of classification, it is conceded in appellant's brief, if two dwellings are located in the same neighborhood and are of similar construction, if one of the houses is located on a tract of land devoted to farming, which consists of as much as 3.1 acres, it is classified as a farm dwelling; but if the other house is located on a tract of land which consists of less than 3.1 acres, it is classified as a non-farm dwelling, whether the occupant is a farmer or not.

For the purposes of classification and keeping of statistics, there are now 115 different classes of property in this State. Statistics are kept as to the premiums and losses with respect to each of the 115 different specific classes. These classes were first approved by the Insurance Department of North Carolina on 1 January 1947. Prior to that time, classification statistics had been kept in only 26 classes. When the 26 classes were expanded to 115, it was merely a refinement of the 26 classes. The 115 classes, with minor modifications which have been approved from time to time, are still in effect.

For a more complete understanding of the powers and duties of the Commissioner with respect to the reduction or increase of rates, we deem it necessary to consider the pertinent provisions of G.S. 58-131.2, which read as follows: "The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable, he shall

order such reduction of rates as will produce a fair and reasonable profit only.

"If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit.

"In determining the necessity for an adjustment of rates, the Commissioner shall give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the State, to the past and prospective loss experience, including the loss trend at the time the investigation is being made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made.

"Whenever the Commissioner finds, after notice and hearing, that the bureau's application of an approved rating method, schedule, classification, underwriting rule, bylaw or regulation is unwarranted, unreasonable, improper or unfairly discriminatory he shall order the bureau to revise or alter the application of such rating method, schedule, classification, underwriting rule, bylaw or regulation in the manner and to the extent set out in the order."

The manager of the Rating Bureau in testifying in its behalf for the requested increase of rates on farm property, said: "As between an unprotected farm dwelling and an unprotected dwelling of Class 10 (an unprotected non-farm dwelling), it could be possible to have precisely similar types of buildings. Farm dwellings are placed in the classification with farm property rather than in the classification of other unprotected dwellings because farm dwellings are really considered to be a part of the farming process, more than in the case of any other class of dwelling occupancy. It is my understanding that the separate classification of farm dwellings is not on the basis of construction but on the basis of hazard."

It is apparent, we think, under the provisions of G.S. 58-131.2, that the General Assembly has never authorized a fire insurance rate to be fixed upon a consideration of hazard alone. Furthermore, 58-131 provides: "The Rating Bureau in making rates shall not unfairly discriminate between risks involving essentially the same construction and hazards, and having substantially the same degree of protection."

We do not understand that property must necessarily be included in the same class in order for it to have the same fire insurance rate, provided the location, construction and degree of protection are substantially the same in both classes.

The question as to whether a 50% loss ratio is a proper division of the premium dollar is not before us for decision. *Aetna Insurance Co.*

v. Hyde, 275 U.S. 440, 72 L. Ed. 357. However, it would seem that the selection of risks may figure substantially in the loss ratio, particularly on unprotected property. Unfortunately, the lack of proper installation and inspection of electric wiring in many instances is a source of substantial fire loss. It is unfortunate indeed that the county commissioners of many of our counties have not seen fit to exercise the authority given them by G.S. 160-122 to appoint qualified electrical inspectors, whose duties, among other things, would be to enforce all State and local laws governing electrical installations and materials, and to make inspection of all new electrical installations in the rural areas, as well as in towns having a population of less than 1,000, unless satisfactory provision for such inspection has been otherwise provided.

The appellant assigns as error the conclusion of law set forth in the judgment entered below to the effect that the following finding of fact is supported by substantial evidence in the record and is correct and proper: "That the North Carolina Fire Insurance Rating Bureau had the burden of proof to justify that there should be a differential in rates on unprotected farm dwellings from the unprotected non-farm dwellings known as Class 10. There was no evidence offered by the Rating Bureau that such differential was justified, and, therefore, in view of the provision of General Statutes 58-131, which reads as follows: 'The Rating Bureau in making rates shall not unfairly discriminate between risks involving essentially the same constructions and hazards, and having substantially the same degree of protection,' the proposed filing must be rejected."

It is provided in G.S. 58-9.3(2), ". . . The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper." But we know of no statute or decision that makes a request of the Rating Bureau for an increase or decrease in rates presumptively correct and proper. The Rating Bureau is the movant in this proceeding and the burden is upon it to establish that the proposed rate is fair and reasonable, G.S. 58-131.2, and that it does not "unfairly discriminate between risks involving essentially the same construction and hazards, and having substantially the same degree of protection." G.S. 58-131. Furthermore, we hold that the mere fact that the Commissioner has heretofore approved 115 different classes of property in this State in order that premiums and losses with respect to each class may be ascertained, does not relieve the Rating Bureau of the burden of proof to support its request or requests to the Commissioner for reductions or increases in rates. Neither does the fact that certain classes have been approved relieve the Commissioner of the duty to determine whether the Rating Bureau's application of an approved rating method or classification is unfairly discriminatory. We think G.S. 58-131 was enacted to prevent such discrimination as

would exist between unprotected farm and unprotected non-farm properties, similar in location, construction and hazards, and having substantially the same degree of protection, if the request of the Rating Bureau, involved in this appeal, should be allowed. This assignment of error is overruled.

The appellant also assigns as error the conclusion of law to the effect that the following finding of fact is supported by substantial evidence in the record and is correct and proper: "That the North Carolina Fire Insurance Rating Bureau did not conform to the General Statutes 58-131.2, which requires that fire experience on any class be kept for five years and that the Rating Bureau did not present such experience on unprotected farm property, sub-Class 024."

In view of the fact that the requested increase was based on the loss ratio of Class 021 as a whole, which includes sub-Class 024, in our opinion this latter finding was not essential to the decision reached in the lower court. Hence, we deem it unnecessary to consider or discuss this assignment of error.

The appellant takes the position that there can be no doubt about certain conclusions, to wit: "(1) The classifications 021, 009, 019, and 029, were adopted by the Bureau pursuant to statutory requirement that classifications be provided. G.S. 58-130. (2) Those classifications were approved by the Commissioner. (3) Those classifications were in effect throughout the base period, 1950-1954, inclusive. (4) The Bureau was required by the N. C. Statute to report its statistics in accordance with the existing classifications and it did so report its statistics in this case in accordance with the classifications 021, 009, 019, and 029. (5) Those statistics justify and support the 25% rate increase sought by the Bureau for Class 021. (6) Those statistics do not justify any rate increase for the unprotected non-farm dwellings and contents, classes 009, 019, and 029."

The appellant's brief contains this further statement: ". . . The only remaining question is whether classification 021, farm property, was so arbitrary and so unreasonable as to be illegal and void from the beginning. That is the nub of this case."

In our opinion, the failure to grant the increase requested is not tantamount to a holding that the classification 021 was so arbitrary and so unreasonable as to be illegal and void from the beginning.

It will be noted that the appellant insists that the statistics do not justify any rate increase in Classes 009, 019, and 029. But the evidence of the Rating Bureau reveals that Class 009 had a loss ratio for the five-year experience period of 63.41%; Class 019 for the same period had a loss ratio of 53.26%; and Class 029 a loss ratio of 40.98%. If these three classes may be consolidated for rate making purposes, as the appellant insists they may, then we can see no reason why prop-

erties classed in 021 and 029, which are substantially alike in location, construction, hazards and protection, should not also be consolidated for rate making purposes.

In light of the provisions of G.S. 58-131, G.S. 58-131.2, and the evidence disclosed on the record, the rulings of the Commissioner in denying the 25% increase in fire insurance rates on farm property, Class 021, which rulings were upheld in the court below, in our opinion, were proper and must be upheld.

Affirmed.

JOHNSON, J., not sitting.

FRED H. COOKE v. WAKE ELECTRIC MEMBERSHIP CORPORATION.

(Filed 1 February, 1957.)

1. Easements § 5—

Ordinarily, when an easement is granted in general terms which do not fix its location, the owner of the servient estate has the right in the first instance to designate the location of such easement, subject to the limitation that he exercise such right in a reasonable manner and with due regard to the rights of the owner of the easement.

2. Same—

If the owner of the servient tenement does not designate the location of an easement granted in general terms, the person owning the easement may select a suitable route, subject to the limitation that he take into consideration the interest and convenience of the owner of the servient estate.

3. Same—

Unless there is an express grant which provides otherwise, when the location of an easement is once selected, it ordinarily cannot be changed by either the landowner or the owner of the easement without the other's consent.

4. Same—

The owner of land conveyed an easement thereover for a power line with specific provision that the owner of the easement have the right to relocate same. The power line was constructed along a highway abutting the land. The relocation of the highway necessitated the relocation of the power line, and the owner of the easement reconstructed the power line approximately the same distance from the new highway that the old line was from the old highway, the new right of way having no greater length or width than the original one. *Held:* Under the terms of the easement the owner had the right to so relocate it without the payment of additional compensation.

5. Same—

Where the easement for a power line includes the right to relocate, and the owner of the easement advises the owner of the servient estate of the necessity of relocating the easement because of the relocation of the adjoining highway, and invites the owner of the servient estate to go upon the premises and agree upon a new location, but the landowner fails to do so or make any objection to the relocation of the easement by the owner thereof until the relocation is two-thirds completed, the landowner may not object to such relocation.

6. Same—

The highway abutting the lands of plaintiff was relocated, necessitating the relocation of defendant's easement for a power line. Because of the topography, the relocation of the highway made it less accessible from plaintiff's land because of a deep cut. *Held:* The damage resulting from the lessened accessibility to the highway is not due in any way to the relocation of the easement for the power line, and the landowner has no basis for the recovery of the resulting damage against the owner of the easement for the power line.

JOHNSON, J., not sitting.

APPEAL by plaintiff from *Seawell, J.*, February Civil Term 1956 of FRANKLIN.

This is a civil action instituted 1 October 1951, in which the plaintiff, who is the owner of a tract of land along U. S. Highway No. 1 in Franklin County, seeks to recover of the defendant compensatory damages in the sum of $1,000 on account of alleged loss and damage to his land occasioned by the defendant's action in relocating its power line on his premises.

It is stipulated by counsel for plaintiff and counsel for defendant that the land now owned by the plaintiff and described in the complaint in this action is the same land described in the instrument executed by G. L. Whitfield and wife to Wake Electric Membership Corporation and recorded on 18 April 1941 in Book 275, at page 128, in the office of the Register of Deeds of Franklin County, and that the plaintiff is successor in title to the said land.

On 8 May 1940, G. L. Whitfield and his wife executed the instrument referred to above for a good and valuable consideration, giving the defendant a right of way across their 134½ acre tract of land and specifically giving it the right "to place, construct, operate, repair, maintain, relocate and replace thereon and in or upon all streets, roads or highways abutting said lands an electric transmission or distribution line or system, and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system and to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling.

"In granting this easement it is understood that at pole location, only single pole and appurtenances will be used, and that the location of the poles will be such as to form the least possible interference to farm operations, so long as it does not materially increase the cost of construction."

The plaintiff, who lives on Highway No. 56 between Franklinton and Creedmoor, testified that when he purchased the land involved in this action, the Wake Electric Membership Corporation had a line running across it; the line ran across the land on the west side of the old highway (U. S. Highway No. 1). The land is located about 2½ miles from the Town of Franklinton and about 3½ miles from the Town of Youngsville. "The lay-out of the land was that before they (the Highway and Public Works Commission) cut the last highway the land ran down to the old highway, sloping slightly about a quarter of a mile from one end to the other; . . . As to any conversation I had with men from the Wake Electric Membership Corporation concerning a change of this line, they came to my house one day at lunch and talked to me; . . . they told me the Highway Commissioners were going to cut another road through there and they would have to move their line; I told them well I reckon they would have to move it back beyond where it was and I gave them permission to move it back from the road just so it would not take the whole road frontage—I thought later probably we would have some understanding. . . . I did not have any further dealings with them until I went by there and saw them cutting a right of way . . . on my land right at the edge of the highway."

Plaintiff's evidence further tends to show that he then retained counsel, and when he, his counsel, and a representative of the defendant went on the premises, the right of way had been cleared and the employees of the defendant were digging pole holes. On this occasion the plaintiff requested the agent of the defendant to run the line about 250 or 300 feet back from the highway, and stated that he would rather pay the added cost involved in putting the line on the back part of his land and that he "would give the right of way to them." The plaintiff, not hearing anything further from the defendant, instituted an action against it and obtained a temporary restraining order which was later dissolved.

On cross-examination, the plaintiff testified, "I don't know whether there is any difference in the space between the new easement right of way and the new highway and the old easement and the old highway. What I complained of is based upon the fact that I say the value has decreased, the value of my land between the right of way easement and the highway. I don't know whether the same condition exist (*sic*) with the old highway and easement, whether there was the same distance

between the line and the highway. The highway was building a new road and they had to move their line. . . . This man, Mr. Stephenson or Mr. Critcher, came to my house before anything was done and had somebody with him. When they came and told me that the Highway Commission was forcing them to move their line back and they would need more space, I told them it was all right to move it if they would move it far enough back. . . . Not so long a time elapsed from that time and I discovered where the right of way was actually run, it was something like one, two or three weeks. . . . I don't think any poles were up at the time I made my first complaint about the location . . . I bought this land in 1946 to develop into building lots."

According to plaintiff's evidence, the contour of the land abutting the old highway was such as to permit building houses behind the power line, but in constructing the new highway, which is a dual-lane highway, the Highway Commission left a strip of land from 25 to 30 feet in width between the north and south lanes of the highway and cut through the land of plaintiff leaving a cut "as high as that ceiling (presumably the courtroom ceiling) and ruined the slope. . . . I did not know the right of way condition, the words that allowed the Wake Electric Membership Corporation to relocate this power line, and I do not deny it had the right to relocate its line."

The plaintiff offered a witness, Phil R. Inscoe, who was held to be an expert land surveyor. This witness testified that he made a map showing the present location of U. S. Highway No. 1, the present location of the power line of the Wake Electric Membership Corporation, and that portion of Mr. Cooke's tract of land which adjoins the highway and over which the defendant's line now runs. This map was introduced in evidence as plaintiff's Exhibit A. This witness testified that the present power line takes up exactly the same space that it did originally. He further testified, "The terrain there is pretty rough. It slopes over, I would say that it is about forty-five per cent grade."

Plaintiff offered a number of witnesses who testified that in their opinion he had been damaged substantially by the relocation of the power line.

The defendant's evidence tends to show that before it took any action with respect to the relocation of its line, two of its representatives, Mr. Linwood K. Stephenson and Mr. I. J. Critcher, went to see the plaintiff and explained to him the necessity of relocating the power line; that they informed him they would come back to see him after a survey was made showing the proposed location for the line; that they went back and told him the survey had been made, that is, the new right of way had been surveyed and staked out on the land, not on a map, and the plaintiff told them he did not have the time to look at it,

but that it would be all right and to keep as close to the highway as they could. The next time the defendant heard from the plaintiff was through his attorney. The defendant's evidence bearing on the location of the present right of way is to the effect that at some places it is a little farther from the new highway than it was from the old highway, while at others it is closer to the new highway than it was to the old highway; but that over all, the present right of way is nearer to the new highway than the old right of way was to the old highway.

The defendant's evidence further tends to show that when Mr. Cooke offered to pay the additional cost necessary to move the power line back some 250 or 300 feet from the road, he was requested to put the proposal in writing for submission to the officials of the defendant; that he got mad and said he would sue them, but at no time did he request the defendant or its employees to stop work on the new right of way; that the work in connection with the relocation of the power line was two-thirds complete when the plaintiff first objected to its location.

At the close of all the evidence the defendant renewed its motion for judgment as of nonsuit. The motion was allowed and the plaintiff appeals, assigning error.

W. P. Pearce, E. F. Yarborough, and Hill Yarborough for plaintiff appellant.

Donald Gulley and Malone & Malone for defendant appellee.

DENNY, J. The sole question presented on this appeal is whether or not the court below committed error in sustaining the defendant's motion for judgment as of nonsuit and in entering judgment accordingly.

As we interpret plaintiff's evidence, before the Highway and Public Works Commission built the southbound lane of the dual highway to the west of what is now the northbound lane of U. S. Highway No. 1, the defendant's power line occupied space west of the right of way of U. S. Highway No. 1 and approximately the same distance therefrom as the present power line does from the western edge of the present right of way of the new dual-lane highway. However, in constructing the southbound lane of the new dual highway, the Highway Commission left a strip of land approximately 30 feet wide between the north and south lanes of the new highway and extended its right of way, according to plaintiff's Exhibit A, approximately 50 feet west of the western edge of the pavement of the southbound lane of the dual highway. Therefore, since the plaintiff's land slopes toward the highway at a grade of about forty-five per cent, the Highway Commission, in grad-

ing for the new highway, necessarily left a high bank west of the new southbound lane through the plaintiff's farm. Consequently, there is no room between the southbound lane of the dual highway and the highway bank to the west of said lane for the location of the defendant's power line. Hence, the defendant cut its right of way through the woods near the top of the embankment. In light of these facts, we think this appeal may be disposed of by the consideration and determination of these questions: (1) Is the defendant entitled to relocate its power line on the premises of the plaintiff under the terms of the easement held by it, without paying additional compensation therefor? (2) Did the plaintiff have the right to determine where the new right of way should be located, and if so, did he waive such right by his failure to object to the location chosen by the defendant until the work in connection with the relocation of the line was approximately two-thirds finished?

Ordinarily, when an easement is granted in general terms which do not fix its location, "the owner of the servient estate has the right in the first instance, to designate the location of such easement. This right, however, must be exercised in a reasonable manner, with due regard to the rights of the owner of the easement. In this situation, if the owner of the servient estate does not designate the location, the person entitled to an easement may select a suitable route, taking into consideration the interest and convenience of the owner of the land over which the easement passes. (*Harper v. Jones,* 35 Ohio Ops. 524, 49 Ohio L. Abs. 289, 74 N.E. 2d 397.) . . . It has also been declared that if a deed so authorizes, the grantee of an easement may shift the location of an easement, but a right in a deed to 'alter, repair, or renew' does not convey such authority." 17 Am. Jur., Easements, sections 86 and 87, page 987, *et seq.*, and cited cases. *Ford v. White,* 179 Ore. 490, 172 P. 2d 822; *Quatchita Rural Electric Co-Operative Corp. v. Bowen,* 203 Ark. 799, 158 S.W. 2d 691.

Unless there is an express grant which provides otherwise, ordinarily, when the location of an easement is once selected it cannot be changed by either the landowner or the owner of the easement without the other's consent. 17 Am. Jur., Easements, section 87, page 988, *et seq.;* 28 C.J.S., Easements, section 84, page 763; *Drainage Dist. v. Holly,* 213 Ark. 889, 214 S.W. 2d 224.

The easement held by the defendant not only gave it the right to locate but to relocate its power line on the premises of the plaintiff. However, the poles were to be so located as "to form the least possible interference to farm operations," and such restriction was to prevail only "so long as it does not materially increase the cost of construction." The easement further expressly provides that the line may be

located, relocated or replaced thereon in or upon all streets, roads or highways abutting the lands described in the right of way agreement.

In *Quatchita Rural Electric Co-Ooperative Corp. v. Bowen, supra,* the landowner signed a right of way agreement in pertinent terms identical with the right of way agreement involved in this appeal. At the time the agreement was signed, however, the Co-Operative's agent exhibited a plat showing that the power line would cross only a corner of the owner's land and only two poles would be located thereon. Later it developed that the corporation had difficulty in obtaining some other rights of way and built its line for a distance of one-half mile on the defendant's land. The Court held that the right of way agreement permitted the change in the route but upheld damages assessed for the timber cut on the substituted route, there having been no timber on the route shown on the map. It would seem that in this case damages should have been assessed for the additional length of the right of way. The Court said, however, no additional damages were assessed, and there was no appeal from the failure to do so.

In the case before us, the present right of way has no greater length or width than the original one.

Certainly, a power line is more easily serviced when it is near the highway. Furthermore, when it is a line from which customers are to be served on both sides of the highway, it is more practical to locate the power line as near as feasible to the highway. Ordinarily, a power line when located near the highway interferes less with farming operations than it does when it runs across a farm several hundred feet from the highway. Consequently, in our opinion, since the defendant chose to locate its right of way originally along U. S. Highway No. 1, when the State Highway and Public Works Commission took that right of way for highway purposes, the defendant had the right, under the terms of its right of way agreement, to relocate its line adjacent to or as near as practicable to the new highway without paying any additional compensation therefor. However, if the plaintiff, prior to the relocation of the line, had so developed the area selected by the defendant as to make the location of the defendant's line thereon a dangerous hazard to the occupants thereof, in our opinion the plaintiff would have had the right to designate another suitable route, taking into consideration the rights and convenience of the respective parties, but which would, as near as practicable, eliminate the hazard involved to the occupant or occupants of the involved area.

We do not think, however, in relocating its right of way under the conditions disclosed on the record in this case, the defendant would have had the right to locate its line substantially farther away from the new highway than it was previously located from the old highway, without the consent of the plaintiff, since it appears to have been rea-

sonable and practicable to locate the line substantially the same distance from the new highway. The mere fact that the plaintiff decided he wanted the line to be 250 or 300 feet from the highway, and according to his testimony, offered to pay the extra cost which would be involved in so locating the line, in our opinion, imposed no legal obligation on the defendant to so locate the line. Certainly the defendant under the terms of the right of way agreement would have had no right without the consent of the plaintiff to place its power line on his premises some 250 or 300 feet from the highway. Neither would it seem to have the right to erect an extension or extensions across the premises of the plaintiff to serve other customers without additional compensation therefor. *Jackson Electric Membership Corp. v. Echols,* 84 Ga. App. 610, 66 S.E. 2d 770.

Since the plaintiff did not see fit to go upon the premises and agree upon a new location for the defendant's power line, as he was invited to do, the defendant had the right to select the site for the relocation, provided, the site selected did not violate the provisions of its right of way agreement, and in our opinion it did not. *Smith v. Jackson,* 180 N.C. 115, 104 S.E. 169.

In the last cited case, the plaintiff claimed an easement by prescription which entitled him to use a road over the defendant's land. The defendant was permitted to testify, over the objection of plaintiff, as to why he closed the road in controversy and that he had built a new road which was more beneficial to his farm and over which the plaintiff could reach the public highway. This Court said: "The evidence offered was plainly irrelevant and incompetent, and calculated to mislead and prejudice the jury. It was the title to the easement which was the issue to be decided, and not whether it was injurious to the defendant's farm. It matters not how detrimental the lane was to the defendant's land, if the plaintiff had acquired title to the use of that lane by prescription it is as effective as if he had acquired title by deed. The defendant could not deprive him of his easement by providing another outlet."

The plaintiff does not challenge the right of the defendant to relocate its power line. Even so, he does not concede that the defendant had the right to run its line across the back of his farm. His own testimony in this respect was to the effect that if the defendant would move its power line back 250 or 300 feet he would pay for the additional cost involved and give the right of way. Furthermore, the plaintiff in his testimony limits the cause for the decrease in the value of his farm not to the location of the defendant's right of way, but to the decreased "value of my land between the right of way easement and the highway." It is clear from the evidence in this case that the construction

of the southbound lane of the present dual highway on the property of the plaintiff has greatly lessened the accessibility of the plaintiff from his premises to the highway, but there is no evidence that the present right of way of the defendant interferes with the plaintiff's accessibility to the present highway any more than the original line did to the old highway. Moreover, this defendant is in no way responsible for the physical condition in which the plaintiff's premises were left as a result of the construction of the southbound lane of the present U. S. Highway No. 1.

A careful consideration of the evidence disclosed by the record herein is insufficient to show that the plaintiff has sustained any loss by reason of the relocation of the defendant's power line for which he is entitled to recover from the defendant.

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

Affirmed.

JOHNSON, J., not sitting.

LELA J. RIVERS v. STATE CAPITAL LIFE INSURANCE COMPANY.

(Filed 1 February, 1957.)

1. Insurance § 32c—

Even though a group insurance policy is executed between the employer and the insurance company, it is primarily for the benefit of the insured employees and their beneficiaries.

2. Same—

A provision in a certificate under a group policy that the certificate should terminate upon cessation of payment of premiums thereon when due or within the grace period thereafter, must be given effect in the absence of extension or waiver.

3. Same—

Tender of premiums under a certificate of group insurance to the employer does not prevent a lapse of the certificate for nonpayment of premiums in the absence of waiver or estoppel, since ordinarily the employer is not the agent of the insurer.

4. Same—

Insured is charged with notice of the provisions of his certificate under a group policy in regard to lapse for nonpayment of premiums and the absence of provision for paid-up insurance, cash or loan value.

5. Insurance § 37: Trial § 24—

Nonsuit may be granted upon an affirmative defense when plaintiff's own evidence establishes such defense as a matter of law, and therefore where plaintiff's own evidence establishes that the certificate of insurance sued on had lapsed for nonpayment of premiums, nonsuit is proper, notwithstanding defendant has the burden of establishing such defense.

6. Insurance § 13a—

Where the terms of an insurance policy are clear and unambiguous and of the essence of the contract, they will be interpreted and enforced according to the usual, ordinary and accepted meaning of the language.

WINBORNE, C. J., took no part in the consideration or decision of this case.
JOHNSON, J., not sitting.

APPEAL by defendant from *Crissman, J.*, March Civil Term 1956 of ROWAN.

This is a suit by plaintiff beneficiary to recover on a certificate of life insurance issued to Charlie C. Rivers by the defendant State Capital Life Insurance Company under a group insurance policy for employees of Linn Mills Company.

From a judgment on a verdict that the plaintiff recover $1,500.00 from the defendant, the defendant appealed.

Robert M. Davis and John C. Kesler for Plaintiff, Appellee.

George R. Uzzell, Allen & Hipp, and Arch T. Allen for Defendant, Appellant.

PARKER, J. Plaintiff's evidence tended to show the following facts: The defendant State Capital Life Insurance Company issued to Linn Mills Company for the benefit of its employees a group insurance policy No. 1300, and this policy, known as the master policy, was in full force and effect during the time alleged in plaintiff's complaint. When this group insurance policy was issued to Linn Mills Company, Charlie C. Rivers was, and had been for many years, an employee of Linn Mills Company. Under the group insurance policy the defendant on 16 August 1953 issued its group insurance certificate No. 130000625 to Charlie C. Rivers, called therein the insured, in the amount of $1,500.00, payable to his wife, Lela J. Rivers, the plaintiff, at his death, provided at such time the certificate of insurance was in force and effect. The premiums on the insurance certificate issued to Charlie C. Rivers were paid bi-weekly by Linn Mills Company, partly by deductions from Rivers' pay cheque, and partly by its contributions.

In November 1954 Charlie C. Rivers quit work with the Linn Mills Company by reason of a cold and rheumatism in his leg. From then

until his death on 5 June 1955, at the age of 64, he did not work for Linn Mills Company. Charlie C. Rivers continued to pay to Linn Mills Company his part of the premium on his insurance certificate due to the defendant from the time he stopped work in November 1954 until 22 February 1955, at which time he made his last bi-weekly payment. This payment covered the period up through the date of 12 March 1955.

In March 1955 Charlie C. Rivers gave Blanchard Carter a $10.00 bill, and asked him to go to Linn Mills Company and pay his insurance. Carter went into the office of Linn Mills Company with the $10.00 bill in his hand, and told Mrs. Shulenberger he wanted to pay Charlie C. Rivers' insurance. She said his insurance had expired. Carter replied, thank you, and walked out. Carter went back, and told Charlie C. Rivers a lady in the office said his insurance had expired. Rivers said: "It shouldn't have, I have been paying on it. I will be straight in a few days and I will go down and straighten it up."

J. D. Rivers, a son of Charlie C. Rivers, testified that subsequent to November 1954, his father made payments on his insurance to the mill, and sometimes his father gave him money to make the payments and he did. Sometime after Christmas, in the early part of January, he went to the mill office to make a payment, and Mrs. Shulenberger, taking the money, said: "I believe we terminated him." Then she got his record—"I guess it was a record"—and marked down on it that the insurance was paid. She tore up the termination slip. That payment paid the insurance up until the next pay day.

Plaintiff alleged in her complaint that Charlie C. Rivers had fully paid the premiums on his insurance "through March of 1955."

Defendant refused to pay plaintiff the face value of the insurance certificate, after notice of Charlie C. Rivers' death and demand for payment.

Plaintiff introduced into evidence the group insurance certificate No. 130000625.

At the close of plaintiff's evidence, the court denied the defendant's motion for judgment of nonsuit, and the defendant excepted.

The defendant then offered evidence as follows: Charlie C. Rivers last worked for Linn Mills Company in November 1954, and was not employed by the company, and did not receive any pay from it, at any time after that date. The employees of the mill can avail themselves of the provisions of the group policy if they want to. All of them have not done so. It is discretionary. Charlie C. Rivers chose to have insurance under the group policy. His premiums were paid by deducting 75 cents a week from his pay cheque and by the mill paying 46 cents a week. He had this insurance while he was employed. He made

a payment of $1.50 on his insurance certificate on 22 February 1955, which paid his insurance through 12 March 1955.

Mrs. Jo. Shulenberger, office manager for Linn Mills Company testified:

> "I did not have any conversation with Mr. Rivers about his employment. I don't remember who I talked to in March telling him that the policy of insurance had terminated, but we told them at the time that the insurance had terminated due to the fact that he had been away from work for 90 days. Our mill terminated the employment of Mr. Rivers on March 12, 1955. His name was left off the payroll. I don't know that he was advised to that effect by myself or my office. His name was left off the payroll March 12, 1955. No further premiums were received by me from him or any further premiums paid by my company for him or for the company to the State Capital Life Insurance Company for Charlie Rivers after March 12. On June 5, 1955, the date of the death of Mr. Rivers, he was not employed by the Linn Mills Company. I was not carrying his name on the list for insurance with the State Capital Life Insurance Company."

She further testified: "A notice was posted on the bulletin board about the insurance plan and also booklet explaining the whole thing. Each employee was given a little booklet with the insurance plan in it. . . . On 12 March 1955 we notified the insurance company that the insurance on Mr. Rivers was terminated." Mrs. Shulenberger did not give Charlie C. Rivers a copy of the termination of insurance or employment that she sent to the defendant.

The defendant received notice from Linn Mills Company that Charlie C. Rivers' employment with it was terminated on 12 March 1955. Since then it has not received any money from anyone as a payment on the premiums on Charlie C. Rivers' insurance certificate. As of 12 March 1955 it terminated his insurance certificate.

At the close of all the evidence defendant renewed its motion for judgment of nonsuit, which the court denied, and the defendant excepted. Defendant assigns as error the failure of the court to nonsuit the plaintiff.

The certificate of insurance issued to plaintiff's insured, and introduced in evidence by plaintiff, contains this language: "The insurance upon the life of any insured under the Group Insurance Policy shall cease automatically upon the occurrence of any one of the following events: . . . (b) the cessation of premium payments on account of such Insured's Insurance hereunder."

This certificate of insurance states that it is subject to the terms and conditions of the Group Insurance Policy issued to Linn Mills Company, which Group Insurance Policy contains this language: "The insurance hereunder of any Insured shall cease automatically upon the occurrence of any of the following events: . . . (2) the cessation of the premium payments on account of such persons insurance hereunder."

The certificate of insurance issued to plaintiff's insured also contains these words: "This certificate is merely evidence of insurance provided under said Group Insurance Policy, which insurance is effective only if the Insured is eligible for insurance and becomes and remains insured in accordance with the provisions, terms and conditions of the said policy."

The certificate of insurance issued to plaintiff's insured contains these words: "The insurance does not at any time provide paid-up insurance, cash or loan value." And also these words: "Upon receipt of satisfactory proof of death of the insured while insurance under the Group Insurance Policy with respect to such insured is in force, the Insurance Company will pay the amount of life insurance shown in the schedule on the first page to the beneficiary . . ." The Group Insurance Policy issued to Linn Mills Company has this Insuring Clause: "Upon receipt of due proof of the death of any person occurring while insured under this policy and while this policy is in force, the Insurance Company agrees to pay, at its Home Office in Raleigh, North Carolina, to the person or persons entitled thereto under the provisions of this policy, the amount for which such person's life is insured."

The Group Insurance Contract here was made by the defendant insurer and Linn Mills Company, instead of between the insurer and the insured employees of Linn Mills Company, and affects four parties —the insurer, the employer, the insured and the beneficiary. "It should be borne in mind, however, that group insurance is not indemnity insurance for the benefit of the employer, but insurance upon the life of the employee for his personal benefit and the protection of those depending upon him. . . ." 29 Am. Jur., Insurance, p. 1027.

This Court said in *Rees v. Ins. Co.*, 216 N.C. 428, 5 S.E. 2d 154: "It is generally understood that the nonpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance." In *Allen v. Ins. Co.*, 215 N.C. 70, 1 S.E. 2d 94, it is said: "The payment of premiums is of the essence of the undertaking and upon its compliance depends the life and success of the insurance company."

In *Modlin v. Woodmen of the World,* 208 N.C. 576, 181 S.E. 559, the plaintiff was nonsuited, and a recovery of disability benefits under a beneficiary certificate issued to him by the defendant was held barred

by forfeiture of contract for nonpayment of dues prior to notice of disability.

Dewease v. Ins. Co., 208 N.C. 732, 182 S.E. 447, was a suit to recover on a certificate of group insurance. Plaintiff claimed total disability. She was employed by Highland Park Manufacturing Company, and amounts sufficient to pay the premiums on her policy were deducted from her wages until 17 August 1931, when she was injured. Thereafter she ceased to be employed, and no further payments were made on the policy. The master policy was cancelled 27 May 1932. Her suit was nonsuited below. On appeal the nonsuit was affirmed, this Court holding that she was not entitled to disability benefits when proof of disability was not given while the policy was in force. See also *Johnson v. Ins. Co.*, 207 N.C. 512, 177 S.E. 646.

When the insured employee under a Group Insurance Policy is required to contribute to the premiums, and the master policy and the certificate thereunder issued to him state that the insurance upon the life of any insured under the Group Insurance Policy shall cease automatically upon the cessation of premium payments on account of such insured's insurance under the master policy, his certificate of insurance becomes lapsed, if he ceases to pay further periodic premiums when due, or within the period of grace thereafter, and by reason thereof there is a nonpayment when due of the premiums to the insurance company, in the absence of some extension or waiver. *Clapp v. Sun Life Assur. Co. v. Canada*, 204 Ark. 672, 163 S.W. 2d 537; *Peyton v. Equitable Life Assur. Soc. of U. S.*, 159 Pa. Super. 318, 48 A. 2d 145; *Jensen v. John Hancock Mut. Life Ins. Co.*, 266 Wis. 595, 64 N.W. 2d 183; *McClain v. Provident Life & Accident Ins. Co.*, 65 Ga. App. 355, 16 S.E. 2d 173; 45 C.J.S., Insurance p. 451.

There is no contention by plaintiff of any payment of premiums within the grace period of 31 days, or after the payment on 22 February 1955 to pay the insurance through 12 March 1955. Plaintiff alleges that Charlie C. Rivers has paid his insurance "through March of 1955." Her evidence shows that his last payment of premiums on 22 February 1955 paid his insurance through 12 March 1955, and that he died 5 June 1955. The grace period is not material here.

Plaintiff contends that the insurance on the life of her insured did not lapse, because of cessation of premium payments on account of the certificate issued to her insured, for the reason Charlie C. Rivers tendered payment in March 1955 to Linn Mills Company of his part of the premium due, and such payment was refused, and that such tender of payment was sufficient to prevent a forfeiture of the policy. Plaintiff cites in support of her contention cases where the tender was made to the insurance company. Such cases are not in point, for here the tender was made not to the insurance company but to the office manager

of Linn Mills Company. It is to be noted that plaintiff has not pleaded any waiver or estoppel in respect to such alleged tender. *Wright v. Ins. Co.*, 244 N.C. 361, 93 S.E. 2d 438.

While it is true that there is a diversity of opinion among the several jurisdictions as to whether in the case of Group Insurance Policies, the employer occupies the role of agent of the employees or of the insurer (Appleman Insurance Law & Practice, Vol. 1, sec. 43), it is definitely held with us that "the employer in a group insurance policy is not ordinarily the agent of the insurance company." *Dewease v. Ins. Co., supra; Haneline v. Casket Co.*, 238 N.C. 127, 76 S.E. 2d 372. And in *Haneline v. Casket Co., supra*, our Court quoted from *Boseman v. Conn. Gen. L. Ins. Co.*, 301 U.S. 196, 81 L. Ed. 1036, 110 A.L.R. 732, as follows: "Employers regard group insurance not only as protection at low cost for their employees but also as advantageous to themselves in that it makes for loyalty, lessens turn-over and the like. When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer but for their employees or for themselves." The U. S. Supreme Court in support of this statement cites in a note to the opinion a number of cases, included in which is our case of *Dewease v. Ins. Co., supra.* To the same effect see 44 C.J.S., Insurance, p. 800.

Whether Charlie C. Rivers tendered the Linn Mills Company, or its office manager, the premium due by him on his insurance for March 1955 is of no consequence, as Linn Mills Company was not an agent for defendant insurance company, and Linn Mills Company's refusal of the tender does not bind the defendant insurance company, and prevent it from declaring a forfeiture of the policy for nonpayment of premiums. *Magee v. Sun Life Assur. Co. of Canada*, 182 Miss. 287, 180 So. 797; *Hanaieff v. Equitable Life Assur. Soc. of U. S.*, 371 Pa. 560, 92 A. 2d 202; *Keane v. Aetna Life Ins. Co. of Hartford, Conn.*, 22 N. J. Super. 296, 91 A. 2d 875; *Duval v. Metropolitan L. Ins. Co.*, 82 N.H. 543, 136 A. 400, 50 A.L.R. 1276; *Leach v. Metropolitan L. Ins. Co.*, 124 Kan. 584, 261 P. 603, rehearing denied 125 Kan. 129, 263 P. 784; *Metropolitan Life Ins. Co. v. Thompson*, 203 Ark. 1103, 160 S.W. 2d 852; *Magee v. Equitable L. Assur. Soc. of the U. S.*, 62 N.D. 614, 244 N.W. 518, 85 A.L.R. 1457; 29 Am. Jur., Insurance, sec. 1379.

This Court said in *Moore v. Accident Assurance Corp.*, 173 N.C. 532, 92 S.E. 362: "And it is true that the insured is charged with notice of the terms of the policy affecting his rights under it, and among them, is the one as to the payment of premiums."

Charlie C. Rivers was charged with notice of the words in the certificate of insurance issued to him that his insurance did not at any time

provide paid-up insurance, cash or loan value. He knew he was not working after November 1954, and that he had earned no wages from which Linn Mills Company could deduct an amount to pay his part of the premiums due on his insurance. He knew from the plain language of the insurance certificate issued to him upon his life, that the insurance would cease automatically upon the cessation of premium payments, because he made the payments through 22 February 1955. In *McClain v. Provident Life & Accident Ins. Co., supra,* it is said: "It has been held that where the contract of insurance provides for the payment of premium installments from wages earned during a specified time, and there are not earned sufficient wages during that time with which to pay the installments, the policy will lapse. See 67 A.L.R. 180, 181, 185 *et seq.* However, in the present case, no wages were earned, and the employee was not working at the time of his death. See 67 A.L.R. 193, 194; 85 A.L.R. 755."

Plaintiff's evidence affirmatively shows that Charlie C. Rivers' certificate of insurance had ceased automatically and lapsed at the time of his death by reason of nonpayment of premiums, since the last payment of premiums was in February 1955 paying the insurance through 12 March 1955, and that Charlie C. Rivers died on 5 June 1955, and there is no evidence of any extension or waiver by the defendant.

However, plaintiff contends that the defendant having alleged nonpayment of premiums as a defense has the burden of sustaining the allegation by proper proof, and that a judgment of nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him. She cites in support of her contention. *Barnes v. Trust Co.*, 229 N.C. 409, 50 S.E. 2d 2. There is one exception to this rule, which is stated in *Hedgecock v. Ins. Co.*, 212 N.C. 638, 194 S.E. 86: "When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered." Plaintiff's evidence brings her case within the exception, when a judgment of nonsuit may be entered.

The extended death benefit provision of the insurance is not relevant to the facts of the case. Plaintiff does not contend in her brief that it has any application.

The conversion privilege clause of the policy affords no relief to the plaintiff, and she does not contend that it does. If this clause did apply to the facts, which we do not concede, Charlie C. Rivers made no effort to avail himself of it. This Court said in *Pearson v. Assurance Society,* 212 N.C. 731, 194 S.E. 661: "It (the conversion privilege clause) grants the insured employee a privilege or option under certain conditions therein stipulated. The insured did not exercise this option or privilege

by applying for such policy or by paying the required premium. The plaintiff, therefore, has no claim against the defendant by reason of the terms of this provision." See also *Adkins v. Aetna Life Ins. Co.*, 130 W. Va. 362, 43 S.E. 2d 372.

The terms of the insurance certificate issued to Charlie C. Rivers and of the master policy as to nonpayment of premiums are plain, clear and unambiguous, and of the essence of the contract, and they will be interpreted and enforced according to the terms of the policy in their usual, ordinary and accepted meaning. *Lineberger v. Trust Co., ante*, 166, 95 S.E. 2d 501; *Haneline v. Casket Co., supra; Motor Co. v. Ins. Co.*, 233 N.C. 251, 63 S.E. 2d 538. "It is our duty to construe policies of insurance as written, and not to rewrite them." *Scarboro v. Ins. Co.*, 242 N.C. 444, 88 S.E. 2d 133.

The lower court erred in overruling defendant's motion for judgment of nonsuit.

Reversed.

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

JOHNSON, J., not sitting.

OPAL B. McGILL, WIDOW & ADMX., ESTATE OF DUNCAN H. McGILL, JR., DEC'D, AND DEBORAH JANE McGILL, MINOR DAUGHTER, v. BISON FAST FREIGHT, INC., AND BITUMINOUS CASUALTY CORPORATION.

(Filed 1 February, 1957.)

1. Automobiles § 54a: Master and Servant § 39b—

Where the owner of a truck drives same on a trip in interstate commerce for an interstate carrier under a trip-lease agreement providing that the carrier's I.C.C. license plates should be used and the carrier retain control and direction over the truck, an assistant driver employed by the owner-lessor is an employee of the carrier within the coverage of the North Carolina Compensation Act. Further, if the owner-lessor be considered an independent contractor, but had less than five employees and no compensation insurance coverage, the carrier would still be liable under G.S. 97-19.

2. Executors and Administrators § 9: Death § 10: Compromise and Settlement § 1—

Ordinarily, an executor or administrator has the right to compromise any disputed or doubtful claim of his decedent, including a purely statu-

tory action for wrongful death, provided he acts honestly and exercises the care of an ordinarily prudent person.

3. Compromise and Settlement § 2: Master and Servant § 41—

An assistant driver of a truck on a trip in interstate commerce under a trip-lease agreement was fatally injured while the truck was being driven by the owner-lessor. Claim for wrongful death against the owner-lessor and the interstate carrier was settled by the widow of the assistant driver in her capacity as administratrix. *Held:* The compromise and settlement extinguishes the liability of the owner-lessor for the wrongful death of intestate and also bars the carrier from maintaining an action therefor on any right of subrogation, it having been a party thereto.

4. Compromise and Settlement § 2: Master and Servant § 47—

The widow of a deceased employee, in her capacity as administratrix, executed a compromise and settlement with the employer on a common law claim for wrongful death under the mistaken belief that the Compensation Act was not applicable. *Held:* The compromise and settlement bars the widow in her capacity as a dependent from recovery under the Workmen's Compensation Act.

5. Compromise and Settlement § 2—

A compromise and settlement negotiated in good faith by persons *sui juris* and represented by counsel will not be disturbed for mistake of law.

6. Compromise and Settlement § 1: Master and Servant § 53a—

Compromise and settlement of the common law claim of the administratrix of a deceased employee for the wrongful death of the employee, executed under the mistaken belief that the Workmen's Compensation Act was not applicable, will not be disturbed on the ground that the Industrial Commission did not approve such settlement, since the "settlement" contemplated by G.S. 97-17, G.S. 97-82, is a settlement in respect of the amount of compensation to which claimants are entitled under the Act.

7. Master and Servant § 43—

A minor dependent under 18 years of age and who is without guardian, trustee or committee, is not barred during such disability by failure to give notice of claim for compensation as required by G.S. 97-22, *et seq.* G.S. 97-50.

8. Master and Servant § 51—

Claim for compensation for a dependent under 18 years of age must be prosecuted in the dependent's name by a general guardian, and the administratrix of the deceased employee is a proper claimant only when there are no dependents, so that the joinder of the administratrix with the dependents in the prosecution of a claim will be treated as surplusage.

9. Master and Servant § 47—

The widow of a deceased employee executed a compromise and settlement of the common law claim for wrongful death against the employer under mistake of law that the Workmen's Compensation Act was not applicable. *Held:* The compromise and settlement does not bar claim under the Compensation Act of the deceased's child under 18 years of age

without guardian, since the administratrix had no authority to act for the dependent child except in respect of claims or causes of action vested in the administratrix as such. However, the child's recovery under the Act should be diminished to the extent of the benefits ultimately received by the child from the compromise and settlement.

10. Master and Servant § 39a—

Where the accident, resulting in an employee's death, occurs in another state, but the contract of employment was made in this State between the resident employee and the resident employer, and the contract of employment is not expressly for services exclusively outside of the State, the North Carolina Industrial Commission has jurisdiction. G.S. 97-36.

JOHNSON, J., not sitting.

APPEAL by defendants from *Hobgood, J.*, August Term, 1956, of LEE.

Claim for death benefits under Workmen's Compensation Act.

The findings of fact, conclusions of law and award made by the hearing Commissioner and thereafter adopted and affirmed by the full Commission and by the court, included the determination that Duncan H. McGill, Jr., died from injuries sustained by accident arising out of and in the course of his employment by Bison Fast Freight, Inc., hereinafter called Bison.

The decedent died 22 February, 1953, intestate, survived by his widow, Opal B. McGill, and one child, Deborah Jane McGill, then one year old.

It was stipulated that "Bituminous Casual Corporation was the compensation carrier for Bison Fast Freight, Inc., and was on the risk on February 22, 1953."

The award, affirmed by the court's judgment, provided, in substance, that the defendants pay: (1) compensation to said widow and child, share and share alike, at the rate of $30.00 per week, beginning as of 22 February, 1953, and continuing for a period of 260 weeks thereafter; (2) the sum of $200.00 as funeral benefits; (3) costs; and (4) an attorney's fee of $600.00, to be deducted from the accrued compensation due.

While operated by J. D. Matthews, the tractor-trailer in which decedent was riding, asleep, turned over near Sylvatus, Virginia, causing decedent's instant death.

Bison was, but Matthews was not, a common carrier by freight under Interstate Commerce Commission franchise. Matthews, the owner, had leased this tractor-trailer to Bison, "to be used by Lessee in transporting property from December 12, 1952, to December 31, 1953." Bison's I. C. C. license plates were attached.

The Lessor (Matthews) agreed, *inter alia*, to pay all costs in maintaining and operating the tractor-trailer, including "the driver'(s) salary," and to comply with "all the requirements of all applicable

State and Federal laws, rules and regulations of the Interstate Commerce Commission . . ."

It was agreed that "during the term of this lease, the said vehicle(s) shall be solely and exclusively under the direction and control of the Lessee who shall assume full common carrier responsibility (1) for loss or damage to cargo transported in such motor vehicle(s) and (2) for the operation of such vehicle."

Matthews received as compensation a percentage of the freight revenues received by Bison from the operation of the leased equipment. Ordinarily, Matthews, who was head driver, was accompanied by an assistant; and in such case the assistant's compensation was a percentage of the revenue.

Uncontradicted evidence is to the effect that Bison's instructions to Matthews were to take the load, then at Bison's place of business in Sanford, North Carolina, to Rittman, Ohio, unload it there Monday morning, and then go to Cincinnati, Ohio, pick up a load of sheet metal there and bring it back to Sanford by Tuesday; and that he could not carry out these instructions under Interstate Commerce Commission regulations unless accompanied by an assistant driver to take turns with him in the operation of the tractor-trailer.

The aforesaid instructions were given to Matthews on Saturday, 21 February. Decedent, a qualified driver, was employed to make the trip as Matthews' assistant.

They left Sanford on Saturday, 21 February, shortly before midnight. Decedent drove from Sanford to a trucking terminal near Sylvatus, Virginia, while Matthews slept, this trip taking approximately six hours. There they had breakfast and the tractor was serviced. When they left, Matthews took over the driving. Matthews had driven some 10 or 11 miles when the fatal accident occurred.

On 3 March, 1953, Mrs. Opal B. McGill, the widow, was appointed and qualified as administratrix of her husband's estate. The administration proceeding was before the Clerk of the Superior Court of Hoke County. As such administratrix, she filed with said clerk her verified petition dated 7 July, 1953, in which she set forth that she had been offered $3,500.00 "as settlement of her claim for the fatal injury" of her intestate; that, after full consideration, she was of the opinion that the offer was fair and reasonable and "that it would be to the best interest of the estate . . . that said offer be accepted"; and she prayed that said clerk authorize her to accept said offer "as full settlement and discharge of all claims against J. D. Matthews and Bison Fast Freight, Inc." and to execute and deliver to them "an absolute release." In accordance with her prayer, said clerk authorized the settlement. His order, dated 8 July, 1953, refers to her claim as a claim "for the wrongful death of Duncan H. McGill, Jr." The settle-

ment was consummated on 8 July, 1953. Bison's $3,500.00 check was payable jointly to "Mrs. Opal B. McGill, administratrix of the Estate of Duncan H. McGill, Jr." and her counsel. After deduction of attorney fee, the administratrix received $2,800.00 which, according to her testimony, is "a part of the assets of the estate of Duncan McGill." Incident to said settlement, Mrs. McGill as administratrix and individually executed a comprehensive full release, providing, *inter alia,* that she released and discharged Matthews and Bison from all claims, etc., "for, by reason of, or growing out of the death of the said Duncan H. McGill, Jr."

On 16 February, 1954, the Commission received its first notice of the present claim for compensation, to wit, a letter from counsel. Apparently, no notice was given to defendant carrier until May, 1954.

Defendants, in apt time, made and preserved exceptions to the findings of fact, conclusions of law and award; and, upon this appeal from said judgment, they bring forward numerous assignments of error. These relate principally to defendants' contentions that claimants' rights to compensation are barred (1) by said settlement, (2) by failure to give notice as required by G.S. 97-22, G.S. 97-23, and G.S. 97-24, and (3) by G.S. 97-36, the accident having occurred in Virginia.

John D. McConnell, Teague & Johnson, and Grady S. Patterson, Jr., for appellees.

Uzzell & Dumont for appellants.

BOBBITT, J. It is now established in this jurisdiction that an interstate carrier, which exercises its franchise rights by transporting its freight in leased equipment under leases such as that here involved, is liable in damages for injuries to third parties caused by the negligent operation of such equipment in the prosecution of such carrier's business. *Wood v. Miller* 226 N.C. 567, 39 S.E. 2d 608; *Motor Lines v. Johnson,* 231 N.C. 367, 57 S.E. 2d 388; *Eckard v. Johnson,* 235 N.C. 538, 70 S.E. 2d 488; *Hill v. Freight Carriers Corp.,* 235 N.C. 705, 71 S.E. 2d 133; *Newsome v. Surratt,* 237 N.C. 297, 74 S.E. 2d 732.

And, with specific reference to the Workmen's Compensation Act, this Court has held: 1. The dependents of a lessor-operator, who was transporting freight for the lessee, an interstate carrier, under authority of the lessee's I. C. C. franchise and license plates, were entitled to recover death benefit compensation from the lessee. *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71. 2. The dependents of the lessor's driver, whose death occurred while operating the leased equipment under like circumstances, were entitled to death benefit compensation from the lessee. *Roth v. McCord,* 232 N.C. 678, 62 S.E. 2d 64.

In the *Brown* and *Roth cases,* for the reasons stated, the death was regarded as arising out of and in the course of decedent's employment by the lessee. Here the decedent was an assistant driver, aboard the tractor-trailer but not operating it on the occasion of the mishap causing his fatal injuries. His status, with reference to the Act, was that of an employee of the lessee, whose death resulted from an accident arising out of and in the course of such employment. Hence, on this aspect of the case, the conclusion reached is that the dependents of McGill had the right to recover compensation under the Act from Bison and its compensation carrier.

No question is involved here as to the rights and liabilities of Bison and Matthews *inter se,* by reason of the terms of the lease agreement or otherwise. Compare: *Hill v. Freight Carriers Corp.,* 235 N.C. 705, 71 S.E. 2d 133; *Newsome v. Surratt, supra.*

It appears here that Matthews had no compensation insurance coverage; and, unless decedent is so considered, Matthews had no employees. Hence, if Matthews were considered an independent contractor, as defendants contend, it would seem that Bison would be liable for the payment of compensation under the Act. G.S. 97-19.

Even so, defendants contend that the settlement made by Opal B. McGill, individually and as administratrix, constitutes a complete bar to claimants' right to compensation under the Act. In considering this contention, the following must be kept in mind.

Since Matthews had less than five employees, the Act did not apply to him. G.S. 97-2(a). If McGill's death was caused by the negligence of Matthews in respect of the manner in which he operated the tractor-trailer, unquestionably *his administratrix* had a good cause of action against Matthews. G.S. 28-173. As to Bison, the only remedy was a proceeding by *his dependents* for compensation under the Act. G.S. 97-10; *Bright v. Motor Lines,* 212 N.C. 384, 193 S.E. 391; *Hunsucker v. Chair Co.,* 237 N.C. 559, 570-571, 75 S.E. 2d 768, and cases cited. As stated by *Barnhill, J.* (later *C. J.*): "While the rights of the employee, as against a third party after claim for compensation is filed, are limited, G.S. 97-10, there is nothing in the Act which denies him the right to waive his claim against his employer and pursue his remedy against the alleged tort-feasor by common law action for negligence." *Ward v. Bowles,* 228 N.C. 273, 275, 45 S.E. 2d 354.

Ordinarily, an executor or administrator has the right to compromise any disputed or doubtful claim of his decedent provided he acts honestly and exercises the care of an ordinarily prudent person. 33 C.J.S., Executors and Administrators, Sec. 181. "In the ordinary course of the administration all that is required of him is that he act in good faith and with such care, foresight and diligence as an ordinarily sensible and prudent man would act with his own property under like cir-

cumstances." *Higgins, J.*, in *Poindexter v. Bank,* 244 N.C. 191, 92 S.E. 2d 773. And this rule is applicable to a purely statutory cause of action for wrongful death. 16 Am. Jur., Death Sections 53 and 159. Acceptance of this rule in this jurisdiction is implied in *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908.

There is force in the contention that when the widow, individually and as administratrix, effected said settlement, irrespective of her misapprehension as to the law applicable to her rights as against Bison, she elected to extinguish the liability of Matthews by acceptance of the $3,500.00; that thereafter she had no further remedy against Matthews; and that Bison, if subrogated to the rights of the administratrix, would have no standing to prosecute a wrongful death action against Matthews, Bison having been a party to the settlement. The doctrine of election of remedies is discussed in *Surratt v. Insurance Agency,* 244 N.C. 121, 93 S.E. 2d 72, and in *Davis v. Hargett,* 244 N.C. 157, 92 S.E. 2d 782.

If we exclude Matthews from consideration, the situation as to Bison alone would be as follows: rather than two available inconsistent remedies, only one remedy was available; and the settlement was made in the belief that this one available remedy was an action for wrongful death. This belief, of course, was grounded on the idea that McGill was *not* an employee of Bison. Therefore, appellants contend, the widow cannot now assert that McGill was an employee of Bison. Compare *Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561.

We are constrained to hold that Mrs. Opal B. McGill, in respect of her right to recover compensation under the Act, is barred by said settlement and release.

It appears that the $3,500.00 settlement was negotiated and effected in good faith. Mrs. McGill was represented by counsel. The grounds upon which the defendants now base their contentions that McGill's dependents have no claim for compensation against Bison under the Act, and perhaps other factors not disclosed by the record, apparently lead the administratrix and her counsel to the considered opinion that the sole remedy available against Bison was an action to recover damages for alleged wrongful death. Unfortunately, the decision now reached by this Court was not available for their guidance. While it appears now that they were mistaken as to the applicable law, the fact remains that the $3,500.00 was paid and accepted in full settlement of all claims against both Bison and Matthews. No attack is made upon the settlement. Only the legal effect thereof as made is under consideration.

It is noted that the recovery by the administratrix for alleged wrongful death, except as to burial expenses, is for distribution equally between the widow and child. G.S. 28-173; G.S. 28-149(i). It is fur-

ther noted that, under the Act, the compensation payable would be to the widow and child, share and share alike, the award to provide for burial expenses not exceeding $400.00. G.S. 97-38; G.S. 97-39; *Wilson v. Construction Co.*, 243 N.C. 96, 89 S.E. 2d 864.

A compromise and settlement negotiated in good faith by persons *sui juris* and represented by counsel will not be disturbed by a mere mistake of law or mistake as to its legal effect. 15 C.J.S., Compromise and Settlement Section 36(c); 11 Am. Jur., Compromise and Settlement Section 31; *Dixie Lines v. Grannick*, 238 N.C. 552, 555, 556, 78 S.E. 2d 410. It is noted that in *Allgood v. Trust Co.*, 242 N.C. 506, 88 S.E. 2d 825, the basis of decision was that the evidence did not establish as a matter of law the defense of accord and satisfaction. Here the proceedings before the clerk and the release leave no room for doubt that a full and complete settlement was intended.

In accordance with claimants' contention, the court upheld the conclusion of law that the $3,500.00 was not a bar to the award of compensation herein because it "has never been submitted to or approved by the North Carolina Industrial Commission as provided by G.S. 97-17." We are constrained to hold that the only "settlement" contemplated by G.S. 97-17 and G.S. 97-82 is a settlement in respect of the amount of compensation to which claimants are entitled under the Act. Such a settlement is not involved here.

Since the widow is barred, defendants' contentions in respect of the failure to give notice as required by G.S. 97-22, G.S. 97-23, and G.S. 97-24, become immaterial. The minor child, for whom no general guardian has been appointed, is certainly not barred. G.S. 97-50 provides: "No limitation of time provided in this article for the giving of notice or making claim under this article shall run against any person who is mentally incompetent, or a minor dependent, as long as he has no guardian, trustee, or committee." While, for the purposes of the Act, a minor becomes *sui juris* upon attaining the age of 18 years, until then he may prosecute his proceeding for compensation only when represented by general guardian or other legal representative. *Lineberry v. Mebane*, 219 N.C. 257, 13 S.E. 2d 429. As to the dependent minor claimant, she is the real party in interest and the proceeding must be prosecuted in her name by general guardian. The administratrix of the decedent is the proper claimant in a proceeding for compensation only when there are no dependents, whole or partial. *Hunt v. State*, 201 N.C. 37, 158 S.E. 703; G.S. 97-40; G.S. 1-57. Apparently, whether the proceeding was properly constituted as indicated was not raised in several of the cases heretofore presented to this Court. In view of the foregoing, the presence of the administratrix as a claimant is surplusage; and in further proceedings herein the dependent minor claimant should appear by general guardian.

This leaves for consideration the effect, if any, of said settlement upon the award to be made in favor of the dependent minor claimant.

The settlement by the administratrix does not bar the dependent minor claimant for the simple reason that the administratrix had no authority to act for her except in respect of claims or causes of action vested in the administratrix as such. The widow, neither as administratrix nor as natural guardian, could conclude a settlement or execute a release that would bar the minor dependent's claim for compensation. Hence, the minor dependent is entitled to recover her one-half of the compensation payable under the Act.

Even so, as stated by *Schenck, J.*, in *Holland v. Utilities Co.*, 208 N.C. 289, 292, 180 S.E. 592; ". . . we think the weight of both authority and reason is to the effect that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage." *Preddy v. Britt*, 212 N.C. 719, 194 S.E. 494; *Smith v. Thompson*, 210 N.C. 672, 188 S.E. 395; *Hester v. Motor Lines*, 219 N.C. 743, 14 S.E. 2d 794.

The result is that the award in favor of the dependent minor should be diminished to the extent of the amount of the release consideration now held by the administratrix for distribution to said dependent minor and actually available for payment to a guardian for her.

We have considered each of defendant's other contentions, whereby they seek to defeat the present claim in its entirety. Brief reference will be made to the following:

We reject as untenable defendants' contention that decedent's death was not compensable under the Act because the fatal accident occurred in Virginia. The Commission had jurisdiction under G.S. 97-36. It appears affirmatively that the contract of employment was made in this State, that Bison's place of business was in this State, and that decedent resided in this State; and further, that decedent's employment "was not expressly for service exclusively outside of the state." *Aylor v. Barnes*, 242 N.C. 223, 87 S.E. 2d 269.

Incidental mention is made in defendants' brief to their contention "that the Commission's findings of fact and conclusions of law in reference to the deceased's average weekly wage is determined contrary to the provisions of G.S. 97-2(e)." Suffice to say, the evidence, in our opinion, supports the Commission in this respect.

Moreover, the Commission's denial of defendants' motion that Prunty Motor Express be joined as a defendant herein was fully justified by the evidence.

By reason of the foregoing, the judgment of the court below is vacated and the cause is remanded, to the end that further proceedings

may be had and an award made for the benefit of said minor claimant in accordance with the law as stated herein.

Judgment vacated and cause remanded.

JOHNSON, J., not sitting.

MAXWELL H. THOMPSON AND JAMES G. LIPE, T/D/A THOMPSON-LIPE COMPANY, v. D. WALTER TURNER.

(Filed 1 February, 1957.)

1. Sales § 11—Consummation of written agreement to sell personalty need not be established by any writing.

Allegations and evidence tending to establish a written contract to sell a business, supported by the payment of a part of the purchase price as a binder, which writing stipulated that price of the fixtures and equipment had been agreed upon but that price of the merchandise should be agreed upon, and the business turned over to the purchasers when the financial arrangements had been completed, together with allegations and evidence that thereafter a substantial sum was paid to the seller by the purchasers and the business turned over to the purchasers, *is held* sufficient to be submitted to the jury on the question of a consummated sale of the business, it not being necessary that the consummation of the sale be evidenced by any writing.

2. Contracts § 7a—

A covenant by the seller of a business not to engage in competition with the purchaser thereof is valid if the covenant is reasonable in protecting the purchaser from competition from his vendor without detriment to the public.

3. Same: Evidence § 39—

A covenant by the seller of a business not to engage in competition with the purchaser in the territory "now covered" is not void for indefiniteness of description when the territory may be specifically located by parol evidence. Such parol evidence does not contradict the terms of the writing, but merely makes them definite and certain.

JOHNSON, J., not sitting.

APPEAL by defendant from *Sink, E. J.*, April 1956 Term of CALDWELL.

This action was instituted in October 1955 to recover damages for breach of contract and for false and defamatory statements concerning plaintiffs' business and to enjoin further breaches and further utterances of defamatory and slanderous statements.

On 2 July 1947 defendant, designated as first party, and plaintiffs, designated as second parties, entered into a written contract, the material parts of which follow:

"The party of the first part agrees to sell to the parties of the second part his business known as the Walter Turner Company, situated in the Martinat Building at 324 West Avenue, Lenoir, North Carolina, which includes stock, fixtures, rolling stock and all good will and established business to the parties of the second part for the values agreed upon, and in consideration of this agreement the party of the first part acknowledges receipt of Two Thousand Dollars ($2,000.00) to apply on the total price, and as a binder on the deal.

"List of fixtures and equipment has been priced and agreed upon. Merchandise is to be listed at cost subject to price adjustments on certain slow moving items satisfactory to all parties concerned.

"The party of the first part agrees to turn the business over to the parties of the second part when financial arrangements, as agreed upon, has been met, and which must be completed within forty days from the above date.

"The party of the first part further agrees that he will not re-enter the wholesale coffee, tea and specialty business in Lenoir nor the territory now covered by him nor will he aid or assist any other person in doing so. However, he reserves the right to manufacture and sell to Wholesalers throughout any part of the country a brand of coffee known as MILLION DOLLAR. But it is further agreed in such a case that the parties of the second part are to have exclusive rights to sell this brand in their own territory or to manufacture same if they so desire, but for sale only in said territory."

The complaint averred that defendant sold, transferred, and conveyed the business pursuant to said contract; that plaintiffs had paid the price as agreed upon and had fully performed all of the conditions required by the contract; that defendant uttered "false and defamatory statements concerning the plaintiffs to the effect that the plaintiffs are manufacturing and selling the MILLION DOLLAR brand of coffee without any legal right to do so and that the coffee they are selling under such brand name is terrible . . ." Plaintiffs further alleged that defendant sought to prevent them from getting bags to sack the coffee and, in violation of his contract, had been selling coffee, tea, and other specialties to plaintiffs' customers in the territory sold to them by defendant.

Defendant answered and admitted that he executed the agreement of 2 July 1947. He denied the instrument was subject to the interpretation placed on it by plaintiffs. In response to the allegation that plaintiffs had paid the full amount agreed upon, the answer "admitted the plaintiffs have paid the amount of money as named . . ." The answer also admitted defendant had written two letters to a manufac-

turer of bags. Except for these admissions and an admission as to the residence of plaintiffs and defendants, the answer denies all other allegations of the complaint.

The court submitted issues which were answered by the jury as follows:

"1. Did the defendant sell and convey his wholesale coffee, tea and specialties business to the plaintiffs and agree not to re-enter said business within the counties of Alexander, Ashe, Avery, Burke, Caldwell, McDowell, Mitchell, Watauga, Wilkes and Yancey, as alleged in the Complaint?

"Answer: Yes.

"2. If so, did the defendant breach his contract with the plaintiffs, as alleged in the Complaint?

"Answer: Yes.

"3. If so, what amount, if any, are the plaintiffs entitled to recover of the defendant for such breach of contract?

"Answer: $3,000.00."

Judgment was rendered on the verdict and defendant appeals.

Williams & Whisnant for plaintiff appellees.

L. H. Wall and Hal B. Adams for defendant appellant.

RODMAN, J. Defendant's brief, after listing forty-one assignments of error composed of forty-two exceptions, says: "All of the assignments of error heretofore listed and brought forward are insisted upon, but we especially invite the Court's attention to the following:" Eight assignments of error are then listed as meriting special attention.

We do not deem it necessary to deal separately with the designated assignments of error consisting of motions to nonsuit and exceptions to the charge. We understand them to present two legal questions.

The first question is: Have plaintiffs alleged and proved a consummated sale under the paper writing of 2 July 1947? Defendant in his brief insists that plaintiffs have only pleaded and proven an option to purchase and not a consummated sale. This position of defendant results from a misconstruction of the pleadings, the effect of the testimony, and the theory on which the case was tried. The complaint, in section 2, recites the execution of the written contract and the substance of its provisions and that defendant transferred and conveyed his business pursuant thereto. Section 3 reads: "That the plaintiffs have paid full consideration agreed upon and have duly performed each and all of the conditions of the written contract on their part to be performed." The corresponding section of the answer is: "It is admitted the plaintiffs have paid the amount of money as named; all other allegations of paragraph 3 are denied." Fairly interpreted, the complaint did not

merely allege that plaintiffs had paid the $2,000 as a binder on the deal as recited in the paper writing of 2 July 1947, but that plaintiffs had paid the total purchase price ascertained after the inventory referred to in that paper had been taken; and plaintiffs had acquired the business pursuant to the terms of the written contract. The case was tried on that theory. All the evidence shows that on 1 August 1947 plaintiffs paid a substantial sum to defendant at which time the business was turned over to plaintiffs by defendant. The testimony of the witness Wise, who worked for defendant until 1 August, is to that effect. Plaintiff Lipe was asked what amount he paid under the contract for the business of D. Walter Turner. He replied: "Well, $2,000 was paid as a binder, and then the balance was paid. Q. How much was paid? A. Approximately $25,000.00." Speaking with reference to the payment of the consideration, he said: "It was paid in cash, and we took over the business August 1, 1947." Defendant himself nowhere controverts the fact that the sale was consummated as provided by the paper of 2 July 1947. He says: "Yes, I wrote the contract, the paper writing, and I signed it. I don't recall how much they paid me for the business; I don't recall what the amount was. Yes, they paid me a substantial amount. No, I don't know it was as much as $20,000; I don't know that. I have already told you I didn't know. Yes, they paid as much as $5,000; they paid as much as $10,000 . . ." He further testified: ". . . when I sold out, I did not go to Mr. Wise and Mr. Ross and ask them to stay on and work the counties that they had been working." Again he testified: "Prior to the time I sold it, I could have sold it to two people . . ." To show the sale had been consummated it was not necessary to show the minute details necessary to determine the exact price paid under the terms of the contract. If, as the testimony establishes, the sale was consummated, it was immaterial whether the amount paid and received was approximately $25,000, as testified by plaintiffs, or merely more than $10,000, as testified by defendants.

It was not necessary when the sale was consummated pursuant to the contract of 2 July 1947 to have any paper writing to evidence that fact. The property passed by delivery when the terms of the contract as written by defendant himself had been complied with. There is testimony in the record coming from the defendant to the effect that he delivered the merchandise to plaintiffs.

This brings us to the second question, namely: Is the territory in which defendant contracted not to engage in business void for failure of description?

Defendant does not assert that the contract is void as being in restraint of trade and hence contrary to public policy. Contracts for the sale of a business containing as an incident to the sale a covenant

not to engage in business in competition with the vendee in the area served by the business are recognized as valid when reasonable. The test of a covenant is its reasonableness in protecting the purchaser from competition from his vendor without detriment to the public. *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910; *Sonotone Corporation v. Baldwin*, 227 N.C. 387, 42 S.E. 2d 352; *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154; *Faust v. Rohr*, 166 N.C. 187, 81 S.E. 1096; *Wooten v. Harris*, 153 N.C. 43, 68 S.E. 898; *Shute v. Heath*, 131 N.C. 281; *King v. Fountain*, 126 N.C. 196; *Kramer v. Old*, 119 N.C. 1; 36 Am. Jur. 537.

Defendant's position is that the contract does not describe the area in which defendant is prohibited from competing with sufficient accuracy to identify and locate it. The defendant cites, in support of his position, *Hauser v. Harding*, 126 N.C. 295. There the area was described as "the territory surrounding Yadkinville." The Court said: "The territory surrounding Yadkinville—the language of the contract—is so uncertain as to be incapable of being marked out or being identified. Such language does not in law define a prescribed territory. We know of no rule by which the territory could be laid off."

In *Shute v. Heath, supra*, the territory was described as "any territory now occupied by them or from which they secure their patronage." The Court held the description was not susceptible of location. Manifestly that is so because where the purchaser might secure patronage in the future is not something that could be determined when the contract was entered into. That case expressly recognizes the doctrine that if a description suffices to meet the test necessary for a valid conveyance of real estate, it is sufficiently accurate to meet the test of area which limits the vendor's right to compete with the purchaser.

The evidence for the plaintiffs identifies the territory in which defendant operated at the time of the sale as composed of the ten counties named in the issue. Plaintiffs testified that these were the counties which comprised the territory served by defendant in July 1947. In addition to the testimony of plaintiffs, former employees of defendant testified as to the territory in which defendant operated at the time of the sale. Defendant, a witness in his own behalf, did not specifically deny that the counties enumerated in the issue were the counties covered by him in July 1947. He testified: "I was not to sell any merchandise of any kind within the territory where I sold to the plaintiffs, within their territory. I don't know just what the territory was, all of the counties it included, but I know most of the counties, in the territory . . ." It did not, as defendant suggests, contradict the terms of the written contract to show by parol what counties the defendant was operating in at the time of the sale in 1947. This was a fact susceptible

of accurate determination and when shown by parol fixed the bounds of the area in which defendant had contracted not to compete with plaintiffs. This sufficed to meet the test. *Skipper v. Yow,* 238 N.C. 659, 78 S.E. 2d 600; *Linder v. Horne,* 237 N.C. 129, 74 S.E. 2d 227; *Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29; *Self Help Corporation v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Lee v. Barefoot,* 196 N.C. 107, 144 S.E. 547; *Norwood v. Totten,* 166 N.C. 648, 82 S.E. 951.

The crucial question in this case was not what was the area in which competition was prohibited, but had defendant under the guise of a manufacturer of coffee in fact sought, as a wholesale merchant, to wean from plaintiffs, retail merchants, former customers of defendant. The jury has found that fact in accordance with the contentions of plaintiffs.

We have given consideration to all the other exceptions and assignments of error but discover nothing which would justify a new trial. There is

No error.

JOHNSON, J., not sitting.

THOMAS H. BRADLEY v. GEORGIA BRADLEY.

(Filed 1 February, 1957.)

1. Easement § 2—

An easement by implication is created upon separation of title when a use has been so long continued and is so obvious as to show it was meant to be permanent, and the easement is necessary to the beneficial enjoyment of the land conveyed.

2. Same—

In plaintiff's action to establish an easement by implication, plaintiff's evidence which discloses that the use of the claimed easement would be a mere convenience in providing a shorter way to other lands owned by plaintiff, is insufficient, since the grant of an easement by implication cannot be based upon mere convenience but is to be implied only where the easement is necessary for the full enjoyment of the land granted.

3. Same—

An easement by implication arises only in relation to the land granted in the severance of title, and may not rest upon the convenient use of lands acquired by claimant from other sources.

JOHNSON, J., not sitting.

APPEAL by defendant from *Hall, J.*, March Term 1956 of ORANGE.

This is an action to establish an easement by implication.

In 1940 the defendant, Georgia Bradley, was the owner of a farm containing 164 acres located in Cedar Grove Township, Orange County, North Carolina, situated on both sides of a public highway known as the Mebane-Carr Road, hereinafter referred to as the G. Bradley farm. Also in 1940 Will Tate was the owner of land adjoining the G. Bradley farm on the south that fronted on the Mebane-Carr Road, and A. H. Whitted was the owner of land adjoining the G. Bradley farm on the west that is separated from the Mebane-Carr Road by the G. Bradley farm but fronts on another public road.

In 1940 the plaintiff, Thomas H. Bradley, negotiated with all three of the above landowners for the purchase of land from each of them and in fact did purchase two acres from the defendant, Georgia Bradley, hereinafter referred to as the Bradley lot, 2-15/100 acres from Will Tate, hereinafter referred to as the Tate lot, and 75 acres from A. H. Whitted, hereinafter referred to as the Whitted land. The Bradley lot and the Tate lot are adjoining parcels and front on the Mebane-Carr Road. The Whitted land adjoins the G. Bradley farm on the west and is separated from the Bradley and Tate lots by lands of the G. Bradley farm. The distance across the G. Bradley farm from the Bradley and Tate lots to the Whitted land is approximately 915 feet.

Prior to 1940, the plaintiff alleges and contends there was a country road which turned off the Mebane-Carr Road near the southern boundary of the G. Bradley farm and ran westward through the two-acre parcel subsequently conveyed to the plaintiff and referred to herein as the Bradley lot, into the interior and across the G. Bradley farm and into and across the Whitted land and Lot No. 4, being the Richmond tract purchased by the plaintiff in 1942. Thence through Lot No. 5, on which the Mt. Zion Christian Church is located, and from there to a public road as shown on a map introduced in evidence by plaintiff and marked "Plaintiff's Exhibit A."

On the other hand, the defendant alleges and contends that prior to the sale of the two acres of land to plaintiff by the defendant, the road in controversy was only a private farm road, used by the defendant as a means of access to cultivated fields located in the interior of the G. Bradley farm; that occasionally neighbors, including the plaintiff, have used this passageway with the express or implied permission of the defendant, and said passageway has never been a public way and has never been used by the public or anyone regularly, under claim of right or otherwise; that after the defendant sold the two-acre lot to plaintiff, the defendant's tenant closed that part of the private farm road that ran across the two-acre lot and relocated it east of the Brad-

ley lot on the defendant's premises. The closed portion of the road was later reopened by consent of the parties; the defendant, however, continued to use the relocated portion of the road.

The plaintiff offered evidence tending to show that for many years the road led from the public highway through defendant's farm to the Whitted land and was used by the owner of each for the benefit of both farms.

The defendant's evidence tended to show that the road never extended beyond the defendant's land until the plaintiff extended it across the Whitted land after he built on the lots purchased by him on the Mebane-Carr Road in 1942 or 1943. The defendant's evidence is to the further effect that the road was extended pursuant to the verbal permission given by the defendant for the plaintiff to go through her field to work, provided he would haul no heavy loads through it or cut up her field.

Plaintiff testified, "I asked Miss Georgia Bradley and she agreed to me crossing on the road that had been there. She said, 'We use the road.'" This witness was asked if he didn't try to get the defendant to put this permission in writing when he purchased the land from her, and his answer was, "Yes, I asked her." The plaintiff was then asked the following question: "Did you ask her for permission to go across her place? A. Yes sir, I thought it looked better. No, I didn't pay her anything for it and she didn't give me any deed." According to the plaintiff's evidence he paid the defendant $40.00 for the two acres fronting on the Mebane-Carr Road, which is a hard surfaced highway. The plaintiff and the defendant are first cousins.

The plaintiff and the tenant of the defendant, who is a brother of the defendant, had a dispute over some timber and the tenant, with the permission of the defendant, again closed the road at the point where the original road ran across the land purchased from the defendant by the plaintiff, to the Mebane-Carr Road.

The following issue was submitted to the jury and answered in the affirmative: "Does the plaintiff have an easement over the roadway across the lands of the defendant, as alleged in the complaint?"

From the judgment entered on the verdict, the defendant appeals, assigning error.

Bonner D. Sawyer and W. R. Dalton, Jr., for appellee.
Long, Ridge, Harris & Walker for appellant.

DENNY, J. We shall first consider defendant's assignment of error No. 8, based on exceptions to the refusal of the court below to allow her motion for judgment as of nonsuit interposed at the conclusion of plaintiff's evidence and renewed at the close of all the evidence.

The plaintiff's evidence in the trial below was for the most part of the character usually offered to establish an easement by prescription. However, having failed to negative permissive user, on a previous hearing for injunctive relief, based on allegations in his original complaint to the effect that the plaintiff and his predecessors in title had used the road in controversy for more than fifty years, which use had been open, adverse, notorious, continuous and uninterrupted, except when the defendant or her agent or employees blocked the road by cutting trees across it, he amended his complaint and alleged an easement by implication.

The plaintiff concedes he is not entitled to an easement by necessity. In fact, the record discloses that the plaintiff may reach the Whitted land by traveling a few hundred yards south from his home on the Mebane-Carr Road and then west over an improved highway which runs through the defendant's land. This public road constitutes the entire southern boundary of the Whitted land. The plaintiff may also reach the Whitted land by traveling over the Mebane-Carr Road in a northerly direction from his home to a public road which runs from the Mebane-Carr Road in a northwesterly direction along the Mt. Zion Christian Church lot, then over a public road which runs through the church lot, across the Richmond tract to the Whitted land.

The law relating to the creation of easements by implication is well established in this and other jurisdictions. In 17 Am. Jur., Easements, section 33, page 945, *et seq.*, it is said: "It is a well-settled rule that where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of the severance, is in use and is reasonably necessary for the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law. . . . The underlying basis of the rule is that unless the contrary is provided, all privileges and appurtenances as are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant."

There are three essentials to the creation of an easement by implication of law upon severance of title. They are: (1) A separation of the title; (2) before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. "Separation of title implies, of course, unity of ownership at some former time as the foundation of the right. The easement derives its origin from a grant and cannot legally exist where neither the party

claiming it nor the owner of the land over which it is claimed, nor anyone under whom they or either of them claim, was ever seized of both tracts of land. This unity of title must have amounted to absolute ownership of both the *quasi*-dominant and *quasi*-servient tenements." 17 Am. Jur., Easements, section 34, page 948; *Barwick v. Rouse, ante*, 391, 95 S.E. 2d 869; *Spruill v. Nixon*, 238 N.C. 523, 78 S.E. 2d 323; *Green v. Barbee*, 238 N.C. 77, 76 S.E. 2d 307, 46 A.L.R. 2d 455; *Ferrell v. Trust Co.*, 221 N.C. 432, 20 S.E. 2d 329; *Carmon v. Dick*, 170 N.C. 305, 87 S.E. 224.

In the instant case, when we apply the law to the facts, it is clear that before the plaintiff would be entitled to an easement by implication over the premises of the defendant, it would be necessary for him to establish by the greater weight of the evidence that such an easement is necessary to the beneficial enjoyment of the land granted to him by the defendant. There is no evidence on this record to support the view that an easement across the lands of the defendant is necessary or would add to the beneficial enjoyment of the land conveyed to the plaintiff by the defendant. *Green v. Barbee, supra; Milliken v. Denny*, 141 N.C. 224, 53 S.E. 867. The only possible beneficial use that the plaintiff could derive from such an easement would be to give him a shorter and more convenient way to the Whitted land. "The grant of an easement cannot be implied from convenience, but is only implied where it is necessary to the full enjoyment of the thing granted." Thompson on Real Property, Permanent Edition, Volume 1, section 337, page 544.

An easement by implication of law extends only to the land granted or that retained, and not to land acquired from other sources. And there is no contention on the part of the plaintiff that there has ever been unity of title of the G. Bradley farm and the Whitted land. Moreover, aside from the evidence with respect to an easement by implication, the plaintiff's own testimony is sufficient to sustain the view that his use of the road across the defendant's land since 1940 has been permissive.

The facts here are distinguishable from those involved in the case of *Packard v. Smart*, 224 N.C. 480, 31 S.E. 2d 517, 155 A.L.R. 536, and other cases cited and relied upon by the plaintiff.

The defendant's motion for judgment as of nonsuit should have been allowed. The judgment of the court below is

Reversed.

JOHNSON, J., not sitting.

MURRY LEE MESIMORE AND MARION MARLOW MESIMORE v. A. B. PALMER; C. D. COOK AND WIFE, ELTHIE M. COOK; J. LEWIS PATTERSON AND WIFE, BLANCHE B. PATTERSON; AND ARNOLD FRANKLIN ABERNETHY AND WIFE, BILLIE MENSER ABERNETHY.

(Filed 1 February, 1957.)

1. Evidence § 25—

Where the issue raised by the pleadings and evidence is whether lessor waived breach of the lease, evidence offered by lessees for the purpose of showing that there had been no breach is irrelevant to the issue and properly excluded.

2. Appeal and Error § 41—

Where lessees rely upon waiver of breach of the lease contract, the exclusion of evidence as to negotiations between lessor and one of lessees in regard to a collateral dispute, relevant solely because settlement thereof was made to depend upon the continuance of the lease, is harmless even if such evidence was competent, since there is nothing in the excluded evidence to show waiver.

3. Trial § 36—

The allegations set forth waiver by lessor of breach of the lease conditions on a specified date. *Held:* The refusal of the court to submit an issue relative to the sufficiency of notice of default at a subsequent date is proper, since the trial must be limited to matters put into dispute by the pleadings.

JOHNSON, J., not sitting.

APPEAL by plaintiffs from *Crissman, J.*, June Term 1956 of CABARRUS.

This action was begun 15 October 1955. The complaint alleged defendants Palmer, Cook, and Patterson, in 1953, leased to plaintiffs and defendants Abernethy a parcel of land with an option to purchase, that lessors asserted a default and forfeiture under the terms of the lease when in fact there was no default. They asked for a declaratory judgment. The defendants demurred for failure to state a cause of action. The demurrer was sustained whereupon plaintiffs filed an amended complaint.

Attached to and made a part of the amended complaint was a lease for a term of five years to plaintiffs and defendants Abernethy. The right to occupy was conditioned upon the payment of semiannual installments of rent and other expenditures made obligatory on lessees. The amended complaint then alleged on 22 August 1955 lessors had notified lessees of the termination of the lease for failure to comply with its provisions when in truth and in fact plaintiffs had fully complied with all the terms of the lease; that the demised premises were fit and intended for agricultural purposes and were so used or attempted

to be used by lessees, but because of the wrongful assertion of default they were unable to obtain the necessary credit on which to farm. Defendants Abernethy, joint lessees with plaintiffs, were made parties defendant because of their refusal to become plaintiffs. Based on the complaint plaintiffs prayed that the court adjudge they were not in default, that lessors had no right to terminate the lease and option to purchase and that a judgment declaratory of the rights of the parties be entered as provided by G.S. 1-253.

Defendants Palmer, Cook, and Patterson answered. They admitted the execution of the lease and averred lessees had breached the covenants therein contained in numerous particulars set out in detail in the answer: among others, failure to pay rents in installments due August 1953 and all installments due in 1954 and 1955, and because of lessees' failure to comply with the provisions of the lease they had, on 22 August 1955, notified lessees of the termination of the lease; and notwithstanding such notice, lessees continued in default. They averred that defendants Abernethy had, on 1 December 1955, released and quitclaimed all rights which they might have to the lessors. The answer prayed that lessors be adjudged the owners and entitled to immediate possession of the premises and for a monetary judgment to satisfy rents accrued and moneys advanced for plaintiffs.

Defendants Abernethy, in March 1956, filed an answer disclaiming any interest in the controversy asserting they had, on 1 December 1955, relinquished to lessors any claim which they could assert.

Plaintiffs replied to the answer of the defendants Palmer, Cook, and Patterson. They admit that lessees had defaulted in their obligations under the lease. They aver that the defaults were occasioned by controversies which developed between plaintiffs and the defendants Abernethy, the lessees of the property. They allege that in July 1955 lessors agreed to waive the defaults which had then occurred if lessees would settle their controversies and carry out the terms of the lease; that they settled and adjusted their controversy with defendants Abernethy but lessors repudiated their agreement and refused to permit plaintiffs to comply with the lease and option. They allege if they are not entitled to specific performance they are entitled to damages in the sum of $75,000 for breach of the contract.

Defendants, lessors, at the conclusion of the evidence, announced they would not seek judgment for the rents and other sums asserted to be owing by lessees.

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

"1. Have the plaintiffs complied with the lease-option contract referred to in the Complaint?

"Answer: No.

"2. Did the defendants in July, 1955, orally agree that the plaintiffs might continue in the carrying out of the lease-option contract and be reinvested with the original rights thereunder upon certain conditions, as alleged by the plaintiffs?

"Answer: No.

"3. If so, did the plaintiffs offer to comply with the terms of such oral agreement?

"Answer: ....."

The court rendered judgment declaring the lessors owners and entitled to the possession of the lands described in the lease. Plaintiffs appealed.

Richard M. Welling for plaintiff appellants.

John Hugh Williams for defendant appellees.

RODMAN, J. Plaintiffs' first assignment of error is to the exclusion of evidence as to the value of the demised premises. We are unable to perceive any relevancy which the proffered testimony could have to the issues. Plaintiffs assert that it was relevant and material in showing the nature and extent of the breach. We do not agree, but if it should be conceded, the answer is that plaintiffs, after considerable maneuvering, selected the field of battle. That field was waiver and not denial of the breach. Hence evidence offered to show there was no breach is irrelevant.

Plaintiff Murry Mesimore testified that a controversy developed between him and Abernethy late in 1954 or early in 1955. Abernethy had said he was going to quit farming. Plaintiff employed counsel to represent him in the controversy with Abernethy. The attorney so employed conferred in July 1955 with defendant Palmer. The asserted agreement to waive past defaults is alleged to have occurred in that conversation.

Plaintiffs' second assignment of error is composed of exceptions to the exclusion of evidence relating to the controversy between plaintiff and Abernethy and efforts to settle that controversy. The evidence objected to and excluded was either later admitted or was not material to the issue of waiver. Litigation was pending in Mecklenburg County between Mesimore and Abernethy. Basically the evidence offered and excluded consisted of letters between counsel in that suit in which offers and counteroffers of settlement were made. There is no reference to lessors, defendants in this action, until a letter of 10 September 1955 when counsel for plaintiff Mesimore wrote counsel for Abernethy agreeing to settle that litigation for $4,500 but conditioning his offer as follows:

"(1) That the case will be continued for a period of ninety days so that Mr. Mesimore can make a settlement of $4500.00.

"(2) The payment of $4500.00 is conditioned expressly upon satisfactory arrangements with Palmer and his two associates, Patterson and Cook, for the contract between them, on one side, and Abernathy and Mesimore on the other side to be placed back in full force and effect, for if they. Palmer, Patterson and Cook, refuse to revive the contract, and since there has been a violation of the same, that is, a default by Abernathy and Mesimore in the payment of the installments, neither Mesimore nor Abernathy, in legal contemplation, would probably have any further interest in the realty, or at least it would be very difficult for Abernathy and/or Mesimore to require conveyance of the land even though all the conditions and terms of the contract were complied with at this time. In other words, Mesimore is not going to pay $4500.00, and *by* a lawsuit, the outcome of which is very doubtful would be in his favor."

In a succeeding paragraph of that letter counsel for Mesimore reiterates his statement that his agreement to pay the $4500 is conditioned upon his being able to effectuate a satisfactory settlement with defendant lessors.

We find nothing in the evidence excluded which might lead the jury to conclude that defendants had waived the payment of the rent and other obligations of lessees. If error be conceded, it is assuredly harmless. Harmless error is not sufficient. *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657.

Plaintiffs' third assignment of error relates to the refusal of the court to submit an issue as to the sufficiency of the notice of 22 August 1955 to meet the terms of the lease in declaring a default. The original complaint alleged that lessees were notified in August that lessors had terminated the lease because of asserted defaults when in truth and in fact lessees had not defaulted. The answer alleged that due notice of termination was given 22 August 1955 and alleged in detail the manner in which lessees had failed to comply. Plaintiffs replied, admitting that lessees had not complied with their obligations under the contract. They then asserted as a basis for recovery that lessors had, in July 1955, waived any rights they might have to declare a default under the contract for "arrearities" and partial non performance by lessees. The reply thus in effect became the complaint. The issues arose on allegations of waiver of right to declare a forfeiture and denial of any agreement to waive. There is no allegation that lessors waived any breach occurring after July 1955. On the contrary, the allegation is expressly limited to July 1955 and prior thereto. The pleadings determine the issues, and the trial must be limited to the matters put in dispute by the pleadings. *Bowen v. Darden*, 233 N.C. 443, 64 S.E. 2d 285; *Andrews*

v. Bruton, 242 N.C. 93, 86 S.E. 2d 786. The issues which the court submitted to the jury were proper for a determination of the factual dispute.

The case was tried upon the theory which plaintiffs selected. No exception was taken to the charge of the court. The jury has found the facts adverse to plaintiffs' contention. The motions to set aside the verdict and for a new trial are formal. There is

No error.

JOHNSON, J., not sitting.

BRAGG INVESTMENT COMPANY, INC., v. CUMBERLAND COUNTY AND R. E. NIMOCKS, TREASURER OF CUMBERLAND COUNTY.

(Filed 1 February, 1957.)

1. Taxation § 19½—

Fixtures and improvements placed upon lands in a military reservation leased from the Federal Government, as well as the value of the leasehold estate, are subject to taxation in this State, Congress having waived any immunity of such property from taxation. 10 U.S.C.A. 1270d.

2. Taxation § 19—

All property privately owned within this State is subject to taxation unless exempt by strict construction of pertinent statute.

3. Taxation §§ 26, 26½—

Structures and improvements, together with stoves and refrigerators placed by lessee on lands within a military reservation leased from the Federal Government, are subject to taxation by the county in which the property is situate, the improvements as realty, and the stoves and refrigerators as tangible personal property. G.S. 105-306(7), G.S. 105-306 (24), G.S. 105-272(30), G.S. 105-279(1).

4. Landlord and Tenant § 1—

A lease is a chattel real, and as such is a species of intangible personal property.

5. Taxation § 26—

The value of a leasehold estate is subject to *ad valorem* tax and not to the State intangible tax.

JOHNSON, J., not sitting.

APPEAL by plaintiff from a judgment rendered by *Nimocks, J.,* 3 April 1956 pursuant to a stipulation entered into November 1955 Term of CUMBERLAND.

Plaintiff seeks to recover the sum of $24,882.23 taxes and interest paid under protest.

On 19 April 1950 the Secretary of the Army leased to plaintiff approximately 120 acres in Cumberland County, a part of Fort Bragg, a military reservation of the United States. The lease was made under the authority vested in the Secretary by the Act of Congress of 5 August 1947 (10 U.S.C.A. 1270-1270d). The lease was made to effectuate the purposes of Title VIII of the National Housing Act (12 U.S.C.A. 1748), by constructing on the land demised approximately 500 housing units. The lease provides for a term of 75 years at an annual rental of $359.01. Acting under the lease, plaintiff, a North Carolina Corporation proceeded to erect the housing units. It installed in each of the units an electric stove and refrigerator. Under the terms of the lease, military and civilian personnel of the Army, Navy, Marine Corps, and Air Force are to have priority in the right to rent and occupy the units. Provisions are made to protect occupants of the units from exorbitant rents.

The provisions of the lease deemed pertinent to this inquiry follow:

"5. That the Lessee shall neither transfer nor assign this lease without the prior written approval of the said District Engineer. This provision shall not apply to the leasing of the individual units to tenants or to the placing of Deeds of Trust, mortgages or similar liens on the leased premises or to voluntary or involuntary transfers in pursuance of such security instruments or to any transfer in pursuance of, or subsequent to, any transfer of the property under the contract or mortgage insurance."

"8. That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this Lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased property. In the event any taxes, assessments or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the Government and included in this Lease (as opposed to the leasehold interest of the Lessee therein), this Lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his lease-hold interest in the Leased Property prior to the granting of such consent by the Congress of the United States . . ."

"11. That title to all improvements constructed upon the leased premises by the Lessee, in accordance with the terms of this Lease, shall during the term of this lease remain in the Lessee. Upon the expiration

of this Lease, or earlier termination, unless the lessee shall elect to remove the improvements and restore the premises, all improvements made upon the leased premises shall become the property of the Government without compensation."

Cumberland County notified plaintiff that it would assess the property owned by plaintiff. Pursuant to the notice Cumberland County assessed plaintiff's property at $1,436,950 of which $62,270 was assessed as the value of the stoves and refrigerators, $1,373,484 was assessed as the value of the buildings erected by plaintiff, and $1,196 was assessed as the value of the leasehold interest in the lands. A tax for the year 1952 was assessed based on those values. Plaintiff protested the assessment, asserting that the State and its subdivisions were without authority to tax as Fort Bragg was held pursuant to provisions of G.S. 104-7 and the provisions of the Constitution of the United States, Art. I, sec. 8, cl. 17, and for the further reason that the State had not authorized Cumberland County to tax. The protest was overruled and plaintiff, on 28 September 1954, made payment. On 14 October 1954 it made an appropriate demand for refund. The county refused to refund any part of the amount paid whereupon plaintiff brought suit to recover. The cause was heard by Judge Nimocks at the November 1955 Term of Cumberland. Pursuant to a stipulation that he might render judgment out of term, he decided the controversy in April 1956 and entered judgment in favor of defendants. Plaintiff appealed.

Poyner, Geraghty & Hartsfield, Taylor, Allen & Warren, and Hoyle & Hoyle for plaintiff appellant.

James MacRae, Lester G. Carter, Jr., and Robert H. Dye for defendant appellees.

RODMAN, J. Congress waived the immunity from taxation which plaintiff might otherwise have claimed by the enactment of 10 U.S.C.A 1270d. Any doubt with respect to the application of that statute to the facts of this case has been removed by the decision in *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 100 L. Ed. 1151, 76 S. Ct. 814. The decision in that case was rendered since this litigation began. Appellant concedes its applicability.

The only question left for decision is: Has the State authorized Cumberland County to impose the tax? Appellant contends that the answer should be in the negative because it is a mere tenant and our statutes do not authorize the taxing of a leasehold estate. The answer to the question must, of course, be found by an examination of our statutes.

"All property, real and personal, within the jurisdiction of the State, not especially exempted, shall be subject to taxation." G.S. 105-281.

It is traditional with us that property privately owned, either by individuals or corporations, shall, except when devoted to a public purpose, bear its proportionate part of the tax imposed for public benefit. *Hospital v. Guilford County,* 218 N.C. 673, 12 S.E. 2d 265; *Odd Fellows v. Swain,* 217 N.C. 632, 9 S.E. 2d 365; *Latta v. Jenkins,* 200 N.C. 255, 156 S.E. 857; *Southern Assembly v. Palmer,* 166 N.C. 75, 82 S.E. 18.

Exemptions from taxation are not presumed and statutes providing exemption are strictly construed. *Henderson v. Gill,* 229 N.C. 313, 49 S.E. 2d 754; *Harrison v. Guilford County,* 218 N.C. 718, 12 S.E. 2d 269; *Rich v. Doughton,* 192 N.C. 604, 135 S.E. 527.

Private owners of property are required to make and file a list showing the property they own. When listing real property, the improvements thereon must be shown, and if these improvements or other separate rights are owned by someone other than the owner of the fee, that fact, with a description of the improvements or rights so owned, must be shown. G.S. 105-306(6). This provision requiring the owner of the land to disclose the owner of the improvements is followed by a provision requiring the owner of the improvements to list the same unless with statutory permission they are listed by the owner of the land. G.S. 105-306(7). Following these provisions is an enumeration of various properties required to be listed and then an all-embracing clause: "The value and description of all other property whatever, not specifically exempted by law." G.S. 105-306(24).

Real property required to be listed includes buildings, and permanent fixtures. G.S. 105-272(30). Personal property required to be listed is defined as "all personal property whatsoever, tangible or intangible, except personal property expressly exempted by law." G.S. 105-279(1).

G.S. 105-301(8) provides the statutory permission referred to in G.S. 105-306(7) for listing the fee ownership and improvements as a unit when the separate owners so contract. If they do not so agree, then each must list his own property. That is the express provision of the statute.

Statutory provision is made for the listing of property for taxation when it passes after 1 January (the date for listing) prior to 1 July (the beginning of the tax year) from the hands of a nontaxable owner to an owner who is not tax exempt. G.S. 105-280.

It is, we think, clear from our statutes that the property is subject to tax. The stoves and refrigerators are tangible personal property and as such subject to taxation. The structures and improvements are subject to taxation as real property. This leaves for consideration the leasehold rights valued for tax purposes at $1,196. A lease is, as appellant asserts, a chattel real, *Moche v. Leno.* 227 N.C. 159, 41 S.E. 2d 369,

and as such a species of intangible personal property. But that does not mean that it can escape taxation. It is, we think, subject to *ad valorem* tax and not to the State intangible tax. We do not understand that the right to so classify it is questioned.

The conclusions which we reach with respect to the validity of the tax based on our statutes conforms with the general pattern of taxation in other States. *Conley Housing Corp. v. Coleman,* 89 S.E. 2d 482; *Meade Heights v. State Tax Commission,* 95 A. 2d 280; *Fort Dix Apartments Corp. v. Borough of Wrightstown,* 225 F. 2d 473; Landlord & Tenant, 32 Am. Jur. 268.

By the express provisions of the lease quoted above plaintiff has obligated itself to pay the taxes assessed. The lease conforms with the provisions of G.S. 105-306(7) and 105-301(8). The judgment appealed from is

Affirmed.

JOHNSON, J., not sitting.

AMAZON COTTON MILLS COMPANY v. THE DUPLAN CORPORATION.

(Filed 1 February, 1957.)

1. Arbitration and Award § 1—

Agreement to arbitrate is the foundation on which arbitration must rest, and in the absence of agreement the award cannot be binding.

2. Injunctions § 4f—

Plaintiff sought to enjoin defendant from arbitrating a dispute between them, plaintiff claiming that it had not agreed to arbitration and defendant contending to the contrary. *Held:* Injunction will not lie since, if plaintiff's contention be correct, the award would not be binding and therefore would not be hurtful, while if defendant's contention be correct, equity cannot be enlisted to aid plaintiff in breaching its agreement to arbitrate.

3. Actions § 1—

The right to sue involves the right to select the time, the place and the tribunal.

4. Injunctions § 4f—

A party may not force his adversary to litigate a claim against him in the courts of this State, since, if his adversary bring suit in the wrong jurisdiction, he has the remedy of a motion to dismiss, or if in the wrong venue, the remedy of a motion to remove, or if in the proper jurisdiction

and correct venue, opportunity to appear, answer and defend, and therefore, he has an adequate remedy at law.

JOHNSON, J., not sitting.

APPEAL from *Olive, J.*, DAVIDSON Superior Court at Chambers, 26 March, and 14 April, 1956.

Civil action "primarily to restrain the defendant from proceeding with arbitration in New York, and secondarily for the purpose of having all matters pertaining to the controversy decided by the duly constituted courts of North Carolina."

The plaintiff is a North Carolina corporation engaged in the manufacture of cotton yarn, with its factory and main office in Thomasville, North Carolina. The defendant is a Delaware corporation, domesticated in North Carolina, operating textile manufacturing plants in North Carolina, Virginia, Pennsylvania, and elsewhere, with its main office at 1407 Broadway, New York City. Cannon Mills, Inc., with an office at 70 Worth Street, New York City, acted as sales agent for the plaintiff in the transactions here involved.

The parties entered into five contracts for the sale by the plaintiff and purchase by the defendant of 38,400 pounds of 36/2 combed amafleece vet black cotton yarn at $1.89 per pound. Each of the contracts contained the following: "The contract is subject to the provisions of the Cotton Yarn Rules as revised, but if the said Rules provide any conditions or procedure inconsistent with this contract, then the provisions of the contract shall control."

The defendant claimed damages in the sum of $65,442.95 by reason of the alleged failure of the amafleece to be 100 per cent cotton as warranted by the seller when in fact it was in part rayon.

All the foregoing appears from the plaintiff's complaint and the exhibits attached to and made a part of it. In addition, the plaintiff alleged it had not breached its contract in any way and was not due the defendant anything; that, . . . "a serious controversy exists as to the proper construction and interpretation of the aforementioned contract." . . . "That if the plaintiff participates in the arbitration proceeding under the laws of the State of New York, which has been initiated and instituted by the defendant it will subject itself to the jurisdiction of a foreign state for the purpose of trying and determining an action arising out of contract made in North Carolina and which is controlled by the laws of the State of North Carolina . . .; that the plaintiff is informed and believes . . . that if it does not participate in the arbitration proceeding . . . that an arbitrator will be appointed for the plaintiff and an award will be made and docketed in the State of New York with the force and effect of a judgment with the courts of that State."

"That if the said arbitration proceeding . . . is permitted to proceed it will oust the courts of North Carolina of jurisdiction to determine the serious controversy arising out of the contracts, . . . and thereby deprive the plaintiff of the right to have the controversy determined by the courts of this State, all of which will result in a multiplicity of suits and in irreparable injury to the plaintiff, for the prevention of which the plaintiff does not have a remedy at law."

The prayer is (1) that the Court determine all matters in controversy between the parties arising under the contracts and (2) that an appropriate restraining order be issued against the defendant enjoining and restraining it from proceeding with arbitration proceedings in the State of New York. The Resident Judge of the 22d Judicial District issued an order enjoining the defendant from proceeding with the arbitration in New York and "from attending any hearing, offering any evidence, or taking any steps whatsoever pursuant to said proceeding."

The defendant made a motion to dissolve the restraining order upon the grounds the complaint does not state facts sufficient (1) to give the court jurisdiction, (2) to show lack of an adequate remedy at law.

The Cotton Yarn Rules in effect on the date of the contracts provided "for the settlement of any controversy between buyer and seller by arbitration under the Rules of the General Arbitration Council of the Textile Industry," which, in turn, provided that if the parties are unable to agree respecting the time, place, or rules of arbitration, then such arbitration shall be held in the City of New York in accordance with the laws of the State of New York.

After hearing, the restraining order was continued "until the final determination of this action." The defendant excepted to the order, and appealed.

Ratcliff, Vaughn, Hudson, Ferrell & Carter,
By: R. M. Stockton, Jr., for defendant, appellant.
James L. Rankin; E. T. Bost, Jr.; W. H. Beckerdite; Walser & Brinkley,
By: Don A. Walser, for plaintiff, appellee.

HIGGINS, J. The questions involved in this appeal are altogether procedural. As stated in its brief, "the plaintiff institutes this action in the Superior Court of Davidson County, North Carolina, primarily to restrain the defendant from proceeding with arbitration in New York; and secondarily for the purpose of having all matters pertaining to the controversy decided by the duly constituted courts of North Carolina."

The parties entered into five written contracts, the first on 16 December, 1954, and the fifth on 20 April, 1955, under the terms of which the

plaintiff sold and delivered, and the defendant purchased and received 38,400 pounds amafleece cotton yarn at the agreed price of $1.89 per pound. The plaintiff admits it has been paid in full. It, therefore, seeks to assert no claim against the defendant. The defendant, on the other hand, contends it purchased the yarn under plaintiff's warranty that it was pure cotton, whereas in fact it was part rayon; that by reason of the breach of warranty, the defendant was greatly damaged. The plaintiff denied the breach of warranty; thus a controversy arose.

All the contracts between the parties contain the following provision: "This contract is subject to the provisions of the Cotton Yarn Rules as revised, but if such rules provide any conditions or procedure inconsistent with this contract, then the provisions of this contract shall control." The Cotton Yarn Rules provide for arbitration of controversies . . . "by proceeding under rules of the General Arbitration Council of the Textile Industry," which in turn provide . . . "If the parties are unable to agree on time, place, method, or rules of arbitration, then such arbitration shall be held in the City of New York in accordance with the laws of the State of New York."

After the controversy arose, the defendant instituted arbitration proceedings in New York City. The plaintiff's brief contains the following statement: "The plaintiff says that it has not contracted, agreed, or consented to arbitrate. The defendant says otherwise." If, as it contends, the plaintiff has not contracted, agreed, or consented to arbitrate, the arbitration proceeding in New York will not be binding on it. Agreement to arbitrate is the foundation on which arbitration must rest. In its absence the award will not be binding. Equity is not available until injury is threatened. "A well established rule of this Court is that injunctive relief will be granted only when irreparable injury is both real and immediate." *Hudson v. R. R.*, 242 N.C. 650, 89 S.E. 2d 441; *Wilcher v. Sharpe*, 236 N.C. 308, 72 S.E. 2d 662. "It is incumbent on the plaintiff to make out a *prima facie* case of irreparable injury entitling him to equitable relief by injunction." *Teer v. Jordan*, 232 N.C. 48, 59 S.E. 2d 359. "Arbitration proceedings, under an agreement for arbitration, may be enjoined where proper grounds therefor are present. Such proceedings, however, ordinarily will not be enjoined unless the conduct of the arbitrators or of the parties is manifestly unlawful. They will not be enjoined on the ground that some of the matters presented by one of the parties for determination are not within the contract of submission, or because one of the things which the arbitrators will decide is whether the case is one of which they will take cognizance." 43 C.J.S., 495. "Matters that will constitute a defense of which complainant may avail himself in an action pending or threatened against him cannot be made the ground of an injunction to restrain proceedings in such action, unless he alleges and proves special circum-

stances showing that he will suffer irreparable injury if he is denied the preventive remedy." 43 C.J.S., 481.

On the other hand, if the defendant's contention is correct, and the parties have contracted to arbitrate, then certainly a court of equity cannot be enlisted to aid in breaching the contract. In either event, therefore, the primary purpose of restraining arbitration fails for want of an equitable showing. Can the secondary purpose of forcing the defendant to litigate in North Carolina be accomplished by injunction?

The plaintiff has been paid in full for its goods. It asserts no claim, except that the Court should stop the arbitration and require the defendant to come into the Superior Court of Davidson County and litigate its claim for damages for the alleged breach of warranty. The defendant is the party who asserts the claim, and the only party claiming damage. The defendant alone has the right to elect whether to bring suit. The right to sue involves the right to select the time, the place, and the tribunal. If suit is brought in the wrong jurisdiction, the remedy is a motion to dismiss; if in the wrong venue, a motion to remove. If the suit is brought in the proper jurisdiction and in the correct venue, the plaintiff will have ample time and opportunity to appear, answer, and defend. Courts will not grant the equitable relief of injunction when there is an adequate remedy at law. *Arey v. Lemons*, 232 N.C. 531, 61 S.E. 2d 596; *Clinton v. Ross*, 226 N.C. 682, 40 S.E. 2d 593; *Newton v. Chason*, 225 N.C. 204, 34 S.E. 2d 70.

The defendant's motion to dissolve the restraining order and dismiss the action should have been allowed. The order appealed from is

Reversed.

JOHNSON, J., not sitting.

MRS. JOHN LOOKABILL, ADMINISTRATRIX OF RUTH L. WORKMAN, DECEASED, v. HENRY G. REGAN.

(Filed 1 February, 1957.)

1. Automobiles § 46—

This action involved the alleged negligence of defendant in failing to yield to plaintiff's intestate one-half the highway as the respective vehicles, traveling in opposite directions, passed each other. G.S. 20-148. *Held:* An instruction embracing the statutory duty of a driver of a vehicle overtaking and passing another vehicle traveling in the same direction, G.S. 20-149, is prejudicial error.

2. Appeal and Error § 24—

It is not required that a party bring to the trial court's attention an inadvertence in the court's statement of contentions when such statement contains an erroneous view of the law or an incorrect application thereof, and such error must be held prejudicial, even though in another portion of the charge the law is correctly stated.

JOHNSON, J., not sitting.

APPEAL by defendant from *Johnston, J.*, at April 1956 Term, of DAVIDSON.

Civil action to recover for alleged wrongful death of Ruth L. Workman, intestate of plaintiff, as result of injury sustained in overturning of automobile operated by her,—proximately caused by alleged negligence of defendant.

The uncontroverted facts appearing in the case on appeal disclose that at the time and place in question plaintiff's intestate, accompanied by her husband and small son, was operating her automobile in a southerly direction, and defendant was operating his automobile in northerly direction on same highway; and that they met and passed each other without colliding.

Plaintiff alleges in her complaint and, upon the trial in Superior Court, offered evidence tending to show as acts of negligence on the part of defendant that, as the two automobiles so operated approached each other on a curve defendant drove his automobile to his left of the center of the highway, and failed to yield to plaintiff's intestate at least one-half of the traveled portion of the roadway as nearly as possible, thereby forcing her to drive upon the shoulder of the highway on her right, in order to avoid a collision with defendant's automobile, by reason of which she lost control of her automobile with resultant injury and death to her.

On the other hand, defendant, answering the complaint, denies that he was negligent as alleged, and avers that, if he be found negligent in any respect, intestate of plaintiff was contributorily negligent.

The case was submitted to the jury on three issues, first, as to negligence of defendant, second, as to contributory negligence of plaintiff's intestate, and, third, as to damage.

The jury answered the first "Yes," the second "No," and the third, in substantial amount.

From judgment, signed in accordance with the verdict, defendant appeals to Supreme Court and assigns error.

Philip R. Craver and Charles W. Mauze for Plaintiff Appellee.

Deal, Hutchins & Minor for Defendant Appellant.

WINBORNE, C. J. Defendant appellant in brief filed here presents seven questions based upon exceptions taken upon the trial below, and to the charge of the court to the jury.

Among these, assignment of error Number Ten based upon exception Nineteen challenged, and we hold properly so, the correctness of a portion of the charge. The case on appeal discloses that here apparently the provisions of the statute G.S. 20-149, pertaining to the duty of the driver of any vehicle overtaking another vehicle proceeding in the same direction, to pass at least two feet to the left thereof was confused with the provisions of the statute G.S. 20-148 prescribing the respective duties of drivers of vehicles proceeding in opposite directions when meeting to pass each other to the right,—each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible. For the provisions of G.S. 20-149 are inapplicable to factual situation in hand.

In this connection, counsel for appellee in brief filed in this Court frankly concede "that the words 'yielding two feet to the vehicle to the left' were an inadvertent misstatement on the part of the trial judge." But they contend that this was not reversible or prejudicial error for that: (1) The misstatement was immediately followed by a correct statement of the rules; (2) "The misstatement was a misstatement of a contention"; and (3) "a misstatement of a contention should have been called immediately to the court's attention." Even so ordinarily, —this Court is constrained to hold that the error thus appearing entitled defendant to a new trial. For, as stated by *Johnson, J.*, in *Blanton v. Dairy*, 238 N.C. 382, 77 S.E. 2d 922, "It is the duty of the trial court to explain and apply the law to the substantive phases of the evidence adduced (G.S. 1-180), and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error, the rule being that while ordinarily the misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it," citing cases. See also *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767; *McKinney v. High Point*, 239 N.C. 232, 79 S.E. 2d 730; *Harris v. Construction Co.*, 240 N.C. 556, 82 S.E. 2d 689; *Caudle v. R. R.*, 242 N.C. 466, 88 S.E. 2d 138.

As matters to which other assignments of error relate may not recur upon another trial, the Court refrains from discussion of them for fear that prejudice may result.

For error pointed out, let there be a

New trial.

JOHNSON, J., not sitting.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1957

ARTHUR E. BOYD AND WIFE, MARY M. BOYD, v. BANKERS & SHIPPERS INSURANCE COMPANY.

(Filed 27 February, 1957.)

1. Insurance § 25a—

A provision in a fire insurance policy, written in accordance with the standard form prescribed by statute, that action on the policy must be commenced within twelve months next after inception of the loss is a valid contractual limitation and not a statute of limitation, and is binding upon and enforceable between the parties. G.S. 58-176.

2. Same—

The provision in the standard form of a fire insurance policy that suit must be commenced within twelve months next after inception of the loss is made a conjunctive limitation by the 1945 Act, so that compliance with this requirement is necessary in addition to compliance with the other statutory conditions of the policy. Sec. 14. Chapter 378, Session Laws of 1945.

3. Same—

Revisal 4809 (G.S. 58-31) was repealed by Chapter 378, Session Laws of 1945 (G.S. 58-176) in so far as the former act is in conflict with the contractual limitation in a standard form of a fire insurance policy that suit on the policy be instituted within one year of the inception of loss.

4. Insurance § 24a—

Under the terms of the standard fire insurance policy in effect in this State, no action may be maintained on a policy unless proof of loss shall be filed within the prescribed period.

5. Insurance § 25a—

In an action upon a policy of fire insurance in the standard form, judgment of nonsuit is proper when the record discloses that more than twelve months elapsed between the inception of the loss and the commencement of the suit.

PARKER, J., dissents.

APPEAL by plaintiffs from *Sink, E. J.*, at July 1956 Civil Term of SURRY as No. 673 at Fall Term, 1956, and brought forward to Spring Term, 1957.

Civil action to recover on policy of insurance on dwelling house against loss by fire.

Plaintiffs, Arthur E. Boyd and wife, Mary M. Boyd, in their complaint, as amended, allege substantially the following:

I. That on or about 6 November, 1953, defendant, a New York corporation, authorized to engage in the business of insuring property against loss by fire, issued a policy of insurance upon a one-story frame dwelling owned by plaintiffs, situated in Bryan Township, Surry County, North Carolina, against loss by fire within three years thereafter, not exceeding $3,500.00, with loss, as provided by rider in said policy, by reason of mortgage indebtedness owed by plaintiff, payable to Workmen's Federal Savings & Loan Association of Mt. Airy, N. C., as its interest might appear.

II. That on 26 November, 1953, the said dwelling house, described above, was damaged and destroyed by fire, and rendered worthless causing a direct loss and damage to plaintiffs in excess of $3,500.00 by reason of which, and under the said policy of insurance, defendant is indebted to plaintiffs in the sum of $3,500.00.

III. That plaintiffs and Workmen's Federal Savings & Loan Association immediately gave notice of said loss and damage, but defendant, through its agent, refused to make any settlement until Workmen's Federal Savings & Loan Association sold the land upon which the house was situated, under its mortgage, which was done,—the same bringing at such sale $2,478.65, that is, $255.20 in excess of the mortgage debt; and that thereafter plaintiffs immediately gave defendant written notice of the sale, and again demanded settlement, but that defendant immediately denied liability or responsibility for any part of said loss, thereby waiving further proof of loss.

IV. That, as set forth in amendment to complaint, defendant, by returning to plaintiffs the proof of loss, so furnished by plaintiffs, and by continuing negotiations toward reaching a settlement of plaintiffs' claim, with plaintiffs or their agents, defendant waived the provisions of said policy regarding proof of loss and regarding the time within which suit shall be brought (on said policy), and estopped itself from

objecting to the contents of the proof of loss, or from taking advantage of the time within which suit was brought.

Defendant, answering the complaint of plaintiffs, admits (1) that a policy of insurance was issued in favor of plaintiffs; that the policy contained a rider to the effect that, by reason of mortgage indebtedness from plaintiff, loss clause was made payable to Workmen's Federal Savings & Loan Association as its interest might appear; (2) that the dwelling house of plaintiff was destroyed by fire; (3) that verbal notice of a loss under the policy was given to defendant; (4) that it is advised that a foreclosure sale of premises owned by plaintiffs was had at request of Workmen's Federal Savings & Loan Association, and (5) that defendant received a letter from J. N. Freeman, attorney for plaintiffs, under date 5 November, stating that Workmen's Federal Savings & Loan Association informed him "that they have satisfied their mortgage by selling the land in the deed of trust." But defendant denies all other allegations of the complaint and of the amendment thereto.

And by way of further answer and defense, defendant avers in substance:

1. That the policy of insurance issued by it in favor of plaintiffs contained following provisions: ". . . and within sixty days after the loss, unless such time is extended in writing by this company insurer shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: . . . the interest of the insured and of all others in the property . . . all encumbrances thereon . . .," (Here is set forth verbatim provisions of Standard Fire Policy with respect to requirements as to proof of loss in case loss occurs—G.S. 58-176).

2. That subsequent to the fire loss suffered by plaintiffs, it, the defendant, furnished to plaintiffs, to their attorney, Mr. J. N. Freeman, Mt. Airy, North Carolina, and to the Workmen's Federal Savings & Loan Association, Mt. Airy, North Carolina, form of proof of loss for use by plaintiffs.

3. That plaintiffs, at all times prior to the institution of this action failed and refused to execute and furnish to defendant a proof of loss, as was required by the policy, and as appears in paragraph 1 of this further answer and defense.

4. That at the time of the alleged loss by fire suffered by plaintiffs, there were two unsatisfied deeds of trust on record in the office of Register of Deeds of Surry County against the premises in question—one in favor of Workmen's Federal Savings & Loan Association, as alleged by plaintiffs, and the second in favor of Albert J. Stanley and wife, Jane Stanley.

5. That plaintiffs refused to execute due proof of loss as was required by the policy because they did not consent to the inclusion in the proof

of loss reference to the second deed of trust; and that defendant contends that under the terms of the policy hereinbefore recited it was necessary that the interest of the insured "and of all others in the property" must necessarily have been shown in the proof of loss; and that this was material and defendant has a right under the policy to insist upon full compliance therewith, with respect to the filing of proof of loss by plaintiffs.

And by way of second further answer and defense: Defendant, without abandoning any of the matters hereinabove set forth, avers that the action of plaintiffs was instituted more than twelve months after the inception of the loss; and that in this connection defendant pleads that the policy purchased and held by plaintiff had the following provision therein: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

And the evidence offered upon the trial and elicited from plaintiff Arthur Boyd, and witnesses for him, as shown in case on appeal tends to show this factual background:

(1) That Ray Riggs and his wife, Lena H. Riggs, acquired the property here involved from Oliver J. Stanley and wife; that Ray Riggs and his wife, on 25 November, 1949, conveyed the property to Arthur E. Boyd and his wife, the plaintiffs in this action; that in the meantime Ray Riggs and his wife executed two deeds of trust; the first to A. B. Carter and Fred Folger, Trustees, for benefit of Workmen's Federal Savings & Loan Association of Mt. Airy, dated June 4, 1947, recorded in Book 169 at page 14 in office of Register of Deeds of Surry County, securing a loan of $3,000.00; and the second to R. Louis Alexander, Trustee, for benefit of Oliver J. Stanley, dated seven days later than the first, to wit, June 11, 1947, and recorded in the same Book 169 as the first, at page 19 in office of Register of Deeds of Surry County, to secure an indebtedness in amount of $1,000.00; that both deeds of trust appeared of record as uncancelled on the date of the fire which destroyed the dwelling house covered by the insurance policy, to wit, 26 November, 1953.

(2) That as to the first deed of trust above described, when the Boyds purchased from Riggs, they assumed the indebtedness secured thereby, and, as admitted in the pleadings, the insurance policy was endorsed with loss-payable clause in favor of the Workmen's Federal Savings & Loan Association as its interest might appear. But as to the second deed of trust, Arthur Boyd disclaimed any knowledge of it, at the time he purchased, though it was of record and uncancelled and

only seven days junior to the deed of trust for benefit of Savings & Loan Association.

Plaintiffs offered in evidence the insurance policy and endorsement thereon, and the record shows that "counsel for plaintiffs and counsel for the defendant stipulate and agree that the fire insurance policy which is the subject of this case on appeal is in form the standard fire policy as is set forth in G.S. 58-176(3) as appears in Vol. 2B of the General Statutes of North Carolina at page 367, and on the four preceding pages, and by consent the policy is not copied in the record on appeal." The basic amount of the policy was $2,400.00 on the dwelling,—later, before the fire, it was increased to $3,500.00.

The evidence also tends to show that after the fire occurred the land was sold under foreclosure of the first deed of trust, after several raised bids, for $2,478.65, which was $255.20 over and above the amount of the indebtedness due on the loan; and that thereafter, to wit, on 3 November, 1954, attorney for the Building & Loan Association turned over the policy of insurance to attorney for plaintiff,—advising him that the debt of the association had been satisfied.

The evidence also tends to show that the defendant, upon receiving notice of the fire, prepared, through its representative, and left form of proof of loss with attorney for the Building & Loan Association for Mr. Boyd to sign; and that he did not sign it.

And the record of case on appeal discloses that Mr. Carter, attorney for the Savings & Loan Association, referring to insurance company representative, testified: "They never did deny the claim so far as I know," and again "They didn't deny the claim." Plaintiff Arthur Boyd testified: "After the house burned the first conversation I had with the insurance company agent was next afternoon, the 27th of November, 1953; I reported it to Mr. Royall's office . . . and Mr. Hinnant . . . contacted me. . . . If he questioned the loss in any way, I didn't know anything about it . . ."

The case on appeal shows that Arthur Boyd testified: "I only saw one proof of loss furnished by the company which included the names of me and my wife, A. B. Carter, Fred Folger, Trustees, Workmen's Federal Savings & Loan Association, Mr. Louis Alexander, and Mr. and Mrs. Stanley. . . I was told that a proof of loss was left for me at the Building & Loan Association, but I wasn't interested in it like that. So far as the name of Mr. Louis Alexander, Trustee, and Mr. and Mrs. Stanley's names appeared on it, I was not going to sign it. I never did sign a proof of loss. Mr. Hinnant (representative of Insurance Company) said that I would have to file a proof of loss before any payment could be made, he said he couldn't pay anything until that had been done." And plaintiff Boyd later continued by saying: "Mr. Freeman was my agent in this matter from the early part of 1954 on up to the

present in connection with this loss. I had continuous representation and I knew the policy was at the Building & Loan Association . . ." And again he identified the original summons in this action as being dated "27th day of November, 1954."

At the conclusion of plaintiff's evidence, defendant moved for judgment as of nonsuit on two grounds: (1) That plaintiffs have not filed proof of loss as required in the policy, and (2) that the action was not instituted within one year as required by the policy.

The motion was allowed upon both grounds and order was entered in accordance therewith, dismissing the action.

Plaintiffs excepted thereto, and appealed therefrom to Supreme Court and assign error.

Frank Freeman for Plaintiffs Appellants.
Wilson Barber for Defendant Appellee.

WINBORNE, C. J. Is there error in the ruling of the trial court in granting defendant's motion for judgment as of nonsuit? Consideration of the pertinent acts of the General Assembly, and decided cases in respect thereto, leads to a negative answer.

The policy of insurance here involved is in form the "Standard Fire Insurance Policy of the State of North Carolina" prescribed by the General Assembly, Section 14 of Chapter 378, 1945 Session Laws, by which G.S. 58-176 and G.S. 58-177, as they then appeared, were repealed and new sections of the same numbers were inserted. In the new G.S. 58-176 the General Assembly has declared in pertinent part "(1) The printed form of a policy of insurance, as set forth in subsection three shall be known and designated as the 'Standard Fire Insurance Policy of the State of North Carolina.'

"(2) No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this State, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy . . .

"(3) The form of the standard fire insurance policy of the State of North Carolina . . . shall be as follows: . . . This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations, and agreements as may be added hereto, as provided in this policy."

And among the stipulations set forth in such standard form of policy it is provided that when loss occurs, the insured shall file with insurer proof of loss, as therein prescribed and that "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have

been complied with, and unless commenced within twelve months next after inception of the loss."

In this connection the word "inception" as defined by Webster means "act or process of beginning; commencement; initiation." Hence as used above "inception" necessarily means that the beginning, the commencement, the initiation of the loss was that caused by the fire.

Moreover, the General Assembly declared in the 1945 Act, Chapter 378, that "All laws and clauses of laws in conflict herewith are hereby repealed," and the Act became effective July 1, 1945.

And this Court in *Meekins v. Ins. Co.*, 231 N.C. 452, 57 S.E. 2d 777, decided in 1951, in opinion by *Denny, J.*, held in effect that the provision of the Standard Fire Insurance Policy of the State of North Carolina that an action to recover thereon must be commenced within twelve months next after the inception of the loss, unless a longer time for instituting suit has been agreed upon between the parties, and such agreement appears upon the face of the policy, is valid as a contractual limitation, and is binding upon and enforceable between the parties.

To like effect, in principle, are these decided cases: *Holly v. Assurance Co.* (1915), 170 N.C. 4, 86 S.E. 694; *Tatham v. Ins. Co.* (1921), 181 N.C. 434, 107 S.E. 450; *Welch v. Ins. Co.* (1926), 192 N.C. 809, 136 S.E. 117; *Midkiff v. Ins. Co.* (1929), 197 N.C. 139, 147 S.E. 812; *Johnson v. Ins. Co.* (1931), 201 N.C. 362, 160 S.E. 454; *Rouse v. Ins. Co.* (1932), 203 N.C. 345, 166 S.E. 177; *Zibelin v. Ins. Co.* (1948), 229 N.C. 567, 50 S.E. 2d 290.

In the *Welch case, supra*, this Court in Per Curiam opinion referring to grounds upon which judgment of nonsuit may be sustained, stated that "Failure of plaintiff, however, to commence the action within twelve months next after the fire, without allegation and proof of waiver or estoppel, precluding this defense, is sufficient," adding "Decisions of this Court are all to this effect," citing *Beard v. Sovereign Lodge* (1922), 184 N.C. 154, 113 S.E. 661, and other cases there enumerated.

In the *Midkiff case, supra*, this Court held that the terms and conditions of the standard form of a fire insurance policy, C.S. 6436, 6437, and the stipulations as to a valid waiver thereof are valid and binding on the parties. *Connor, J.*, opened the opinion of the Court by saying: "When a policy of insurance, in the form prescribed by statute (C.S. 6437), and known and designated as the Standard Fire Insurance Policy of North Carolina (C.S. 6436), has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms and provisions have been prescribed by statute, and are valid in all

respects; they are just both to the insurer and to the insured. Each is presumed to know all the terms, provisions and conditions which are included in the policy. Both are ordinarily bound by them . . ." See also *Johnson v. Ins. Co.* (1931), 201 N.C. 362, 160 S.E. 454.

Moreover in *Rouse v. Ins. Co., supra,* the judgment of the Court sustained the demurrer upon the ground that it appeared "to the Court that the plaintiff did not institute his action on the policy sought to be recovered on within the twelve months next after the fire, and under the terms of said standard fire insurance policy of the State of North Carolina, the type of the policy sued on, it is required as a condition precedent to the maintenance of any action for recovery thereon that such action shall be commenced within said period." And this Court, in Per Curiam opinion, affirming judgment below, declared: "The decisions of this Court are to the effect that the contractual limitation of twelve months in which to bring suit, inserted in a fire insurance policy by virtue of C.S. 6437, is valid and binding," citing *Holly v. Assurance Co., supra,* and *Tatham v. Ins. Co., supra.*

To like effect is *Zibelin v. Ins. Co.* (1948), *supra,* involving a standard fire insurance policy. There *Devin, J.*, later *C. J.*, summarizes: "Unfortunately for the plaintiff, he failed to observe the terms of his policy and to comply with its plainly written provisions. The contract between the plaintiff and the Insurance Company embodied in the standard form of fire insurance is one prescribed by statute (G.S. 58-177), and its provisions have been held by this Court to be valid and just to insured and insurer. *Greene v. Ins. Co.*, 196 N.C. 335, 145 S.E. 616. The rights and liabilities of both under the policy must be ascertained and determined in accord with its terms," citing *Ins. Co. v. Wells,* 226 N.C. 574, 39 S.E. 2d 741; *Midkiff v. Ins. Co., supra; Muse v. Assurance Company*, 108 N.C. 240, 13 S.E. 94.

And it is worthy of note that the Federal District Court of Florida, Jacksonville Division, in case of *Holderness v. Hamilton Fire Ins. Co. of New York* (1944), 54 Fed. Sup. 145, interpreting the North Carolina statute, held that "A provision in fire insurance policy, issued to North Carolina citizens on building in such State, that no action thereon shall be sustainable, unless commenced within 12 months after fire, is valid and enforceable in North Carolina, and hence bars action on policy in Florida after such time in absence of countervailing circumstances." See also Ann. 112 A.L.R. p. 1288; also 121 A.L.R. at pages 759 and 772. Anno. Contractual Limitation of Time for Suit.

Now in the light of contentions made by and for appellant on this appeal a brief history of the legislation in respect to the "Standard Fire Insurance Policy of the State of North Carolina" may be appropriate and informative in reference to the many decisions of this Court pertaining to the subject.

The General Assembly of 1893, in Chapter 299, amended the insurance law then in effect in North Carolina so as to adopt, by reference, and provide for the exclusive use in this State the Standard Fire Insurance Policy prescribed under certain insurance law of the State of New York. But the act did not spell out the form of the policy.

Thereafter, in 1899, the General Assembly passed a comprehensive act, Chapter 54, entitled "An Act to Regulate Fire Insurance and Other Companies." This act, under the sub-heading "Fire Insurance," and in Section 43 declared that "No fire insurance company shall issue fire insurance policies on property in this State other than those of standard form filed in the office of the insurance commissioner of the State, known and designated as the standard fire insurance policy of the State of North Carolina, except" (Exception not here pertinent); and in subsection f of Section 43 the form of such policy is prescribed and set out in detail.

And in Section 117 certain laws relating to insurance, among them Chapter 29 of The Code of 1883, and Chapter 299, Laws 1893, were repealed.

Moreover this act of 1899, as amended, was codified and incorporated as Chapter 100 entitled "Insurance" in the Revisal of 1905 of North Carolina. And Sec. 43 of this act, P.L. 1899 Chapter 54, became, in the main, Sections 4759, adopting standard fire insurance policy, and 4760, prescribing the form and conditions, stipulations and agreements of such standard form.

Next the General Assembly, by Sec. 9, Chapter 109, P.L. 1915, amended the form and the provisions of standard form of policy described in Revisal 4760, incorporating in the body thereof the condition that "This policy is made and accepted subject to the foregoing stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided."

And it is noted that there is set out in the Act of 1899, and in the codification thereof in the Revisal of 1905, and in the Act of 1915, respectively, above described, a contractual limitation substantially as follows: No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless the insured shall have complied with all the requirements of this policy, nor unless commenced within twelve months next after the fire.

And it is declared in Sec. 13 of the 1915 Act that "All laws and parts of laws in conflict with or inconsistent with this Act are hereby repealed."

Thereafter the provisions of the 1915 Act pertaining to the adoption, and to the form of standard policy, in substantial accord, became Sec-

tions 6436 and 6437 of the Consolidated Statutes of North Carolina of 1919.

And thereafter upon the adoption of the General Statutes of North Carolina, effective December 31, 1943, Sections 6436 and 6437 of Consolidated Statutes, in substantial accord, including the contractual limitation as to time within which a suit may be commenced, as above recited, became G.S. 58-176 and G.S. 58-177.

Thereafter the General Assembly, 1945 Session Laws, Chapter 378, amended Chapter 58 of the General Statutes of North Carolina relating to fire insurance by repealing Sections G.S. 58-176 and G.S. 58-177, and inserting new sections of same numbers, as hereinabove related.

Among the stipulations made a part of the policy are these:

"*Waiver Provisions:* No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein . . .

"*Requirements In Case Loss Occurs:* The insured shall give immediate written notice to this company of any loss, . . . and within sixty days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, . . .

"*Suit:* No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

In summary it may be noted that (1) in the act of 1899, (2) in the codification in Revisal of 1905, (3) in the act of 1915, (4) in the codification of Consolidated Statutes of 1919, and (5) in the General Statutes, as hereinabove set forth, the limitation agreement as to suit each reads as follows: "Nor unless commenced within twelve months next after the fire," whereas the new section of the 1945 act reads, "and unless commenced within twelve months next after the inception of the loss."

In other words the provisions of the limitation in the 1945 Act are used conjunctively, that is, there must be compliance with all the requirements of the policy, and the suit or action must be commenced within twelve months next after inception of the loss.

Moreover, since it is contended that the contractual limitation as to suit should be construed *in pari materia* with the provisions of Revisal 4809, now G.S. 58-31, as was done in *Modlin v. Ins. Co.*, 151 N.C. 35, 65 S.E. 605, a case decided in the year 1909, before the enactment of the Act of 1915, repealing all laws and parts of laws in conflict or inconsistent therewith, it is appropriate to interpose here the history of the statute G.S. 58-31, formerly L. 1899 Chap. 54, Sections 23 and 106; L. 1901 Chap. 391, Section 8; Revisal 4809; C.S. 6290, relied upon by appellants in instant case.

This statute originated in this manner: The General Assembly of the year 1899, as above related, passed a comprehensive act, Chapter 54, entitled "An Act to Regulate Fire Insurance and Other Companies." In Section 1 thereof it is declared that "the word 'domestic' designates those companies incorporated or formed in this State and with home offices therein." And under sub-division entitled "North Carolina or Domestic Companies, Organizations, etc.," Section 23 read as follows: "No such company shall make any condition or stipulation in its insurance contracts concerning the courts or jurisdiction wherein any suit thereon may be brought, nor shall they limit the time within which such suit may be commenced to less than one year after the cause of action accrues, and any such condition or stipulation shall be void." And under heading "Insurance in Unauthorized Companies," Section 106 read as follows: "No person licensed to do business under this act shall limit the term within which any suit shall be brought against such person to a period less than one year from the time when the loss insured against shall accrue." And this Section 106 was amended, Public Laws 1901, Chapter 391, Section 8, by adding at the end thereof this clause: "Or less than six months from any time at which a plaintiff shall take a nonsuit to an action begun within the legal time."

Thereafter Sections 23 and 106, as so amended, were codified in the Revisal of 1905 as Section 4809, to read as follows: "Stipulations as to jurisdiction and limitation of actions. No company or order, domestic or foreign, authorized to do business in this state under this chapter, shall make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor shall it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff shall take a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section shall be void."

And the provisions of Rev. 4809 were later codified into Consolidated Statutes of 1919, as Section 6290, and lastly codified into General Statutes as G.S. 58-31, in substantially the same language as in Revisal 4809.

And though the statute pertaining to form of Standard Fire Insurance Policy of the State of North Carolina as originally written in the year 1899, and re-written in the years 1915 and 1945, the verbiage of Revisal 4809 remained substantially the same.

It will be noted, in this connection, that the *Modlin case, supra,* was decided in the interim between the 1905 codification of the 1899 act, and the enactment of the 1915 act. And it is significant that the 1915 act made no reference to Revisal 4809, but re-enacted the standard form of fire insurance policy, and declared "that all laws and parts of laws in conflict with or inconsistent with this act are hereby repealed." Thus this repealing clause had the effect of repealing Revisal 4809 in so far as it was in conflict or inconsistent with the contractual limitation in the standard policy as formulated and adopted in said act is concerned. *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231; *Commrs. v. Commrs.*, 186 N.C. 202, 119 S.E. 206; *Spaugh v. Charlotte,* 239 N.C. 149, 79 S.E. 2d 748. It too had the effect of overruling decisions of this Court made in the interim giving effect to conflicting and inconsistent provisions of Revisal 4809. And the tenor of subsequent decisions all along the line clearly indicate that this Court was so impressed,—that is, that the provisions of the contractual limitations are valid, and binding upon the parties, and are enforceable as the obligations of the parties.

In this connection it may be noted incidentally that the General Assembly of 1883, at a time when no standard form of fire insurance policy had been adopted in this State, passed an act, Chapter 57, which was codified as Chapter 29 of The Code of 1883, entitled "Insurance." This Act declared that: "It shall be unlawful for any person, whether natural or corporate, either as principal or as agent, to do or contract or solicit for any insurance business with any resident of this State, unless such insurance business shall be licensed, as provided in this act, and no contract for any such insurance business entered into otherwise than as this act permits, shall be enforceable in any of the courts of this State." The Code 3061. L. 1883, Chapter 57, Section 1.

And in Section 16 of the Act of 1883 it is declared that: "No person licensed to do business under this act shall limit the term within which any suit shall be brought against such person to a period less than one year from the time when the loss insured against shall accrue." This Section 16 was codified as Section 3076 of The Code.

While this Section was in effect, before the adoption of standard form of fire insurance policy in North Carolina, this Court rendered opinions in the cases of *Muse v. Assurance Co.* (1891), *supra; Dibbrell v. Ins. Co.* (1892), 110 N.C. 193, 14 S.E. 783, and *Lowe v. Accident Asso.* (1894), 115 N.C. 18, 20 S.E. 169. The principles there applied are applicable to factual situation of case in hand.

In the *Muse case, supra,* this headnote epitomizes the opinion: "A stipulation in a policy of insurance that the insured shall bring his action for any loss within twelve months next after the loss shall accrue is not in contravention of the general policy of the statutes of limitation, nor with the special statute of this State (The Code, Sec. 3076) which limits the powers of insurance companies to make such stipulations or conditions to a 'period less than one year from the time of the loss.'"

Avery, J., writing for the Court in this *Muse case* had this to say: "It seems to be established that a provision in a policy that the insured may bring suit within twelve months after the loss, and not later, being in the nature of a condition precedent, is not in contravention of the policy of the statutes of limitation, and will be upheld by the courts." And the Court continued: "The condition that the suit shall be instituted, if at all, within a year after the loss has been sustained, is reasonable and valid . . ."

To like effect are *Dibbrell v. Ins. Co.* (1892), *supra,* and *Lowe v. Accident Asso.* (1894), *supra.*

The *Dibbrell case* is premised upon the principle that "a stipulation in an insurance policy that a failure to bring suit within a time therein prescribed after loss shall constitute a forfeiture, is a contract, and not a statute of limitation . . ."

And in the *Lowe case, supra,* while this Court dismissed the appeal as premature (*Edwards v. Raleigh,* 240 N.C. 137, 81 S.E. 2d 273), the opinion concluded with this declaration: "In the absence of any proof tending to show a waiver of the benefit of this stipulation on the part of the defendant company, we must hold that it is binding upon the plaintiffs, and operates to defeat the action, not as a statute of limitation, but as a reasonable agreement insisted on by defendant, in order to avoid the danger incident to making defense after the lapse of a long time intervening between the loss of injury and the institution of suit."

Moreover, under the terms of the standard fire insurance policy of the State of North Carolina, plaintiffs agreed and were required to file proof of loss within sixty days after the fire occurred, and unless the requirements of the policy shall have been complied with, that is, unless proof of loss shall be filed as required, within the prescribed period, no action may be maintained on the policy. See *Gardner v. Ins. Co.,* 230 N.C. 750, 55 S.E. 2d 694, and cases cited. Indeed it is said in the *Gardner case* that ordinarily compliance with these provisions of the policy must be alleged in the complaint and proved upon the trial. Here there is no evidence that proof of loss was filed.

The record discloses that the fire occurred on November 26, 1953. And this action was commenced by summons dated November 27, 1954

—more than twelve months from the inception of the loss. Hence in any event it is manifest that the trial judge properly allowed the motion for judgment as of nonsuit on the ground of failure of plaintiffs to commence the action within twelve months next after inception of the loss.

Cases cited and relied upon by appellant are distinguishable in factual situation, and not controlling here.

All other assignments of error brought up have been duly considered and in them error is not made to appear. Thus the judgment from which appeal is taken will be

Affirmed.

PARKER, J., dissents.

FRANK ROLLER v. DAVID G. ALLEN, GEORGE W. CARTER, O. A. RITCH, FRANK R. SMITH, ERVIN R. BEAN AND F. E. WALLACE, JR.

(Filed 27 February, 1957.)

1. Injunctions § 4g: Constitutional Law § 6½—

While ordinarily the constitutionality of a statute cannot be tested by suit to enjoin its enforcement, injunction will lie when equitable relief is necessary to protect fundamental property or human rights guaranteed by the organic law.

2. Same—

A person seeking to engage in a particular occupation may challenge by injunction the constitutionality of the statute requiring a license to engage in such occupation when he alleges and offers evidence tending to show that his fundamental right to earn a livelihood was circumscribed by the Act.

3. Appeal and Error § 50—

In injunction proceedings the Supreme Court is not bound by the findings of the lower court but may examine the evidence and reach its own conclusions as to the facts.

4. Constitutional Law § 11—

A statute must have some substantial relation to the public health, morals, order, safety or general welfare in order to be valid as an exercise of the police power.

5. Constitutional Law § 17—

G.S. Chapter 87, Article 3, requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls, *is held* unconstitutional as an unwarranted interference with the fundamental right to engage in an ordinary and innocuous

occupation in contravention of Article I, Sections 1, 7, 17 and 31 of the Constitution of North Carolina. The statute cannot be upheld as an exercise of the police power, since its provisions have no substantial relation to the public health, safety or welfare but tend to create a monopoly.

6. **Constitutional Law § 10b—**

While the Court must assume that the Legislature acted within its powers until the contrary clearly appears, and in cases of doubt will resolve the question of constitutionality in favor of validity, where a statute unreasonably obstructs the common right of the persons affected to engage in an ordinary and harmless occupation in violation of the organic law, it is the duty of the Court to declare the Act unconstitutional.

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

APPEAL by the plaintiff from *Phillips, J.*, RICHMOND Superior Court, 19 May, 1956, in Chambers.

Civil action against the individual members comprising the North Carolina Licensing Board for Tile Contractors and the Executive Secretary of the Board to restrain them from enforcing Chapter 87, Article 3, General Statutes of North Carolina, on the ground that the article is in violation of plaintiff's constitutional rights under Article I, Sections 7 and 31, Constitution of North Carolina, and under the 14th Amendment to the Constitution of the United States. The Superior Court, after hearing, held the Act a valid exercise of legislative authority, denied the application for injunction, and dismissed the action. From the judgment accordingly, the plaintiff appealed.

Page & Page,
By: John T. Page, Jr., for plaintiff, appellant.
Fletcher & Lake,
By: I. Beverly Lake, for defendants, appellees.

HIGGINS, J. The parties concede that if Chapter 87, Article 3, General Statutes is a valid exercise of legislative power, the judgment below should be affirmed. On the other hand, they concede that if the Act is in violation of plaintiff's constitutional rights, the judgment should be reversed. Counsel have confined the discussion solely to the constitutional question involved.

Plaintiff does not contend the North Carolina Licensing Board for Tile Contractors acted arbitrarily in refusing to issue him a license to engage in tile, marble, and terrazzo contracting. He does contend, however, that the Constitution of North Carolina denies to the General Assembly the power to enact legislation requiring the license.

In summary, Chapter 87, Article 3, provides: The North Carolina Licensing Board for Tile Contractors shall be composed of five mem-

bers, each of whom shall have had at least five years experience in tile contracting. The Act requires a license from "any person, firm, or corporation who, for profit, undertakes to lay, set, or install ceramic tile, marble, or terrazzo floors or walls in buildings for private or public use." The Board is authorized to make rules to govern its proceedings and for the examination of applicants for license. The applicant must have had at least two years experience or its equivalent as a tile, marble, or terrazzo student or mechanic, possessing the knowledge to specify the proper kind of such materials and the ability to install the same in accordance with specifications and blueprints. All persons actively engaged in tile contracting on the effective date of the Act are entitled to license without examination. The Board is given power to suspend or revoke license (among other causes) for incompetency or inefficiency in carrying on the business of tile contracting. Any person not licensed who engages in tile contracting and any architect, engineer, or contractor who receives or considers a bid from an unlicensed contractor, shall be guilty of a misdemeanor and fined not less than $200, or imprisoned not less than two months, or both fined and imprisoned, in the discretion of the court. Each applicant must pay $25.00 to take the examination and $50.00 for each yearly renewal of license. Exempt from the provisions are all contracts in which the total cost of materials and labor does not exceed $150; all contracts in State colleges, hospitals, and other State buildings.

The plaintiff attempted, but failed, to pass the examination given by the licensing board. The evidence of both parties, however, discloses that he has engaged to some extent in tile contracting without a license. The evidence indicates the licensing board has made no attempt to have him prosecuted under the penal provisions of the Act. If indicted, he could plead as a defense the unconstitutionality of the licensing Act. Inasmuch as he has not been indicted, that method of raising the question is not open to him. Undoubtedly, it is the well established general rule that the constitutionality of an Act cannot be challenged in a suit to enjoin its enforcement. *Jarrell v. Snow*, 225 N.C. 430, 35 S.E. 2d 273; *Scott v. Smith*, 121 N.C. 94, 28 S.E. 64. However, the exception to the rule is as well established as the rule itself. *Clinard v. Winston-Salem*, 217 N.C. 119, 6 S.E. 2d 867. An Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees. *Biscuit Co. v. Sanford*, 200 N.C. 467, 157 S.E. 432; *Advertising Co. v. Asheville*, 189 N.C. 737, 128 S.E. 149. The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare. *Advertising Co. v. Asheville, supra.* "The right to

conduct a lawful business or to earn a livelihood is regarded as fundamental." *McCormick v. Proctor,* 217 N.C. 23, 6 S.E. 2d 870; *S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; 19 Am. Jur. 144.

An additional ground upon which the plaintiff claims the right to challenge the validity of the licensing Act by injunction is the fact, as he alleges, that architects, engineers, and contractors refuse to receive or consider his bids because they fear prosecution. In answer to plaintiff's allegation to that effect, the defendants admit their purpose to enforce the Act.

The evidence discloses that at least one contractor had plenty of work for plaintiff but refuses to consider his bids solely because he is not licensed. We hold, therefore, that this case falls within the exception to the general rule. The constitutionality of the Act is challenged in this proceeding.

The evidence of both parties consisted of *ex parte* affidavits. The plaintiff presented affidavits from engineers, architects, and building contractors who stated in substance that they are familiar with the uses and installation of tile, marble, and terrazzo as building materials and that the installation is simple, easy to learn, and requires no special skill; that manufacturers of these materials describe their purposes and uses in catalogues and other advertising so that the selection of the proper materials for different uses is simple and easy. Some of the affiants stated that the plaintiff had worked for them and that his work was especially well done and entirely satisfactory.

The defendants offered affidavits of two members and the executive secretary of the licensing board and others, among them engineers, architects, and contractors, to the effect that the selection and installation of proper tile, marble, and terrazzo for the various uses is a highly technical and complicated business and requires special and unusual skill. The executive secretary of the licensing board, however, stated: "The United States Department of Commerce has published various pamphlets concerning minimum specifications and requirements for the setting and installing of ceramic tiles. The Tile Council of America, which is an association formed by the manufacturers of ceramic tile, have constantly engineered and developed books of instruction to assure proper installation of these products."

One of the defendants' affidavits from a contractor disclosed that the plaintiff had been discharged because his work was unsatisfactory.

While there is disagreement as to how simple or how complicated the business of tile contracting is, there is, however, general agreement that the installation of tile and marble consists of the following steps: A metal mesh lath is nailed to the wall and covered with a plastic mixture of cement, lime, and sand about one-fourth-inch thick. This mixture is permitted to harden. Another like mixture is applied and while it is in

the plastic state the tile or marble blocks are pressed into place, beginning at the bottom of the space to be covered, and the seams are then beveled. Tile and marble are wall materials that are non load-bearing. That is, they do not support any other part of the structure. Terrazzo (basically a floor material) is a built-up type of flooring consisting of mixed cement, sand, and lime into which marble chips are pressed when the mixture is plastic. After it hardens, a buffing and polishing machine is run over it until the surface is smooth and even. The installation of terrazzo is usually upon a subfloor of concrete or some other solid base prepared by the general building contractor.

Ceramics as building and surfacing materials have been manufactured and used for more than 4,000 years. The following is quoted from a United States Government publication, entitled "Earthen Floor & Wall Tiles:"

> "Floor and wall tiles, together with other products of fired clay, were produced in a very early period of the industrial history of mankind, a fact probably accounted for by the widespread occurrence of the raw materials and the comparative simplicity of manufacturing methods. Fired clay objects are usually among the articles discovered by archaeologists in the ruins of ancient civilizations, and there is ample evidence that the early builders in the Nile Valley and the Tigris-Euphrates Basin, as well as in other areas, were familiar with the superior qualities of fired clay as a medium of surface covering and used it extensively in their work. The famous doorway of blue glazed tile found in the Step Pyramid and now in a Berlin museum, the tile facing of the Istar Gate and the decorations of the Processional Street of Babylon, the famed Archers and Lions friezes from the palace of Darius at Susa—these and many other examples attest the antiquity of ceramic art and the technical competence of the ancient ceramists.
>
> "The art of tile production in Europe was advanced greatly by the Persians, and it is to Saracenic Persia that the world largely owes the preservation and development of the art during the Medieval and Renaissance periods. It is said that the course of Saracen conquests can almost be traced by the glazed and decorated wall tiling of their buildings, for many of the tiles produced during those periods still adorn the ancient mosques and shrines of Bagdad and Damascus."

From the evidence offered, the trial court found as a fact that the examining board was justified in finding from the written examination the plaintiff did not possess the qualifications required by the licensing

Act and did not pass the examination. The crucial finding is here quoted:

> "6. That tile contracting is not an ordinary trade, but is a highly skilled trade and due to the many varieties of tile, marble, and terrazzo materials and of the uses thereof, the restriction of the right to engage in the business of tile contracting to those persons possessing the qualifications prescribed by G.S. 87-33 is necessary and reasonable in order to protect the public from fraud, imposition and incompetency, to promote the public health, sanitation, safety and general welfare."

The court concluded as a matter of law, (1) the licensing Act does not create a monopoly; (2) it is reasonable and necessary to prevent fraud and incompetence, and to promote public health; (3) does not violate either the Constitution of North Carolina or of the United States. The plaintiff's exceptions and assignments of error call in question the correctness of the court's findings of fact and conclusions of law. Ordinarily, this Court is bound by the findings of the Superior Court if there is competent evidence to support them. This rule, however, does not apply in injunction proceedings. In such cases it is the duty of this Court to examine the evidence and draw its own conclusions. *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319; *Cahoon v. Comrs.,* 207 N.C. 48, 175 S.E. 846; *Angelo v. Winston-Salem,* 193 N.C. 207, 136 S.E. 489. ". . . in a suit of this character (injunction) the appellate court may examine the evidence and reach its own conclusions as to the facts." *Advertising Co. v. Asheville, supra; Sanders v. Ins. Co.,* 183 N.C. 66, 110 S.E. 597.

Is Chapter 87, Article 3, General Statutes, a valid exercise of the police power of the State in the public interest for reasons of health, safety, morals, or welfare? This Court must assume the Legislature acted within its powers until the contrary clearly appears. *Glenn v. Board of Education,* 210 N.C. 525, 187 S.E. 781. The defendant contends the licensing Act is a valid exercise of the police power reasonably necessary (1) to promote public health, and (2) to protect the public from imposition and fraud by reason of the inherent difficulty in detecting faulty workmanship in tile selection and installation. The defendant offered the affidavit of the Director of Sanitary Engineering, Division of the North Carolina Board of Health: "Approximately 200 sanitarians work with the local health departments in this State and they generally recommend ceramic tile where sanitation problems exist. That this department does not specify general installation procedures but recognizes the sanitation problems that arise as a result of inferior workmanship or improper materials. That the Division recommends

that all work done when tile is specified be done in a manner that will satisfy sanitation requirements. That new developments in these areas of construction both in products and techniques when used by competent personnel insure installations more satisfactory to all concerned." The purport of the above is that the more skilled and experienced the workman, the more satisfactory will be his work. The same can be said of any other trade in which human beings engage—even to shining shoes. Usually, the greater the skill, the higher the charge. If only those of the highest skill are permitted to do the work, those who are unable to pay the higher prices for tile must use wood, brick, concrete, linoleum, or some other material which the ordinary workman is permitted to install. An average man with an average purse has a right to employ a workman of ordinary skill to perform an ordinary task.

The health claim is considerably weakened by the failure of the Act to assign to the health authorities any additional duties or give them any voice in the work of the licensing board. The very exceptions in the Act, that it shall not apply to contracts of less than $150.00 and for work done on State colleges, hospitals, or other State buildings, regardless of cost, suggest that health is certainly not a primary consideration. Of course, health to some extent enters into all construction where people live and work. It is not enough that health may be indirectly affected. "If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational regard or substantial relation to the public health, morals, order, or safety, or general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm." *S. v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731; *Skinner v. Thomas,* 171 N.C. 98, 87 S.E. 976; *Glenn v. Express Co.,* 170 N.C. 286, 87 S.E. 136. This challenge to the licensing Act is not answered by saying the plaintiff did not pass the written examination prepared by the board. Tile work consists of selecting and installing tile. The affidavit of the Executive Secretary of the Licensing Board says: "The United States Department of Commerce has published various pamphlets concerning minimum specifications for setting ceramic tiles. The Tile Council of America . . . have constantly engineered and developed books of instruction *to assure proper installations of their products.*" (Emphasis added.) The evidence further discloses that tile catalogues and advertising recommend the type of tile for different uses. Nothing in the record shows that a man of average intelligence and some aptitude for such work cannot learn quickly enough to do average work. Successful tile contracting consists in doing the work rather than describing it in a written examination paper. In all probability the average worker could learn to do acceptable tile work as quickly as he can learn to describe it on paper. The plaintiff's written examination is a part of the record. Undoubt-

edly those who are inclined to be fastidious in the use of the words that go to make up our mother tongue would not be impressed with the plaintiff's selection of words or the way he spells them. According to tradition, the most skillful blacksmith in the writer's native county lost his life by reason of a handicap similar to plaintiff's. In explaining the cause of death, George's more literate brother said, "Yes, lack of education killed him. The trouble was, he couldn't spell. He thought the proper way to spell the eighth month is O-r-g-u-s-t and he ate some oysters that killed him."

The defendant further urges that the licensing Act can be sustained upon the ground that tile installing is a trade in which it is easy to practice fraud upon the public by doing shoddy work and that by policing the industry the public welfare will be promoted. In the case of *S. v. Ballance, supra, Justice Ervin* answers a similar argument: "The initial defect in this argument is that it runs counter to the economic philosophy generally accepted in this country that ordinarily the public is best served by the free competition of free men in a free market. To be sure, a dishonest photographer may defraud those with whom he deals. So may a dishonest person in any other calling. Indeed, fraud has been practiced on occasion in all relations of life since the serpent invaded Eden and misrepresented the qualities of the forbidden fruit to the woman. . . . 'In our opinion, the right to earn one's daily bread cannot be made to hang on so narrow a thread. *Rawles v. Jenkins*, 212 Ky. 287, 279 S.W. 350.' "

Significantly, all members of the licensing board must come from the industry. Neither the health, police, nor welfare authorities are given any voice or control. Not only does the licensing board have the exclusive right to say who shall be licensed, but upon complaint supported by affidavit, it may suspend or revoke a license for incompetence or inefficiency in doing tile work. It is doubtful whether any other licensing agency has been granted the facilities for such tight and absolute control over any profession or business. The licensing board has the power to make a monopoly out of an industry which one of the defendants' witnesses described as having grown "into a major segment of today's construction business."

Notwithstanding the growth of the business, there are only 107 persons, firms, and corporations licensed "to lay, set, or install ceramic tile, marble, or terrazzo floors or walls in buildings for profit." How many were in the business in 1937 and licensed without examination is not disclosed by the record. In order to qualify for the examination, the applicant must have had two years experience as a student or mechanic, or its equivalent, next preceding the application for license. From the foregoing it is difficult to conclude otherwise than that the effect of the

licensing Act is to give control of tile contracting to those already in the business and a continuing opportunity to perpetuate that control.

Historically significant is the fact that regimentation and control over trades and industry by law reached its high water-mark about 1937. In 1940 this Court gave expression to its concern over the tendency in the following words of warning:

> "The state of internal protest has been reached. In marginal cases controversies in the courts have arisen as to whether the organization has captured a sufficient *quantum* of public purpose to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to a private group to be used in narrowing the field of competition, or in aid of exploitation by creating remunerative positions in administration. *Roach v. Durham,* 204 N.C. 587, 169 S.E. 149; *S. v. Lawrence,* 213 N.C. 674, 197 S.E. 586. Without the aid of the statute these groups would be mere trade guilds, or voluntary business associations; with it they become State agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved by the device of securing a majority membership on the administrative boards or commissions, and in aid of this the power of the State is heavily invoked by way of prosecution in the criminal courts of those who are unable to secure the approval of the board and obtain license to engage in the occupation."

The foregoing is quoted from *S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854.

One year after the passage of Chapter 87, Article 3, General Statutes, Professor Hanft and Mr. Hamrick of the University Law School, published an article entitled, "Haphazard Regimentation Under Licensing Statutes," Vol. 17, N. C. Law Review, 1. As bad examples of licensing acts (among others) the article lists licensing of photographers (held unconstitutional, *S. v. Ballance, supra*), drycleaners (held unconstitutional, *S. v. Harris, supra*), and tile contractors:

> "This review of some of the decisions on the question of the validity of statutes or ordinances providing for regulation of occupations by licensing makes it apparent that where the occupation has no special relationship to public health, safety, morals, or welfare the courts have a well-established basis for invalidating the regulation. Courts can, if they choose, preserve from such control the ordinary callings. Where the licensing is statewide and is to be done by a commission or agency composed of men already in the business to be licensed, the courts may well insist on being shown that the

regulation is in the interest of those public purposes nurtured by the police power. Of course, it may be argued that the trend of the times is in the direction of complete subordination of the individual to his government, that licensing regulation is part of the trend, and that courts can not thwart that trend. It is true that courts can not hold back the inevitable. But they can do much good in restraining mass inroads on individual liberty until those inroads have proved themselves inevitable."

Without doubt there are professions and occupations so affected with the public interest as to warrant their regulation for the public good. *S. v. Warren,* 211 N.C. 75, 189 S.E. 108; *Roach v. Durham,* 204 N.C. 587, 169 S.E. 149; *S. v. Lockey,* 198 N.C. 551, 152 S.E. 693; *S. v. Scott,* 182 N.C. 865, 109 S.E. 789; *S. v. Siler,* 169 N.C. 314, 84 S.E. 1015; *S. v. Hicks,* 143 N.C. 689, 57 S.E. 441; *S. v. Call,* 121 N.C. 643, 28 S.E. 517; *S. v. Van Doran,* 109 N.C. 864, 14 S.E. 32; *Ex Parte Schenck,* 65 N.C. 353.

On the other hand, "A state cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them." *S. v. Ballance, supra; Palmer v. Smith,* 229 N.C. 612, 51 S.E. 2d 8; *S. v. Harris, supra; Skinner v. Thomas, supra; Glenn v. Express Co., supra; Liggett Co. v. Baldridge,* 278 U.S. 105; *Baking Co. v. Bryan,* 264 U.S. 504; *Board of Examiners v. Jewelers,* 183 Ga. 669, 189 S.E. 238; *People v. Griffith,* 280 Ill. 18, 117 N.E. 195; 11 Am. Jur., Constitutional Law, s. 336; *Ex parte Dickey,* 76 W. Va. 576; *The Case of the Tailors &c of Ipswich,* 11 Cokes Reports 53, 77 English Reports (Full Reprint) 1218. (Decided 1615.)

Admittedly there are borderline occupations in which the right to regulate is doubtful. In such cases rules of construction require that the regulation shall be upheld. But where, as here, no substantial public interest is shown to be involved or adversely affected, regulation is not justified. The fact that North Carolina was the first and is still the only State regulating tile contracting by license is not without persuasive effect. This State is under no obligation to wait until some other state "pioneers the field," but if regulation is in the public interest, it does seem strange indeed that no sister state has discovered the fact.

From what this Court has said, in the cases cited, it may be concluded that the police power, in seeking to extend its field of control, must not invade personal and property rights guaranteed and protected by Article I, Sections 1, 7, 17 and 31 of the Constitution of North Carolina. The Act in question here has as its main and controlling purpose not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business. The Act

unreasonably obstructs the common right of the plaintiff as well as of others to choose and follow as a means of livelihood an ordinary and harmless occupation. It tends to promote a monopoly in what is essentially a private business.

This Court, in the cases cited, has surveyed and marked the dividing line between the professions and skilled trades which in the public interest permit of regulation by licensing under the police power, and those ordinary lawful and innocuous occupations and trades which are protected from regulation by constitutional guarantees. The occupations and trades in the latter category constitute off-limits ground on which trespassing is forbidden by the Constitution. The police power of the State must stop at the line.

If the Legislature can take away the right to lay tile without license, then few, if any, trades remain in which man has the right to work. The effect of the licensing Act is to create a monopoly in a trade designed by the framers of the Constitution to be free from legislative control. Chapter 87, Article 3, is repugnant to Article I, Sections 1, 7, 17, and 31, Constitution of North Carolina, and, therefore, void. The judgment of the Superior Court of Richmond County is

Reversed.

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

ELIHU MILLER v. NEW AMSTERDAM CASUALTY COMPANY.

(Filed 27 February, 1957.)

1. Insurance § 43a—

The Motor Vehicle Safety and Financial Responsibility Act of 1953 has no application to the rights and liabilities of the parties arising out of a collision occurring prior to 1 January 1954, G.S. 20-279.35, the Act of 1947 being applicable thereto.

2. Insurance § 43b—

An assigned risk policy of automobile insurance specifying the vehicle covered by the policy does not cover another vehicle owned by insured in the absence of a provision in the policy for extension of coverage or approval by insurer of a change in the vehicle covered. Motor Vehicle Safety and Financial Responsibility Act of 1947; G.S. 20-227(2)(a).

3. Same—Assigned risk policy held not to cover vehicle other than the one specified in the policy.

Where an assigned risk policy of automobile liability insurance provides for the payment of additional premium for application of the policy to a

newly acquired vehicle, and insurer, upon notification that insured had traded in the vehicle covered for another, advised insured that it would issue endorsement covering the second vehicle upon payment of additional premium in a stipulated amount, and there is no evidence that the additional premium was ever paid or the endorsement issued, *held*, under the Motor Vehicle Safety and Financial Responsibility Act of 1947, G.S. 20-227(2)(a), the policy does not cover loss inflicted in the operation of the second vehicle, nor is insurer estopped from denying liability by reason of its failure to return the unearned premium on the original policy or its failure to cancel it.

4. Estoppel § 11a: Waiver § 4—

Waiver or estoppel, or facts constituting the basis thereof, must be pleaded.

5. Waiver § 2: Estoppel § 6a—

There can be no waiver unless intended by the one party and so understood by the other, and no estoppel unless one party has been misled to his prejudice by the other.

6. Insurance § 43b—

The registration of a vehicle by the Department of Motor Vehicles in violation of G.S. 20-252(b) cannot have the effect of enlarging the coverage of an assigned risk policy of liability insurance beyond its express terms.

7. Insurance § 43a—

The requirement of the Motor Vehicle Safety and Financial Responsibility Act that the statute be liberally construed, G.S. 20-225, cannot be invoked to permit recovery under a policy beyond the express limitation of coverage stipulated in the policy contract.

APPEAL by defendant from *Huskins, J.*, February Term 1956 of CALDWELL.

Civil action by plaintiff against an automobile liability insurer to subject an assigned risk policy issued to Willard W. Walker under the provisions of the Motor Vehicle Safety and Financial Responsibility Act of 1947, Ch. 1006 of 1947 Session Laws, to the satisfaction of a judgment for personal injuries recovered by the plaintiff against Clara Oakes Wilson Smith, who was allegedly driving a 1951 Ford pick-up truck covered by the policy with the permission, express or implied, of Willard W. Walker.

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

"1. Does the policy of insurance issued by defendant to Willard Walker (being Defendant's Policy No. LA 512462) cover the 1951 Ford Pick-up Truck (Motor No. FI-RIBF-14322) which was involved in the collision when plaintiff was injured on February 13, 1952? Answer: Yes.

"2. If so, was Clara Oakes Wilson at the time of said collision using said 1951 Ford Pick-up Truck with the permission, express or implied, of Willard Walker? Answer: YES.

"3. What amount, if any, is plaintiff entitled to recover of defendant? Answer: $5,500.00 with interest from 28 May 1953."

From a judgment in accord with the verdict, defendant appeals.

James C. Farthing and Fate J. Beal for Plaintiff, Appellee.
Townsend & Todd for Defendant, Appellant.

PARKER, J. Defendant's assignment of error as to the refusal of the court to grant its motion for judgment of nonsuit, made at the close of plaintiff's evidence—the defendant offered none—, requires the statement of a summary of plaintiff's evidence necessary to an understanding of the legal questions arising on the appeal.

Plaintiff offered in evidence a judgment rendered at the May Term 1953 of the Superior Court of Caldwell County in the case of Elihu Miller (the plaintiff here) *v.* Willard Walker and Clara Oakes Wilson. The issues submitted to the jury were set forth in the judgment, and show that the jury found for its verdict that plaintiff was injured by the negligence of the defendant Clara Oakes Wilson, as alleged, that plaintiff was free from contributory negligence, that Clara Oakes Wilson at the time of the accident and damage to plaintiff was not acting within the scope of her employment and in furtherance of the business of the defendant Willard Walker, that plaintiff is entitled to recover damages in the amount of $5,500.00 from the defendant Clara Oakes Wilson. The judgment adjudges and decrees that plaintiff recover from the defendant Clara Oakes Wilson Smith the sum of $5,500.00 with interest, and that plaintiff take nothing from the defendant Willard Walker. It is to be noted that the judgment refers to the *feme* defendant five times as Clara Oakes Wilson and once as Clara Oakes Wilson Smith. The complaint in the instant case calls her by both names. It is evident that both names refer to the same person. There is nothing in the Record and Briefs to the contrary.

It was stipulated by the parties that execution in the case of Elihu Miller *v.* Clara Oakes Wilson was duly issued, and returned by the sheriff on 5 July 1955 with the return, "No property found to levy on."

Plaintiff alleges "that on or about February 13, 1952 this plaintiff was seriously injured in an automobile collision with a truck owned by Willard W. Walker, and being driven at the time of said collision by one Clara Oakes Wilson Smith with the express permission of the said Willard Walker" . . . and "that on the 13th day of February 1952 the

said Willard W. Walker had an assigned risk automobile policy with the defendant covering the truck being driven by the said Clara Oakes Wilson Smith; that said policy bore the number LA 512462, and was in full force and effect on the 13th day of February 1952, the date the plaintiff herein was seriously injured and his property damaged." The defendant in its answer denied these allegations, with the exception that it admitted plaintiff was injured in an automobile collision. Plaintiff offered evidence to the effect that he was injured on 13 February 1952 in a collision with a 1951 Ford Pick-up Truck owned by Willard W. Walker and driven by Clara Oakes Wilson Smith.

Plaintiff filed an amendment to his complaint alleging that the defendant was notified of the injuries to Elihu Miller and had due opportunity to defend the suit instituted by plaintiff against Clara Oakes Wilson Smith and Willard W. Walker, but defendant denied that its policy covered the vehicle in question, and would not defend the action. The defendant in an amendment to its answer admitted this allegation to be true.

Plaintiff offered other evidence as follows: Lenoir Insurance Agency on 29 May 1951 wrote and mailed the following letter to the defendant: "Re: LA 295865 Willard W. Walker (N. C. Assigned Risk) Route #5, Lenoir, North Carolina. We enclose herewith Cashier's Check in the amount of $53.48, which represents payment for the renewal of the above mentioned liability policy. Please issue the renewal policy in accordance with your letter of April 5th, and make the necessary filings with the North Carolina Department of Motor Vehicles." This Insurance Agency received from the defendant a copy of a letter it sent to Willard W. Walker dated 8 June 1951 reading: "Re: LA 512462—Assigned Risk. We acknowledge receipt of payment in the amount of $53.48, for the above captioned policy. We enclose policy herewith and trust you will find it entirely satisfactory." On 11 June 1951 this Insurance Agency wrote and mailed to the defendant the following letter: "Re: Policy LA 512462 Willard W. Walker (N. C. Assigned Risk), Route #5, Lenoir, North Carolina. Gentlemen: We have been notified by the above insured that the 1940 Ford Coupe, Motor # 18-5575141, has been traded for the following described unit: 1951 Ford Pick-up Truck, Motor #FI-RIBF-14322. Please issue an endorsement showing this change." Plaintiff offered in evidence a motor vehicle registration certificate for a 1951 Ford Pick-up Truck #FI-RIBF-14322 issued to Willard W. Walker, Lenoir, North Carolina, as owner, by the North Carolina Department of Motor Vehicles.

On 12 June 1951 defendant wrote and mailed a letter to Willard W. Walker, and sent a copy of it to the Insurance Agency, reading: "Re: LA 512462—Assigned Risk. We have received a request from your agent to change the 1940 Ford to a 1951 Ford Pick-up Truck. The

additional premium will be $17.26. Please send us certified check or postal money order in this amount and we will issue the endorsement and notify the Bureau." This letter also contains the following: "CC: Lenoir Insurance Agency, Lenoir, North Carolina. CC. N. C. Automobile Assigned Risk Plan, Raleigh Building, Raleigh, North Carolina." On 23 February 1952 the Insurance Agency wrote and mailed a letter to the defendant with the same reference to the assigned risk policy by number and to Willard W. Walker as in its letter to it of 11 June 1951, and in this letter informed the defendant the insured was involved in an accident on Highway #321, north of Lenoir, on 13 February 1952, and suggested that it assign an adjuster to investigate.

In the complaint in the instant case and in the evidence Walker is referred to as Willard W. Walker. In the judgment introduced in evidence he is referred to as Willard Walker. It is plain that both names refer to the same man.

During the presentation of plaintiff's evidence the defendant admitted "that Willard W. Walker was an assigned risk and had been assigned to the New Amsterdam Casualty Company (the defendant here) under the Assigned Risk Plan in force in North Carolina on and after the 2nd day of June 1950."

The Assigned Risk Automobile Liability Policy No. LA 512462 issued to Willard W. Walker by the defendant was in place of a former Policy No. 295865 issued to him as an assigned risk. Plaintiff introduced in evidence the Policy No. LA 512462, whose Policy Period was from 20 June 1951 to 20 June 1952—12:01 a.m. The description of the automobile in the policy was a 1940 Ford Coupe 18-5575141. The total premium was $53.48. This policy has attached to it an automobile transfer of insurance endorsement, which states that insurance under this policy to which this endorsement is attached is extended to a 1950 Ford Tudor Sedan, effective 12:01 a.m., 13 March 1952, and that insurance as provided by the policy to which this endorsement is attached was cancelled on a 1940 Ford Coupe 18-5575141, effective 12:01 a.m., 13 March 1952.

Plaintiff offered in evidence the record of the assigned risk automobile liability insurance of Willard W. Walker filed with the Safety Division of the Motor Vehicle Department. This record shows that the defendant issued to Willard W. Walker as insured an Assigned Risk Automobile Liability Policy No. LA 512462, describing the automobile as a 1940 Ford Coupe 18-5575141. That this policy was in force from 20 June 1951 to 20 June 1952—12:01 a.m., and that defendant never made any request to the Department of Motor Vehicles to cancel or terminate the policy. W. C. Poe, one of the custodians of the records of the Safety Division of the Motor Vehicle Department testified: "On June 20, 1951, the 1940 Ford Coupe was insured by New Amsterdam

Casualty Company (defendant here). Yes, on March 13, 1952, that policy was changed from the 1940 Ford to a 1950 Ford two-door Sedan. I have no record of any 1951 Pick-up Truck insured."

A Motor Vehicle Liability Policy, issued under the Motor Vehicle Safety and Financial Responsibility Act of 1947 in force in 1952—The Motor Vehicle Safety and Financial Responsibility Act of 1953, Ch. 1300 of 1953 Session Laws, has no application to the collision in the instant case on 13 February 1952—may be either an owner's policy of liability insurance conforming to subdivision (2) of G.S. 20-227, in force in 1952, or an operator's policy of liability insurance arising out of the use by him of any motor vehicle not owned by him satisfying subdivision (3) of G.S. 20-227, in force in 1952. *Russell v. Casualty Co.*, 237 N.C. 220, 74 S.E. 2d 615. The Motor Vehicle Safety and Financial Responsibility Act of 1953, as set forth in G.S. 20-279.35, provides that the Motor Vehicle Safety and Financial Responsibility Act of 1947 remains in full force and effect with respect to any accident or violation of the motor vehicle laws of this State occurring prior to 1 January 1954, or with respect to any judgment arising from such accident or violation. Defendant issued to Willard W. Walker an owner's policy of liability insurance. G.S. 20-227 provides subdivision (2): "Every owner's policy shall—(a) Designate by explicit description, or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted." G.S. 20-252—in force in 1952—provides that proof of financial responsibility may be made by filing with the Commissioner of Motor Vehicles a written certificate of an insurance carrier, authorized to do business in this State, certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility, and this certificate "unless the policy is issued to a person who is not the owner of a motor vehicle, must designate by explicit description or by appropriate reference all motor vehicles covered." G.S. 20-252(b) reads: "No motor vehicle shall be, or continue to be, registered in the name of any person required to file proof of financial responsibility, unless it is so designated in the certificate."

The Assigned Risk Automobile Liability Policy No. LA 512462, when issued to Walker, covered by explicit description a particular motor vehicle—a 1940 Ford Coupe 18-5575141. This policy under the Title, Insuring Agreements IV(a), has this provision: "AUTOMOBILE. Except where stated to the contrary, the word 'automobile' means: (1) DESCRIBED AUTOMOBILE—the motor vehicle or trailer described in this policy." The Policy's Insuring Agreements IV(4) has this provision for the extension of insurance coverage to a Newly Acquired Automobile: "Newly Acquired Automobile—an automobile, ownership of

which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

The policy states that the Insuring Agreements with the insured are made "in consideration of the payment of the premium."

It is well settled law that "in the absence of a provision for the extension of coverage of an automobile liability policy to an automobile other than those described in the policy, or of specific approval of the change, the insurer does not cover the insured's liability resulting from the use of such other automobiles." 5A Am. Jur., Automobile Insurance, p. 81. To the same effect Annotation 34 A.L.R. 2d 938.

Howell v. Indemnity Co., 237 N.C. 227, 74 S.E. 2d 610, was an action in which an injured third person, whose claim against insured for negligent injury had been reduced to judgment, sued an insurance company upon an owner's motor vehicle liability policy issued under the North Carolina Motor Vehicle Safety and Financial Responsibility Act of 1947. The Court said: "An insurance company cannot be held liable upon a policy of insurance beyond the limits of coverage specified in it, if the limits of coverage are consistent with the statute under which the policy is issued."

There is no contention by plaintiff that Policy LA 512462 did not comply with the terms and conditions of the Motor Vehicle and Financial Responsibility Act of 1947, or that Walker on the policy's delivery date owned any automobile, except the insured 1940 Ford Coupe.

Willard W. Walker was charged with notice of the terms of his policy, and among them, was the one that obligated him to pay any additional premium required because of the application of the insurance to a newly acquired automobile. *Moore v. Accident Assurance Corp.*, 173 N.C. 532, 92 S.E. 362. On 12 June 1951 the defendant wrote and mailed Willard W. Walker a letter referring to Policy LA 512462, and saying we have received a request from your agent to change the 1940 Ford to a 1951 Ford Pick-up Truck; the additional premium will be $17.26: please send us certified check or postal money order in this amount, and we will issue the endorsement and notify the Bureau. Plaintiff introduced a copy of this letter sent to Lenoir Insurance Agency in evidence. This copy shows this notation: "CC N. C. Automobile Assigned Risk Plan, Raleigh Building, Raleigh, North Carolina."

Plaintiff has offered no evidence that Willard W. Walker paid the additional premium of $17.26, and plaintiff's evidence affirmatively shows that defendant never issued an endorsement to the policy to cover the 1951 Ford Pick-up Truck, that insurance on the 1940 Ford Coupe was not cancelled until 13 March 1952, when by endorsement the coverage was extended to a 1950 Ford Tudor Sedan, and that no 1951 Ford Pick-up Truck was ever insured under the policy. The only reasonable inference from the evidence is that Walker never paid the additional premium, for if he had, the defendant would have issued the endorsement. Under the Motor Vehicle Safety and Financial Responsibility Act of 1947 the defendant was not required to grant insurance coverage for the 1951 Ford Pick-up Truck, until it had received payment of the additional premiums required, when demanded. G.S. 20-276; *Graham v. Ins. Co.*, 240 N.C. 458, 82 S.E. 2d 381. The payment of premiums is of the essence of a contract of insurance, and is a *sine qua non* to the successful operation of an insurance company. *Allen v. Ins. Co.*, 215 N.C. 70, 1 S.E. 2d 94.

Plaintiff contends that notice to the insurer by the insured, in apt time, of a newly acquired automobile is sufficient for insurance coverage under the policy on such newly acquired automobile. Such contention is unsound, because it ignores the policy provision that the insured shall pay any additional premium required because of the application of the insurance to such automobile.

Plaintiff further contends that the defendant "after due and timely notice, waived its right to deny liability under the policy by estoppel or operation of law." No question of waiver or estoppel is presented for decision, for the reason that plaintiff has not pleaded waiver or estoppel, though he had an opportunity to do so, and no facts constituting a waiver or estoppel appear in the pleadings. *Wright v. Ins. Co.*, 244 N.C. 361, 93 S.E. 2d 438. Even if plaintiff had pleaded waiver or estoppel, there is no evidence to support either plea. In *Green v. P. O. S. of A.*, 242 N.C. 78, 87 S.E. 2d 14, this Court said: " 'There can be no waiver unless so intended by one party and so understood by the other, or unless one party has so acted as to mislead the other.' 2 Herman on Estoppel, Sec. 825." In *Shean v. U. S. Fidelity & Guaranty Co.*, 263 Mich. 535, 248 N.W. 892, 894, it is written: "There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up." Defendant waived none of its rights under the policy as to Willard W. Walker, and did not mislead Walker into the belief that his insurance had been transferred to his 1951 Ford Pick-up Truck. In fact, defendant, by its letter of 12 June 1951, stated definitely to Walker that it would not issue an endorsement covering the truck and notify the Department of Motor Vehicles, until the additional premium of $17.26 was paid.

"The insurer may always set up against the injured party the defenses which it may have set up against the insured." *Sheeren v. Gulf Ins. Co. of Dallas, Tex.*, (L. App.), 174 So. 380. The act of the Department of Motor Vehicles in registering the 1951 Ford Pick-up Truck in Walker's name without receiving a written certificate of an insurance carrier that such truck was covered by a motor vehicle liability policy, or without proof that a satisfactory bond had been executed, or that an adequate deposit of cash or securities had been made, or that self-insurance certificates have been filed, in violation of G.S. 20-252(b), cannot impair any defenses of the defendant. *Graham v. Ins. Co., supra.* The defendant did not authorize or permit Walker or any one else to operate the 1951 Ford Pick-up Truck on the highways. Defendant has not waived any of its rights under the policy as regards the plaintiff, and has not misled him to his prejudice.

In *Dobranski v. Lincoln Mut. Casualty Co.*, 275 Mich. 1, 265 N.W. 507, headnote 5 in the N. W. Reporter correctly states the decision of the Court: "Insurer *held* not estopped to refuse to reform automobile liability policy to cover new automobile purchased by insured by retention of premium payments made for balance of year under old policy, where insurer had refused to transfer old insurance to new automobile or to write new policy for less than one year before payments were made."

There is attached to Policy LA 512462 an endorsement entitled "Use of Other Automobiles—Broad Form." Plaintiff, in his brief, states the questions presented for our decision, and in these questions no reference is made to this endorsement. Nowhere in his brief does he refer to or mention this endorsement. There is neither allegation nor proof that Clara Oakes Wilson Smith was the wife of Willard W. Walker, or a relative of and a resident of his household, or a part owner of the 1951 Ford Pick-up Truck, etc. It would seem that this endorsement by its express terms has no application to the facts of the instant case.

We are advertent to the fact that G.S. 20-225 states that it is the legislative intent that the 1947 Motor Vehicle Safety and Financial Responsibility Act shall "be liberally construed" so as to effectuate its purposes, as far as legally and practically possible. However, we cannot hold, by reason of the Act, there is created in favor of the plaintiff, an injured party, a right to recover from the insurer upon a policy that had never attached to and covered the 1951 Ford Pick-up Truck involved in the collision in which he was injured. To hold otherwise, would permit plaintiff to recover from the insurer under circumstances not covered by the policy. *Graham v. Ins. Co., supra; Howell v. Indemnity Co., supra; Sheeren v. Gulf Ins. Co. of Dallas, Tex., supra; Black v. Dunn*, (La. App.), 46 So. 2d 625; *Aetna Casualty & Surety Co. v. Chapman*, 240 Ala. 599, 200 So. 425; *Hobbs-Western Co. v.*

Employers' Liability Assur. Corp., (1939; CCA 8th) 102 F. 2d 32; Anno. 34 A.L.R. 2d 938. See *Merchants Mut. Casualty Co. v. Lambert*, 90 N.H. 507, 11 A. 2d 361, 127 A.L.R. 483, for the second headnote in A.L.R. The question here is not whether the defendant terminated or not its policy, when notified that Walker had traded his 1940 Ford Coupe for a 1951 Ford Pick-up Truck, or whether or not it kept the premium paid for the policy to cover his 1940 Ford Coupe when insured, but whether the 1951 Ford Pick-up Truck was covered by the policy. It was not necessary for defendant to terminate the policy, or to return the premium paid when the policy was issued to cover his 1940 Ford Coupe to preclude recovery against it for a loss not covered by its policy. See *Sheeren v. Gulf Ins. Co. of Dallas, Tex., supra.*

We conclude that plaintiff's evidence affirmatively shows that there was no coverage under the policy on the 1951 Ford Pick-up Truck, that there was no waiver or estoppel under which the insurer may be held liable, and that the lower court erred in overruling the defendant's motion for judgment of nonsuit.

Reversed.

WACHOVIA BANK AND TRUST COMPANY, AS EXECUTOR UNDER THE WILL OF ADDIE HEREFORD UPTON, v. CAMILLE H. WOLFE AND THE AMERICAN NATIONAL RED CROSS.

(Filed 27 February, 1957.)

1. Wills § 31—

A will must be construed as a whole to ascertain the intent of testator, and effect must be given to each clause, phrase and word if this is possible by any reasonable construction, and conflicting provisions must be reconciled if possible.

2. Same—

In undertaking to reconcile apparently conflicting provisions of a will, apparently inconsistent subordinate provisions must be given effect in accordance with the general prevailing purpose of testator.

3. Wills § 34e—

The rule of *ejusdem generis* does not arbitrarily control in the construction of a will but is to be used as an aid in ascertaining the intent of testator as gathered from the will as a whole.

4. Same—Under rule of ejusdem generis "personal property" held to refer to personal effects rather than to securities.

Testatrix, after bequests of specified sums to designated charities, left her sister "my furniture, household effects and personal property" and then left "the balance of my estate" to the National Red Cross. At the time of

executing the will and at the time of her death testatrix had no realty. It further appeared that testatrix had made provision for her sister in certain insurance policies and savings bonds. *Held:* Construing the will as a whole, the bequest to testatrix' sister was only of tangible articles of household and personal use, since otherwise the residuary bequest to the National Red Cross would be meaningless, and this construction is strengthened by the evidence of the circumstances attendant when the will was made.

5. Wills § 39—

The ascertainment of the intent of testatrix from the language of the instrument is a question of law.

6. Same—

The intent of testator must be ascertained from the language of the instrument, and while evidence of the circumstances attendant the execution of the will is competent when tending to shed light upon testator's intent as expressed in the language used, parol evidence of declarations made by testator is incompetent as an aid in construction.

APPEAL by defendant American National Red Cross from *Crissman, J.*, March Term, 1956, of ROWAN.

Executor's action for construction of the holographic will of Addie Hereford Upton and for advice as to the disposition of cash, bonds and securities remaining in its hands.

The dispositive provisions of the will are these:

"I hereby will and bequeath ten thousand dollars ($10,000.) to the Charity Hospital in New Orleans, Louisiana. To St. Andrews Episcopal Church in New Orleans, Louisiana, I will the sum of five hundred ($500.00) dollars. To St. Luks (*sic*) Episcopal Church in Salisbury, N. Carolina, I leave the sum of ($500.00) five hundred dollars. To the Red Cross of Salisbury, N. Carolina, I leave five hundred ($500.00) dollars. To my sister Mrs. Camille H. Wolfe, I leave my furniture, household effects and personal property. The balance of my estate I leave to the National Red Cross society of America."

The assets of the testatrix on 5 August, 1953, the date of her death, and other particulars, are set forth in connection with opinion on prior appeal, when the cause was remanded for construction of the will in the light of "circumstances attendant" when the will was executed, to wit, 2 October, 1951.

Thereafter, in the Superior Court, the defendants supplemented their original answers and offered evidence purporting to relate to such "circumstances attendant"; and the court, predicated on certain *findings of fact*, entered judgment that the words, "personal property," as used by the testatrix, included cash, bonds and securities, denoting all assets other than real estate, and that defendant Wolfe was entitled thereto.

Defendant Red Cross excepted and appealed.

James L. Woodson and Nelson Woodson for defendant American National Red Cross, appellant.

Clarence Kluttz and Lewis P. Hamlin, Jr., for defendant Wolfe, appellee.

BOBBITT, J. Reference is made to the statement of facts and opinion on said prior appeal. *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246. There is no need to discuss further the reasons why the cause was then remanded. Too, the principles of law then stated will be treated as established without further citation of authority. Suffice to say, we did not then construe the will; nor did we undertake to mark out what portions, if any, of the evidence offered at the first hearing, but not considered by the Court, were relevant and competent. See: *Collier v. Mills, ante,* 200, 95 S.E. 2d 529.

In the construction of the will in the light of "circumstances attendant" when the will was executed, these well established rules are pertinent:

1. To ascertain the intent of the testator, the will must be considered as a whole. If possible, meaning must be given to each clause, phrase and word. If it contains apparently conflicting provisions, such conflicts must be reconciled if this may reasonably be done. *Williams v. Rand,* 223 N.C. 734, 737, 28 S.E. 2d 247; *Holland v. Smith,* 224 N.C. 255, 257, 29 S.E. 2d 888; *Schaeffer v. Haseltine,* 228 N.C. 484, 489, 46 S.E. 2d 463; *Coppedge v. Coppedge,* 234 N.C. 173, 176, 66 S.E. 2d 777. As succinctly expressed by this Court in *Edens v. Williams,* 7 N.C. 27, 31, decided May Term, 1819: "Every part of a will is to be considered in its construction, and no words ought to be rejected, if any meaning can be possibly put upon them. Every string should give its sound."

2. When undertaking to reconcile apparently conflicting provisions "greater regard must be given to the dominant purpose of a testator than to the use of any particular words." *Trust Co. v. Waddell,* 234 N.C. 454, 461, 67 S.E. 2d 651. If it may reasonably be done, apparently inconsistent subordinate provisions must be given effect in accordance with the general prevailing purpose of the testator. *Schaeffer v. Haseltine, supra; Coppedge v. Coppedge, supra.*

In our opinion, the words written by Mrs. Upton, considering her will as a whole, show clearly that her dominant purpose was to leave the bulk of her estate to charitable causes. The sentence, "To my sister Mrs. Camille H. Wolfe, I leave my furniture, household effects and personal property," is both preceded and followed by dispositive provisions to charitable causes.

Did the testatrix use the words "personal property" to denote everything she owned except real property? The court below, in accordance

with defendant Wolfe's contention, answered "Yes." We are constrained to hold otherwise, namely, that when used in the context, "my furniture, household effects and personal property," the personal property referred to was *ejusdem generis,* that is, tangible articles of household and personal use.

It is noteworthy that the dispositive words used by the testatrix are "will and bequeath," "will," and "leave." The word "devise" does not appear.

If the words "personal property" were construed to denote everything the testatrix owned except real property, no significant meaning can be given to her use of the words "furniture" and "household effects." The concise provisions of her will indicate that the testatrix did not use superfluous words. Meaning is given to these words if we consider the word "household" as modifying both "effects and personal property."

The testatrix, in prior provisions of her will, had left specific charitable legacies, aggregating $11,500.00, which, if she owned no real property, could be paid only from her then assets, to wit, cash, bonds and securities. It appears, therefore, that the testatrix did not intend to leave to Mrs. Wolfe all of her personal property of every kind and character. It is noteworthy that words such as "all" or "all the remainder" nowhere appear in association with the words "personal property."

Moreover, if the testatrix owned no real property, the construction for which defendant Wolfe contends would give no significance whatever to the final sentence: "The balance of my estate I leave to the National Red Cross Society of America." It should be noted that this sentence, rather than the bequest to Mrs. Wolfe, constitutes the residuary clause of the will. Decisions to the effect that, because of the presumption against partial intestacy, the rule of *ejusdem generis* is not generally applied to a residuary clause, *e.g., Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231, have no application here.

We agree with the contention that the so-called rule of *ejusdem generis* does not arbitrarily control in the construction of a will. While generally referred to as a rule of construction, perhaps it is more accurate to use this expression to denote the construction adopted by the court from the consideration of a will as a whole.

The condition, nature and extent of Mrs. Upton's estate *when she made her will* are relevant "circumstances attendant." Did she own real property *then?*

Admissions in the pleadings suffice to establish that she owned no real property at the time of her death; and there is no evidence or contention that she acquired or sold any real property after she made her will. Moreover, it appears *now* from uncontradicted evidence offered by defendant Wolfe that Mrs. Upton owned no real property when she

made her will. True, the court's finding was: "12. On October 2, 1951, the testatrix owned no real estate in Rowan County, N. C., or in Orleans Parish, Louisiana. The Court does not consider the evidence satisfactory and does not determine whether she owned any real estate elsewhere." However, persons intimately associated with her across the years, including defendant Wolfe, testified that they knew of no real estate she had owned, located elsewhere, except a summer cottage in Bay St. Louis, Mississippi, which she had sold in 1948 or prior thereto. It would be fanciful to predicate decision on a speculation that she might have owned some unidentified real property located elsewhere than in the communities in which she had resided when neither her executor nor any of her kin had knowledge or information thereof.

In short, it appears from uncontradicted evidence offered by Mrs. Wolfe that the estate of the testatrix on 2 October, 1951, the date of the will, consisted of assets of the kind and character owned by her on 5 August, 1953, the date she died, to wit: cash, including bank deposits, bonds and securities.

Testatrix, who had resided in New Orleans, moved to Salisbury in 1948. She purchased a residence on Mitchell Avenue, the only property in North Carolina ever owned by her. After a fire on 6 June, 1951, this residence was unfit for use; and, without making repairs, testatrix sold this property on 25 August, 1951.

The court made this finding: "11. Following the sale of the Salisbury house, the testatrix consulted a real estate agency and was looking at houses and lots offered for sale in Salisbury at or about the time the will was written and subsequently." We need not decide whether there is competent evidence to support the implication, if such was intended, that this occurred prior to 2 October, 1951, the date of the will. The fact is that testatrix owned no real estate when she made her will. This has significance only as it may enlighten the court as to her intention as expressed in her will. If she had purchased real estate thereafter, the price paid therefor would have depleted the cash, bonds and securities constituting her assets. We cannot accept the suggestion that it was testatrix' intent to leave defendant Red Cross real property, if perchance she should purchase real property, but that in the event she did not do so the residuary clause in favor of defendant Red Cross would be devoid of meaning. No sound reason appears why the testatrix would prefer or intend to leave to defendant Red Cross real estate rather than assets of the kind and character she owned when she made the will.

It is noted that the judgment, from which this appeal is taken, sets forth *as findings of fact* the following: "15. At the time the will was written, the testatrix understood the term 'personal property' to include cash, bonds, and securities. 16. The testatrix. Addie Hereford Upton,

used the term 'personal property' in her will to include cash, bonds, and securities." These are not findings of fact as to circumstances attendant when the will was made, but rather reflect the court's view as to the proper construction of the will. Whether the testatrix so intended, is the sole question *of law* presented to the Court for decision.

The "circumstances attendant" when the will was made refer to objective factual data, not to the intent of the testatrix. In short, they are *facts* of which the testator *had knowledge* when she made her will; and such facts may or may not aid the court in the construction of the terms thereof.

The intent of the testatrix must be ascertained from her written words. Parol evidence of her declarations is not competent as an aid in the construction of her will, whether made before, after or at the time she made it. *Reeves v. Reeves,* 16 N.C. 386; *Worth v. Worth,* 95 N.C. 239; *Patterson v. Wilson,* 101 N.C. 594, 8 S.E. 341; *In re Shelton's Will,* 143 N.C. 218, 55 S.E. 705; *Raines v. Osborne,* 184 N.C. 599, 602, 114 S.E. 849; *Holmes v. York,* 203 N.C. 709, 166 S.E. 889; *Reynolds v. Trust Co.,* 201 N.C. 267, 159 S.E. 416. As stated by *Merrimon, J.* (later *C. J.*), in *Patterson v. Wilson, supra:* "The very purpose of putting the will in writing was to declare and express the testator's settled intentions in respect to his property, to establish the certain evidence of his intentions, and such evidence must prevail, no matter what he may have said before or after its execution."

Under the rule stated in the preceding paragraph, testimony as to testatrix' declarations, if relevancy were conceded, must be disregarded as incompetent. We give two instances of testimony in this category. First: The testimony of Ralph Hereford, a nephew, offered by Mrs. Wolfe, that years ago in New Orleans, Louisiana, Mrs. Upton told him "in so many words" that "she had some stocks and bonds which she considered her personal property." Second: The testimony of Mrs. Harding and Mrs. Warlick, nieces, offered by the Red Cross, that on frequent occasions before she made her will, Mrs. Upton had spoken highly of the work of the Charity Hospital, New Orleans, Louisiana, and of the Red Cross; and the testimony of Mrs. Wolfe that she did not remember hearing Mrs. Upton speak of "the National Red Cross Society."

The relationships between Mrs. Upton and the beneficiaries named in her will are relevant "circumstances attendant."

We accept the court's findings of fact bearing upon the close relationship subsisting between Mrs. Upton and Mrs. Wolfe. Indeed, the evidence bearing upon Mrs. Upton's family relationships is free from contradiction. A brief recital must suffice.

Mrs. Upton and Mrs. Wolfe were sisters, both widows, the only survivors of six brothers and five sisters. They had some twenty-five

blood nephews and nieces, with whom their relationships were friendly and cordial.

Until 1948 Mrs. Upton had lived in New Orleans. Her husband, an active, full-time notary public, died in 1923. Mrs. Upton had no lineal descendants.

Mrs. Wolfe's husband, who had been manager for Duke Power Company in Salisbury for a number of years, died in 1929. Some two years later, Mrs. Wolfe left her Salisbury home and went back to New Orleans and lived with Mrs. Upton. From time to time other relatives resided with them.

In 1948, Mrs. Upton requested Mrs. Warlick, a niece then living in Salisbury, to visit her in New Orleans. As a result of this visit, Mrs. Upton sold her New Orleans property; and she and Mrs. Wolfe moved to Salisbury. Mrs. Upton then purchased the Mitchell Avenue residence in which the two sisters, along with Mr. and Mrs. Warlick and their two boys, lived until May, 1951. The Warlicks moved out when Mrs. Upton decided to convert the residence into apartments, and this work was in progress when the fire occurred. After the fire, the two sisters moved into the home of Mr. and Mrs. Clamp, the latter, a daughter of Mrs. Wolfe; but soon thereafter Mrs. Upton suffered a heart attack and was in the hospital two months. During this time, the Clamps remodeled their residence, constructing a separate apartment for rental. Except for the time she was in the hospital, Mrs. Upton lived with Mrs. Wolfe in this apartment until Mrs. Upton's death. Mrs. Wolfe continued to reside there. During their joint occupancy, Mrs. Upton was the household manager and paid the greater part of their expenses, while Mrs. Wolfe contributed $40.00 per month.

The description of the articles of personal property, valued by the executor at $300.00 and delivered by it to Mrs. Wolfe, indicates that the apartment was well and comfortably furnished.

Mrs. Wolfe had four children, Mrs. Clamp and three sons, all residents of North Carolina. Mrs. Clamp resided in Salisbury. One son resided nearby in Spencer. The other two sons resided in Henderson. Her son-in-law and each of her sons had employment and apparently were in comfortable circumstances. Indeed, Mrs. Wolfe describes one of them as "a very successful man"—"the operator of a very successful quarry." Mrs. Upton had knowledge of the fact that Mrs. Wolfe had an estate of her own, worth some $7,000.00. Mrs. Upton had made these separate provisions for Mrs. Wolfe, viz.: Before leaving New Orleans, Mrs. Upton had given to Mrs. Wolfe some diamonds of undisclosed value. She had purchased $10,000.00 of U. S. Bonds, Series G, bearing 2½% interest, payable to Mrs. Wolfe upon Mrs. Upton's death. When Mrs. Upton died, these bonds were worth $10,000.00. She had purchased an insurance contract providing for the payment to Mrs.

Wolfe of $45.00 per month for life, if she survived Mrs. Upton. She had purchased another insurance contract, on which, upon Mrs. Upton's death, Mrs. Wolfe was entitled to receive a lump sum of $1,005.95 or $15.05 semi-annually as long as she lived. The foregoing items were kept in Mrs. Wolfe's bank box, along with cash which Mrs. Upton had supplied to Mrs. Wolfe to pay for Mrs. Upton's funeral arrangements. Upon Mrs. Upton's death, Mrs. Wolfe became the owner of the bonds and the beneficiary of the insurance contracts.

While fully recognizing the close relationship between the elderly sisters, we cannot say that the foregoing circumstances attendant support the construction of the will for which defendant Wolfe contends. Indeed, it seems more reasonable to conclude therefrom that Mrs. Upton intended to provide and did provide for Mrs. Wolfe, apart from furniture, household and personal effects, by making separate arrangements for her independent of the provisions of her will.

A further contention by defendant Wolfe should be considered. It is based primarily on this finding of fact: "14. The testatrix was, by reason of her background and experience, familiar with business and legal terminology, and had previously used the term 'personal property' to include intangibles, she having worked in the office of her husband when he was a full time practicing Notary Public in the State of Louisiana."

While we forego an analysis in detail of the voluminous testimony and documentary evidence upon which this finding is based, a brief summary is as follows: Under Louisiana law a notary public is an important public official, with established qualifications, whose functions include services in connection with wills, estate successions, inventories, etc. Prior to 1923 Mrs. Upton had assisted her husband in his work. Upon his death, she served as co-executor of his will, his estate consisting of household furniture and effects, cash in banks, bonds, notes, jewelry and real estate. Later, in 1941, she served as executrix of the estate of one George H. Jahns. The evidence discloses that on occasions, in connection with the handling of these two estates, the words "personal property" were used to denote a general classification of all property other than real estate. Unquestionably, in North Carolina as well as in Louisiana the words "personal property" are often used in that sense. Assuming the competency of these events of 1923 and 1941, we do not think they bear significantly upon the meaning of the words "personal property" when considered in the context of the testatrix' will. Indeed, an examination of the will of Mrs. Upton's deceased husband, referred to below, would seem rather to support the construction we place upon Mrs. Upton's will.

As shown in the record offered by defendant Wolfe, Mr. Upton's will was as follows: He made four specific cash bequests, then made a

specific bequest of his watch, chain and locket, and then provided: "I give and bequeath *the balance of my estate* to my wife Addie H. Upton." (Italics added.) True, the words "personal property" were not used in connection with any specific bequest. However, the words "the balance of my estate" are the identical words used by Mrs. Upton in the residuary clause of her will. Under the quoted words in her husband's will, Mrs. Upton received, other than the specific bequests, her husband's entire estate, "as the universal heir and legatee." Her knowledge of this exact phraseology in her husband's will and of its legal effect and her use of the identical phraseology in the residuary clause of her own will would seem to negative any suggestion that no significant meaning should be given to this provision: *"The balance of my estate* I leave to the National Red Cross society of America." (Italics added.)

The findings of fact, other than those quoted herein, and also many facts not incorporated in the court's findings of fact, are based upon uncontradicted evidence. We cannot discuss in detail each finding or every phase of the evidence. Certainly, the able and diligent counsel for defendant Wolfe have brought forward every fact that might lend any measure of support to her position. Suffice to say, each has been carefully considered.

Our conclusion is that the provision, "To my sister Mrs. Camille H. Wolfe, I leave my furniture, household effects and personal property," when the will as a whole is considered, manifests the testatrix' intention to leave to Mrs. Wolfe, under the will, only tangible articles of household and personal use, and that the circumstances attendant when the will was made strengthen rather than impair this construction. It appearing that the executor has delivered all of such articles to defendant Wolfe and that it has paid the specific cash bequests, it follows that defendant Red Cross, as residuary legatee, is entitled to receive, under the will, the balance of the estate remaining in the hands of the executor, consisting of cash, bonds and securities, after payment by the executor therefrom of the costs of administration, including the costs of this action, taxes and valid claims, if any, against the estate.

Accordingly, there is error in the judgment of the court below; and the cause is remanded for judgment in accordance with the construction of the will as declared herein.

Error and remanded.

COLONEL PRIDMORE, EMPLOYEE, CLAIMANT, v. VIRGIL McCRARY, T/A McCRARY & SON, NON-INSURED, EMPLOYER.

(Filed 27 February, 1957.)

1. Master and Servant § 55d—

Exceptions to the findings of fact of the Industrial Commission cannot be sustained when there is sufficient evidence to support each of the findings, and the findings are sufficient to support the conclusions of law and the award pursuant thereto.

2. Master and Servant § 53b(1)—

Evidence that fingers of the employee's hand were severed in the accident supports a conclusion of a percentage loss of the use of the hand upon which an award of compensation for such loss of use is proper. G.S. 97-31 (m), (t).

APPEAL by defendant from *Froneberger, J.*, at November 1956 Term, of HENDERSON.

Proceeding under the North Carolina Workmen's Compensation Act to determine compensation liability of defendant to claimant as employee of defendant for injury by accident arising out of and in the course of his employment on 16 April, 1955.

The record shows that defendant Virgil McCrary & Son denied liability on the ground that at the time of injury complained of, they did not have five persons regularly employed in the conduct of the business as well drillers, and were not subject to and bound by the provisions of the Workmen's Compensation Act, and that upon such denial, a hearing was requested by the claimant before the North Carolina Industrial Commission, and that the matter came on to be heard before Deputy Commissioner Robert F. Thomas on 9 January, 1956 in Henderson County, North Carolina.

The parties being unable to agree upon any stipulations, the following proceedings were had:

The record contains testimony of claimant, and of another in his behalf: Testimony of defendant Virgil McCrary and another in behalf of defendant.

Thereafter on 11 April, 1956, a further hearing was had before Commissioner N. F. Ransdell, at Asheville, at which time only deposition of Dr. William S. Lampley was submitted. (This deposition, though referred to several times, is not included in record of case on appeal.)

The record of case on appeal further shows that on 14 May, 1956, "Based upon all the competent evidence adduced at the hearing, the Deputy Commissioner makes the following

"FINDINGS OF FACT

"1. That the defendant Virgil McCrary, in April 1955, and for many years prior thereto was the owner of a business known as McCrary & Son, located at Penrose, N. C., at his home; that such business consisted of drilling of wells and installation of water pumps.

"2. That the defendant had three well-drilling machines mounted on three separate trucks, each of which required two men to operate, and in April 1955, and prior thereto, claimant, Frank Pridmore, Samuel Pridmore and Charles McCrary were regularly employed by the defendant in the operation of the well-drilling machines, and in addition, Melvin Hamilton and Bob Merrill were regularly employed by the defendant in the installation of water pumps, making a total of six persons regularly employed by the defendant employer.

"3. That in addition to the three above mentioned trucks, the defendant was the owner of three pick-up trucks, and all of said six trucks had the McCrary and Son on the side of them and all of said trucks and other equipment used in the business were stored at the home of the defendant at Penrose, N. C., when not actually in use; that one of the pickup trucks was used exclusively in the pump installation work and on occasions one of the other pickup trucks was used by the pump men.

"4. That all records in connection with the operation of the well-drilling and pump installation business were kept in the same book or books by defendant and his wife; that the hours of work of all of the six named men were kept in such books and all were paid in the same manner; that the defendant maintained a bank account in his name and same was used to pay bills incurred in the well-drilling operation as well as the pump installation operation and no one other than defendant and his wife drew checks on such bank account; that defendant made the necessary reports to the proper authorities and paid the necessary sums of money with reference to social security, income tax withholding, and unemployment compensation on all of the six named employees and showed such employees as his employees.

"5. That there was an interchange of labor between the well-drilling and the pump installation operation on rare occasions only for the reason that the pump men did not have the necessary experience and training to operate the well-drilling equipment and the men who operated the well-drilling equipment did not have the necessary experience and training to operate the pump-installation equipment.

"6. That on April 16, 1955 and for at least two weeks prior thereto, claimant was regularly employed by defendant employer and was paid $45.00 per week for six days of work, and as a part of his wage contract was paid $1.00 per day for meals; that claimant's average weekly wage while employed by the defendant employer was $51.00.

"7. That on April 16, 1955 and for sometime prior thereto, Virgil McCrary, t/a McCrary & Son, was subject to and bound by the provisions of the Workmen's Compensation Act and his liability under such Act was not insured at such time.

"8. That on April 16, 1955, at approximately 9:30 a.m., claimant and Charles McCrary were operating a well-drilling machine in Henderson County; that the machine was started, was not running properly, and Charles McCrary instructed claimant to adjust or release the brake on said machinery; that claimant in adjusting a V-belt running from the motor to the well-digging apparatus, was using a wrench, his hand slipped, and was "slung" into the machinery, severing the middle, right and little fingers of his left hand, and cutting the left index finger across the top of the first knuckle.

"9. That as above described, claimant on April 16, 1955, sustained an injury by accident arising out of and in the course of his employment with defendant employer.

"10. That following the injury claimant was hospitalized for a period of six weeks and on August 2, 1955, had a reamputation of the stump of the third finger of his left hand.

"11. That claimant did no work and earned no wages from April 16, 1955 to November 13, 1955, at which time he returned to work at a wage in excess of that paid him by defendant employer; that claimant was able to do light work on September 19, 1955, but no such work was tendered to him by defendant employer and he was unable to obtain any such work and was therefore temporarily totally disabled from April 16, 1955 to November 13, 1955.

"12. That for all practical purposes, claimant reached the end of the healing period on January 9, 1956, except that the stump of his left fourth finger is tender and may require re-amputation."

And that "based upon the foregoing findings of fact the Deputy Commissioner makes the following

"CONCLUSIONS OF LAW

"1. That on April 16, 1955 and for sometime prior thereto, defendant employer regularly employed more than five persons and was subject to and bound by the provisions of the Workmen's Compensation Act and was not insured under such Act. G.S. 97-2(a), G.S. 97-2(b), G.S. 97-2(c), *Hunter v. Peirson*, 229 N.C. 356.

"2. That on April 16, 1955 and for at least two weeks prior thereto, claimant was regularly employed by defendant employer at an average weekly wage of $51.00. G.S. 97-2(c), G.S. 97-2(b).

"3. That as above described claimant, on April 16, 1955, sustained an injury by accident arising out of and in the course of his employment with defendant employer. G.S. 97-2(f).

"4. That for all practical purposes claimant reached the end of the healing period on January 9, 1956.

"5. That as a result of the injury in question claimant was temporarily totally disabled from April 16, 1955 to November 13, 1955 and is entitled to be paid compensation therefor at the rate of $30.00 per week. G.S. 97-29.

"6. That as a result of the injury in question claimant has a 75% loss of use of his left hand, and is entitled to be paid compensation therefor at the rate of $22.50 per week for a period of 170 weeks, beginning November 13, 1955. G.S. 97-31. *Watts v. Brewer,* 243 N.C. 422."

And that "based upon the foregoing findings of fact and conclusions of law the Deputy Commissioner makes the following

"AWARD

"Defendant shall pay compensation to the claimant at the rate of $30.00 per week during the period, April 16, 1955, to November 12, 1955, both dates inclusive, as for temporary total disability.

"Defendant shall pay compensation to claimant at the rate of $22.50 per week for a period of 170 weeks, beginning November 13, 1955, to cover 75% loss of use of claimant's left hand."

That thereafter the defendant, Virgil McCrary & Son, gave notice of application for review by the Full Commission, and alleged twelve errors in the findings of fact and conclusions of law by the hearing commissioner.

The case on appeal shows that the Full Commission, after hearing argument, and considering all competent evidence, adopted as its own the findings of fact and conclusions of law of the deputy commissioner, and ordered that the result reached by him be affirmed—and that an award issue accordingly.

It appears that thereafter defendants Virgil McCrary & Son gave notice of appeal to Superior Court, setting forth exceptions assigned as error in the award made by the Full Commission.

And that on hearing upon such appeal, the Judge Presiding over Superior Court of Henderson County, being of opinion that the findings of fact and conclusions of law and award of the North Carolina Industrial Commission should be approved and affirmed, entered judgment in accordance therewith,—adjudging the plaintiff entitled to recover of the defendants the compensation awarded to him by the said Commission for the injury of which complaint is made.

And the record shows that to the signing of the judgment so entered "the defendants except and particularly except to the affirming of the Findings of Fact and Conclusions of Law in each and every exception heretofore filed by the defendants from the Full Commission,"—and

appeal to the Supreme Court. It appears that thereupon defendants group exceptions and set forth assignments of error.

Don C. Young for Claimant Appellee.
Potts & Ramsey for Defendants Appellants.

WINBORNE, C. J. It is the contention of plaintiff appellee that the exceptions properly presented on this appeal raise only the question as to whether error appears upon the face of the record. Be that as it may, after careful consideration of the case on appeal in the light of all contentions made by defendant, this Court holds that the exceptions taken fail to show error for which the judgment from which appeal is taken should be disturbed.

The evidence offered on the hearings, as shown in the record of case on appeal, is sufficient to support each of the findings of fact made by the Deputy Commissioner and approved and adopted by the Full Commission. And these findings of fact are sufficient to support the conclusions of law made by the Deputy Commissioner, and the award pursuant thereto, all as approved and adopted by the Full Commission.

Moreover in this connection appellant challenges particularly the sixth conclusion of law in respect to percentage of loss of use of claimant's left hand as a result of the injury in question. While there is no evidence bearing expressly on the subject, the evidence clearly discloses injuries to claimant's left hand from which conclusion as to the extent of impairment in its use may be reasonably made. And the award is in keeping with the provisions of G.S. 97-31 (m and t), as interpreted and applied by this Court in *Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764.

Hence the judgment of Superior Court affirming the award of the North Carolina Industrial Commission is

Affirmed.

WINFRED BASNIGHT v. PEARL WILSON, EDWARD WILSON AND PERNELL DOZIER.

(Filed 27 February, 1957.)

1. Negligence § 11—

The law imposes upon every person the duty to exercise for his own safety that degree of care which a reasonably prudent person would employ in the circumstances.

2. Automobiles § 47—

The failure of the driver of a car to warn a guest, alighting from the car, that a vehicle was approaching, is without significance when the guest already knew of the approaching vehicle.

3. Automobiles §§ 9, 49—Guest's contributory negligence held to bar recovery from driver for negligence in parking vehicle.

The evidence disclosed that the driver of a vehicle, traveling north, parked it on the shoulder on the west side of the highway with its right wheels some 10 inches on the 20-foot hard surface, and with its lights burning, in violation of G.S. 20-161, G.S. 20-161.1, that plaintiff passenger got out of the car to open the trunk, and observed the location of the vehicle and saw a car approaching, traveling south at a high rate of speed, some distance away. As plaintiff was standing at the rear of the parked car, the oncoming vehicle collided therewith head-on. *Held:* Even if it be conceded that the evidence supports an inference that the negligence in parking the car was a concurring proximate cause of the collision, the evidence discloses that plaintiff had knowledge of all the facts and circumstances and therefore was under equal duty to foresee that the car parked in such manner might be hit by a vehicle traveling along the highway, and therefore nonsuit was proper on the ground of contributory negligence.

APPEAL by plaintiff from *Bone, J.*, October Term, 1956, of CURRITUCK.

Civil action to recover damages on account of personal injuries. Issues arising on the pleadings relate to (1) the alleged negligence of defendants, (2) the alleged contributory negligence of plaintiff, and (3) damages.

The appeal and only assignment of error relate to the judgment of involuntary nonsuit entered at the close of plaintiff's evidence.

Robert B. Lowry and John H. Hall for plaintiff, appellant.

LeRoy & Goodwin for defendants, appellees.

BOBBITT, J. Plaintiff's testimony is the only evidence as to what occurred prior to and at the time of his injury. It tends to show these facts:

Defendants Wilson, mother and son, owned a 1955 Ford. Pearl Wilson, in the presence of Edward Wilson, asked plaintiff to go "with them" to New York. Defendant Dozier was to drive the Wilson car to New York. Plaintiff was to drive it back.

On the night of 20 January, 1956, en route to New York, Dozier was driving the Wilson car in Currituck County, proceeding north on N. C. Highway #34. Seven persons were riding in the Wilson car, the plaintiff, the three defendants, Daisy Dozier, Lillie Wilson and Shirley Gregory. Dozier and plaintiff were riding on the front seat. There is no evidence as to where the other occupants were seated.

In the locality of the Chapman house, the two-lane hard-surfaced highway was level and straight. On each side, the dirt shoulder was wide enough for the Wilson car to be driven and stopped thereon. "It was raining a drizzly rain . . ."

Edward Wilson directed Dozier to stop at the Chapman house and get a jack. The Chapman house was on the west, their left, side of the highway. A driveway extended west from the highway, into the Chapman premises. Chapman's car was parked there, the back bumper "just even with the shoulder of the road on his bridge." The implication is that the bridge spanned a ditch between the shoulder of the road and the Chapman premises. Dozier drove onto the west, his left, shoulder of the highway, and stopped the Wilson car. He got out the left front door. When opened, it "just missed the back bumper" of the Chapman car. The implication is that he went to the Chapman house to see about the jack. Dozier, while driving, had on his driving lights. Plaintiff testified: "As far as I can remember, the lights were not changed when we stopped at the Chapman house."

Pearl Wilson had asked plaintiff to get out and unlock the trunk and Dozier had given the key to plaintiff. Plaintiff testified: "We were going to put the jack in the trunk." Plaintiff got out on the right side, stepping down "on the cement road." When he did so, he made these observations: (1) ". . . the two right-hand wheels were just on the edge of the cement, about 10 inches." (2) He saw a car, identified later as the Munden car, traveling south, come around a curve nearly a mile up the road. The Munden car "had its lights on." Plaintiff walked around to the back of the Wilson car and "bent down to unlock the trunk." Meanwhile: "The car was coming fast, because I thought it was a truck, it sounded so loud. I did not look at it and I didn't watch it coming. I paid some attention to it." The Munden car crashed into the Wilson car, knocking the Wilson car against plaintiff and thereby causing the injuries for which he seeks damages. The occupants of the Wilson car also received injuries.

No vehicles other than the Munden car and the Wilson car were involved or on the highway.

The testimony of witnesses who arrived after the accident had occurred tends to show these additional facts: "The hard-surfaced part of this road is about 20 feet." The Wilson car was knocked into the ditch, about 40 or 50 feet south of the Chapman driveway. "The front end was smashed up . . . the front of the Wilson car was shoved back." Both cars were "busted in the front." The Munden car collided with the Chapman car "to some extent."

Plaintiff bases his action primarily upon the alleged negligence of Dozier, as agent of the Wilsons, in parking and leaving standing the Wilson car in violation of G.S. 20-161, G.S. 20-161.1 and G.S. 20-162.

Obviously, violations of the cited statutes, apart from the intervening conduct, negligent or otherwise, of the operator of the Munden car would not have caused plaintiff's injuries. G.S. 20-162 has no application. Compare: *Peoples v. Fulk,* 220 N.C. 635, 637, 18 S.E. 2d 147. Conceding the sufficiency of the evidence to show that the Wilson car was parked and left standing in violation of G.S. 20-161 and of G.S. 20-161.1, this serious question confronts us: Was the violation of either of these statutes such negligence as to constitute a proximate cause of the collision; specifically, were the circumstances such that defendants could and should have reasonably foreseen that on account of such violations a collision was probable or likely to occur? *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331.

The evidence, considered most favorably to plaintiff, is to the effect that the front portion of the southbound Munden car crashed into the front portion of the Wilson car, a head-on collision; that the Wilson car, headed north, except the portion extending some 10 inches onto the hard-surface, was on the west shoulder of the highway; and that, except for a foot or less, the entire width of the 20-foot hard-surfaced highway was open and available for use by the operator of the Munden car.

The only reasonable inference is that the operator of the Munden car, proceeding fast, drove onto the west, his right, shoulder of the highway. The Wilson car was standing still, its headlights burning, *both* right wheels extending approximately 10 inches onto the hard-surface. The highway was straight. Presumably, the lights of the Wilson car disclosed the west shoulder of the highway. Presumably, the Munden car was proceeding in its right lane. The operator of the Munden car knew *his* position on the highway and could have observed that the lighted Wilson car was somewhat to his right. If, for any reason, the driver of the Munden car was uncertain as to the exact position of the Wilson car, due care would have required that he reduce his speed, bring his car under control and proceed with commensurate caution, until he could determine the true situation. Unquestionably, upon the evidence before us, the intervening action of the driver of the Munden car, negligent or otherwise, proximately caused the collision and plaintiff's injuries. (The operator of the Munden car is not a party; nor was he a witness.)

Was the intervening action of the operator of the Munden car, negligent or otherwise, the *sole* proximate cause of the collision and of plaintiff's injuries; or was defendants' negligence a concurring proximate cause? In relation to the negligence issue, the crucial question is this: Was the position of the Wilson car, with headlights burning, such that defendants, by the exercise of due care, could and should have reasonably foreseen such intervening action or some similar intervening action on the part of an approaching motorist? If not, the negligence of de-

fendants was insulated and unrelated to plaintiff's injuries as a proximate cause. *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; *Peoples v. Fulk, supra; Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673; *Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894, and cases cited therein.

Assuming the sufficiency of plaintiff's evidence to warrant submission of the negligence issue on the crucial question posed, acceptance of this evidence in the light most favorable to plaintiff leads to the inescapable conclusion that plaintiff, with knowledge of all the facts, had equal, if not better, opportunity reasonably to foresee such intervening action on the part of the operator of the Munden car.

The law imposed upon plaintiff the duty to use due care for his own safety. "The test of liability for negligence, primary or contributory, is the departure from the normal conduct of the reasonably prudent man, or the care and prevision which a reasonably prudent person would employ in the circumstances. The rule is constant, while the degree of care which a reasonably prudent person is required to exercise varies with the exigencies of the occasion." *Stacy, C. J.,* in *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251. "There is really no distinction, or essential difference, between negligence in the plaintiff and negligence in the defendant . . . The criterion for establishing both is the same. . . . The same standard applies alike to both." *Stacy, C. J.,* in *Sebastian v. Motor Lines,* 213 N.C. 770, 197 S.E. 539.

An analysis of the evidence, in the light of these elementary principles, discloses these facts: Plaintiff knew the exact extent to which the right wheels of the Wilson car extended onto the hard-surfaced portion of the highway. While Dozier drove and stopped the car as indicated, plaintiff was with him on the front seat. Plaintiff was invited to take the trip in the capacity of a co-driver. It is a fair inference that when Dozier handed to plaintiff the key to the trunk, plaintiff had possession of or access to the switch key as well. Apparently, he anticipated no danger on account of the position and status of the Wilson car. It does not appear whether defendants or the others seated in the Wilson car could or did observe the approach of the Munden car; but plaintiff saw the Munden car, heard it, realized it was coming fast, thought it was a truck, etc. If dangerous consequences resulting from the position and status of the Wilson car could and should reasonably have been foreseen, plaintiff, not the persons seated in the car, had the better opportunity to do so. Moreover, if such dangerous consequences could and should reasonably have been foreseen, plaintiff could have moved to a position of safety.

Plaintiff's contention that defendants' failure to warn him of the approach of the Munden car constituted actionable negligence is without merit. Plaintiff saw it. A failure to warn plaintiff of what he

already knew is without significance. *Petty v. Print Works,* 243 N.C. 292, 304, 90 S.E. 2d 717. Indeed, if danger were reasonably anticipated, it would seem that plaintiff might well have warned the persons seated in the Wilson car. There is nothing to indicate that plaintiff or any occupant of the car saw or could have seen that the operator of the Munden car would run onto the west, his right, shoulder of the highway, and crash into the Wilson car, for any appreciable time prior to the actual impact.

We have considered *Webb v. Hutchins,* 228 N.C. 1, 44 S.E. 2d 350. Suffice to say, the cited case is not regarded as authority for plaintiff's position on the *uncontradicted* evidence now before us.

The evidence strongly supports the view that negligence on the part of the operator of the Munden car was the sole proximate cause of the collision. But, apart from that view, if plaintiff's evidence is treated as sufficient to support a finding of negligence on the part of defendants, such uncontradicted evidence suffices to show conclusively that plaintiff, with knowledge of all the facts, was in like manner contributorily negligent. In either event, the judgment of involuntary nonsuit was proper.

Affirmed.

JAMES O. TAYLOR v. ALFRED JUNIUS BRAKE AND SOLOMAN ANDERSON.

(Filed 27 February, 1957.)

1. Trial § 22a—

On motion to nonsuit, plaintiff's evidence is to be taken as true, and he is entitled to every reasonable intendment and legitimate inference fairly deducible therefrom.

2. Trial § 22b—

Defendants' evidence in direct conflict with that of plaintiff is not to be considered on motion for compulsory nonsuit.

3. Automobiles § 17—

Where at about the same time two vehicles approach an intersection which has no stop signs or traffic control signals, the vehicle on the right has the right of way, G.S. 20-155(a), and they approach the intersection at approximately the same time within the purview of this rule when their respective distances from the intersection and relative speeds, and other attendant circumstances, show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed.

4. Same—

Where a vehicle approaches an intersection and no other vehicle is then approaching within such distance as reasonably to indicate danger of colli-

sion, the driver is under no obligation to stop or wait in the absence of stop signs or traffic control signals, but may proceed to use the intersection as a matter of right, and if he thus first enters the intersection, he has the right of way over a vehicle approaching the intersection from his right. G.S. 20-155(b).

5. Negligence § 16—

Mere allegation that defendants' conduct was negligent, without alleging the facts constituting the alleged negligence, is insufficient.

6. Automobiles § 41g—Plaintiff's evidence held insufficient to show negligence on part of defendant in entering intersection.

Plaintiff's evidence tended to show that he approached an intersection, slowed his vehicle, looked, and seeing no other vehicle approaching, drove into the intersection, that he did not again look until he heard the squeal of tires, and that the right rear of his vehicle was struck by the car driven by one defendant, which approached the intersection from plaintiff's right at a speed of about 25 miles per hour. There was no allegation by plaintiff that he was first in the intersection. *Held:* Plaintiff's evidence does not show that he was first in the intersection, and therefore defendant driver had the right of way and the right to assume that plaintiff, approaching from his left and slowing down, would yield him the right of way, and nonsuit was correctly entered.

7. Automobiles § 7—

It is the duty of a motorist not merely to look, but to keep a proper lookout, and he is held to the duty of seeing what he ought to have seen.

BOBBITT, J., dissents.

APPEAL by plaintiff from *Morris, J.*, September Term 1956 of PITT.

Civil action for personal injuries and damage to an automobile arising out of a collision between two automobiles at a street intersection within the corporate limits of the city of Rocky Mount.

Plaintiff's evidence tends to show these facts:

Coleman Avenue, which runs north and south, and Holly Street, which runs east and west, intersect and cross each other within the corporate limits of the city of Rocky Mount. Where these streets intersect, Coleman Avenue is about 39 feet wide, and Holly Street about 36 feet wide. Coleman Avenue is paved to the intersection going north, and is a dirt street north of it. Holly Street is a dirt street. There are no stop signs and no right-of-way signs at the intersection, and no evidence that any stop or caution lights were there.

About 10:30 a.m. on 29 November 1955, a clear, cold day, an eastbound Mercury Automobile, owned and operated by the plaintiff, which approached and entered the intersection on Holly Street, and a northbound Ford Automobile, owned by the defendant Soloman Anderson and operated for him by his agent, the defendant Alfred Junius Brake, which approached and entered the intersection on Coleman Avenue,

collided in the intersection causing personal injury to the plaintiff and damage to his Mercury, and personal injury to the defendant Brake, and damage to the defendant Anderson's Ford. As they approached the intersection, plaintiff's Mercury was approaching from the left of the Ford driven by the defendant Brake, and the defendant Brake was approaching in the Ford from plaintiff's right.

Plaintiff testified that he was travelling east on Holly Street about 20 miles an hour on the right hand side when he saw the intersection of Holly Street and Coleman Avenue, and, as he approached the intersection, he took his foot off the accelerator, put it on the brake, and proceeded to slow down. About 8 to 10 feet, or maybe a little more, from the intersection he looked to the right and left on Coleman Avenue, along which street he could see 100 to 125 feet, and not seeing any traffic on the street—he did not look again—he took his foot off the brake, put it on the accelerator, and drove into the intersection at a speed of about 15 miles an hour. When the front end of his Mercury was already across the intersection, he heard tires squeal. He started to turn his head to the right, and his Mercury was hit by a Ford driven by the defendant Brake. He said on cross-examination his whole car had crossed the center of the street when hit. The right back end of the Mercury over the rear wheel was struck by the front of the Ford. The collision drove the Mercury almost all the way across the street, turning as it went. The door flew open, and he could not control the car.

The Mercury went 105 feet in the direction it was travelling on Holly Street from debris in the intersection before it stopped. The Ford went about nine feet from the debris before it stopped.

A police officer of Rocky Mount, who went to the scene of the collision, testified as a witness for plaintiff, and said, "he (plaintiff) had brake pedal but it wasn't more than half-way down there." This officer also testified that the plaintiff and the defendant Brake at the scene of the collision talked to him in each other's presence and hearing, that the plaintiff said he did not see the Ford car, and defendant Brake said he was approaching the intersection about 25 miles an hour, that the Mercury was about 20 feet from the intersection when he saw it, that he was about 40 feet from the intersection at that time, that he thought it was going to stop but when he saw it was not going to stop and yield the right-of-way, he put on his brakes and was unable to stop.

At this intersection each driver could have seen the other automobile 50 to 75 feet from the intersection.

Defendants' evidence was to this effect: The first time Brake looked, he didn't see the Mercury coming because of a store on the right. Brake was travelling 20 to 25 miles an hour. He looked again to the left, and there the Mercury was, he entered the intersection, and plaintiff entered it. As Brake approached the intersection, 20 or 30 feet

away, he saw plaintiff, who was slowing up to stop. He thought plaintiff was going to stop. He entered the intersection, and when his front wheels were two feet in the intersection, plaintiff speeded up, entered the intersection and came across his front wheels. He applied his brake, but could not avoid colliding with plaintiff's car.

At the close of all the evidence the court sustained the defendants' motion for judgment of nonsuit, and from the judgment entered, plaintiff appeals.

Robert D. Wheeler and Owens & Langley for Plaintiff, Appellant.
James & Speight for Defendants, Appellees.

PARKER, J. For present purposes, the plaintiff's evidence is to be taken as true, and he is entitled to every reasonable intendment and legitimate inference fairly deducible therefrom. *Scarborough v. Veneer Co.*, 244 N.C. 1, 92 S.E. 2d 435; *Polansky v. Ins. Asso.*, 238 N.C. 427, 78 S.E. 2d 213. Defendants' evidence in direct conflict with that of plaintiff is not to be considered by the court on a motion for a compulsory nonsuit. *Lawrence v. Bethea*, 243 N.C. 632, 91 S.E. 2d 594; *Brafford v. Cook*, 232 N.C. 699, 62 S.E. 2d 327.

At the intersection of Coleman Avenue and Holly Street there were no stop signs and no right-of-way signs, and there is no evidence that any stop or caution lights were there. As they approached the intersection, plaintiff's Mercury was approaching from the defendant's left, and the defendant Brake was driving the Ford and approaching from plaintiff's right.

"When two automobiles approach or enter an intersection . . . at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right," with certain specified exceptions, which are not relevant to the facts of the instant case. G.S. 20-155(a). "Two motor vehicles approach or enter an intersection at approximately the same time within the purview of these rules whenever their respective distances from the intersection, their relative speeds, and the other attendant circumstances show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed. (Many cases are cited in support of the statement.) A corollary of this proposition may be stated conversely in these words: When the driver of a motor vehicle on the left comes to an intersection and finds no one approaching it on the other street within such distance as reasonably to indicate danger of collision, he is under no obligation to stop or wait, but may proceed to use such intersection as a matter of right." *S. v. Hill*, 233 N.C. 61, 62 S.E. 2d 532. This Court has also said in *Kennedy v. Smith*, 226 N.C. 514, 39 S.E. 2d 380: "However, this

statutory rule is based upon the assumption that the two vehicles approach or enter the intersection at approximately the same time, and does not apply if the driver on the right, at the time he approaches the intersection and before reaching it, in the exercise of reasonable prudence ascertains that the vehicle on his left has already entered the intersection."

G.S. 20-155(b) states "the driver of a vehicle approaching but not having entered an intersection . . ., shall yield the right-of-way to a vehicle already within such intersection." *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147.

Plaintiff contends that the case should have been submitted to the jury on the theory that he was already within the intersection, when the defendant Brake approached it. This Court said in *Cox v. Freight Lines* and *Matthews v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25: "The court cannot submit a case to the jury on a particular theory unless such theory is supported by both the pleadings and the evidence." Plaintiff has not alleged any where in his complaint that he was already within the intersection, when the defendant Brake approached the intersection but had not entered it, nor has he testified that he entered the intersection first. It is true that plaintiff alleged the defendants were negligent by "negligently, recklessly and carelessly failing to yield the right-of-way to this plaintiff's automobile as by law required." "To characterize an act or course of conduct as negligent without more is insufficient. As stated in McIntosh on Prac. and Proc., sec. 388, 'In negligence cases, a general allegation of negligence is insufficient and the facts constituting negligence must be given and that it was the cause of plaintiff's injury.' " *Fleming v. Light Co.,* 232 N.C. 457, 61 S.E. 2d 364. This allegation is insufficient to support plaintiff's theory that plaintiff had the right-of-way by virtue of G.S. 20-155(b).

Even if plaintiff had alleged facts to show that he had the right-of-way by virtue of G.S. 20-155(b), he has no evidence to support such an allegation. He approached the intersection about 20 miles an hour, took his foot off the accelerator, put it on the brake and proceeded to slow down. Brake approaching the intersection, at about 25 miles an hour, according to plaintiff's evidence, had the right to assume that plaintiff approaching from his left and slowing down would yield the right-of-way to the vehicle on the right driven by him, and stop or slow down sufficiently to permit him to pass in safety. *Bennett v. Stephenson, supra; Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276. About 8 to 10 feet, or maybe a little more, from the intersection plaintiff looked to the right and left on Coleman Avenue, along which street he could see 100 to 125 feet, and not seeing any traffic on the avenue—he did not look again—he took his foot off the brake, put it on the accelerator, and drove into the intersection. He did not see defendants' car, until

it hit him. We are of opinion that plaintiff's evidence is not susceptible of the reasonable inference that he was within the intersection first, and we are supported in our opinion by the fact plaintiff did not see fit to allege it.

It was plaintiff's duty "not merely to *look*, but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330.

If plaintiff had seen the Ford approaching the intersection on his right at 25 miles an hour, as it was his duty to see it, he should have reasonably apprehended that there was danger of a collision, unless he delayed his progress until defendants' Ford on the right had passed through the intersection. The evidence, considered in the light most favorable to plaintiff, presents a case when two automobiles approach or enter an intersection at approximately the same time, as the applicable statute has been construed by this Court, particularly in *S. v. Hill, supra*, and it was the duty of plaintiff, the driver of the vehicle on the left, to yield the right-of-way to the defendants' vehicle on the right.

In order to make out a case for the jury plaintiff is required to have a sufficient pleading and to present probative facts from which negligence and causal relation can reasonably be inferred. In a consideration of the evidence the essential requirement is that mere speculation be not allowed to do duty for probative facts. A consideration of all the evidence favorable to plaintiff leads us to the conclusion that it does not make out a case of negligence against the defendants sufficient to carry the case to the jury.

Donlop v. Snyder, 234 N.C. 627, 68 S.E. 2d 316, relied on by plaintiff, is distinguishable. In that case plaintiff testified defendant told him at the hospital, "he saw me in the intersection but was coming so fast he could not stop." *Kennedy v. Smith, supra*, relied on by plaintiff, is also distinguishable.

The judgment of nonsuit below is

Affirmed.

BOBBITT, J., dissents.

MRS. JESSIE MURRELL v. E. L. HANDLEY.

(Filed 27 February, 1957.)

1. Negligence § 4f—

An invited guest or visitor in the owner's home is a licensee and not an invitee, and the fact that the guest, at the time of the injury, was performing a trifling or incidental service for the owner or his wife does not change the guest's *status*.

2. Same—

Res ipsa loquitur does not apply to injuries resulting from slipping or falling on a waxed or oiled floor.

3. Same—

Evidence tending to show that an invited guest, while on a personal and gratuitous errand for the wife of the owner, slipped and fell when she stepped on a small rug covering a newly waxed floor, without evidence that the wax was applied in an improper manner or that an improper material was used or that the rug was not of a kind in general use, is insufficient to be submitted to the jury on the issue of negligence, even if the guest be considered an invitee.

APPEAL by plaintiff from *Clarkson, J.*, July Regular Civil Term 1956, of BUNCOMBE.

This is a civil action in which the plaintiff seeks to recover damages resulting from an injury which she sustained while a visitor in the home of the defendant.

The facts pertinent to the appeal are as follows:

1. The plaintiff and the defendant's wife are sisters. The plaintiff's home is in Tampa, Florida. Prior to the last of July 1954, the defendant and his wife lived in the country, on Leicester Road, Asheville, North Carolina, where they had resided for a number of years. For several years prior to 1954, the plaintiff had visited the defendant and his wife each summer and was visiting them in their home on Leicester Road when they moved into a house at 133 Spears Avenue in Asheville, the latter part of July 1954. It has been the custom of the defendant and his wife for many years to spend considerable time in the home of the plaintiff in Florida each winter.

2. The residence at 133 Spears Avenue was an old house when the defendant purchased it. Before moving into this house the defendant and his wife had the floors sanded, varnished, waxed and polished. The house contains two bedrooms, living room, dining room, bathroom and kitchen—all on one floor.

3. The plaintiff moved into the new home at the same time the defendant and his wife moved in, and continued as their gratuitous

guest until the 27th or 28th of November 1954, when she returned to Florida.

4. The defendant's wife, as a witness for the plaintiff, testified that on the evening of 23 September 1954, after they prepared and ate the evening meal, the plaintiff went into her room to do some sewing; that she did not see her any more that night; that after she and Mr. Handley washed the dishes, "we decided that we should wax and take care of the floors, just spots that were beginning to wear where we neglected them ever since we had moved in the house. Mr. Handley waxed the floor at the door leading into the dining room from the kitchen with some paste wax. . . . He did not wax it all over, just where we had been walking . . . the pathway into the kitchen and then through the dining room. . . . As to the rugs, he picked them up and threw them in a corner while he waxed, and then I later on polished those places and placed them (the rugs) around where I thought they would keep the wear off the floor. I had had right at the entrance at the dining room from the kitchen . . . a little wool rug that I had used one place and another for a long time. . . . After we finished the waxing and arranging, I placed a larger rug there, . . . a hand-hooked rug . . ." The witness further testified that on the morning of 24 September 1954, she asked her husband to bring her the scissors; that her sister got the scissors and was entering the dining room from the kitchen and just as she started through the dining room "her feet flew out from under her and she just had a terrific fall . . ." On cross-examination this witness testified that "I had a number of rugs there in the house, scatter rugs. I moved them around from time to time. . . . I changed them around continually. . . . They were regular floor rugs, some of them were hooked rugs and some of them were machine-made rugs . . . They are in common and general use everywhere. The rug I put down the night before was a newer rug than the one that had been there. It was in better condition than the old rug. . . . It had been used there on the floor in the door to my room. . . . I don't know how many times that rug had been other places. I had walked over it all over the house. I suppose Mrs. Murrell had walked on it various times at various places. Mr. Handley walked over the rug all over the place. I did just what I had done frequently all over the house when I changed this rug. You never get rugs back the same place they were. You are always changing them."

5. The plaintiff testified that "I had gotten up and gone in the kitchen to get my coffee, and while there I heard my sister, over in her bedroom, ask for some thread. She asked for a needle and thread and scissors. . . . I came from the kitchen and went to the buffet and walked right over that rug; and when I came back from the buffet. back through the kitchen to get the scissors, I may have walked over

that rug; and then it was the third time that I came in walking over that rug, that same rug, when the accident occurred." The witness was given a statement which she said she had signed, as follows: "My right foot slipped forward, and I tried to turn to my left and catch the door jamb, but then my left foot also slipped, and I went down flat on the floor, landing on my left side, with my head about the doorway of the kitchen, and my feet extending out into the dining room." She then said: "That is about what happened." This witness also testified that while she was on the floor waiting for someone to help her, she observed the rug on which she fell, and that it appeared to be a different rug than was there before; that she also observed the floor, but could see no difference in it.

The evidence tends to show that the plaintiff was painfully and permanently injured as a result of the fall.

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was allowed and judgment entered accordingly. Plaintiff appeals, assigning error.

Don C. Young for plaintiff.

Harkins, Van Winkle, Walton & Buck and Herbert L. Hyde for defendant.

DENNY, J. The appellant urgently contends that she was an invitee of the defendant and not a licensee at the time of her injury in his home. The authorities, however, support the view that she was a bare licensee. *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408; *Money v. Hotel Co.*, 174 N.C. 508, 93 S.E. 964, L.R.A. 1918B, 493; *Greenfield v. Miller*, 173 Wis. 184, 180 N.W. 834, 12 A.L.R. 982; *Colbert v. Ricker*, 314 Mass. 138, 49 N.E. 2d 459, 147 A.L.R. 647; *Comeau v. Comeau*, 285 Mass. 578, 189 N.E. 588, 92 A.L.R. 1002, 1004-1005; *Biggs v. Bear*, 320 Ill. App. 597, 51 N.E. 2d 799; *Page v. Murphy*, 194 Minn. 607, 261 N.W. 443; *Lewis v. Dear*, 120 N.J.L. 244, 198 A. 887; *Bugeja v. Butze*, 26 N.Y.S. 2d 989, 262 App. Div. 756, 28 N.Y.S. 2d 716; *Roth v. Prudential Life Ins. Co.*, 266 App. Div. 872, 42 N.Y.S. 2d 592; Restatement of the Law on Torts, Volume 2, sections 330, 331 and 332; 65 C.J.S., Negligence, section 32(e), page 489; Anno.: 25 A.L.R. 2d, Injury to Social Guest, 598-628.

The appellant further contends, however, if it be conceded that a guest or visitor in a home is only a bare licensee, that since she was engaged in a mission for the benefit of the defendant's wife, at the time of her injury, her status was changed to that of an invitee, citing *Thompson v. DeVonde*, 235 N.C. 520, 70 S.E. 2d 424. The facts in the *DeVonde case* were substantially different from those in the instant case. Among other things, the plaintiff Thompson, in the *DeVonde*

case, was a paying guest of the defendant's boarding house. The *DeVonde case* and others of similar import, cited by the appellant, are not controlling on the facts set forth in the record on this appeal.

It is said in Anno.: 25 A.L.R. 2d 600: "It has generally been held . . . that one who enters upon premises as a social guest will not escape the liabilities of that status merely by performing incidental services beneficial to the host in the course of the visit."

Minor services performed by a guest for the host during the course of a visit will not change the status of the guest from a licensee to an invitee. Anno.: 25 A.L.R. 2d 607; *O'Brien v. Shea,* 326 Mass. 681, 96 N.E. 2d 163.

In our opinion, the evidence adduced in the trial below bearing on the question of negligence was insufficient to justify its submission to the jury, even if the plaintiff had been an invitee. *Ashley v. Jones,* 126 Cal. App. 2d 328, 271 P. 2d 918; *Nelson v. Smeltzer,* 221 Iowa 972, 265 N.W. 924; *Brown v. Davenport Holding Co.,* 134 Neb. 455, 279 N.W. 161, 118 A.L.R. 423; *Greenfield v. Miller, supra.*

The fact that a floor is waxed does not constitute evidence of negligence. Nor does the mere fact that one slips and falls on a floor constitute evidence of negligence. *Res ipsa loquitur* does not apply to injuries resulting from slipping and falling on a waxed or oiled floor. *Barnes v. Hotel Corp.,* 229 N.C. 730, 51 S.E. 2d 180, and cases cited therein.

There is no evidence on this record tending to show that the defendant applied the wax to the floor in an improper manner or that an improper material was used.

It seems to be the general rule that an action will not be sustained against the owner or lessee of a building, founded solely upon the fact that the patron or invitee was injured by slipping on a waxed or oiled floor, where the floor had been waxed or polished in the usual and customary manner and with material in general use for that purpose. *Barnes v. Hotel Corp., supra.*

In *Brown v. Davenport Holding Co., supra,* the Court said: "The common use of waxed and polished floors, covered with small rugs, in homes and apartments is a matter of common knowledge. In the instant case the evidence establishes that the appellant knew of such use. They are not inherently dangerous to invitees. In the absence of unusual circumstances and conditions, the maintenance of polished hardwood floors and the use of small rugs in an apartment is not negligence for which the owner is liable to a prospective tenant invited to inspect the premises . . . though a polished floor is slippery and light rugs are apt to slide, since such rugs are in common use their use is not negligent, unless there is something unusual about them."

The ruling of the court below is

Affirmed.

THE SCOTTISH BANK, A CORPORATION, ADMINISTRATOR OF EMILY P. BENNETT, DECEASED, PLAINTIFF, v. MARY BENNETT ATKINSON AND HUSBAND, JOHN D. ATKINSON, AND ELEANOR BENNETT BENNETT AND HUSBAND, JOHN R. BENNETT, AND MRS. AVIS F. NELSON, DEFENDANTS.

MARY BENNETT ATKINSON AND HUSBAND, JOHN D. ATKINSON, PETITIONERS, v. ELEANOR BENNETT BENNETT AND HUSBAND, JOHN R. BENNETT, RESPONDENTS.

(Filed 27 February, 1957.)

1. Corporations § 13b: Gifts § 1—

The delivery by the owner of certificates of stock, duly endorsed, to the donees or their agent is sufficient delivery to constitute a valid gift, both as to certificates issued prior to 15 March 1941 (C.S. 1164), and as to certificates issued thereafter (G.S. 55-81), and this notwithstanding any agreement between the corporation and its affiliate that it would not transfer any stock on its books unless the new owners were approved by the affiliate, since C.S. 1170 applies only between the corporation and the transferee.

2. Evidence § 32—

The husband of the donee of a gift may testify as to directions given and declarations made by the donor to the donee, since the testimony is not in behalf of the husband or in behalf of a party succeeding to his interest, nor as to a transaction or communication between him and the deceased, the testimony being as to a transaction between donor and donee. G.S. 8-51.

APPEAL by Mary B. Atkinson and husband from *Carr, J.*, June Civil Term 1956 of ROBESON.

These consolidated cases were here in the spring of 1955. The decision on the questions then presented is reported 242 N.C. 456, 88 S.E. 2d 76, which is referred to for a statement of the facts on which that appeal was based. When the case was again in the Superior Court it was re-referred. The referee, having taken additional testimony, made findings of fact and conclusions of law. Mrs. Atkinson and husband (hereinafter designated as appellants) excepted to evidence offered by appellees Bennett. They also excepted to the findings and conclusions of law. The exceptions were heard by Judge Carr. He sustained some of appellants' exceptions, overruled others, made findings of fact himself, and thereupon rendered judgment. Appellants Atkinson noted exceptions to the rulings made by Judge Carr and appealed. The administrator did not appeal. A statement of such additional facts as may be necessary for an understanding of the decision appears in the opinion.

Ingram P. Hedgpeth and Varser, McIntyre & Henry for appellants.
Nance, Barrington & Collier and McLean & Stacy for appellees.

RODMAN, J. We held, when this litigation was here before, that equalization of advancements could only be effected from property owned by Mrs. Emily P. Bennett at the time of her death. The evidence taken by the referee was for the purpose of ascertaining what property, if any, was so owned. The case depends on the ownership of 140 shares of stock in Avant-Sholar, Inc.

Judge Carr found as a fact: "On 31 October 1949, Mrs. Emily P. Bennett signed the transfer on the certificates of stock then owned by her and registered in her name on the books of the corporation, representing 140 shares of the capital stock of Avant-Sholar, Inc., which transfer contained the names of Eleanor Bennett Bennett and Mary Bennett, as now appears on said certificates of stock offered in evidence. After signing such transfer, the said Emily P. Bennett delivered said certificates of stock to her daughter, Eleanor Bennett Bennett."

Judge Carr further found that the stock certificates were, on 31 October 1949, delivered by John R. Bennett to the secretary-treasurer of Avant-Sholar, Inc., for cancellation and issuance of a new certificate to the tranferees. The new certificate was not actually issued until 24 February 1950. Notwithstanding the new certificate was not so issued until 1950, Avant-Sholar, Inc., on 31 October 1949, recognized the change of stock ownership and paid a dividend to the new owners on 12 December 1949.

Appellants except to the findings that Mrs. Emily Bennett delivered the stock certificates to the transferees, contending that the only evidence tending to establish that fact is the testimony of John R. Bennett, who, they say, is prohibited by statute from testifying. Appellants also assert that transfer on the books of the corporation was necessary to vest title to the stock in the transferees.

Ralph Sholar, secretary-treasurer of Avant-Sholar, Inc., testified that the stock certificates were delivered to him by John R. Bennett on 31 October 1949 and, when delivered, the certificates bore the signature of Mrs. Emily P. Bennett. He knew her signature. The names of the transferees appeared in the certificates when Bennett requested cancellation of the old certificates and issuance of a new certificate. Avant-Sholar, Inc., was sales agent for Chevrolet automobiles and had agreed with General Motors it would not transfer on its books any stock unless the new owners were approved by General Motors. Witness wrote General Motors 31 October 1949 asking its approval of transferees as stock owners. He did not receive a reply until February 1950 and then issued a new certificate for 140 shares to Eleanor Bennett and

Mary Bennett. December 1949 the corporation declared a dividend. This dividend was paid to Mrs. Atkinson and Mrs. Eleanor Bennett.

Emily P. Bennett executed a deed dated 28 October 1949 acknowledged by her 31 October 1949 by which she conveyed to her daughters Mary and Eleanor several tracts of land. Immediately following the description of the lands is this language: "Also a one-half interest to said Eleanor Frances Bennett and a one-half interest to the said Mary E. Bennett in and to all of the personal property and mixed property of every nature, description and kind, including automobile, household and kitchen furnishings, stocks, bonds, notes and money which the said party of the first part owns or in which she has an interest."

Mrs. Atkinson alleged in the petition which she filed in Columbus County asking for partition that she and her sister Eleanor owned as tenants in common all of the property, real and personal, including stocks and bonds owned by their mother, Emily, on 28 October 1949.

Delivery of the certificate for corporate stock is essential to a valid gift. This was true at common law and is now expressly provided for by statute, G.S. 55-81.

Possession by the endorsee or his agent of stock certificates duly endorsed by the person to whom the certificates were issued suffices to establish *prima facie* the fact of delivery and that the transferee in possession has good title to the stock represented by the certificates. *Castelloe v. Jenkins,* 186 N.C. 166, 119 S.E. 202; *Vann v. Edwards,* 128 N.C. 425, 39 S.E. 66; *Vinson v. Knight,* 137 N.C. 408, 49 S.E. 891.

The 140 shares were represented by seven certificates. Five of these were issued prior to 15 March 1941, the effective date of the Uniform Stock Transfer Act, G.S. 55-103. C.S. 1164, providing "The shares of stock in a corporation are personal property, and are transferable on the books of the corporation in the manner and under the regulations provided by the by-laws," did not prevent the transferee from acquiring title to the stock upon endorsement and delivery, notwithstanding any provision of the corporation's by-laws. The last paragraph of G.S. 55-81 states the construction which had been given to C.S. 1164. *Castelloe v. Jenkins, supra; Cox v. Dowd,* 133 N.C. 537; *Grissom v. Sternberger,* 10 F. 2d 764. The endorsement and delivery of the stock certificates terminated Mrs. Emily P. Bennett's claim to all 140 shares notwithstanding the provisions of the contract between Avant-Sholar, Inc., and General Motors. C.S. 1170 applies only between the corporation and transferee.

Appellants insist that if there is competent evidence to support the findings of fact, the findings disclose that they were predicated on the testimony of John R. Bennett, that he is not competent to testify, and that the case should be remanded for findings based only on competent evidence.

John R. Bennett testified he was present and heard Mrs. Emily Bennett direct her daughter Eleanor, wife of the witness, to type in the names of the transferees of the stock certificates, and when the typing was completed, Emily Bennett signed the certificates. Her signature was witnessed, whereupon Mrs. Emily Bennett handed the certificates to her daughter Eleanor, stating as she handed over the certificates: "Now, I am a pauper." He further testified that after the certificates were delivered to Eleanor Bennett she gave the certificates and the deed which Mrs. Bennett had signed to the witness with instructions to file the deed for record and to take the stock to Mr. Sholar. Appellants excepted to this testimony, contending it violates the provisions of G.S. 8-51.

The conditions necessary to seal the lips of a witness under this statute were summarized in *Bunn v. Todd,* 107 N.C. 266, and restated in *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542. Using the yardstick given in *Peek v. Shook,* it is apparent that two of the requisites there given do not apply to the testimony of the witness Bennett. He was not testifying in his own behalf or in behalf of a party succeeding to his interest. *Vannoy v. Green,* 206 N.C. 80, 173 S.E. 275; *Burton v. Styers,* 210 N.C. 230, 186 S.E. 248. The fact that he was the husband of Eleanor, one of the transferees, did not disqualify him. *Allen v. Allen,* 213 N.C. 264, 195 S.E. 801. He was not testifying to a personal transaction or communication with the deceased. The communication and transaction to which he testified was between Emily Bennett and her daughter Eleanor Bennett. He was not prohibited from testifying to that transaction. *Johnson v. Cameron,* 136 N.C. 243; *Zollicoffer v. Zollicoffer,* 168 N.C. 326, 84 S.E. 349; *Vannoy v. Green, supra.*

The form of the questions cannot be held as prejudicial error. Judge Carr, in making his findings, excluded all objectionable portions of the questions and considered them only as directing the attention of the witness to a time or event.

After careful consideration of all of the assignments of error we find nothing which would justify a new trial. The judgment is

Affirmed.

T. S. MEEKINS, M. B. SIMPSON, JR., JEAN S. SHARP AND JOHN H. HALL, PETITIONERS, v. NIKOLAI MILLER, LOUVAL REALTY CO., INC., MURIAL DOW LEWIS, RUTH MARY LEWIS HILL, CAROLYN LEWIS HAZLETT, GREENVALE HILLS CORPORATION, C. CLIFTON LEWIS, AND FREDERICK W. LEWIS, DEFENDANTS.

(Filed 27 February, 1957.)

1. Boundaries § 5b—

Anyone present at the time of the survey of a State grant is competent to testify where the corners were marked and the lines actually run.

2. Boundaries § 2b—

The corners marked and the line actually run in the survey of a State grant is the line of the grant.

3. Boundaries § 5f—

Explanations of the court surveyor as to how he illustrated on the map the respective contentions of the parties are not evidence and are not prohibited.

4. Same—

Certified copy of a State grant with certificate of the county surveyor and his description and map of the land covered by the grant, while not conclusive as to the location of the land granted, is competent. G.S. 8-6.

5. Boundaries § 5a—

Testimony as to physical facts, such as that the line contended for by one party would be on a ridge distant from any water, and that when viewed from the air an island in a sound corresponded in detail with the location of the island upon a map introduced in evidence, is competent.

APPEAL from *Bone, J.,* December 1956 Term of PASQUOTANK.

This is a processioning proceeding instituted in Dare County. Plaintiffs and all of defendants other than Nikolai Miller own land lying north of the disputed boundary. Miller owns the land south of the boundary. For convenience and because of identity of interest, the parties other than Nikolai Miller will hereafter be designated as appellants, and Miller, as appellee.

By consent the cause was referred. The referee, after hearings, made findings of fact fixing the location of the disputed boundary. Appellants took exception during the hearings to portions of the evidence and excepted to the finding fixing the location of the dividing line. The cause was thereafter by consent moved to Pasquotank County. Appellants' exceptions were heard, overruled, and the report of the referee confirmed. Judgment was entered in conformity with the findings, and appellants appealed.

M. B. Simpson, Jr., John H. Hall, and Worth & Horner for appellants.
McCown & McCown and LeRoy & Goodwin for appellee.

RODMAN, J. Appellants propound two questions: (1) Is there competent evidence to support the finding fixing the location of the dividing line as contended by appellee?

The location of the true line is dependent upon the answer to this question: Where is the beginning point of grant 18,708 issued by the State of North Carolina to L. R. Rogers, 30 January 1922? U. S. Midgett, a witness for appellee, testified he was on the survey on which the Rogers grant was issued. He testified the survey began at point 1, shown on the court map, in accordance with the contention of appellee. The only reason advanced for excluding his testimony is that the witness was not the official chain bearer. The evidence is competent, and, if, as the witness testified, the line was actually run and the corners marked, the line so run is the line of the grant. Anyone present on the survey is competent to testify. *Bowen v. Lumber Co.*, 153 N.C. 366, 69 S.E. 258; *Marshall v. Corbett,* 137 N.C. 555; *Euliss v. McAdams,* 108 N.C. 507; *Dugger v. McKesson,* 100 N.C. 1. The fact that the witness testifying in *Marshall v. Corbett, supra,* happened to be a chain bearer was not the reason for admitting his testimony. There was other competent evidence tending to establish the beginning corner of the Rogers grant in accordance with appellee's contention.

Appellants' second question is: Did the court err in the admission and rejection of evidence? It is asserted that the court committed sixty-nine prejudicial errors in taking evidence to find the answer to the single question of fact: Where is the beginning point of the Rogers grant?

By consent a court survey with maps to show the contentions of the parties was ordered. Many of the exceptions taken and assigned as error relate merely to explanations made by the surveyor of the court map and how he illustrated on the map the contentions of the respective parties. The surveyor's explanations were not evidence. Manifestly, statements of where he surveyed and how the maps represented the contentions of the parties were not prohibited.

Appellants contend that the beginning point of the Rogers grant is, by express terms, the south line of the Theo S. Meekins land at the Sound. For the purpose of locating the south line of the Meekins land they introduced a grant to E. H. Bailey dated 11 May 1882. The grant for sixty-six acres either *on* or *in* Roanoke Sound and east of Roanoke Island begins at a point on the mouth of Rock Hall Creek. This grant was, in 1901, conveyed to R. C. Evans and Theo S. Meekins. Evans conveyed the land to Meekins in October 1908. Both of these deeds recite that the land is *in* Roanoke Sound. The grant as recorded in

Dare County describes the land as *on* Roanoke Sound. Appellants contend the grant as recorded in Dare is correct and the land is a part of the beach—Bodie Island Beach, and when so located fixed the beginning point of the Rogers grant at letter A on the court map, some 1,500 feet south of Rock Hall Creek.

Appellee contends the Bailey grant is Headquarters Island lying *in* Roanoke Sound, distant 300 or more feet from the beach. He asserts the Meekins land referred to in the Rogers grant is the land conveyed by N. E. Gould to R. C. Evans and Theo S. Meekins in June 1900, the southern line of which runs from the Atlantic Ocean across the beach to Rock Hall Creek and the Sound, thus establishing the beginning corner of the Rogers grant at figure 1, just on the north side of Rock Hall Creek.

Appellants' exceptions to the evidence most strongly urged are directed at the evidence tending to support appellee's contention that the Bailey grant is not a part of the beach and on Roanoke Sound but an island in the Sound. For that purpose appellee, over objection of appellants, introduced a copy of the grant to which is attached the certificate of the county surveyor with his description and a map of the land covered by the grant. These papers were duly certified by the Secretary of State. The survey and map attached to the certified copy of the grant says that the land was surveyed in accordance with the entry, and is situate *in* Roanoke Sound and east of Roanoke Island. The map has written on it "Headquarters Island 66 Acres." It shows as boundaries Rock Hall Creek and Roanoke Sound.

The certified copy of the grant, survey, and map were competent. G.S. 8-6. The map accompanying the grant is not conclusive of the location of the land granted, but is a matter which a jury or a referee may consider. *Higdon v. Rice,* 119 N.C. 623; *Redmond v. Mullenax,* 113 N.C. 505.

Exceptions to testimony as to physical facts tending to support appellee's location of the Bailey grant cannot be sustained. It was competent to prove that appellants' location of the Bailey grant would put several of its boundaries on a ridge distant from any water; and when viewed from the air, Headquarter's Island, as located by appellee, corresponded in detail with the map of Headquarter's Island attached to the Bailey grant. *Maynard v. Holder,* 219 N.C. 470, 14 S.E. 2d 415; *Roberts v. Preston,* 106 N.C. 411; *Hough v. Horne,* 20 N.C. 369.

No reason is assigned to render incompetent the testimony of the present owner of the Bailey grant and others that from their earliest recollection the island was generally known as Headquarter's Island.

We have examined but find nothing in the exceptions and assignments of error which in our opinion justifies a new trial. The judgment is

Affirmed.

PATRICIA LEE, CHARLES McCLENNY LEE AND LINDA MASON LEE, INFANTS BY THEIR NEXT FRIEND, T. J. COLLIER, v. H. IRWIN COFFIELD, JR., EXECUTOR AND TRUSTEE UNDER THE WILL OF THE ESTATE OF CHARLES CLIFTON LEE.

(Filed 27 February, 1957.)

1. Parent and Child § 5: Executors and Administrators § 15g—

The estate of a father is not liable to his minor children for sums paid out by their mother for their support and maintenance.

2. Parent and Child § 5—

The law in this State imposes a duty on both parents to provide, within their means, for the necessary support of their minor children, and while this is primarily the obligation of the father, upon his death the duty rests on the mother to provide for their support to the best of her ability.

3. Same: Executors and Administrators § 15g—

Under a deed of separation the father provided for monthly sums for the support of his minor children. After his death the mother expended sums in excess of the amount provided in the deed of separation for their support and maintenance. *Held:* Neither the minors nor their estates is liable to their mother for such sums, and the properties willed them by their father, to be distributed upon their twenty-fifth birthdays, may not be used to reimburse the mother for such sums.

APPEAL by plaintiffs from *Morris, J.*, 26 November, 1956 Term of PAMLICO.

Plaintiff Collier, on 14 January 1956, filed with the Clerk of the Superior Court of Pamlico County an application for the appointment of a next friend for Patricia, Charles, and Linda Lee. The application states that the parties named are infants, age not disclosed, without guardian, and that they are entitled to obtain reimbursement for necessary expenses incurred for them from defendant, executor and trustee under the will of Charles Clifton Lee, their father. Applicant was appointed next friend and authorized to bring suit.

The complaint alleges a separation agreement dated 8 August 1953 between Charles Clifton Lee and Grace M. Lee, father and mother of the infants. A copy of the agreement is annexed and made a part of the complaint.

The agreement provides in substance for the separation and a release by each of the parties thereto of all rights in the property or obligation to the other, specifically including any right which the wife might have to look to the husband for support and the payment by the husband to the wife of $12,400.

The agreement, as it relates to the three children of the marriage, provides that the mother shall have custody and control, with limited rights of visitation by the father, that the father shall pay to the mother

$200 per month for the support of the children until they finish high school or become nineteen years of age, and as each completes high school or reaches that age, the monthly payment is to be reduced one-third. The agreement further provides that if any child should become disabled, the age limit for support shall be increased by the length of time the child is disabled; and, if the cost-of-living index increases or decreases as much as ten per cent, there shall be a like increase or decrease in the monthly payments. The agreement obligates the father to provide $3,500 for each child for the college education of that child.

The complaint, after setting out the terms of the separation agreement, alleged that the father, on 30 September 1953, died testate, his will bearing date 8 August 1953; that defendant had qualified as executor and trustee under the will; that the children have received medical, dental, and other treatment, all of which was reasonably necessary but for which no specific provision was made in the separation agreement; that Mrs. Lee expended, between October 1953 and November 1955, $902.05 for the children in excess of the $200 monthly payments provided for in the agreement, which sum represented medical and similar services she had provided for the children; that the estate of Charles Lee is solvent; that the executor has not closed the estate; and that the will, after providing for the payment of testator's debts, gives the estate to the children to be distributed as the children reach twenty-five years of age. The complaint prays that defendant, as executor and trustee, be compelled to pay Grace Lee the monies which she expended for medical services and any other sums expended by her for the minors in excess of the monthly payments made to her in conformity with the separation agreement.

Defendant demurred for that the complaint failed to state a cause of action. The demurrer was sustained, and plaintiffs appealed.

B. B. Hollowell and R. E. Whitehurst for plaintiff appellants.
Ward & Tucker for defendant appellee.

RODMAN, J. The case presents two questions: (1) Can liability be imposed on the estate of the deceased father beyond his contractual obligations for the support of his minor children residing with their mother?

The liability of the father's estate to make the monthly payments to the mother for the support of the minors as provided in the deed of separation is not questioned.

So far as liability of the estate is concerned, the only question is: What obligation, if any, exists in favor of the minors beyond the monthly payments provided for in the deed of separation? The answer is none. *Elliott v. Elliott*, 235 N.C. 153, 69 S.E. 2d 224. It was there

held that the obligation imposed by the common law on a father to support his minor children terminated at his death. Additional authorities supporting the conclusion there reached may be found in the notes 18 A.L.R. 2d 1126.

(2) Can the properties willed by the father to be distributed to the minors as they reach their twenty-fifth birthday be used to reimburse their mother for monies expended by her for their care? This question likewise requires a negative answer.

The law in this State imposes a duty on both parents to provide, within their means, for the necessary support of their minor children. This is primarily an obligation of the father. *Smith v. Hewett,* 235 N.C. 615, 70 S.E. 2d 825; *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31; *In re Ten Hoopen,* 202 N.C. 223, 162 S.E. 619; *Sanders v. Sanders,* 167 N.C. 319, 83 S.E. 490.

The fact that the father, during life, is primarily responsible for the support, maintenance, and education of his minor children does not relieve the mother of her responsibility. Upon the death of the father, a duty rests on the mother to the best of her ability to provide for the support of her children. This we conceive to be the common law as adopted in North Carolina. *Casualty Co. v. Lawing,* 225 N.C. 103, 33 S.E. 2d 609. A like conclusion has been reached in other states. *Whitehurst v. Singletary,* 50 S.E. 2d 80 (Ga.); *Pettigrew v. Williams,* 16 S.E. 2d 120 (Ga.); *Davidson's Adm'x. v. Davidson,* 117 S.W. 2d 1044; *In re Nolan's Guardianship,* 249 N.W. 648; *Workman v. Workman,* 178 S.E. 121 (S.C.); *In re Siems' Estate,* 179 N.Y.S. 875. It is true that expressions can be found in cases from other states indicating a contrary view, 46 C.J. 1276 and notes, but we think the view here expressed is the sounder view. Our view of the common law is recognized by statute, and the willful failure to provide adequate support is, as to the offending party, made a misdemeanor. G.S. 14-322.

This action is predicated on the theory that the minors and their estate are legally liable to their mother for their support or for such sums as she may have expended for them in excess of the amounts provided by her deceased husband. There is no allegation that the mother is without adequate means to properly support her children or to supplement to the extent necessary the funds available from her husband's estate under the separation agreement.

The husband's will is dated 8 August 1953, the same day the separation agreement was made. Apparently the parties then thought that the monthly payments were either adequate for the support of the children or that the mother, with her own estate, could and would provide such supplementary funds as might be necessary. Provision was made in the agreement to protect against a rising cost of living.

The father's estate has not been settled. It may, as alleged in the complaint, be solvent; but what amount will remain after the $10,500 fixed by the separation agreement for the college education is not alleged.

The estate of the minors cannot be used to pay a nonexistent debt to their mother. The property of minors can only be used for their support when the parents are unable to properly provide such support. Upon appropriate allegations and findings of fact, the properties of the minors can be used to provide for their necessary support. *Casualty Co. v. Lawing, supra.* The judgment is

Affirmed.

FAYE G. BISHOP v. FRANTZ S. BISHOP.

(Filed 27 February, 1957.)

1. Appeal and Error § 19—

An appeal is itself an exception to the judgment and presents for review whether the facts found support the judgment.

2. Divorce and Alimony § 20½: Husband and Wife § 12d—

Provisions in a deed of separation for support of the minor children of the marriage, entered as a consent judgment by the court, cannot deprive the Superior Court of its inherent and statutory authority to protect the interests and provide for the welfare of the infants, and therefore judgment increasing the allowance for the minor children upon findings of change of circumstances warranting such increase, will be affirmed.

APPEAL by defendant from *Froneberger, J.*, September Term 1956 of TRANSYLVANIA.

This action was instituted on 11 September 1954 for alimony without divorce and for custody of children. The plaintiff filed her duly verified complaint alleging that the plaintiff and defendant were married on 8 March 1941; that to the marriage two children were born, namely, Robert Bishop, age ten, and Nancy Bishop, age four. The plaintiff prayed for reasonable subsistence as provided in G.S. 50-16 for herself and her minor children and for the sole and exclusive custody of the children.

The defendant filed his verified answer denying the pertinent allegations in the complaint.

Thereafter, on 22 September 1954, the plaintiff and the defendant entered into a separation agreement in which a full and complete property settlement was made between the parties. The home in which the parties had theretofore lived was owned by them as tenants by the

entireties. The plaintiff, pursuant to the terms of the separation agreement, paid the defendant $4,000 for his interest in the home, and the defendant duly conveyed his interest therein to the plaintiff. The agreement further provided for the defendant to pay to the plaintiff for the support of the minor children born of the marriage, the sum of $80.00 per month, payable in installments of $40.00 on the 1st and 15th of each calendar month thereafter, beginning with 1 October 1954. It was further agreed that the plaintiff should have complete and sole custody of Robert and Nancy Bishop, provided, the defendant should have certain visitation rights wherever the children might be located.

On 20 December 1954, his Honor R. Lee Whitmire, a Special Judge of the Superior Court, residing in the Eighteenth Judicial District, entered a consent judgment to the effect that "it appearing to the court that all matters and things in controversy between the plaintiff and the defendant in this action have been settled and compromised by the execution of a separation agreement . . . it is, therefore, ordered, adjudged and decreed that said separation agreement . . . be and hereby is the judgment of this court in this action." The cause was retained as to the custody of the minor children.

The plaintiff, through her attorney, filed a verified motion in the cause in August 1956 in which she stated, among other things, that the amount agreed upon for the support of the defendant's minor children took into consideration the fact that she was employed as a school teacher in the public school system of Transylvania County and earning a salary therefrom, and was also based on other conditions then existing. That in May 1956 the plaintiff was informed that her services as a teacher would be terminated at the end of the 1955-1956 school year, and her employment was so terminated in June 1956. That the plaintiff holds only a "B" teaching certificate and cannot obtain work elsewhere without additional training, which would require her to go back to college and qualify for an acceptable teacher rating or be unable to earn a livelihood in the future. The plaintiff further stated in her motion that since she would be without income for the ensuing year and could not support her children on the amount contributed by the defendant, she prayed for an increase to $30.00 per week for the support of the children for the period plaintiff would be unemployed.

The defendant filed an answer and the matter was heard before his Honor, at the September Term 1956 of the Superior Court of Transylvania County. The court found as a fact "that the plaintiff has lost her job and must attend college for the ensuing nine months in order to reinstate her teaching certificate, and that there is therefore a material change in condition of the plaintiff and said minor children." The court further found as a fact that "the plaintiff is attending college in the State of South Carolina and has both the children with her, where

they expect to remain at least until June 1957." Whereupon, the court entered an order in pertinent part as follows: "that to and including the month of June 1957, the payments required of the defendant for the support of his minor children be and are hereby increased to the sum of $100.00 per month commencing with the month of September 1956, and that after the month of June 1957, said payments shall revert to $80.00 per month during the remaining minority of said minor children or until further orders of this court."

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

J. Y. Jordan, Jr., and Williams & Williams for plaintiff.
Redden & Redden and Thomas R. Eller, Jr., for defendant.

DENNY, J. The defendant did not request the court to find the facts, or except to the findings made by it. *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E. 2d 884. In fact, no exception was entered at the hearing below. However, the appeal itself constitutes an exception to the judgment. *Cannon v. Wilmington*, 242 N.C. 711, 89 S.E. 2d 595; *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223; *Gibson v. Insurance Co.*, 232 N.C. 712, 62 S.E. 2d 320. Therefore, the only question presented is whether the facts found are sufficient to support the judgment. *Byrd v. Thompson*, 243 N.C. 271, 90 S.E. 2d 394; *Scarboro v. Insurance Co.*, 242 N.C. 444, 88 S.E. 2d 133; *Muilenburg v. Blevins*, 242 N.C. 271, 87 S.E. 2d 493; *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759; *Glace v. Throwing Co.*, 239 N.C. 668, 80 S.E. 2d 759. Other questions argued in the appellant's brief are not presented for decision.

In the case of *Story v. Story*, 221 N.C. 114, 19 S.E. 2d 136, the action was for divorce. In September 1938, before the cause was heard on its merits, the court entered a consent order requiring the plaintiff, the father of the child of the marriage, to pay into the office of the Clerk of the Superior Court $25.00 per month for the support of the defendant and the child and awarding the custody of the child to the defendant. During the same term of court, judgment of divorce absolute was entered. In August 1941 the defendant made a motion in the cause for an increased allowance for the support of the infant child. An order was so entered. The plaintiff appealed therefrom on the ground that the original order was by consent and not subject to modification by the court. On appeal, this Court said: "No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment; *In re Albertson*, 205 N.C. 742, 172 S.E. 411; *Morris v. Patterson*, 180 N.C. 484, 105 S.E. 25; *Webster v. Webster*, 213 N.C. 135, 195 S.E. 362; but they cannot thus withdraw

children of the marriage from the protective custody of the court. . . . In such case the welfare of the child is the paramount consideration to which even parental love must yield, and the court will not suffer its authority in this regard to be either withdrawn or curtailed by any act of the parties.

"Hence, even if we accept the contention of the plaintiff that the order constitutes a judgment by consent, the court below had full jurisdiction to hear the matter on the motion of the defendant and to make the order from which plaintiff appeals."

Ordinarily, in entering a judgment for the support of a minor child or children, the ability to pay as well as the needs of such child or children will be taken into consideration. Such decree is subject to alteration upon a change of circumstances affecting the welfare of the child or children. G.S. 50-13; *Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 2d 133: *Hardee v. Mitchell, supra; Story v. Story, supra.*

We think the facts found by the court below are sufficient to show such change in the temporary financial circumstances of the plaintiff as to justify the inference that the welfare of the defendant's minor children has been affected thereby, and that such facts are sufficient to sustain the order for the temporary increase of the amount allowed for the support of these minor children. 17 Am. Jur., Divorce and Separation, section 703, page 534; 27 C.J.S., Divorce and Separation, section 322, page 1235, *et seq.*

The order of the court below will be upheld.

Affirmed.

MRS. MYRTLE C. PAINTER v. HOME FINANCE COMPANY.

(Filed 27 February, 1957.)

1. Process § 8d—

In an action against a nonresident corporation for wrongfully taking plaintiff's property by duress and threats of arrest without legal process and for invasion of privacy and public humiliation, findings of fact that the tortious acts were committed in this State are sufficient to support adjudication that service of process on it by service on the Secretary of State under G.S. 55-38.1 is valid.

2. Appeal and Error § 1—

It is unnecessary for an appellate court, after having determined the merits of the case, to examine questions not affecting decision reached.

APPEAL by defendant from *Clarkson, J.*, November Term, 1956, of BUNCOMBE.

Civil action by plaintiff to recover damages for alleged torts committed in this State by the defendant foreign corporation, heard below on special appearances and motions to quash service of process upon the ground that the defendant has never engaged in such business or activity in the State of North Carolina as would subject it to the jurisdiction of the courts of the State.

The following facts were found by the court:

"1. That the plaintiff is a . . . resident of Buncombe County, North Carolina, and . . . the defendant is a South Carolina corporation with its principal place of business in Spartanburg, South Carolina; that its president, J. E. Burnsides, is a resident . . . of Charlotte, North Carolina.

"2. That the plaintiff, while a resident of South Carolina, gave a chattel mortgage on her 1952 Dodge automobile, which mortgage was purchased by defendant; that up until February 25, 1956, plaintiff paid the defendant the sum of $706.44 on said contract, leaving a balance of $504.60; that due to a lack of work plaintiff lost her job in South Carolina and found work in Asheville, North Carolina, and notified defendant of same; that defendant advised plaintiff it made no difference under the conditional sales (*sic*) contract where she lived; that . . . plaintiff continued to make payments to defendant until her husband became seriously ill . . . and had to undergo expensive medical and surgical treatment.

"3. That on Sunday afternoon, May 20, 1956, while plaintiff was visiting her sick husband in St. Joseph's Hospital in Asheville, . . . where he had recently undergone a major operation . . . and was still in a very serious and critical condition, defendant's agent, John L. Thornburg, without any permission or authority and with knowledge of the circumstances, invaded plaintiff's privacy and publicly demanded that she immediately pay the balance of $504.60, or surrender said automobile, and refused to wait until the next day when the banks would be open and plaintiff could raise the money; but told plaintiff if she did not pay or surrender the automobile immediately he would have her put in jail; that under threat of duress plaintiff surrendered said automobile, which defendant took, without any legal process, to the State of South Carolina, and sold.

"4. That on 27 July, 1956, plaintiff brought her action in the Superior Court of Buncombe County against the defendant, Home Finance Company, for damages for the wrongful and unlawful taking of her automobile, for invasion of her privacy, for unlawful public threats of arrest, for duress and mental and physical suffering resulting directly therefrom.

"5. That summons was issued . . . from the Superior Court of Buncombe County to the Sheriff of Mecklenburg County, who served same

together with copy of complaint on J. E. Burnsides, President of defendant corporation, who is a permanent resident of Charlotte, North Carolina; that defendant, through its counsel, moved by special appearance, to dismiss on the ground that it was not doing business in North Carolina; that Home Finance Company's President, J. E. Burnsides, is also President of Home Finance Group, Inc., which owns several subsidiary corporations doing business in North Carolina, South Carolina, Virginia, West Virginia, Georgia, Tennessee, and Florida; and in isolated instances when it is necessary to sign a tax return or a similar report for defendant corporation, he does so in Charlotte, North Carolina.

"6. That on 24 September, 1956, alias summons and true copy of the complaint was issued from the Superior Court of Buncombe County to the Sheriff of Wake County, who served same on the Honorable Thad Eure, Secretary of State for North Carolina, as process agent for defendant Home Finance Company; and said Secretary of State sent said summons and complaint by Registered Mail to defendant Home Finance Company, Spartanburg, South Carolina, as provided by law; and said summons and complaint, with the Secretary's forwarding letter, were received, and Registered Mail Return Receipt Card signed, on 28 September, 1956, 'Home Finance Company, by John L. Thornburg, Agent.'

"7. That thereafter by special appearance defendant filed another motion, substantially the same as the first, asking dismissal of plaintiff's action for alleged lack of jurisdiction.

"8. And the Court further finds that plaintiff's cause of action arises out of the tortious conduct of defendant committed in this State, constituting misfeasance, and consisting principally of the wrongful taking of plaintiff's property by duress and threats of arrest and without any legal process or right; for invasion of privacy and public humiliation.

"9. And the Court further finds that the foregoing facts constitute doing business in the State of North Carolina as contemplated by the laws of this State applicable thereto."

Upon the facts found the court entered judgment decreeing: "that the service of process on J. E. Burnsides, as president of defendant Home Finance Company is a good and valid service, and that the service of process on Honorable Thad Eure, Secretary of State, as process agent of defendant is a good and valid service and that this Court now has jurisdiction of defendant, Home Finance Company, for all purposes relative to this action."

The defendant excepted to the judgment and appealed.

Parker & McGuire and Bruce J. Brown for defendant, appellant.

M. John DuBose and Melvin K. Elias for plaintiff, appellee.

JOHNSON, J. Decision here is controlled by Chapter 1143, Session Laws of 1955, now codified as G.S. 55-38.1. This statute provides in pertinent part:

"(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State . . . whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

"(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

"(c) . . . In any case where a foreign corporation is subject to suit under this section and has failed to appoint and maintain a registered agent upon whom process might be served . . . then the Secretary of State shall be an agent of such corporation upon whom any process in any such cause of action may be served."

G.S. 55-38.2 prescribes the procedure to be followed in serving process on the Secretary of State. This section also provides: ". . . (g) Nothing herein contained shall limit or affect the right to serve any process, notice or demand to be served upon a corporation in any other manner now or hereafter permitted by law."

The allegations of the complaint and the crucial findings of fact made by the court below disclose that the plaintiff's cause of action arose out of the defendant's tortious conduct committed in this State. This suffices under G.S. 55-38.1 to render the defendant amenable to the jurisdiction of the Superior Court of Buncombe County. See *Smyth v. Twin States Import Corp.*, 116 Vt. 569, 80 A. 2d 664, 25 A.L.R. 2d 1194; Annotation: 25 A.L.R. 2d 1202. See also *Compania De Astral, S. A. v. Boston Metals Co.*, 205 Md. 237, 107 A. 2d 357, pet. for *cert.* denied, 348 U.S. 943, 99 L. Ed. 738; *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L. Ed. 95.

In this view of the case finding of fact No. 9, wherein the court below concluded that the defendant was "doing business in the State of North Carolina," may be treated as surplusage. It is unnecessary for an appellate court, after having determined the merits of the case, to examine questions not affecting decision reached. *Merrell v. Jenkins*, 242 N.C. 636, 639, 89 S.E. 2d 242, 244. Therefore we do not reach for decision the question whether upon the facts found the court below erred in concluding that the defendant was doing business in the State of North Carolina.

With decision here being rested on the 1955 statute, the decisions in *Lambert v. Schell*, 235 N.C. 21, 69 S.E. 2d 11, and cases there cited do not control.

The record discloses that the defendant has been duly served with process. The result below will be upheld.

Affirmed.

BELLE H. COPELAND v. HAYWOOD PHTHISIC AND HENRY G. QUINN, INDIVIDUALLY AND PARTNERS T/A AS P & Q.

(Filed 27 February, 1957.)

1. Negligence § 4f—

The doctrine of *res ipsa loquitur* does not apply to injuries resulting from slipping and falling on a waxed floor.

2. Same—

The proprietors of a store are not insurers of the safety of their customers, but are liable only for injuries resulting from negligence on their part.

3. Same—

Evidence that a patron in a store, while walking down an aisle where customers were invited to inspect the merchandise, slipped and fell at a place where more wax had been allowed to accumulate than at any other place in the store, so that plaintiff's shoe heel made a print in the wax, is sufficient to support the inference that defendants had not properly applied the wax at this point, and nonsuit was properly denied in an action to recover for the resulting injury.

4. Same—

No notice to a store proprietor is necessary of a condition created by him.

APPEAL by defendants from *Bone, J.*, September Term 1956, of PASQUOTANK.

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

The jury found for its verdict that plaintiff was injured by the negligence of the defendants, that she was free from contributory negligence, and awarded damages in the amount of $2,750.00.

From a judgment in accord with the verdict the defendants appeal.

John H. Hall for Plaintiff, Appellee.
LeRoy & Goodwin for Defendants, Appellants.

PARKER, J. The defendants present for decision one question: Did the trial court commit error in denying their motions for judgment of nonsuit, made at the close of plaintiff's evidence, and renewed at the close of all the evidence?

The defendants operate a self-service retail grocery store in Elizabeth City, North Carolina. The stock of merchandise carried by defendants was arranged on shelves or counters for the purpose of effective display. The store had an asphalt tile floor, with a concrete subfloor. There were several aisles in the store, and defendants once a week waxed the floor with a heavy duty wax, that is not needed in homes. This wax has a water base, and, according to a certificate that comes with it, is rated as "non-skid." It is applied one night, and the next morning it is buffed with an electrical machine. The floor of the store was waxed by the defendants on Monday night and buffed on Tuesday morning, before the plaintiff fell on the following Saturday.

Plaintiff was an active lady 77 years of age, residing in Elizabeth City. On Saturday afternoon, between 3:00 and 4:00 o'clock, 2 July 1955, plaintiff, with her daughter, went to defendants' store to purchase prunes. She had visited the store before, and was familiar with it. It was a bright, sunshiny afternoon and the store was well lighted. Plaintiff was wearing low heel shoes and their soles were dry. She asked a clerk where the prunes were, and was following him down one of the aisles of the store, when she stepped on a slippery place, and both her feet slipped out from under her, and she fell. Her head struck the cosmetic counter, and her left hip was broken. Plaintiff had been given no notice or warning to watch the floor.

Plaintiff's daughter, Mrs. E. R. Russell, was behind her mother in the aisle when she fell. Mrs. Russell's testimony in part is as follows: "Her foot just sloughed out from under her and she just went down. Her head struck the cosmetic counter and knocked some bottles over and broke them; I'd say about two bottles. I looked at the place on the floor where she had slipped. It looked like a big place of wax where her foot slipped and she fell. I'd say the patch of wax was about the shape of an egg, about this large, indicating (arms in an oval, fingers touching) in the shape of an egg, round. I don't know what size. I know it was a large enough place so you could see it. It was as large as I made by extending my arms and putting my hands together. I looked at it right after she fell, I wanted to see what she fell over, what caused her to fall. They had just picked her up, and I wanted to see, you know, what caused her to fall. . . . It looked like it hadn't been long waxed. . . . There was more wax on the floor at this place that I have told you about than on the rest of the floor. . . . I have had experience in using wax on floors, for twenty years, I guess." She further testified: "Her shoe heel print was in that wax where she slipped. It had made a track where she slid in the wax. That was at the place I described to the jury. That was the place on the floor where I told about seeing this patch of wax. That particular patch of wax looked oily to me. Like it hadn't been too long put down, about two or three days."

When plaintiff's head struck the cosmetic rack or shelf or counter a bottle there spilled on the floor where her head was lying, at a different place from where the patch of wax was.

Henry G. Quinn, one of the defendants, testifying in their behalf, said that the type of wax they used, and the manner of its putting on the floor by them, are in general and approved use in stores of this kind. He further said on cross-examination: "When wax is properly applied, it is evenly distributed but it can be more evenly distributed with a buffer." He also testified enough people go through the store to require waxing it once a week.

The defendants further offered evidence to the effect that asphalt tiling is the standard material used in stores of this kind, is in general and approved use, and for asphalt tiling the standard maintenance procedure is to continue to wax such floors.

The doctrine of *res ipsa loquitur* does not apply to injuries resulting from slipping and falling on a waxed floor. *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180; *Parker v. Tea Co.*, 201 N.C. 691, 161 S.E. 209.

The defendants are not insurers of the safety of their customers on their premises, and liability for injury to such customers attaches only for injuries resulting from negligence on their part. *Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33; *Pratt v. Tea Co.*, 218 N.C. 732, 12 S.E. 2d 242; *Bowden v. Kress & Co.*, 198 N.C. 559, 152 S.E. 625.

This Court has said in *Barnes v. Hotel Corp., supra:* "It seems to be the general rule that an action will not be sustained against the owner or lessee of a building, founded solely upon the fact that a patron or invitee was injured by slipping on a waxed or polished floor, where the floor had been waxed or polished in the usual and customary manner and with material in general use for that purpose."

However, in the instant case, considering the evidence with that liberality, which the statute requires on a motion for judgment of nonsuit, it appears as a reasonable inference that defendants did not properly wax the floor of their store, in that the unusual patch of wax, on which plaintiff slipped and fell, had been permitted to accumulate, or had been left, on the floor of the aisle at a place where customers were invited to inspect the merchandise displayed. This patch of wax was unusual because the evidence tended to show that there was more wax at this point than at any other point in the store. Plaintiff's shoe heel print was in this wax where she slipped. These pertinent facts permit the legitimate inference to be fairly deducible therefrom that the wax had been applied in a negligent and unusual manner.

No notice to defendants was necessary, as they created the hazard. *Lee v. Green & Co., supra; Hughes v. Enterprises, ante*, 131, 95 S.E. 2d 577.

The ultimate question is whether the evidence brings the case within the rules of liability set forth in *Bowden v. Kress, supra; Parker v. Tea Co., supra; Anderson v. Amusement Co.*, 213 N.C. 130, 195 S.E. 386; *Lee v. Green & Co., supra; Hughes v. Enterprises, supra.* We are of the opinion that the rules of liability announced in these cases apply, that there was some evidence of negligence to be submitted to the jury, and the motions for judgment of nonsuit were properly overruled.

Defendants do not contend that plaintiff was guilty of legal contributory negligence. If such contention had been made, it would avail them nothing on the facts here.

In the trial below we find

No error.

JUNIUS D. GRIMES v. VIRGINIA ELECTRIC & POWER COMPANY AND THE CITY OF WASHINGTON, N. C., A CORPORATION.

(Filed 27 February, 1957.)

Easements § 5—

The purchaser of an easement granting to it, its successors and assigns, the right to maintain power lines and poles, the right of ingress and egress, and the right to increase or decrease the number of wires, may not grant to another utility a license to attach its crossarms and wires to the poles without the payment of additional compensation to the landowner for the additional burden. The second utility is not an assignee of the first, since the first utility retains its full right to use the easement granted.

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

APPEAL by plaintiff from judgment of nonsuit entered by *Frizzelle, J.*, October, 1956 Term, BEAUFORT Superior Court.

Civil action to recover compensation for an additional burden placed upon plaintiff's land. The plaintiff's alleged cause of action grew out of the following facts: On 7 May, 1953, the plaintiff and his wife, for a valuable consideration, granted to Virginia Electric & Power Company, "its successors and assigns, the perpetual easement to construct, operate, and maintain one or more pole or tower lines, as the company may from time to time deem expedient or advisable, for the purpose of transmitting electricity, . . . including all wires, poles, towers, attachments," . . . over, on, and across a certain described tract of land owned by the plaintiff, Junius D. Grimes, and located just outside the corporate limits of the Town of Washington. The grant included the right of ingress and egress for maintenance purposes, and to increase or to decrease the number of wires. The easement was granted over a strip 50 feet wide and approximately 2,500 feet long.

Prior to February, 1954, the City of Washington was engaged in the business of furnishing electric power both to residents of the city and to residents beyond its corporate limits. In order to facilitate its distribution outside the city, it entered into a written agreement on 15 February, 1954, with the Virginia Electric & Power Company in which the power company granted to the City of Washington a license to attach wires and appurtenances to the power company's poles and to maintain not to exceed eight wires with a maximum potential of 15,000 volts. The attachment required the addition of one crossarm and contained a provision that each of the defendants should be responsible for the maintenance of its separate facilities.

The plaintiff introduced evidence to the effect that the power lines of the defendants traversed his land for about 2,500 feet and that his land was damaged from $2,000 to $5,000 by the attachment of the city's lines. At the close of all the evidence the court entered judgment of compulsory nonsuit, from which the plaintiff appealed.

Rodman & Rodman, Bryan Grimes, Junius D. Grimes, Jr., for plaintiff, appellant.

James B. McMullan and L. E. Mercer for defendant City of Washington, appellee.

Spruill & Spruill for defendant Virginia Electric & Power Company, appellee.

HIGGINS, J. The question presented is whether the plaintiff's grant to Virginia Electric & Power Company authorized it in turn to grant to the City of Washington the right to attach electric lines and appurtenances, including a crossarm, to the power company's poles. The plaintiff contends he is entitled to collect compensation for the increased servitude thus placed on his land. On the other hand, the defendant contends the plaintiff's grant was to the Virginia Electric & Power Company and to its successors and *assigns,* and permitted it to make the assignment to the City of Washington.

The answer to the defendant's contention is that the Virginia Electric & Power Company has not assigned anything. It still retains its right to maintain its full complement of wires and other facilities and to transmit electricity within the full limits of its grant. The contract between the defendants permits the power company to retain all its facilities and, in addition, permits the City of Washington to transmit its own current by means of its own wires attached to the power company's poles. The plaintiff was not a party to the contract between the defendants. The additional lines of the city, with the right to enter upon the lands for maintenance purposes, place an additional burden on plaintiff's land without his consent. Two power companies enjoy an easement over his land. He granted only one.

Any additional burden beyond the grant entitles the landowner to just compensation. *Light Co. v. Clark,* 243 N.C. 577, 91 S.E. 2d 569; *Hildebrand v. Tel. Co.,* 219 N.C. 402, 14 S.E. 2d 252; *Crisp v. Light Co.,* 201 N.C. 46, 158 S.E. 845; *Rouse v. Kinston,* 188 N.C. 1, 123 S.E. 482; *Teeter v. Telegraph Co.,* 172 N.C. 783, 90 S.E. 941; *Hodges v. Telegraph Co.,* 133 N.C. 225, 45 S.E. 572; *Phillips v. Telegraph Co.,* 130 N.C. 513, 41 S.E. 1022; Mordecai's Law Lectures, 2d Ed., Vol. 1, pp. 467, 469, 470.

The plaintiff is entitled to go to the jury on the question of just compensation for the additional burden placed upon his land.

Reversed.

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

P. J. IPOCK v. WYNNE MILLER AND COLEY MILLER.

(Filed 27 February, 1957.)

Costs § 3a—

Where plaintiff fails to recover in an action involving title to real property in which a court survey is ordered, the clerk is without authority to tax the surveyor's fees in the bill of costs, but on appeal from the clerk's order, the Superior Court, while properly affirming the clerk's order, should pass upon the motion for taxing such fees as a part of the costs as a matter of right. G.S. 6-19.

APPEAL by defendant from *Morris, J.,* at November 1956 Term of CRAVEN.

Civil action to recover damages for trespass, and to enjoin further trespass upon certain land in Craven County, North Carolina, of which plaintiff alleges he is owner and entitled to possession,—heard upon motion of defendants to tax cost of surveying defendants' contentions as set forth on court map, pursuant to provisions of G.S. 6-19.

Defendants, answering complaint filed by plaintiff, denied the allegations of plaintiff's ownership of land therein described, and of their trespass thereon, and set up cross-action and counterclaim in which they assert in themselves ownership of the same lands, and plead same in bar of plaintiff's right to recover.

Thereafter at February Term 1956 the presiding judge by consent-order duly signed and entered, appointed a court surveyor and directed him to survey the contentions of both plaintiff and defendants, and to prepare blueprints for use at the trial of the cause by the parties, court and jury. And the court further ordered plaintiff and defendants, each,

to pay into the hands of the Clerk of Superior Court the sum of $25.00 "to be applied toward the expense of the survey and blueprints."

Thereafter, at October Term 1956, judgment as of nonsuit was granted, and plaintiff was "taxed with the costs to be taxed by the Clerk."

To this judgment plaintiff objected and excepted and appealed to Supreme Court, notice of which was given in open court, and plaintiff was given sixty days within which to serve case on appeal and defendant was given thirty days thereafter to serve counter-case.

Thereafter on 30 November, 1956, attorneys for defendants, after notice to plaintiff and her attorneys, moved before Clerk of Superior Court for an order taxing against plaintiff the costs of surveying the defendants' contentions as set forth on the court map under provisions of G.S. 6-19. The Clerk, upon hearing the motion, being of opinion that he had no authority to tax the surveyor's fees in the bill of costs, and being of further opinion that the provisions of G.S. 38-4 and the case of *Cannon v. Briggs*, 174 N.C. 740, 94 S.E. 519, applied, entered an order on 4 December 1956, denying the motion. Defendants excepted and appealed to Superior Court.

And on 5 December, 1956, Judge of Superior Court ruled that "The foregoing order is hereby sustained."

Defendants except thereto and appeal to Supreme Court, and assign error.

R. E. Whitehurst for plaintiff appellee.

L. T. Grantham and Lee & Hancock for defendants appellants.

WINBORNE, C. J. Appellant challenges the action of the Judge of Superior Court in merely sustaining the order of the Clerk.

In this connection it is noted that when in an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial, plaintiff fails to recover, the defendant shall be allowed costs therein as a matter of course. G.S. 6-19.

Moreover, "When in any suit pending in the Superior Court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the boundaries and lines expressed in each party's title, and such other survey as shall be deemed useful, which surveys shall be made by surveyors appointed by the court . . . or by one surveyor, if the parties agree; . . . and for such surveys the court shall make a proper allowance to be taxed as among the costs of the suit." G.S. 38-4, also *Cannon v. Briggs, supra.*

This Court held in *Cannon v. Briggs, supra* (an action for recovery of land and to remove a cloud from title), that where a court survey

of lands has been ordered and made, and the trial judge has failed to make an order allowing compensation to the surveyor, the Clerk of the court has no power to make the allowance (then Rev. Sec. 1504, now G.S. 38-4), but on appeal from the Clerk's refusal, the Judge of the Superior Court should make it, upon motion made to that effect. And this Court in that case granted permission to renew the motion at the next term of the Superior Court of the county.

In the instant case the Clerk correctly ruled that he had no authority to tax the surveyor's fee in the bill of costs. On the appeal therefrom the Judge of Superior Court properly sustained the order of the Clerk. But the appeal being before the Judge, he should have passed upon the motion. And as in *Cannon v. Briggs, supra,* this cause is remanded, with permission to renew the motion at the next term of Superior Court of Craven County.

Error and remanded.

GLADYS MARIE TATEM v. WALLACE TATEM.

(Filed 27 February, 1957.)

Automobiles § 41b—

Evidence tending to show that a guest in a car had remonstrated with the driver as to speed, that the driver had just passed a highway sign indicating he was approaching a winding road, and that as he entered a curve to his left, he swerved over to the right and went off the road on the right side into a swamp, resulting in personal injury to the guest, *is held* sufficient to take the case to the jury on the question of actionable negligence. G.S. 20-140.

APPEAL by defendant from *Bone, J.,* and a jury, at December Term, 1956, of PASQUOTANK.

Civil action in tort by plaintiff wife against her husband to recover damages for personal injuries sustained in an automobile wreck.

Issues of negligence and damages were submitted to the jury and answered in favor of the plaintiff. From judgment on the verdict awarding plaintiff $5,451 in damages, the defendant appeals.

LeRoy & Goodwin for defendant, appellant.
Killian Barwick and John H. Hall for plaintiff, appellee.

JOHNSON, J. The single question presented for decision is whether the evidence favorable to the plaintiff was sufficient to carry the case to the jury on the issue of actionable negligence. The plaintiff was a passenger in an automobile driven by her husband. They were travel-

ing on a winding hard-surfaced road through a swamp in Pasquotank County. It was in the nighttime. The car crossed the pavement and shoulder to its right, ran off the side of the embankment down into the swamp, and overturned after traveling about 90 feet from where it left the road. The plaintiff sustained substantial injuries, necessitating the amputation of her right arm between the elbow and shoulder.

Before reaching the curve where the wreck occurred, the defendant had passed a highway sign indicating he was approaching a winding road with zigzag curves. The curve where the wreck occurred was to the driver's left. The defendant was driving on the left side of the road as he entered the curve. The pavement was 16 feet wide. The plaintiff testified: "As we went around the curve the car swerved over to the right and went off the road on the right hand side. It went over in the swamp. It did not skid or hit any bump in the road. The road was smooth. I . . . did not feel any brake being applied."

The defendant had just previously gone around one curve and the plaintiff had remonstrated with him about the speed he was making. He replied: "I am driving this car," and he did not slow down. Instead he continued on at the same speed, 40 to 45 miles per hour, until he ran off the side of the road.

From the foregoing evidence it is inferable that the defendant in rounding the curve failed to exercise due care to maintain a proper lookout and to keep his car under control, and that he was driving recklessly in violation of G.S. 20-140. The evidence was sufficient to carry the case to the jury on the issue of actionable negligence. Decision here is controlled by the principles explained and applied in *Etheridge v. Etheridge*, 222 N.C. 616, 24 S.E. 2d 477, and *Boone v. Matheny*, 224 N.C. 250, 29 S.E. 2d 687. See also *King v. Pope*, 202 N.C. 554, 163 S.E. 447.

No error.

HERTFORD LIVESTOCK AND SUPPLY CO., A CORPORATION, v. D. M. ROBERSON, JOHN B. ROBERSON, GEORGE M. PEEL, AND ETHEL G. ROBERSON.

(Filed 27 February, 1957.)

Judgments § 27a—

Where the findings of the trial court that movants had failed to show a meritorious defense or show that the judgment against them had been taken through their surprise or excusable neglect, are supported by the evidence, order refusing to set aside the judgment under G.S. 1-220 will be affirmed.

FLOYD *v.* DICKEY.

APPEAL by movants John B. Roberson and George M. Peel from *Frizzelle, J.*, 20 June 1956, PERQUIMANS.

This was a motion made by defendants John B. Roberson and George M. Peel, under G.S. 1-220, to set aside a judgment rendered against them, and their codefendants D. M. Roberson and Ethel G. Roberson, jointly and severally, at the January Term 1956 of Perquimans County Superior Court, upon the ground that judgment in the action was taken against them, the movants, through surprise or excusable neglect. By consent of the parties the motion came on to be heard before Frizzelle, J., Presiding Judge of the First Judicial District for the Spring Term 1956, at Elizabeth City, county seat of Pasquotank County, which is in the First Judicial District, on 20 June 1956.

From an order denying their motion the movants John B. Roberson and George M. Peel appeal.

Carroll R. Holmes and John H. Hall for Plaintiff, Appellee.
Peel & Peel for Defendants, Appellants.

PER CURIAM. Judge Frizzelle found the facts in detail, and specifically found that the movants John B. Roberson and George M. Peel failed to show that they have a meritorious defense to the cause of action alleged against them. He concluded upon the facts found that the movants failed to show that judgment was rendered against them at the January Term 1956 of Perquimans Superior Court through their surprise or excusable neglect, and that they had failed to show that they had a meritorious defense to said action. The findings of fact by the trial judge upon the hearing of a motion to set aside a judgment for excusable neglect, G.S. 1-220, are conclusive on appeal, when supported by competent evidence. *Carter v. Anderson*, 208 N.C. 529, 181 S.E. 750; *Sanders v. Chavis*, 243 N.C. 380, 90 S.E. 2d 749. There is competent evidence to support the judge's findings of fact, and his findings of fact support his conclusions and order.

Affirmed.

MRS. NORA C. FLOYD v. FRANK DICKEY AND WAYNE CRISP.

(Filed 27 February, 1957.)

Automobiles § 54f—

Where action is instituted more than a year after the cause of action accrued, so that plaintiff does not have the benefit of G.S. 20-71.1, nonsuit is properly entered as to the alleged superior when there is no evidence that the driver was operating the truck in the course of his employment as an agent or employee of the superior.

PARKER *v.* YOUNCE.

APPEAL by plaintiff from *Nettles, J.*, November Term 1956 of CHEROKEE.

Plaintiff's intestate was struck and killed on 25 May 1954 by a motor vehicle owned by defendant Dickey and, at the time of the accident, operated by defendant Crisp. This action was begun 16 February 1956. At the conclusion of plaintiff's evidence defendant Dickey moved for nonsuit. The motion was allowed. Thereupon plaintiff submitted to a voluntary nonsuit as to the defendant Crisp and appealed.

Frank Ferguson and T. D. Bryson for plaintiff appellant.

McKeever & Edwards, F. O. Christopher, and McKinley Edwards for defendant Dickey, appellee.

PER CURIAM. Dickey's asserted liability is predicated on the theory of *respondeat superior*. There is no evidence to show that Crisp in moving the truck was the agent of Dickey and about his master's business. Plaintiff does not have the benefit of G.S. 20-71.1 as she waited more than one year after the cause of action accrued before instituting suit. The judgment is

Affirmed.

THELMA PARKER v. E. S. YOUNCE AND HAROLD GARDNER.

(Filed 27 February, 1957.)

APPEAL by defendant Gardner from *Frizzelle, J.*, October Term, 1956, of BEAUFORT.

Civil action growing out of a collision that occurred 6 March, 1954, at night, on a paved highway known as Whichard's Beach Road, between a Plymouth car, owned and operated by plaintiff, and a pickup truck operated by defendant Gardner, resulting in damage to plaintiff's car.

Defendant Younce is not a party to this appeal. At the close of plaintiff's evidence, judgment of nonsuit was entered as to him. Thereupon, he abandoned his alleged counterclaim.

Motions for judgment of nonsuit made by defendant Gardner were overruled; and, as between plaintiff and defendant Gardner, three issues were submitted to the jury. The jury answered the negligence issue, "Yes," the contributory negligence issue, "No," and awarded damages in the amount of $382.45.

From judgment in plaintiff's favor, in accordance with verdict, defendant Gardner appealed, assigning errors.

S. M. Blount for plaintiff, appellee.
LeRoy Scott for defendant, appellant.

PER CURIAM. The conclusion reached is that the evidence, when considered in the light most favorable to plaintiff, presented a case for jury determination on the issues submitted. Moreover, consideration of appellant's assignments of error relating to rulings on evidence and to the charge fails to disclose any error of law deemed of sufficient prejudicial effect to warrant a new trial. Hence, the verdict and judgment will not be disturbed.

No error.

HENRY LEE DERBY v. W. W. OWENS, INDIVIDUALLY, AND T/A W. W. OWENS & SON, AND PAUL JEFFERS.

(Filed 27 February, 1957.)

APPEAL by plaintiff from *Bone, J.*, September, 1956 Term, PASQUOTANK Superior Court.

Civil action for personal injury tried upon issues of negligence, contributory negligence, and damages. The jury answered all issues in favor of the plaintiff, assessing damages at $5,000.00. The court denied plaintiff's motions to set aside the verdict (1) on the third issue, and (2) in its entirety. From a judgment in accordance with the verdict, the plaintiff appealed, assigning errors.

John H. Hall for plaintiff, appellant.
Wilson & Wilson,
By: J. Kenyon Wilson, for defendants, appellees.

PER CURIAM. The plaintiff's assignments of error relate to the charge. Particularly, he contends that even in the absence of a request the judge committed reversible error in failing to instruct the jury that the plaintiff had a life expectancy of 15.27 years according to the mortuary table (G.S. 8-46) which he had introduced in evidence. Although the charge did not contain a direct reference to the plaintiff's life expectancy, the court did instruct the jury to take into consideration all the evidence bearing on the issue, including the plaintiff's age. The court, with clarity and accuracy, applied to the evidence in the case rules of law as they have been approved by this Court.

In the judgment we find

No error.

STATE v. TOM CHAPMAN.

(Filed 27 February, 1957.)

APPEAL by defendant from *Froneberger, J.*, November Term, 1956, of RUTHERFORD.

Stover P. Dunagan for defendant, appellant.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

PER CURIAM. This is an appeal from an order of Judge Froneberger directing execution of a suspended prison sentence imposed by previous judgment entered at the May Term, 1955, by Judge Pless.

Judge Froneberger, after hearing evidence *pro* and *con*, found that the defendant had violated conditions upon which the original judgment was suspended. Our examination of the record discloses that the findings are supported by the evidence. This suffices to sustain the order activating the suspended sentence.

Affirmed.

FRANTZ S. BISHOP v. E. A. GLAZENER.

(Filed 6 March, 1957.)

1. Husband and Wife § 26—

A cause of action for alienation of affections exists in this State when a third party, by wrongful and malicious conduct, causes one party to a marriage to lose the affection or consortium of the spouse.

2. Same—

When there has been no adultery, seduction or improper relationship, malice constituting an essential part of an action for alienation of affections need not be express malice, but may be implied from intentional, unjustifiable and wrongful conduct.

3. Same—

A third party's wrongful conduct need not be the sole cause of the alienation of affections of a spouse in order for him to be liable to the injured party, but it must be the controlling or effective cause, even though there may be other causes.

4. Same—

A parent of one spouse, when sued for alienation of affections by the other, occupies a markedly different situation from that of a stranger or

unrelated third person, and the parent may be held liable only for conduct which arises from malice or other improper motive, with the presumption being that the parent acted in good faith and for the child's welfare.

5. Husband and Wife § 29—

Evidence tending to show that plaintiff's father-in-law lived in the home, that as a result of recurring friction, plaintiff asked him to leave, that the father-in-law left, remarking, "I will ruin your home," that thereafter the wife visited her father daily and separated herself from her husband some two months thereafter, without evidence of any action by the father-in-law in execution of his threat or any conduct on his part which in fact caused the wife to separate herself from plaintiff, *is held* insufficient to overrule his motion for nonsuit in an action for alienation of affections.

APPEAL by plaintiff from *Froneberger, J.*, October Term 1956 of TRANSYLVANIA.

Civil action by plaintiff against his father-in-law for alleged alienation of his wife's affections.

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

Redden & Redden and Thomas R. Eller, Jr., for Plaintiff, Appellant.
Potts & Ramsey and J. Y. Jordan, Jr., for Defendant, Appellee.

PARKER, J. Plaintiff is now 50 years of age; his wife 43. In 1939 plaintiff was working in a filling station at Saluda, North Carolina, and there met his wife, a daughter of defendant, who at that time was a teacher in the Saluda Public Schools. They were married on 8 March 1941, and have two children; a boy, now twelve, and a girl, now six. At the time of the marriage defendant's daughter was living with him in his home in Rosman, North Carolina, and working at the Ecusta Paper Plant at Brevard, North Carolina. After the marriage plaintiff and his wife lived in his father-in-law's home in Rosman for about seven years, and during this time plaintiff paid about half of the bills. Mrs. Bishop resumed teaching in January 1942, and continued to do so, until a short time before the first child was born 17 January 1944. About two years thereafter she resumed teaching in the public schools of the county, and continued to do so until she and plaintiff separated in 1954. While living in Rosman, plaintiff was employed by the Ecusta Paper Plant. Plaintiff testified, "Mr. Glazener (the defendant) told me I had a job at Ecusta; he may have helped get it for me." Plaintiff has worked at this plant since then.

Both were working, they had two small children, and they employed a housekeeper, while the mother taught school.

In 1949 plaintiff bought a lot on Carolina Street in the Town of Brevard, and built thereon a house. His wife paid a small part of the cost of construction of the house. The house had a $2,500.00 mortgage on it. He and his wife lived in this home with their children until their separation 17 September 1954. Since then they have lived apart.

When the house was built in Brevard, plaintiff invited the defendant, his father-in-law, to come and live with them in the house, which invitation he accepted. They used in the house two beds, several chairs and a refrigerator belonging to the defendant. Plaintiff bought the rest of the furniture. The defendant paid $100.00 for concreting the basement in the house and $350.00 for installing a furnace therein. The defendant paid $50.00 for screening the house, he bought the concrete blocks for a garage, and he paid $25.00 or $30.00 for the construction of a driveway. Defendant loaned plaintiff $100.00 to install a sewer line, which plaintiff has not repaid, because defendant owed him for venetian blinds left in the home at Rosman worth $100.00. While they were living together at Brevard, defendant bought "a deep freeze" for the house, a hindquarter of beef, a ton or two of coal, paid the electric bill for one year and eight months, and worked in their garden. Defendant lived in this house with plaintiff and his wife for five years. Plaintiff paid the bills, though defendant spent some money on the house.

During the five years the defendant lived in plaintiff's house in Brevard, difficulties and "clashes of opinion" developed between them. Plaintiff testified, "it was my house and he (the defendant) would set up the standard way I should live and expected me to take orders from him, and I didn't like it. . . . He never did like the way I ran things, he wanted to run them." Defendant was constantly cursing in the presence of the children. Plaintiff did not like it, and remonstrated with the defendant about it. They had arguments about the defendant trimming the shrubbery on the lot. Defendant in the daytime played the radio very loud, walked through the house "like a horse," and raked and sawed under plaintiff's bedroom, when plaintiff was trying to sleep, after working on the night shift. They had arguments about defendant putting trash on an adjacent lot. In July 1954 plaintiff saw the defendant with a big bucket, and asked him, "have you been dumping trash and stuff on that man's lot?" Defendant said, "I will do as I please." Plaintiff replied, "If you can't do what I want around here, you can get your things and leave." Defendant replied, "I will go, but I will ruin your home." Defendant moved out, and went to live in the Lawrence Apartments in Brevard.

While defendant was living in plaintiff's home, he made disparaging remarks about plaintiff to Lawrence Hipp, a neighbor. He told Hipp, "Frantz Bishop was so damned contrary nobody could get along with

him, and he didn't see why his wife stayed there with him. . . . he would get up and leave, take off." Defendant also made uncomplimentary and profane remarks about plaintiff to other neighbors.

Mrs. Bishop and her children continued to live with plaintiff in their home from the time her father left in July 1954 until they separated 17 September 1954. During this time Mrs. Bishop visited her father nearly every day. About a week or two after defendant left, Mrs. Bishop brought suit against her husband for alimony, while living in the house with him. Plaintiff begged his wife not to leave him. She replied, "if my father cannot live here, I won't." On 17 September 1954 Mrs. Bishop and the children left their home and went to the Lawrence Apartments to live.

After leaving Mrs. Bishop brought another suit against her husband for support. This suit was heard in Hendersonville, and resulted in a separation agreement, which was signed 22 September 1954, in which plaintiff sold their home to his wife for $4,000.00, which her father paid. The separation agreement is not in the Record. On 1 October 1954, after the sale, plaintiff vacated the house, and Mrs. Bishop, her children, and her father moved in. Mrs. Bishop and the children lived there, until 24 August 1956, when she moved to South Carolina "to improve her B Certificate" as a teacher. She is now there with her children and father.

After defendant left the Bishop home, a sister of plaintiff had a conversation with Mrs. Bishop, and asked her to stay with the plaintiff and keep the home together. Mrs. Bishop replied, "if my father can't stay here, I won't." Plaintiff's sister told her she cared more for her father than she did for her husband, and she said that was her business.

Plaintiff testified: "At the time I married my wife, I was in love with her, and she was in love with me. We lived together in peace and happiness in our home until the time of the separation. My wife showed affection for me all during that time, and I showed affection for her. . . . Since our separation my wife has shown no affection for me whatever and no love for me whatever. . . . I would like to have her back. I still love her." Plaintiff further testified he gave his wife no cause to leave.

The existence of a cause of action for damages in favor of a husband against one who wrongfully and maliciously alienates the affections of his wife depriving him of his conjugal rights to her consortium has long been recognized in England and this country. This is a fundamental common law right. *Barbee v. Armstead*, 32 N.C. 530, 51 Am. Dec. 404; *Cottle v. Johnson*, 179 N.C. 426, 102 S.E. 769; *Rose v. Dean*, 192 N.C. 556, 135 S.E. 348; 27 Am. Jur., Husband and Wife, sec. 522.

The essential elements of an action for alienation of affections are the marriage, the loss of affection or consortium, the wrongful and

malicious conduct of the defendant, and a causal connection between such loss and such conduct. *Cottle v. Johnson, supra; Rose v. Dean, supra; Hankins v. Hankins,* 202 N.C. 358, 162 S.E. 766; *Ridenhour v. Miller,* 225 N.C. 543, 35 S.E. 2d 611; 27 Am. Jur., Husband and Wife, secs. 523 and 524; 42 C.J.S., Husband and Wife, sec. 663.

Rose v. Dean, supra, was an action for damages for alienation of the affections of plaintiff's wife. The Court said: "The basis of the action is the husband's loss of the society, affection, and assistance of his wife, and if there is no element of seduction or adultery, malice must be shown; but 'malice' as used here means unjustifiable conduct causing the injury complained of."

It seems to be the general rule, at least in cases where there has been no adultery, seduction or improper relationship, that malice is an essential element of the action for alienation of affections, but malice, as used in this class of cases, does not necessarily mean express malice; an intentional, unjustifiable and wrongful alienation being sufficient from which to imply the requisite malice. 42 C.J.S., Husband and Wife, sec. 662; 27 Am. Jur., Husband and Wife, sec. 527.

The wrongful and malicious conduct of the defendant need not be the sole cause of the alienation of affections. It suffices, according to the rule in a large majority of the cases, if the wrongful and malicious conduct of the defendant is the controlling or effective cause of the alienation, even though there were other causes, which might have contributed to the alienation. Anno. 19 A.L.R. 2d, sec. 6, p. 500 *et seq.,* where the cases are cited; 27 Am. Jur., Husband and Wife, p. 129.

Manifestly, if the affection of the wife was destroyed by the habits and conduct of the husband, or other cause, without the malicious interference or procurement of a third person, then such third person would not be liable. *Hankins v. Hankins, supra.* It is fundamental to a recovery against a third person that the alienation of affections resulted from his malicious interference. Anno. 108 A.L.R., pp. 426-7, where many cases are cited; Anno. 19 A.L.R. 2d, pp. 471-509, Element of Causation in Alienation of Affections Action.

When a suit for alienation of affections is brought by one spouse against the parent of the other, the parent occupies a markedly different situation from a stranger or unrelated third person in these matters. The law recognizes, respects and protects not only the marital relation, but likewise the natural affection between parent and child. The parent does not in the eyes of the law become a stranger by reason of the child's marriage. *Brown v. Brown,* 124 N.C. 19, 32 S.E. 320; *Johnston v. Johnston,* 213 N.C. 255, 195 S.E. 807; *Monen v. Monen,* 64 S.D. 581, 269 N.W. 85, 108 A.L.R. 404; *Glatstein v. Grund,* 243 Iowa 541, 51 N.W. 2d 162, 36 A.L.R. 2d 531; Anno. 108 A.L.R., p. 421; 27 Am. Jur., Husband and Wife, sec. 529.

Johnston v. Johnston, supra, was an action by a daughter-in-law against her mother-in-law for alienation of her husband's affections. The Court said: "Times of stress, with their attendant solicitude on the one hand and desire for aid on the other, naturally bring parent and child together for counsel and advice. This the law condones and does not condemn. Its one requirement is good faith."

In *Brown v. Brown, supra,* it is said: "There are laws of natural affection and of natural duty, and municipal law will not obstruct their free operation as long as they are not abused. The presumption in fact and in law in all such cases must be, and is, that the parent will act only for the best interest of the child and for the honor of the family." It seems to be the general rule, that when parents advise or interfere in the marital relationships of their children, such conduct is presumed to be in good faith and for the child's welfare. Anno. 108 A.L.R., p. 413 *et seq.,* where cases are cited from 27 states, including our case of *Brown v. Brown.*

In *Woodhouse v. Woodhouse,* 99 Vt. 91, 130 A. 758, the Court said: "The law recognizes the natural solicitude of the normal parent for the welfare of his child, and accordingly indulges the presumption that in his influence, association, and conduct with the child he is acting within his rights. No inference of malice will flow from the mere fact of parental interference in the marital relations of a child. In such cases the proof must go further and show that such interference was without just cause or excuse; in other words, was malicious." To the same effect see cases cited Anno. 108 A.L.R., p. 422.

It is settled law that a parent may advise and assist his or her child in respect to the latter's marital relations without liability to the other spouse for alienation of affections, although separation results, provided such advice and aid were in good faith, based on a reasonable belief that the child's welfare makes them necessary, and were not from malice or other improper motive. But the law will not tolerate a parental malicious interference in the child's marital relations, and when such unjustified interference is proved, the parent is liable in an action for alienation of affections, like any other person. *Johnston v. Johnston, supra; Monen v. Monen, supra; Glatstein v. Grund, supra; Woodhouse v. Woodhouse, supra;* Anno. 108 A.L.R., p. 410 *et seq.,* and p. 419 *et seq.;* 15 Va. Law Rev. 94; 42 C.J.S., Husband and Wife, sec. 681; 27 Am. Jur., Husband and Wife, sec. 529.

The *quo animo* is the vital consideration where parents are charged with alienating the affections of a child. "The rights of parents end at the border of good faith." *Johnston v. Johnston, supra.*

The facts in *Hankins v. Hankins, supra,* cited in plaintiff's brief, are far different from the facts here. In that case there was evidence that the "defendant had inquired of his son (plaintiff's husband) if there

was no way to upset the marriage, and that he advised his son to throw the plaintiff out of his life."

During the five years that defendant lived with his son-in-law in the house at Brevard, difficulties and "clashes of opinion," to use plaintiff's phrase, developed between them, which finally culminated in July 1954 with the plaintiff telling the defendant, "if you can't do what I want around here, you can get your things and leave." Defendant replied, "I will go, but I will ruin your home." Defendant's statement "I will ruin your home" seems not to have been executed, because a careful examination of all the evidence fails to disclose any evidence tending to show any conduct or words of the defendant, which in fact alienated the affections of plaintiff's wife, or caused her to separate herself from plaintiff, and to continue to live separate and apart from him.

The fact that plaintiff's wife visited her father daily after he left, and on 17 September 1954 moved into the apartment where he was, and has since lived with him, is not sufficient to show that he alienated her affections from plaintiff or caused the separation, in view of relationship of father and daughter existing between them. *Ridenhour v. Miller, supra; Townsend v. Holderby*, 197 N.C. 550, 149 S.E. 855.

After defendant left plaintiff's home in July 1954, plaintiff's wife and two children lived in the home with him until 17 September 1954. During that period it would seem that plaintiff was not properly supporting his family, because his wife, while living in the home with him, brought a suit for alimony. After she separated from him on 17 September 1954, she brought another suit against him for support, which ended in a separation agreement.

Plaintiff's evidence shows that his wife told him and also his sister, if her father could not live in the house with them, she would not live there. Plaintiff testified, he had lost the affections of his wife, and she had separated herself from him. One can speculate that this was caused by his ordering her father to leave his home, unless her father did what he wanted him to do around the home, or that his conduct to his wife caused this, or that his wife loved her father more than she did him, and would not live apart from him. Be this as it may, a consideration of all the evidence, which we accept as true and consider in the light most favorable to plaintiff, fails to show any wrongful and malicious conduct on the part of the defendant tending to establish liability against him, under the principles of law before set forth.

Affirmed.

MISS MARIE KING, EMPLOYEE, v. J. N. ARTHUR, JR., T/A ARCADIA DAIRIES, EMPLOYER, AND LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., CARRIER.

(Filed 6 March, 1957.)

Master and Servant § 40c—

An injury sustained by an employee as a result of a medical blood test required by statute (G.S. 130-20) in the interest of public health because of the nature of the work, does not arise out of her employment within the meaning of G.S. 97-2(f).

APPEAL by defendants from *Clarkson, J.*, October Civil Term 1956, of BUNCOMBE.

Proceeding under our Workmen's Compensation Act to determine the liability of the defendants for compensation to plaintiff resulting from an injury hereinafter described.

It is stipulated that the claimant and J. N. Arthur, Jr., trading as Arcadia Dairies, were subject to the provisions of the Workmen's Compensation Act at the time of claimant's injury, and that her average weekly wage was $33.00.

The claimant had been employed by J. N. Arthur, Jr., trading as Arcadia Dairies, for approximately five years prior to the date of her injury. The claimant testified, "As to the materials with which I work at the dairy, I bottle milk, . . . I have a man there to help me with the cans . . . we use G.L.X. Soap Powder to clean the machinery and utensils at the dairy; we have a caustic soda that we put in the bottle washers; I did that work every day."

On 18 April 1955, the claimant was sent by her employer to a County Clinic which was being held at Avery's Creek Methodist Church to have a Wassermann test, which tests were being administered by a County Health Nurse. The nurse attempted to extract blood from the claimant's left arm but failed to do so; she then changed needles and extracted the blood from claimant's right arm. The County Health Nurse, Mrs. Esta Crawford, testified that the vein in claimant's left arm had flattened, making the withdrawal of blood impossible. Immediately following the Wassermann, the claimant experienced a swelling and drain lesion at the point of the needle puncture in the left arm, which injury has not yet healed.

It is also stipulated that employees of certain types of dairies, including Arcadia, are required by the rules and regulations of the Buncombe County Board of Health to submit to Wassermann tests every six months, and that such employers must furnish evidence of compliance with such requirements or be subject to "immediate degrading, suspension of permit, and/or court action."

The medical testimony is completely negative as to the cause of the injury which followed the insertion of the needle into the left arm of the claimant. The claimant had had a similar lesion in 1950 and the evidence does not disclose whether or not she was employed at that time by the defendant employer. The only medical testimony offered before the hearing Commissioner was that of an admitted medical expert specializing in dermatology. This witness, offered by the defendants, testified, "From the history given me by Miss King, and on my own observation and experience, it is my opinion that she had an itchyma. The cause can be due to an infection that is uncontrolled, caustic burn, or local medication. You ask me the possible causes. . . . I cannot say definitely it was an infection. I cannot say it was due to medication. I cannot say it was due to a caustic burn. . . . It could have been caused by an infection of some kind that got under the skin; or due to a caustic burn which later became infected; or to a local medication. I have no opinion satisfactory to myself as to which of these things caused the particular trouble."

The hearing Commissioner found as a fact that the "claimant sustained an injury by accident arising out of and in the course of her employment when the needle was inserted in her arm and an infection resulted." He likewise concluded as a matter of law that the claimant sustained an injury by accident arising out of and in the course of her employment, on 18 April 1955. An award was accordingly entered in favor of the claimant for temporary total disability during the period from 5 May 1955 to 2 July 1955 inclusive.

The defendants filed exceptions and appealed to the Full Commission. The Full Commission adopted the findings of fact and conclusions of law of the hearing Commissioner and affirmed the award. The defendants preserved their exceptions and appealed to the Superior Court where the exceptions were overruled and the award affirmed.

The defendants appeal, assigning error.

Horton & Hyldburg for plaintiff.

Harkins, Van Winkle, Walton & Buck and O. E. Starnes, Jr., for defendants.

DENNY, J. The defendant employer was under compulsion of law to see that the employees in his dairy took a Wassermann test each six months. If he failed to see that such tests were made and to furnish evidence thereof, upon request, to the Buncombe County Board of Health as required by its rules and regulations, his dairy would become subject to "immediate degrading, suspension of permit," and he would become guilty of a misdemeanor and upon conviction subject to a fine or imprisonment, as provided in G.S. 130-20.

Therefore, the question posed for determination is simply this: Does an injury sustained by an employee while taking a medical test or examination, which test or examination is required by law in order for the employee to continue to hold her job, constitute an accident arising out of and in the course of her employment within the meaning of G.S. 97-2(f)?

A majority of the cases bearing on this question seem to turn on (1) whether or not the vaccination or test was voluntary on the part of the employee, (2) whether or not the vaccination or test was made for the primary benefit of the employer and at his request, or (3) whether or not the vaccination or test was made under compulsion of law.

Where a board of health recommends but does not direct that the employees of an employer be vaccinated in an effort to prevent a threatened epidemic, and the employer makes available the facilities for the vaccination without cost to his employees, but leaves it purely optional with the individual employee as to whether or not he will be vaccinated, and the employee as a result of the vaccination contracts an infection, ordinarily such injury is not compensable. In such a situation the vaccination is recommended not for the benefit of the employer but primarily for the benefit and protection of the employee and the public generally. *Smith v. The Seamless Rubber Co.*, 111 Conn. 365, 150 A. 110, 69 A.L.R. 856.

However, in the case of *Saintsing v. Steinbach*, 1 N.J.S. 259, 64 A. 2d 99, the Court held that disability from a smallpox vaccination administered free to the employee, in the employer's medical clinic, who with other employees was strongly urged but not directed to be vaccinated to guard against a threatened epidemic, was compensable as a result of "accident," "arising out of and in the course of employment." The Court concurred in the finding of the Workmen's Compensation Bureau to the effect that "the vaccination service furnished at the employer's premises was a mutually beneficial facility comparable to its medical clinic, cafeteria and other employee facilities incidental to the employment and that insofar as it aided in the prevention of smallpox within the employee group it protected the employer against possibly disastrous business consequences." Affirmed 2 N.J. 304, 66 A. 2d 159.

Ordinarily, an infection resulting from a vaccination or blood test administered by the employer's physician or nurse, is held to be an injury "arising out of and in the course of the employment," where the employer required the employee to be vaccinated, even though the requirement may have been based on a request or recommendation of the board of health. *Spicer Mfg. Co. v. Tucker*, 127 Ohio St. 421, 188 N.E. 870; *Neudeck v. Ford Motor Co.*, 249 Mich. 690, 229 N.W. 438; *Smith v. Brown Paper Mill Co.*, La. App., 152 So. 700; *Texas Employers Insurance Assn. v. Mitchell* (Tex. Civ. App.), 27 S.W. 2d 600; *Sanders*

v. Children's Aid Society, 238 App. Div. 746, 265 N.Y.S. 698, affirmed 262 N.Y. 655, 188 N.E. 107; *Alewine v. Tobin Quarries*, 206 S.C. 103, 33 S.E. 2d 81; *Roberts v. U.S.O. Camp Shows*, 91 Cal. App. 2d 884, 205 P. 2d 1116; Larson on Workmen's Compensation Law, section 27.32, page 416.

On the other hand, the authorities seem to hold that where the employee is required by law to have a blood test in order to obtain employment or to retain it because of the nature of the work, if the employee becomes infected as a result of such test, the disablement resulting therefrom is not a compensable accident that "arose out of and in the course of the employment," notwithstanding that the employer pursuant to his statutory duty had ordered the employee to take the test. *Industrial Commission v. Messinger*, 116 Colo. 451, 181 P. 2d 816; *Krout v. J. L. Hudson Co.*, 200 Mich. 287, 166 N.W. 848, L.R.A. 1918F, 860; 58 Am. Jur., Workmen's Compensation, section 277, page 775; Larson on Workmen's Compensation, section 27.32, page 416, *et seq.* *Cf. Jefferson Printing Co. v. Industrial Commission*, 312 Ill. 575, 144 N.E. 356.

In the case of *Industrial Commission v. Messinger, supra*, the claimant was a waitress handling food in a local restaurant. When directed by her employer to secure a health certificate, she submitted herself to a physician who drew some blood from her arm for the purpose of making the blood test required by law. The Court said: ". . . it is apparent that the employer was obligated by the state law to have claimant obtain a health certificate. It was not his regulation or requirement, it was that of the State. Claimant was incapacitated by reason of her compliance therewith. Obviously, as the Commission found, her accident did not arise out of and in the course of her employment.

"We have not found, nor has any case been cited involving the question presented. Cases where employees have been injured as a result of vaccination or inoculation present similar legal problems. There are only a few of them and all which have been called to our attention have been considered. What they hold is, that the right to compensation is determined by the construction placed on the phrase, 'Arising out of and in the course of employment,' and its application to the facts in each particular case. Compensation was allowed in those cases where the vaccination or inoculation was performed for the benefit of the employer, and had been required by him. *Neudeck v. Ford Motor Co.*, 249 Mich. 690, 229 N.W. 438; *Spicer Mfg. Co. v. Tucker*, 127 Ohio St. 421, 188 N.E. 870; *Smith v. Brown Paper Mill Co.*, La. App., 152 So. 700.

"On the other hand, compensation was denied in those cases where it appeared that vaccination or inoculation was made necessary by

reason of public requirement. *Smith v. Seamless Rubber Co.*, 111 Conn. 365, 150 A. 110, 69 A.L.R. 856, and *Jefferson Printing Co. v. Industrial Commission*, 312 Ill. 575, 144 N.E. 356. The court rested its decision in these cases upon the ground that the proof disclosed affirmatively that the vaccination was not ordered or in anywise brought about by the employer, but by a public agency for the public interest; and further, that the infection was not in anywise due or attributable to the work or place of work, or to the character of business or service of the employer."

It is said in 58 Am. Jur., Workmen's Compensation, section 277, page 775, "Incapacity caused by illness from vaccination or inoculation may properly be found to have arisen out of the employment where such treatment is submitted to pursuant to the direction or for the benefit of the employer, but the rule is otherwise where the employee voluntarily avails himself of such treatment solely for his own benefit, or in the interest of the public health, even though the facilities therefor were provided by the employer. It has been held also that an employee is not entitled to compensation for injury caused by vaccination which has been required by the employer at the request of the health authorities," citing *Krout v. J. L. Hudson Co., supra.*

Likewise, in Larson on Workmen's Compensation, section 27.32, page 416, *et seq.*, the author said: ". . . if the compulsion comes from state law or public authority, the injury is not compensable, as when regulations of a state board of health require that waitresses undergo a blood test. This was held true even when claimant's employer directed her to obtain the appropriate health certificate, since he did it only because he was compelled by state law to do so. It was not his requirement; it was the State's. When claimant submitted to the test, she was not performing a service for the employer, but merely satisfying a condition precedent to qualifying for that kind of employment."

Our attention has not been called to any decision or textbook authority, and we have been unable to find any, which supports the view that where a statute requires a blood test, because of the nature of the work of the employee, that an injury resulting from such test is compensable as an accident "arising out of and in the course of the employment." Therefore, in our opinion, upon the facts disclosed by the record on this appeal, the ruling of the court below should be reversed, and it is so ordered.

Reversed.

STATE v. GLADYS HARRELSON AND W. C. JONES.

(Filed 6 March, 1957.)

1. **Intoxicating Liquor § 9b—**

While constructive possession of intoxicating liquor for the purpose of sale is sufficient to constitute the offense under G.S. 18-2, defendants' pleas of not guilty put in issue every element of the offense charged.

2. **Intoxicating Liquor § 9d—**

Evidence tending to show that less than five gallons of beer and less than one gallon of gin was found in the house occupied by defendants, and that a quantity of intoxicating liquor was found in a trap under a trash pile across the road from defendants' house, with several paths leading from the trash pile, only one of which went to defendants' house, *is held* insufficient to be submitted to the jury in a prosecution for possession of intoxicating liquor for the purpose of sale.

3. **Intoxicating Liquor § 9b—**

The possession of less than one gallon of gin and the possession of less than five gallons of beer, G.S. 18-32(4), raises no presumption that the possession of the gin or beer was for the purpose of sale.

4. **Criminal Law § 62f—**

Where the judgment upon verdict of guilty in a criminal prosecution also activates a suspended sentence entered against defendant in a prior prosecution, and it is determined on appeal that judgment of nonsuit should have been entered, defendant is entitled to have the provision activating the suspended sentence stricken from the record.

APPEAL by defendants from *Campbell, J.*, at September 1956 Term, of LINCOLN.

Criminal prosecutions upon separate warrants of a Justice of the Peace charging defendants Gladys Harrelson and Cleo Jones each with (1) unlawful possession of intoxicating whiskey for the purpose of sale, and (2) possession of "illegal beer for the purpose of sale," returnable before the Recorder's Court of Lincoln County, consolidated for trial, and then tried in Superior Court on appeal thereto from judgments of the Recorder's Court on verdicts of guilty. Defendant Jones is named Cleo Jones in the warrant and judgment.

Upon the trial in Superior Court the State offered evidence tending to show this narrative: Defendants were living in a 4-room house in Lincoln County owned by the father of defendant Jones. Previously defendant Harrelson had stated to officers that she rented the house, and that defendant Jones did not have anything to do with it. Jones told officers on this previous occasion that he lived in the house.

On 11 August, 1956, two deputy sheriffs of Lincoln County searched the premises of defendants, one officer on the outside of the house, and

the other the inside. On the outside the officer found six one-half gallon jars of "white liquor" in a wooden trap constructed under a trash pile which defendant Harrelson said she used as a trash pile. This trap was located 69 steps from the Harrelson house. There was a path leading from the house across a main road out to the edge of the woods and to the trash pile. To go from the house to the trash pile, "you would go out the front door, turn right, go through the yard, cross a public road at a path leading beyond the public road to the trash pile." It was 75 feet from the house to the road. The road mentioned runs to the Freedell house which is located a short distance south of the Harrelson house. The Freedell house "could be somewhat closer to the trash pile than the Harrelson house." There is a path leading from the trash pile back to the Freedell house, on south away from the Harrelson house and in the general direction of the Lincolnton by-pass. The path appeared to be frequently used. There was a little path leading from the trash pile back to the dirt road in front of the VFW. The officer did not ascertain whether there were paths leading from the trash pile in the direction of the county road. The land on which the trash pile was situated belonged to the father and mother of the defendant Jones. They lived in the same vicinity. It appeared that a good many cans and a large quantity of trash had been burned on the trash pile under which the trap was concealed. The cover of the trap looked pretty dirty, estimated to have been there 3 or 4 months. On a previous occasion officers had located a trap about 15 or 20 feet from the back porch of the Harrelson house. The officers did not believe that the pieces of wood in the trap found on the previous search were the same as those out of which the trap at the trash pile was made.

On the same occasion, 11 August, 1956, the other officer searching inside the Harrelson house found 38 cans of beer, that is, less than 5 gallons, "stored in a refrigerator." The cans were of the "same type" as found on the outside. Also one and one-half pints of gin were found in the house. There was a tub in the kitchen used as a slop bucket. It had an odor of whiskey or beer. Some jars were in the house "but they had been washed." The officers did not find in the house any clothing for men, though defendant Jones said he had three pairs of pants up there.

Officers observed the Harrelson house three or four times from the VFW, and on occasions through field glasses. But on none of them did they see either defendant go to the trash pile in question. A number of cars containing both white and colored people were seen to go in and out. On the previous Saturday the officers watched it and saw two or three cars come in there. And on several occasions they saw either one or the other of defendants come out to the cars when they came into the yard. The house was a residence and not a store.

Verdict: As to each defendant, guilty.

Judgment: As to defendant Cleo Jones: (1) Putting into effect certain former two-year sentence suspended on conditions stated *inter alia*, "that defendant violate none of the laws of the State of North Carolina for a period of two years,"—the verdict here being held to be violative of the condition there; and (2) on verdict here confinement in common jail of Lincoln County for a period of two years, to be assigned to work, etc., this sentence to run concurrently with the suspended sentence being put into effect.

And as to defendant Gladys Harrelson: Confinement in the Women's Division of the State Prison in Raleigh for a period of six months.

The defendants Cleo Jones and Gladys Harrelson except to the judgments as to each of them and move in arrest of judgment, and appeal to Supreme Court and assign error.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Harvey A. Jonas, Jr., and C. E. Leatherman for Defendants, Appellants.

WINBORNE, C. J. The assignments of error, based upon exceptions to denial of motions of defendants for judgment as of nonsuit, appear to be well taken. The evidence offered upon the trial in Superior Court is insufficient to support a verdict of guilty as to either defendant on either count. *S. v. Webb*, 233 N.C. 382, 64 S.E. 2d 268; *S. v. McLamb*, 236 N.C. 287, 72 S.E. 2d 656.

In this State it is unlawful for any person to possess any intoxicating liquor for the purpose of sale. G.S. 18-2. Defendants are charged with violation of this statute. Their pleas of not guilty put in issue every element of the offense charged. *S. v. Webb, supra*, and cases cited. See also *S. v. McLamb, supra.*

(The Attorney-General calls attention to the fact that the contents of the containers is described in evidence merely as "white liquor"). See *S. v. Tillery*, 243 N.C. 706, 92 S.E. 2d 64; *S. v. Wolf*, 230 N.C. 267, 52 S.E. 2d 920.

Possession, within the meaning of the above statute, may be either actual or constructive. *S. v. Lee*, 164 N.C. 533, 80 S.E. 405; *S. v. Meyers*, 190 N.C. 239, 129 S.E. 600; *S. v. Harvey*, 228 N.C. 62, 44 S.E. 2d 472; *S. v. Hendrick*, 232 N.C. 447, 61 S.E. 2d 349; *S. v. Webb, supra; S. v. McLamb, supra.*

In the *Meyers case, supra*, it is stated "If the liquor was within the power of the defendant in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if possession had been actual."

In the light of these principles, applied to the evidence in hand, whether liquor found in the trap at the trash pile belonged to either defendant, or was in his or her possession, is purely speculative, and, hence, insufficient to support a verdict of guilty of possession of intoxicating liquor.

Moreover, the possession of a quantity of gin less than one gallon in the home of defendants raises no presumption that it is possessed for the purpose of sale. Hence the possession of the designated quantity of beer and of the gin is not a circumstance sufficient to be considered by the jury in connection with the charge of illegal possession of beer and gin.

G.S. 18-32(4) makes the possession of more than five gallons of malt liquors at any one time *prima facie* evidence that the possession is for the purpose of sale. But the evidence in the instant case is that the quantity of beer found in the refrigerator in the house is less than five gallons. So, no presumption arises thereupon against defendants. And the evidence is too uncertain and speculative to make out a case of possession for the purpose of sale.

Hence this Court holds that the motions for judgment as of nonsuit should have been allowed.

Also the ruling of the court putting into effect the suspended sentence as to defendant Jones, being predicated upon finding that the verdict of guilty in instant case is violative of conditions, is in error. Hence defendant is entitled to have the judgment by which suspended sentence was put into effect reversed and stricken from the record.

In accordance therewith the judgments from which appeal is taken are

Reversed.

STATE v. MATTIE HUNTER.

(Filed 6 March, 1957.)

1. Criminal Law § 77a—

The indictment or warrant, the plea, the verdict, and the judgment appealed from are essential parts of the transcript on appeal in criminal cases, and may not be dispensed with by stipulation of the parties.

2. Criminal Law §§ 14, 77a—

Where it is made to appear that defendant was tried upon warrants issued by the police court of a municipality, but the record fails to disclose what disposition was made of the prosecutions in the inferior court or how they reached the Superior Court, appeal to the Supreme Court must be dismissed.

STATE *v.* HUNTER.

APPEAL by defendant from *Clarkson, J.*, October Term 1956 of BUNCOMBE.

According to the stipulation contained in the record on appeal, the defendant, Mattie Hunter, was indicted at the regular October Term 1956 of the Superior Court of Buncombe County; that the grand jury returned a true bill of indictment "charging the defendant with the unlawful possession of whiskey, keeping liquor for sale and carrying, transporting and delivering of liquor." It was further stipulated, "that the bill of indictment need not be printed." No copy of the bill of indictment is contained in the record on appeal.

The case on appeal sets out the verdict on "Dockets Nos. 5441 and 5442 . . . as guilty as charged." Sentences were imposed in these cases, which apparently were consolidated for trial. The sentence imposed in case No. 5442 was suspended for three years, to run from the expiration of the sentence imposed in case No. 5441.

The defendant appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

McLean, Gudger, Elmore & Martin for defendant.

PER CURIAM. After the case on appeal was docketed in this Court, a further stipulation and motion to amend the record was filed in the office of the Clerk of the Supreme Court.

The motion is to amend the former stipulation by striking out the reference therein to the bill of indictment and to insert in lieu thereof the following: "That this cause was tried upon two warrants issued by the City of Asheville Police Court charging the defendant with unlawful possession of whiskey, keeping liquor for sale, and carrying, transporting and delivering of liquor." The motion likewise contained a further stipulation "that said warrants need not be printed as a part of the record in this appeal."

We have examined the exceptions and assignments of error and, in our opinion, they present no prejudicial error in the trial below. However, if they did disclose error, they are not properly before this Court for decision.

The State, through the Attorney-General, moved to dismiss the appeal on authority of *S. v. Currie*, 206 N.C. 598, 174 S.E. 447, for that the record on appeal is fatally defective in that it contains no bill of indictment.

On appeal in criminal cases, the indictment or warrant, and the plea on which the defendant was tried in the court below, the verdict, and the judgment appealed from, are essential parts of the transcript. *S. v. Dobbs*, 234 N.C. 560, 67 S.E. 2d 751; *S. v. Jenkins*, 234 N.C. 112, 66

S.E. 2d 819; *S. v. Lumber Co.*, 207 N.C. 47, 175 S.E. 713; *S. v. Currie, supra; Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126.

Here, we have an agreed case on appeal which by stipulation omits the inclusion of the bill of indictment in the record on appeal. This is fatal to the appeal. Moreover, the motion to amend is in itself proof of the soundness of our decisions in this respect. It is now made to appear that the defendant was not tried upon a bill of indictment as the agreed case purports to show, but upon two warrants issued by the Police Court of the City of Asheville and returnable to that court. What disposition was made of these cases in the inferior court or how they reached the Superior Court is not made to appear. This alone is sufficient to require a dismissal of the appeal. *S. v. Thomas*, 236 N.C. 454, 73 S.E. 2d 283; *S. v. Bailey*, 237 N.C. 273, 74 S.E. 2d 609; *S. v. Banks*, 241 N.C. 572, 86 S.E. 2d 76. In addition to this defect, the motion to amend the record as indicated herein does not cure the fatal defect appearing on the face of the record since the solicitor and the attorneys for the defendant expressly stipulated "that said warrants need not be printed as a part of the record in this appeal." As *Stacy, C. J.*, said in the case of *S. v. Lumber Co., supra:* "We can judicially know only what properly appears on the record."

Appeal dismissed.

STATE v. ERNEST C. VANDIFORD.

(Filed 6 March, 1957.)

Criminal Law § 77a—

The failure of the record to contain the bill of indictment is fatal, and such defect cannot be cured by certificate of the clerk that there was a true bill of indictment but that it had been lost, but where a copy of the bill of indictment as returned by the grand jury is certified by the clerk pursuant to an order of the Superior Court, the order and copy of the bill, so certified, become a part of the record on appeal, thus supplying the deficiency and precluding dismissal.

APPEAL by defendant from *Burgwyn, E. J.*, at 1956 December Term, of CRAVEN.

Criminal prosecution on charge of "assault with a deadly weapon with intent to kill, inflicting serious bodily injury."

Verdict: Guilty as charged in the bill of indictment.

Judgment: Confinement in State's Prison for a term of six (6) years —from which defendant appeals.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Cecil D. May for Defendant, Appellant.

PER CURIAM. At the threshold of this appeal the State through the Attorney-General moved to dismiss the appeal on authority of *S. v. Currie,* 206 N.C. 598, 174 S.E. 447, for that the record on appeal is fatally defective in that it did not contain the bill of indictment. In lieu thereof, by consent of Solicitor and attorney for defendant, the Clerk of Superior Court certified that there was a true bill of indictment containing the charge as above recited, but that during the progress of the trial the bill was misplaced, and not to be located. *S. v. Currie, supra,* presented a similar factual situation. In respect thereto this Court held that the statement was not sufficient,—that it was the duty of the defendants to see that the indictment appeared in the record, or, if lost, to apply to the Superior Court for an order that a copy be supplied, citing *S. v. McDraughon,* 168 N.C. 131, 83 S.E. 181, and the appeal was dismissed. To like effect is *S. v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *S. v. Dry,* 224 N.C. 234, 29 S.E. 2d 698; *S. v. Jenkins,* 234 N.C. 112, 66 S.E. 2d 819; *S. v. Dobbs,* 234 N.C. 560, 67 S.E. 2d 751.

In accordance with ruling in *S. v. Currie, supra,* defendant has now applied to Superior Court of Craven County for an order that a copy of the bill of indictment be supplied, and such an order has been made, and certified to this Court, with copy of a true bill of indictment as returned by grand jury, and on which defendant was tried. Under these circumstances, the appeal will not be dismissed, but, rather, the order and copy of bill of indictment so certified will be attached to and become a part of the record on the appeal.

However, exceptions on which assignments of error are presented on this appeal duly considered in the light of evidence offered upon the trial in Superior Court and the charge of the court as a whole fails to show error for which a new trial should be granted.

No error.

STATE v. GEORGE CECIL COOK, JR.

(Filed 6 March, 1957.)

Criminal Law § 53n: Homicide § 27i—

In a prosecution for murder in the first degree, it is required that the court instruct the jury not only as to their right to recommend life imprisonment, but he must also instruct the jury as to the effect of such recommendation. G.S. 14-17.

STATE *v.* COOK.

APPEAL by defendant from *Campbell, J.*, November Term, 1956, of CLEVELAND.

Criminal prosecution on bill of indictment charging defendant with the murder of D. Z. Hollomon.

The record shows: "VERDICT: The Jury returns, in open Court, a verdict of GUILTY."

Thereupon, the court, reciting therein that defendant had been indicted, tried and convicted by jury "for Murder in the First Degree of D. Z. Hollomon," entered judgment imposing death sentence, from which defendant appealed.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

C. C. Horn and A. A. Powell for defendant, appellant.

PER CURIAM. The theory of the State's case was that of murder committed in the perpetration or attempt to perpetrate the felony of robbery. The jury were instructed that they might return a verdict of guilty of murder in the first degree, or a verdict of guilty of murder in the first degree with recommendation of life imprisonment, or a verdict of not guilty.

As in *S. v. Carter,* 243 N.C. 106, 89 S.E. 2d 789, and *S. v. Adams,* 243 N.C. 290, 90 S.E. 2d 383, the court failed to instruct the jury as to the legal effect under G.S. 14-17 of a verdict of guilty of murder in the first degree with recommendation of life imprisonment, namely, that such verdict would require that the court pronounce thereon a judgment of life imprisonment. The Attorney-General, with commendable frankness, concedes that the *Carter* and *Adams cases* control decision. The failure to comply with the mandatory provisions of G.S. 14-17 necessitates a new trial.

Since there must be a new trial for the reasons stated, we do not discuss the sufficiency of the verdict as recorded to support a judgment imposing a death sentence. In that connection, reference is made to *S. v. Matthews,* 142 N.C. 621, 55 S.E. 342. and *S. v. Bazemore,* 193 N.C. 336, 137 S.E. 172; also, G.S. 15-172.

New trial.

J. W. SWANGER v. H. M. RICE AND RONALD A. RICE, TRADING AND DOING BUSINESS AS H. M. RICE & SON.

(Filed 6 March, 1957.)

Negligence § 4f—

Nonsuit *held* proper in this action by an electrician employed in the repair of a burned building, who was injured in doing his work when a board broke under his foot as he was walking, in the progress of his work, near to a ragged burned-out hole in the floor, which he had seen and passed several times before.

APPEAL by plaintiff from *Huskins, J.*, November Civil Term 1956 of BUNCOMBE.

Action for damages for personal injuries.

At the close of plaintiff's evidence, the court entered a judgment of involuntary nonsuit, and plaintiff appeals.

Don C. Young and Narvel Crawford for Plaintiff, Appellant.

Meekins, Packer & Roberts for Defendants, Appellees.

PER CURIAM. Defendants, who were general contractors for the repair of a burned building, employed plaintiff, who had been engaged in the electrical business 36 years, to do temporary electrical work in the burned building to supply light so the repair work could begin. Plaintiff, in doing his work, was walking a foot or so to the right of a ragged edged burned-out hole in the floor six or eight feet square, that he had seen and passed several times before, when a board broke under his left foot, and he fell into the basement, receiving injuries.

A careful consideration of the evidence in the Record constrains us to hold that the court below correctly entered the judgment of nonsuit, if not upon the ground of plaintiff's failure to make out a case of actionable negligence against the defendants, then upon the ground of contributory negligence.

Affirmed.

IN THE MATTER OF REVOCATION OF LICENSE OF ROBERT T. BERMAN.

(Filed 20 March, 1957.)

1. Administrative Law § 3—

A licensing board has the inherent power to revoke a license theretofore issued by it on the ground that its issuance was procured by fraud or misrepresentation, notwithstanding the absence of specific statutory provision for revocation on such ground.

2. Administrative Law § 4—

The findings of fact of an administrative board are conclusive on appeal if the findings are supported by competent, material and substantial evidence in view of the entire record.

3. Administrative Law § 3—

The affidavit of an applicant that he had been engaged in the practice of a dispensing optician for a period of five years next before the enactment of the licensing statute, so as to bring him within the purview of the "grandfather clause" of the Act, is not conclusive, and it is for the administrative board to determine from all the evidence whether he had in fact been engaged in the practice during the time required.

4. Administrative Law § 4—Finding that applicant had not engaged in practice as dispensing optician within purview of grandfather clause held supported by record.

In this case *it is held* that upon the entire record there is competent, substantial evidence to the effect that during the period of five years prior to the passage of Art. 17, Ch. 90 G.S., applicant paid no license tax as an optician, did not habitually hold himself out to the public as a dispensing optician, and that, if he was engaged in the practice as a dispensing optician during that time, it was not sufficiently regular, according to his circumstances, to denote a continuing occupation, and, the crucial findings of fact of the board being supported by the evidence, it was error for the Superior Court on appeal to reverse the judgment of the administrative board revoking the license theretofore granted to the applicant under the "grandfather clause" on the ground that its issuance was procured by misrepresentations.

APPEAL by the North Carolina State Board of Opticians from *Bundy, J.*, September Civil Term 1956 of NEW HANOVER.

Proceeding by the North Carolina State Board of Opticians to revoke a license as a dispensing optician issued to Robert T. Berman by it.

On 30 June 1951, pursuant to G.S. 90-242, Robert T. Berman filed his affidavit with the North Carolina State Board of Opticians stating that he has been engaged in the practice of a dispensing optician in Wilmington, North Carolina, for a period of more than five years prior to 1 July 1951: that during 1944 he was so engaged while manager of the Jewel Box, 119 North Front Street, that during the years 1945, 1946 and part of 1947 he was so engaged and doing business under the trade name of The Optical Shop, 111 North Front Street, and during the last part of 1947 and until the present time he has been so engaged in the operation of Berman Jewelers, Inc. in the Trust Building. Whereupon, pursuant to G.S. 90-242, the Board issued to Robert T. Berman a license as a dispensing optician.

On 15 September 1953 the State Board of Opticians, in compliance with G.S. 150-11(b), gave Robert T. Berman written notice containing a statement that the Board has sufficient evidence which, if not rebutted

or explained, will justify the Board in revoking his license to engage in the practice of a dispensing optician: the general nature of the evidence is that the license was issued to him upon a mis-statement of existing facts. The written notice stated that Berman had a right to request a hearing before the Board.

On 25 September 1953 Berman wrote the Board requesting a hearing and a bill of particulars setting out in detail the alleged mis-statement of facts contained in his affidavit filed with the Board. The Board gave Berman written notice that the hearing would be held on 2 November 1953 in the Office of the Clerk of the Superior Court in Wilmington. On 5 October 1953 the Board furnished Berman a bill of particulars setting forth the contents of the affidavit filed with the Board on 30 June 1951, and stating the Board is advised that Berman was not engaged in the practice of a dispensing optician for a period of more than five years next preceding 1 July 1951.

The State Board of Opticians, with all its members present, conducted the hearing at the time and place specified in its written notice, and heard evidence. On 18 January 1954 the Board rendered its decision. In its decision the Board made findings of fact that on 30 June 1951 Berman filed with it an affidavit, the contents of which are set forth above, and the affidavit is copied verbatim in the findings, that relying upon the information contained in the affidavit the Board issued a license to Berman to practice as a dispensing optician, that the facts set forth in the affidavit were erroneous in that the evidence overwhelmingly establishes that during the years 1945, 1946 and part of 1947, Berman was not engaged in the practice of a dispensing optician doing business under the trade name of The Optical Shop at 111 North Front Street in Wilmington, and that on 30 June 1951 Berman had not been engaged in the practice of a dispensing optician for a period of five years. The Board made conclusions of law, that, by virtue of G.S. 90-242, Berman, on 30 June 1951, in order to be entitled to engage in the practice of a dispensing optician was required to show by affidavit that he had been engaged in such practice as defined in the statute for five years or more, and that upon the foregoing findings of fact Berman was not entitled on 30 June 1951 to a certificate of registration and license as a dispensing optician under the provisions of G.S. 90-242. Whereupon, the Board revoked the license it had previously issued to Berman.

Berman excepted to the crucial findings of fact, conclusions of law, and decision of the Board, and appealed to the Superior Court.

The proceeding was heard in the Superior Court, and Judge Bundy rendered judgment. The judgment recites that the Board's finding that Berman on 30 June 1951 had not been engaged in the practice of a dispensing optician for a period of five years prior to that date, upon

which it based its conclusion of law and order revoking his license, is unsupported by competent, material and substantial evidence, that no witness testified he did not engage in such practice during the five years preceding the date of his affidavit, that nowhere in the record is there one iota of evidence that Berman was not engaged in such practice during such period, while Berman's evidence and that of J. E. L. Wade disclosed that he was so engaged, and a like inference can be drawn from the testimony of G. J. Burkheimer. Whereupon, Judge Bundy reversed the decision of the Board.

The North Carolina State Board of Opticians excepted to the judgment, and appealed.

Clem B. Holding and Ozmer L. Henry for North Carolina State Board of Opticians, Appellant.

W. K. Rhodes, Jr., for Appellee.

PARKER, J. The power to issue licenses to persons practicing as dispensing opticians before the enactment of G.S. Ch. 90, Art. 17, Dispensing Opticians, has been vested by the General Assembly in the North Carolina State Board of Opticians, provided they apply within the required time. G.S. 90-242 provides that "every person who has been engaged in the practice of a dispensing optician as defined in this article for a period of five (5) years or more, and who has been a resident of the State of North Carolina for two (2) years immediately prior to the date of the passage of this article, shall be eligible for and receive a license as a dispensing optician; said person shall file an affidavit as proof of such practice with the Board." In 4 A.L.R. 2d is an elaborate annotation, pp. 667-717, *in re* the construction of a "grandfather clause" in statutes licensing occupations. Robert T. Berman filed an affidavit with the North Carolina State Board of Opticians, in which he stated that he had the qualifications required by G.S. 90-242, and the Board issued to him a license as a dispensing optician. In this proceeding the Board is seeking to revoke his license on the ground that he procured it by a material misrepresentation, in that he stated in his affidavit that he had been engaged in the practice of a dispensing optician as defined in Art. 17, Ch. 90 G.S. for a period of five years or more, whereas in truth and in fact he had not been so engaged in such practice for such a period of time.

It is clear that the Board had the right to refuse an application for a license requested by virtue of G.S. 90-242, if it appeared that the applicant had not been engaged in the practice of a dispensing optician as defined in Art. 17, Ch. 90 G.S. for a period of five years or more. Certain grounds for revocation of a license issued by the Board are set forth in G.S. 90-249. Fraud or misrepresentation, which is material, in

the procurement of the license is not one of them, but the Board has inherent power, independent of statutory authority, to revoke a license it improperly issued by reason of material fraud or misrepresentation in its procurement. *Attorney-General v. Gorson,* 209 N.C. 320, 183 S.E. 392; *Schireson v. Shafer,* 354 Pa. 458, 47 A. 2d 665, 165 A.L.R. 1133; *Williams v. Dickey,* 204 Okla. 629, 232 P. 2d 637; *Butcher v. Maybury,* 8 F. 2d 155; *Vanaman v. Adams,* 74 N.J.L. 125, 65 A. 204; *Martin v. Morris,* 62 N.D. 381, 243 N.W. 747; *Volp. v. Saylor,* 42 Ore. 546, 71 P. 980; Annotation 165 A.L.R. pp. 1141-1142, where cases are cited from 21 states; 53 C.J.S., Licenses, p. 650.

In *Attorney-General v. Gorson, supra,* the Court said: "This Court has the inherent power to revoke a license to practice law in this State, where such license was issued by this Court, and its issuance was procured by the fraudulent concealment, or by the false and fraudulent representation by the applicant of a fact which was manifestly material to the issuance of the license."

In *Schireson v. Shafer, supra,* it was held that the power of a state to require a license implies the power to revoke a license which by reason of fraud in its procurement was improperly issued, and where a physician's license should never have been granted because of fraud or misrepresentation, the licensing authority has inherent power, independent of statutory authority, to revoke it.

In *Butcher v. Maybury, supra,* the Court said: "The power of the state to require a license implies the power to revoke a license which has been improperly issued."

G.S. 90-249 states the procedure for revocation and suspension of licenses of dispensing opticians by the State Board of Opticians shall be in accordance with the provisions of Ch. 150 of the General Statutes, which is entitled Uniform Revocation of Licenses. G.S. 150-23 provides "the decision of the Board shall contain (a) Findings of fact made by the Board; (b) Conclusions of law reached by the Board; (c) the Order of the Board based upon these findings of fact and conclusions of law."

G.S. 150-27 sets forth the scope of review by the Superior Court of the Board's decision, and states that the Judge shall sit without a jury and may affirm the decision of the agency, or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of a person may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are unsupported by competent, material and substantial evidence in view of the entire record as submitted.

The administrative findings of fact made by the State Board of Opticians, if supported by competent, material and substantial evidence in view of the entire record, are conclusive upon a reviewing

court, and not within the scope of its reviewing powers. *Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90; 42 Am. Jur., Public Administrative Law, Sec. 211, where great numbers of cases from State and Federal Courts are cited.

The fact that a statute provides for judicial review of administrative decisions makes it evident that such decisions are conclusive as to properly supported findings of fact. *Social Security Board v. Nierotko,* 327 U.S. 358, 90 L. Ed. 718.

The Court cannot substitute its judgment for that of the State Board of Opticians in making findings of fact. *Baker v. Varser, supra; National Labor Relations Board v. Va. E. & P. Co.,* 314 U.S. 469, 86 L. Ed. 348; *U. S. v. New River Co.,* 265 U.S. 533, 68 L. Ed. 1165; 42 Am. Jur., Public Administrative Law, pp. 632-3.

The General Assembly in explicit words has vested the power and function of appraising conflicting and circumstantial evidence, of determining the weight and credibility to be given the testimony, and of finding the necessary facts in the State Board of Opticians. "The conclusiveness and nonreviewability of administrative findings of fact," when supported by proper evidence, "have often been rationalized on the ground that the administrative agency possesses the special knowledge and expertness that is required to pass upon such questions." 42 Am. Jur., Public Administrative Law, p. 633.

G.S. 90-236 sets forth what constitutes practicing as a dispensing optician, and reads: "Any one or combination of the following practices when done for pay or reward shall constitute practicing as a dispensing optician: interpreting prescriptions issued by licensed physicians and/or optometrists; fitting glasses on the face; servicing glasses or spectacles; measuring of patient's face, fitting frames, compounding and fabricating lenses and frames, and any therapeutic device used or employed in the correction of vision, and alignment of frames to the face of the wearer."

The term "grandfather clause" in comparatively recent years "has been applied to provisions in regulatory statutes or ordinances that extend certain prerogatives to persons theretofore established in the profession, occupation or business regulated." 4 A.L.R. 2d, annotation, p. 670.

The mere filing of an affidavit by Robert T. Berman with the State Board of Opticians as proof that he had been engaged in the practice of a dispensing optician as defined in G.S. Ch. 90, Art. 17, for a period of five years or more prior to the enactment of Art. 17, is not conclusive as to his right to receive a license, even though G.S. 90-242 states the applicant shall file an affidavit as proof of such practice, since the essential fact for the granting of such license to Robert T. Berman is that he was in fact engaged in the practice of a dispensing optician

during the time required by G.S. 90-242. *State ex rel. Copeland v. State Medical Board,* 107 Ohio St. 20, 140 N.E. 660; *Sherburne v. Dental Examiners,* 13 Idaho 105, 88 P. 762; *Sanborn v. Weir,* 95 Vt. 1, 112 A. 228; *S. v. Schmidt,* 138 Wis. 53, 119 N.W. 647; Annotation 4 A.L.R. 2d pp. 671-673. See *Poole v. The State Board of Cosmetic Art Examiners,* 221 N.C. 199, 19 S.E. 2d 635, where the Court said: "However, of necessity, such Board must find the facts with respect to these requirements."

What does practicing as a dispensing optician, as defined in Art. 17, Ch. 90 of the General Statutes, prior to the passage of Art. 17 mean? In *State ex rel. Krausmann v. Streeter,* 226 Minn. 458, 33 N.W. 2d 56, 4 A.L.R. 2d 662, the Court said: "The general rule is that a practitioner of a trade or profession, in the contemplation of the grandfather clause, is one who habitually holds himself out to the public as such (*Hart v. Folsom,* 70 N.H. 213, 47 A. 603; *S. v. Bryan,* 98 N.C. 644, 4 S.E. 522; *Sanborn v. Weir,* 95 Vt. 1, 112 A. 228), and, although the extent of his practice is not controlling, it must be sufficiently regular. according to the circumstances of the particular case, to denote a continuing occupation. *Sanborn v. Weir, supra.*" See annotation 4 A.L.R. 2d pp. 680-684.

In *Sanborn v. Weir, supra,* the Court said: "Nevertheless 'practice' like 'doing business' does not denote a few isolated acts, but implies an occupation that is continuing."

In *S. v. Bryan,* 98 N.C. 644, 4 S.E. 522, the defendant, a justice of the peace, was indicted for practicing law in a court of a justice of the peace in the county in which he held the office of justice of the peace. The Court said: "There was no evidence that the defendant was in the habit of appearing or practicing 'as an attorney at law,' or that he received any compensation, or that he held himself out to the public as an attorney at law."

Robert T. Berman stated in his affidavit filed with the State Board of Opticians, pursuant to G.S. 90-242, that he "is now, and has been, engaged in the business of a dispensing optician in the city of Wilmington, county of New Hanover, and State of North Carolina, continuously for a period of more than five years next preceding July 1, 1951; that during the year 1944 he was so engaged while manager of 'The Jewel Box,' at No. 119 North Front Street; and that during the years 1945, 1946, and part of the year 1947, he was so engaged and doing business under the trade name of 'The Optical Shop' at No. 111 North Front Street in the city of Wilmington." The Board found as a fact that the facts set forth in Robert T. Berman's affidavit "were erroneous in that the evidence in this case overwhelmingly establishes that 'during the years of 1945, 1946 and part of the year 1947' the said Robert T. Berman was not engaged as a dispensing optician, doing business under

the trade name of The Optical Shop, at 111 North Front Street, in the city of Wilmington, North Carolina, and that on June 30, 1951 the said Robert T. Berman had not been engaged in the practice of a dispensing optician for a period of five years."

The State Board of Opticians assigns as error the ruling of the judge below that the above crucial findings of fact by the Board are not supported by competent, material and substantial evidence in view of the entire record, and the judgment below reversing the Board's decision.

The following evidence in the Record supports the Board's crucial findings of fact: J. B. Little of Goldsboro has been connected with the American Optical Company since 1935. In 1944 Hugh Bell, Jr., told Little he would like to do business with the American Optical Company. Little called on Bell at The Jewel Box in Wilmington, and told him they wouldn't be able to do business with him as long as he was in The Jewel Box. In May or June 1945, Bell moved down Front Street a couple of doors from The Jewel Box and opened up a place under the name of The Optical Shop, of which he was the owner and operator. Little sold him supplies from the American Optical Company for a little over a year, after which Bell went out of business in 1946, and the American Optical Company had to sue him for its money. Little was asked on cross-examination by Berman's counsel, "did you ever see Mr. Berman," and replied "I may have seen him."

E. W. Dula of Durham has been in the wholesale optical business since 1934, and is also a dispensing optician. In March 1946 he bought from Hugh Bell, Jr. the edger machinery, the drill, the fitting table and lens marker, which were in The Optical Shop located on North Front Street in Wilmington. Bell told him he was closing the business up, and after his purchase, Dula testified, "I can't recall exactly whether there was any machinery left or not." Dula made payment for his purchases by two cheques: one, in the sum of $100.00 dated 12 March 1946, payable to Hugh Bell, Jr., and the other in the sum of $675.00 dated 19 March 1946, payable to The Optical Shop.

On 11 May 1945 Peoples Bank & Trust Company leased to Hugh Bell, Jr., trading and doing business as The Optical Shop, for one year the space occupied by The Optical Shop. The lease was signed by the Bank and for The Optical Shop by Robert T. Berman and Hugh Bell, Jr. On 9 April 1946 the Bank leased this space for one year to The Jewel Box, Inc. Berman signed for The Jewel Box. The officer of the Bank who gave this testimony testified that during the time of these two leases there were eyeglasses in the windows, and machinery in there.

Berman offered the evidence of J. E. L. Wade, who testified that he knew Robert T. Berman when he was operating in 1945 and 1946 The Jewel Box on North Front Street. That he operated an optical

shop in connection with The Jewel Box. He said, "people have been buying glasses; I bought some myself." That Berman was in and out the space leased by the Bank: it was almost next door to The Jewel Box.

Robert T. Berman testified in substance as follows: He has been in the jewelry business, and several types of businesses associated with the jewelry business, including the optical business, for 25 years, as best he could under the circumstances. As manager of The Jewel Box he replaced glasses and filled prescriptions, and was engaged in the business of a dispensing optician. He financed The Optical Shop. After Bell moved out, he operated as a dispensing optician in The Jewel Box. In 1951 he started the business of Berman's Jewelers, and practiced as a dispensing optician. He has purchased equipment from Homer Optical Company since around 1944, and also from smaller companies. When The Optical Shop closed, he was still in the optical business. On cross-examination he said he had all the prescriptions he had filled, with the exception of those lost in a fire five or six years before. He further said on cross-examination that he had a license to operate The Jewel Box as a jewelry store, but did not have a license to operate as an optician: that an employee of the State Tax Department in Wilmington, whose name he does not know and has no way to find out, told him it was not necessary for him to have a license as an optician, as he already had a license to operate a business. In 1951 he did acquire a license as an optician, because of the new rule drawn up in the optical field.

During the five years prior to 1 July 1951 every practicing optician under 75 years of age was required to obtain a license for the privilege of engaging in such business and to pay for such license. G.S. 105-41. At the time of the hearing Berman was 42 years of age.

In the entire record before us there is competent, material and substantial evidence to the effect, that during the period of five years prior to the passage of Art. 17, Ch. 90 G.S., Robert T. Berman paid no license tax as an optician, did not habitually hold himself out to the public as a dispensing optician, and that, if he was engaged in practice as a dispensing optician during that period, it was not sufficiently regular, according to his circumstances, to denote a continuing occupation, in that in his affidavit he stated that during the years 1945, 1946 and part of the year 1947, he was engaged in the practice of a dispensing optician and doing business under the trade name of "The Optical Shop," and all the evidence shows The Optical Shop sold its optical equipment, and went out of business in March 1946. The purchase of glasses by J. E. L. Wade, and his vague testimony "people have been buying glasses," are isolated acts that do not imply a continuing occupation for five years as a dispensing optician. The crucial findings of fact by

the Board, in view of the entire record, are supported by competent, material and substantial evidence, and are conclusive upon the reviewing court. The judge below erred in ruling that the Board's findings of fact were not so supported. The Board's findings of fact support its inferences, conclusion and decision, and the judge erred in reversing the Board's decision. It is ordered that a judgment be entered in the Superior Court in accordance with this opinion affirming the Board's decision.

Reversed.

COASTAL SALES CO., A CORPORATION, v. ELIZABETH C. WESTON, ADMINISTRATRIX OF F. E. WESTON, DECEASED.

(Filed 20 March, 1957.)

1. Chattel Mortgages and Conditional Sales § 7b—

To embrace after-acquired property, a mortgage or deed of trust must be so worded as to show, expressly or by implication, the mortgagor's unmistakable intention to convey such property.

2. Chattel Mortgages and Conditional Sales § 4: Contracts § 8—

The fact that several instruments between the same parties bear the same date is sufficient to support a finding that they were executed at the same time, and when their terms disclose their interrelation as parts of a single transaction, they should be construed together.

3. Chattel Mortgages and Conditional Sales § 7b—

The documents constituting a contract and chattel mortgage on lumber, sued on in this case, *are held* to disclose a clear intention that plaintiff's lien to the extent of advancements made by him was to attach to all lumber as processed by the other party during the life of the contract, and therefore covered lumber processed by the other party under the contract subsequent to the execution of the instruments.

4. Registration § 4—

Registration does not protect every creditor against unrecorded mortgages, but only purchasers for a valuable consideration from the mortgagor and creditors who have first fastened a lien upon the property in some manner sanctioned by law.

5. Executors and Administrators § 8—

The personal representative takes only that title which the deceased had in the property at the time of his death, and an unrecorded mortgage lien has the same status as against the personal representative that it had against the deceased, regardless of whether the estate is solvent or insolvent.

6. Registration § 4—

An unregistered instrument is valid as between the parties.

7. Executors and Administrators § 15a—

The rights of secured and unsecured creditors alike are fixed at the instant of intestate's death, and the circumstance of death cannot have the effect of fastening a lien upon property of the estate in favor of unsecured creditors.

8. Executors and Administrators § 15h: Chattel Mortgages and Conditional Sales § 10c—

At the time of intestate's death lumber owned by him was subject to the lien of an unrecorded mortgage on after-acquired property. The estate was insolvent. *Held:* The mortgagee has a lien on the property as against the administratrix superior to the claim of general creditors of the estate who had not fastened a lien upon the property at the time of intestate's death.

APPEAL by defendant from *Frizzelle, J.*, August Term, 1956, of MARTIN.

On 21 June, 1956, when F. E. Weston died, intestate, he had, stacked on his mill yard, approximately six hundred thousand feet of lumber. His principal indebtedness to plaintiff, evidenced by interest bearing promissory notes, was $24,551.07.

Plaintiff asserts that it has a lien on said lumber as security for said debt and seeks herein to enforce such lien.

The Weston estate is "hopelessly insolvent." Neither the validity nor amount of plaintiff's claim of debt is controverted. However, defendant, the administratrix, insists that plaintiff has no lien on said lumber.

Upon waiver of jury trial, G.S. 1-184, the evidence was heard by Judge Frizzelle, who, based on his findings of fact and conclusions of law, adjudged that plaintiff has a valid mortgage lien and a valid equitable lien on said lumber; and judgment was entered that defendant sell said lumber and pay to plaintiff from the proceeds of such sale the amount of its said claim ($24,551.07 plus interest), and that defendant pay the costs.

Defendant excepted and appealed, assigning errors.

W. Bernard Allsbrook and Henry C. Bourne for plaintiff, appellee.
Peel & Peel for defendant, appellant.

BOBBITT, J. Two questions confront us: 1. Did plaintiff, as between it and Weston, have a valid lien on said lumber? 2. If so, is plaintiff's lien enforceable against the administratrix of Weston's insolvent estate?

To answer the first question, it is necessary to consider three duly executed documents, all dated 23 February, 1956, Exhibits A, B and C.

Exhibit A is a comprehensive contract between plaintiff and Weston. It was *not* recorded. Its pertinent provisions, summarized, are these:

Weston was to produce, grade and stack lumber on his yard near Williamston, North Carolina. The lumber was to be manufactured under the direction of plaintiff. Plaintiff was to take "a bi-monthly inventory of all lumber on Weston's yard." Plaintiff had the right to go upon the premises to inspect Weston's records and to check the lumber on his yard. Plaintiff was constituted the *exclusive* sales agent for the lumber so produced. All sales were to be made by plaintiff in its name. The lumber was to be shipped from Weston's yard in plaintiff's name and as directed by it. Plaintiff was to send bills for the lumber so sold and shipped and make all collections.

It was agreed that, up to a maximum of $50,000.00, plaintiff would advance to Weston an amount equal to 55% of the market value of the lumber produced by Weston and stacked on his yard; provided, such advancements were to be made only on lumber "free from all liens or adverse claims of any nature whatever." It was agreed that, as the lumber was produced and stacked, successive advancements were to be made by plaintiff to Weston; and Weston's indebtedness to plaintiff therefor was to be evidenced by promissory notes.

It was agreed that Weston was "to pay the taxes on and to keep the lumber adequately insured against loss by fire or other casualty . . . with loss payable to the Coastal Sales Company and Frank E. Weston as their respective interests may appear." In the event Weston failed to do so, plaintiff was given the right to pay such taxes and insurance premiums and add the amount thereof to Weston's indebtedness to it.

It was agreed that Weston was "to keep up all leases as described in Deed of Trust of even date herewith." In the event Weston failed to do so, plaintiff was given the right to make the payments required to keep up said leases and add the amount thereof to Weston's indebtedness to it.

Whether evidenced by promissory notes or otherwise, it was agreed that Weston's indebtedness to plaintiff was to bear interest at the rate of 5½% per annum.

When lumber was sold, the purchase price received by plaintiff therefor was to be applied to plaintiff's commissions and to Weston's indebtedness to plaintiff as set forth in detail.

Exhibit A contains this paragraph: "15. To afford security for the Coastal Sales Company for the indebtedness to arise hereunder, the said Frank E. Weston shall execute, simultaneously with this Contract, a Deed of Trust on all machinery and equipment used by him in the operation of the lumber mill together with all lumber now at or upon the yards of the mill aforesaid, *and all other lumber produced or handled thereat as the natural product of the business of said mill during the life of this Contract.*" (Italics added.)

Exhibit B, which *was* recorded, a contract between plaintiff and Weston, is an abbreviated form of Exhibit A. None of the provisions quoted above from Exhibit A appear in Exhibit B. Exhibit B contains no new matter. Exhibit B provided generally that plaintiff was exclusive sales agent for all lumber then at Weston's mill and "for all lumber produced or handled thereat during the life of this contract"; that plaintiff was to receive commissions on sales and was to make advancements to Weston "as stipulated in a separate agreement of even date herewith by and between the parties hereto"; and that "every part . . . (of said separate agreement) is incorporated herein by reference as fully as if set out herein in detail."

Exhibit C, which *was* recorded, is the deed of trust. It was executed and delivered by Weston to W. B. Allsbrook, Trustee.

Exhibit C recites that Weston "may hereafter become indebted" to plaintiff from time to time in various amounts up to but not exceeding $50,000.00 under the terms of their contract of even date, which indebtedness "will be evidenced by notes" of Weston to plaintiff; and that the deed of trust is to secure the payment of said indebtedness, "both that which now exists and that which will hereafter exist."

The property conveyed to W. B. Allsbrook, Trustee, was described as follows: (1) All of the right, title and interest of Weston in certain described leases; (2) certain described machinery, trucks and trailers; and (3) "All of the machinery, equipment and other personal property used by the said Frank E. Weston in connection with the manufacture of lumber and also all the lumber of every kind and description, including Pine, Hardwood and Cypress, located on the mill yard of the said Frank E. Weston, which mill yard is included in the Leases hereinabove described." Prior liens on described personal property aggregating $48,400.00 were excepted from Weston's warranty.

It was stipulated that Weston was to "take good care of all lumber herein conveyed"; and, if Weston failed to do so, plaintiff, at its option, had the right to declare the outstanding indebtedness immediately due and payable.

It was further stipulated that Weston "at all times hereafter . . . shall keep the lumber herein conveyed insured to the extent of the fair market value of same, the market value to be based on bi-monthly reports of inventories of stocks of lumber on hand, . . ." In the event Weston failed to do so, plaintiff was "at liberty to effectuate such insurance," and add the amount of the premiums paid by plaintiff "to the indebtedness hereby secured."

It was further stipulated that, if considered "reasonably proper" by plaintiff's counsel, Weston was to execute supplemental instruments "to give specific description to the property conveyed or to effectuate the full intent and meaning of this instrument."

Exhibit D, which was *not* recorded, is a contract dated 11 May, 1956, between plaintiff and Weston. It was agreed that plaintiff would make a "supplemental advance of ten ($10.00) dollars per M. board feet of 181 MBF of cypress lumber" located on Weston's yard and that Weston's debt to plaintiff therefor would be evidenced by notes and secured as provided in Exhibits A and C.

Based on production reports furnished by Weston, plaintiff made advancements to Weston; and Weston executed and delivered to plaintiff promissory notes for the amounts so advanced, all in accordance with Exhibits A and D. The admitted indebtedness of Weston to plaintiff in the amount of $24,551.07 plus interest is the balance due on these promissory notes. While not deemed material, the record does not disclose to what extent, if any, plaintiff's present claim is based on supplemental advancements under Exhibit D.

It is stipulated that when the three documents, Exhibits A, B and C, were executed, Weston "did not have and did not represent to have any lumber of any kind on the mill yard referred to in said agreements, and this fact was known to both parties." Too, it appears clear that when said three documents were executed, there existed no indebtedness of Weston to plaintiff on account of advancements.

The purport of the brief oral testimony is that the lumber produced by Weston was graded, stacked and inventoried in accordance with the provisions of Exhibit A; and that this was done under the supervision of plaintiff's employees.

To embrace after-acquired property, a mortgage or deed of trust must be so worded as to show, expressly or by implication, the mortgagor's unmistakable intention to convey such property. *Lumber Co. v. Lumber Co.*, 150 N.C. 282, 285, 63 S.E. 1047; *Bank v. Pearson*, 186 N.C. 609, 120 S.E. 210.

The three documents, Exhibits A, B and C, bear the same date, to wit, 23 February, 1956. It was permissible for the court to find that they were executed at the same time. *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E. 2d 806. Moreover, the terms of these documents disclose their interrelation as parts of a single transaction.

When the three documents, Exhibits A, B and C, are construed together, as parts of one transaction, it is clear that the parties intended that plaintiff have a lien on the lumber produced and stacked on Weston's yard during the life of their contract. These questions arise: Did plaintiff have a valid mortgage lien, such as was upheld in *Bank v. Pearson, supra?* If not, did the plaintiff have an equitable lien, such as was upheld in *Garrison v. Vermont Mills*, 154 N.C. 1, 69 S.E. 743?

The parties intended that plaintiff have a mortgage lien on the lumber; and, if treated as an equitable lien, the basis therefor is that the provisions of the mortgage alone were not legally sufficient to effectuate

their real agreement. If then, on principles of equity, we effectuate their intention, the result reached is that the deed of trust, in respect of the lumber, had the status of a mortgage lien thereon.

The validity of the lien, as between plaintiff and Weston, was not impaired by the failure to record Exhibit A. ". . . as between the parties a mortgage or deed is valid without registration." *McBrayer v. Harrill,* 152 N.C. 712, 68 S.E. 204.

G.S. 47-20 does not protect every creditor against unrecorded mortgages. It protects only (1) purchasers for a valuable consideration from the mortgagor, and (2) creditors who have "first fastened a lien upon it (the property) in some manner sanctioned by law." *Finance Corp. v. Hodges,* 230 N.C. 580, 55 S.E. 2d 201.

Ignoring Exhibit A, which was not recorded, the question arises: Were the *recorded* documents, Exhibits B and C, sufficient to give notice to third parties of plaintiff's lien? When these recorded documents are considered together, the factual situation is similar, although not identical, with that considered in *Bank v. Pearson, supra,* where, as against the purchaser at an execution sale pursuant to judgment against the mortgagor, the mortgage was upheld as to after-acquired property. But, for the reasons stated below, we need not decide that question.

McBrayer v. Harrill, supra, is direct authority for the proposition that the administratrix "stands in the shoes" of Weston; and that, as between plaintiff and the administratrix, an unrecorded mortgage lien has the same status and validity it had between plaintiff and Weston. Appellant challenges the soundness of that decision.

In order of payment by an administrator, the first class consists of "Debts which by law have a specific lien on property to an amount not exceeding the value of such property." G.S. 28-105. However, this statutory provision does not bear upon whether an unrecorded chattel mortgage, valid as against the intestate, is to like extent valid against his estate.

Appellant contends that *Williams v. Jones,* 95 N.C. 504, and *Hinkle v. Greene,* 125 N.C. 489, 34 S.E. 554, cited in *McBrayer v. Harrill, supra,* do not support the decision. The two cited cases involved chattels allotted to the widow of an intestate as part of her year's allowance. G.S. 30-15, *et seq.* It was held that the widow took such chattels subject to her husband's unrecorded mortgage thereon. This statement is noteworthy: "She does not take under the administrator, for she may have her 'year's support' assigned to her before any administration on her husband's estate. The Code, sec. 2127. She takes the allowance, under and by virtue of the statute, out of the personal estate of her husband. The statute, it is true, gives her a right to her 'year's support,' against all general creditors, but no better title to the prop-

erty assigned her than her husband had." *Williams v. Jones, supra.* It may be conceded that *Williams v. Jones, supra,* and *Hinkle v. Greene, supra,* are distinguishable to this extent: The title to the personal estate of an intestate, except the portion thereof allotted as allowances for a year's support, vests in the administrator. *In re Estate of Galloway,* 229 N.C. 547, 50 S.E. 2d 563; *Snipes v. Estates Administration, Inc.,* 223 N.C. 777, 28 S.E. 2d 495; *Linker v. Linker,* 213 N.C. 351, 196 S.E. 329; *Price v. Askins,* 212 N.C. 583, 194 S.E. 284. Even so, the title that passes to and vests in the widow and administrator, respectively, is the title of the intestate.

If an estate is solvent, an administrator cannot, for the benefit of heirs or distributees, attack a mortgage, valid as between the parties, on the ground that it was not recorded during the life of the intestate. As to this proposition, there is no conflict of authority. But there is a conflict of authority as to whether an unrecorded mortgage is void as against the administrator of an insolvent estate. 33 C.J.S., Executors and Administrators sec. 301; 21 Am. Jur., Executors and Administrators sec. 422; Annotation: 91 A.L.R. 299, 304.

When the registration act of each state is considered, it is difficult to determine what is the majority view. Be that as it may, *Blackman v. Baxter,* 125 Iowa 118, 100 N.W. 75 (1904), a leading case holding that such unrecorded mortgage is void, makes it clear that under the Iowa statute only creditors who had fastened a lien upon the property itself were protected against an unrecorded mortgage. The opinion for the Court (there was a dissenting opinion) indicates these bases for the decision: 1. The title of the administrator, regardless of when appointed, relates back to the instant of the mortgagor's death. 2. Thereafter, the unsecured creditors are powerless to obtain relief directly, that is, to fasten a lien upon the intestate's property, but must of necessity work out the collection of their claims through the administrator.

Yet, the rights of secured and unsecured creditors alike are fixed at the instant of the intestate's death. While unsecured creditors can take no action thereafter to fasten a lien on the intestate's property, it is equally true that the recording of a mortgage subsequent to the death of the intestate cannot improve the status of the mortgagee. During the life of the intestate, the unrecorded mortgage is valid against all creditors except such as may fasten a lien on his property. Since their respective rights are fixed as of the date of the intestate's death, we cannot accept the view that the mere circumstance of death should be held to convert unsecured creditors into creditors who have fastened a lien upon the property. The better view, in our opinion, is that the title that passes to the administrator in respect of the intestate's personal estate is precisely the title vested in the intestate immediately

prior to his death; and that, as expressed in *McBrayer v. Harrill, supra,* the administrator "stands in the shoes" of the intestate.

In Jones, Chattel Mortgages and Conditional Sales, Vol. 1, Bowers Edition (1933), sec. 240, the author, referring to *Blackman v. Baxter, supra,* and similar decisions, rejects the rule adopted therein. Thereupon he sets forth the rule adopted in *McBrayer v. Harrill, supra,* and the reasons therefor, as follows:

". . . The mortgagor's death gives no specific lien upon his property in favor of a general creditor. The property passes to the personal representative as the mortgagor left it. One who was a mere general creditor before the death remains such after it. His position with respect to other creditors remains unchanged. He and they have the same right, through the intervention of an administrator, to subject to the payment of their debts, if necessary, all the property of their debtor which has passed to his heirs, devisees, or legatees. This right, which constitutes the only lien which a general creditor has upon the estate of his deceased debtor, is acquired by no act of diligence on the part of the creditor; it arises from no act of the debtor, but from the laws that make the property he has at the time of his death subject to the payment of his debts. This right of the general creditor is limited to the property that passes; and it is limited also to the property in the condition in which it passes, subject to the encumbrances and liens placed upon it by the debtor."

In *McBrayer v. Harrill, supra, Clark, C. J.,* cited Jones on Chattel Mortgages, sec. 239, where the author, after referring to the conflict of authority, set forth what he considered the correct rule in these words: "An unfiled or unrecorded mortgage is valid against the executor or administrator of the mortgagor in the same way that it is valid against the mortgagor himself . . . Neither the heir in the one case, nor the administrator in the other, is a third person, but represents the intestate, and has no better title than he had." Thus it appears that this Court, when *McBrayer v. Harrill, supra,* was decided, was fully aware of the divergent lines of authority.

Our decisions are to the effect that the trustee under a deed of assignment for the benefit of creditors is a purchaser for a valuable consideration within the meaning of G.S. 47-20; and that, upon adjudication of insolvency and the appointment of a receiver, the unsecured creditors, then represented by the receiver, are deemed to have fastened a lien on the insolvent's property. *Finance Corp. v. Hodges, supra,* and *Investment Co. v. Chemicals Laboratory,* 233 N.C. 294, 63 S.E. 2d 637, and cases cited.

There is no contention here that the administratrix is a purchaser for a valuable consideration. Appellant insists that the decisions in the receivership cases, by analogy, support her contention. But in the

basic case relating to receiverships, the ground of decision is that the unsecured creditors by *judicial process, i.e.*, the receivership proceedings, fasten a lien on the insolvent's property. *Observer Co. v. Little,* 175 N.C. 42, 94 S.E. 526. It is noted further: If the receivership proceeding is initiated by the debtor, it is in effect a voluntary assignment for the benefit of creditors. If the receivership proceeding is initiated by creditors, the lien fastened on the debtor's property by judicial process for their benefit is the result of their action. We are not concerned here with a factual situation where action is taken by or against the insolvent during his lifetime. There is only one fact upon which the unsecured creditors rely to convert their claims from unsecured claims to lien claims, namely, the debtor's death. In our opinion, this fact alone is insufficient to vest in such unsecured creditors, or in the administratrix, rights superior to those of the debtor.

It is noted that the Bankruptcy Act was amended 25 June, 1910. Prior thereto a trustee in bankruptcy had no better right or title to the property than the bankrupt had when the trustee's title accrued. The amendment conferred upon trustees in bankruptcy the rights and remedies of a lien creditor as against an unrecorded transfer. Thereafter, it was held that an unrecorded chattel mortgage was void as against a trustee in bankruptcy. *Hinton v. Williams,* 170 N.C. 115, 86 S.E. 994; *Holt v. Albert Pick & Co.,* 25 F. 2d 378 (C.C.A. 4th); *Fairbanks Steam Shovel Co. v. Wills,* 240 U.S. 642, 36 S. Ct. 466, 60 L. Ed. 841. Suffice to say, the title, rights and remedies of a trustee in bankruptcy are determined by the provisions of the Bankruptcy Act.

Neither the reasons advanced nor the authorities cited by appellant are deemed sufficient ground for this Court to overrule its decision in *McBrayer v. Harrill, supra.* On the contrary, under existing statutes, the rule declared therein is approved and recognized as the law in this jurisdiction.

It appearing, by stipulation, that no creditor, represented in this litigation by the administratrix, had a lien on said lumber when Weston died, it follows that plaintiff's lien thereon, valid between the original parties, is equally valid as against the administratrix. Hence, the judgment must be affirmed.

It is noted that the judgment established a separate and unrelated claim of plaintiff in the amount of $478.02 as a valid unsecured claim against the Weston estate. Defendant did not assign error in respect of this portion of the judgment.

Affirmed.

AIDA S. KOVACS v. GEORGE A. BREWER, SR.

(Filed 20 March, 1957.)

1. Appeal and Error § 22—

An exception to findings of fact which does not point out wherein the findings are not supported by the evidence is a broadside exception, and an assignment of error based thereon presents the sole question whether the court's conclusions of law are supported by the findings.

2. Infants § 21—

The courts of this State have jurisdiction to hear and determine the question of the custody of a child living with her grandfather at his domicile in this State.

3. Same: Constitutional Law § 28—

A modification of provisions of a foreign divorce decree in regard to the custody of a minor child of the marriage, entered in the foreign jurisdiction while the child of the marriage was domiciled in this State with her resident grandfather, is not binding on the courts of this State, and does not come under the full faith and credit clause of the Federal Constitution. Article IV, section 1.

4. Divorce and Alimony §§ 17, 19—

In a proceeding under G.S. 50-13 to determine the question of the right to custody of the minor child of parents divorced in another state, decree awarding the custody to the resident paternal grandfather upon findings, supported by evidence, that the welfare and best interest of the child so required, will be affirmed.

APPEAL by petitioner from *Stevens, J.*, at Chambers in Winton, North Carolina, 12 September 1956. From NORTHAMPTON.

This is a proceeding brought pursuant to G.S. 50-13 to determine a dispute concerning the custody of the minor child of the parents who were divorced by a decree of the State of New York.

The order entered pursuant to the hearing in Winton, North Carolina, on 12 September 1956, was signed by consent of counsel at Halifax on 10 December 1956.

This matter was heard before his Honor Henry L. Stevens, Jr., Judge regularly assigned and holding courts of the Sixth Judicial District, at which time and place the petitioner was present and represented by counsel, and the respondent was present and represented by counsel. The minor child, who is the subject of this controversy, was also present, as was her father, George A. Brewer, Jr.

By direction of the court the matter was heard solely on affidavits, pleadings, certain stipulations and petitioner's exhibits, and upon consideration thereof the court found the facts as follows:

"1. That George A. Brewer, Jr., father of Jane Elizabeth Brewer, the minor child who is the subject of this controversy, enlisted in the U. S. Navy in 1946 and has been a member of such service since that date.

"2. That on April 18, 1945, the said George A. Brewer, Jr. married Aida Speciale (now Aida Kovacs). On May 30, 1946, a child, Jane Elizabeth Brewer, was born to said marriage. That they lived together in the marital relation until some time in 1950. That on July 31, 1950, George A. Brewer, Jr. instituted an action for divorce against his wife on the grounds of adultery in the Supreme Court of the State of New York in and for the County of New York. That on January 17, 1951, said Court entered a decree of divorce in favor of George A. Brewer, Jr. against his said wife on the grounds of adultery with Joseph Kovacs, and awarded the custody of the child, Jane Elizabeth Brewer, to George A. Brewer, Sr., the father of George A. Brewer, Jr., and the grandfather of said child.

"3. That immediately after the rendition of the decree awarding custody of said child, the said Aida Brewer went into hiding, taking the child with her, and it was not until on or about September 6, 1951 that the said father or grandfather were able to find the child and her mother. They were found living with Joseph Kovacs at 21 James Avenue in Jersey City and in order to gain the physical custody of the said child, it was necessary for the parent and grandparent to obtain a writ of *habeas corpus* in the Superior Court Chancery Division of Jersey City. Upon a hearing on the return of said writ, physical possession and custody of said minor was granted to the father and grandfather of said child.

"4. That immediately thereafter, the said grandfather returned to his home in Gaston, Northampton County, North Carolina, bringing with him the said Jane Elizabeth Brewer. The domicile of the said George A. Brewer, Sr. is now and has been for more than twenty years, said Town of Gaston, Northampton County, North Carolina.

"5. That since said time the said Jane Elizabeth Brewer has been continuously residing in the home of her grandfather, George A. Brewer, Sr., in Gaston, Northampton County, North Carolina, and at no time has been out of the State of North Carolina.

"6. That immediately following the divorce decree on January 17, 1951, George A. Brewer, Jr. left the State of New York with the intention not to return, and has continuously resided since then in Gaston, North Carolina except for the times that he was on duty in the Navy; has voted in elections held in Gaston Precinct in 1952, 1954 and 1956; that since said time, and in the periods when he owned an automobile, such car has been registered in North Carolina with a North Carolina license plate and the same in the Town of Gaston; that since he left

New York, he has paid his Federal income tax through the Greensboro, North Carolina office; that since he left New York, he has spent his leaves at his home in Gaston, North Carolina with his father, stepmother and child. That at all times since he left the State of New York, and now, George A. Brewer, Jr. has been and is a resident of and domiciled in Gaston, North Carolina.

"7. That George A. Brewer, Jr. is a Machinist Mate First Class in the U. S. Navy with a base pay of $258.00 per month, plus $77.10 for the maintenance of Jane Elizabeth Brewer. That he makes an allotment and pays monthly to his father the sum of $157.10 for the support and maintenance of Jane Elizabeth Brewer.

"8. That on October 2, 1951, and again on November 17, 1952, the petitioner made application in the Supreme Court of the State of New York for the modification of said divorce decree seeking custody of said child for the petitioner. Both applications were denied. That in July 1954, the petitioner married Joseph Kovacs, the person who was named as co-respondent in the divorce action hereinabove referred to, and the person whom the court found as the co-respondent. That in November 1954, the petitioner again applied to said New York Court for a modification of the divorce decree seeking custody of the child for herself. That upon a hearing upon said petition, the court entered a decree awarding such custody. At said hearing, neither George A. Brewer, Sr. nor George A. Brewer, Jr. appeared in person but did through counsel and each submitted affidavits which were considered by the court. The minor child, Jane Elizabeth Brewer, was not present in the State of New York at the time of said hearing, or at any time since her removal from said State in 1951. At the time of said hearing, and since 1951, she has been a resident of and domiciled in Gaston, North Carolina. That neither George A. Brewer, Sr. nor George A. Brewer, Jr. has been in the State of New York since 1951.

"9. That petitioner filed her petition in the present case in the Superior Court of Northampton County on the 24th day of February 1956, under the provisions of Section 50-13 of the General Statutes of North Carolina; summons was personally served on the defendant on February 29, 1956; the defendant filed answer on March 29, 1956.

"10. That George A. Brewer, Sr. is 64 years of age and for more than one year has not required any care for a coronary artery condition or for a diabetic condition. He is able to work, and properly supervise the maintenance and care of his granddaughter, Jane Elizabeth Brewer; that he is senior trustee of the Board of Stewards, teacher of the adult Bible Class of his church school and an active and reliable layman of his church. He is vitally interested in the public schools of his community and in consequence of such church and school interest and activity the environment of his home is suitable for the upbringing

of a child; that George A. Brewer, Sr. owns his residence. It is situated in the corporate limits of the Town of Gaston and located tastefully on a hill, is small, but adequate and neat. The home is attractive in appearance, comfortable and modest. It is complete with bath, hot and cold water, is heated with an oil heater floor furnace and has a gas heater in the fireplace which may be used as auxiliary heat in case of severe weather.

"That Mrs. George A. Brewer, Sr. is a graduate nurse of the Roanoke Rapids, N. C. Hospital, having graduated in 1927; that she is peculiarly qualified to give attention and care to said minor, Jane Elizabeth Brewer; that she has shown, and continues to show, affection and interest in said minor; that she is a teacher of small children in her church school. She is a gentle, loving person, fully qualified in every way to give Jane Elizabeth Brewer motherly care and Christian nurture and training that she needs at this period of her life.

"11. That Jane Elizabeth Brewer was about 5½ years of age when her custody was awarded to her grandfather, George A. Brewer, Sr.; that she has lived continuously since that time with her grandfather and step-grandmother; that she has been a constant attendant at church services and at church school. In church school she has been awarded a pin for uninterrupted attendance for a period of more than five years; that she has been a constant attendant in the local elementary school where she has proven to be a bright and attractive child. She has done well in the scholastic work and has been one of the top-ranking pupils. In 1954, she voluntarily made a public confession of Christ and joined the church of her grandparents of her own free will.

"Said minor is provided with a swing, toys, dolls and doll house and a playhouse. She has many young friends with whom she plays and visits. She has made and enjoys friends in the Town of Gaston not only among those of her age, but with adults also. Her health is good and she has had the doctor only twice since 1951, and that was for a minor upset stomach which lasted only a day. She has grown several inches in height and has gained in weight.

"She has advantages equal to those of any child in Gaston, good schools, supervised playground, recreational facilities, a good home and church training, and above all a sense of being loved and wanted.

"12. That in 1954, when the said New York decree was entered, there was residing in the home of George A. Brewer, Sr., himself, his wife and the son of Mrs. Brewer; that the son of Mrs. Brewer is no longer residing in said home, and it is now occupied only by Mr. and Mrs. George A. Brewer, Sr. and the said Jane Elizabeth Brewer. That the removal of the son of Mrs. George A. Brewer, Sr. provides more space in the home for the convenience and comfort of said child. and

lessens the responsibility of the said Mr. and Mrs. George A. Brewer, Sr. in providing maintenance and supervision for said minor.

"13. That the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"14. That George A. Brewer, Sr. is a man of excellent character, good habits and conduct, and is a fit and suitable person to have the care, custody and control of the minor, Jane Elizabeth Brewer.

"15. That the welfare, interest and development of the child will be materially promoted by allowing her to remain in the custody of George A. Brewer, Sr. and in the environment to which she has become accustomed and upon which in a measure she depends."

The decree entered pursuant to the above findings, in pertinent part, is as follows:

"1. That this Court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by or required to give effect to the decree of the Court of the State of New York made in 1954 and hereinbefore referred to.

"2. That the petitioner's petition to be awarded the care, custody and control of the said Jane Elizabeth Brewer is hereby denied.

"3. That the care, custody and control of the said Jane Elizabeth Brewer is hereby awarded to the respondent, George A. Brewer, Sr."

The petitioner appeals, assigning error.

Sylvester & Haimoff, of the New York Bar, Sanford, Phillips, McCoy & Weaver, for petitioner.

Gay & Midyette and Eric Norfleet for respondent.

DENNY, J. The appellant's first assignment of error is based on a single exception to the court's findings of fact numbered one through fifteen and does not point out wherein the findings of fact are not supported by the evidence. Therefore, the exception is broadside and this assignment of error presents nothing for review except whether or not the court's conclusions of law are supported by its findings. *Winborne v. Stokes,* 238 N.C. 414, 78 S.E. 2d 171; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

The second assignment of error is based on an exception to his Honor's conclusion of law to the effect "that this court, in passing upon the care, custody and control of Jane Elizabeth Brewer, is not bound by nor required to give effect to the decree of the Court of the State of New York made in 1954, . . ."

Irrespective of the failure of the appellant to challenge by proper exceptions the sufficiency of the evidence to support the court's findings in the hearing below, we are of the opinion that the findings are sup-

ported by competent evidence and that they support the court's conclusion of law challenged by the second assignment of error, and we so hold. *Hoskins v. Currin,* 242 N.C. 432, 88 S.E. 2d 228.

The respondent, George A. Brewer, Sr., having been found to be a citizen and resident of North Carolina, domiciled in said State, to whom the custody of Jane Elizabeth Brewer, then 5½ years of age, was awarded, by the New York Court on 17 January 1951; and the said minor child having been a resident in the home of her grandfather, George A. Brewer, Sr., since September 1951; and her father, George A. Brewer, Jr., having been domiciled in North Carolina since immediately after January 1951, we hold, in the light of these findings, that the courts of North Carolina have the power and authority to hear and determine the question of the custody and welfare of the minor child involved herein. *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744; *Hoskins v. Currin, supra; Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313; *In re Biggers,* 228 N.C. 743, 47 S.E. 2d 32; *In re Ogden,* 211 N.C. 100, 189 S.E. 119; *In re Alderman,* 157 N.C. 507, 73 S.E. 126, 39 L.R.A. (N.S.) 988.

We further hold that the modification of the 1951 decree made by the New York Court in 1954, has no extra-territorial effect, and we are not bound by the full faith and credit clause of the Constitution of the United States, Article IV, section 1, to recognize and enforce the modified decree. *In re Alderman, supra; In re Biggers, supra; Hoskins v. Currin, supra.*

An action which relates to the custody of a child is in the nature of an *in rem* proceeding. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71; *Richter v. Harmon, supra; Hoskins v. Currin, supra; Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798.

The court below has found that the petitioner, Aida Kovacs, is not a fit and proper person to have the care, custody and control of the minor, Jane Elizabeth Brewer; on the other hand, it has found that George A. Brewer, Sr. is a man of excellent character, good habits and conduct and is a fit and suitable person to have the care and custody of said minor child. The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody. *Smith v. Smith,* 241 N.C. 307, 84 S.E. 2d 891; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *Gafford v. Phelps, supra; Walker v. Walker,* 224 N.C. 751, 32 S.E. 2d 318; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136.

The judgment of the court below is

Affirmed.

JANIE THRASH PULLIAM AND HUSBAND, W. D. PULLIAM, v JOHN E. THRASH AND WIFE, LOUISE THRASH, GORDON THRASH, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF CAROLYN THRASH DORSETT, AND WIFE, TRUDELL THRASH, JACKSIE WOLFE, AND MAX POLANSKY AND WIFE, SELMA A. POLANSKY.

(Filed 20 March, 1957.)

1. Taxation § 28—

The primary liability of the devisees for the inheritance tax on the value of property devised to them under the will is not affected by any compromise agreement under which the ultimate disposition of the lands differs in whole or in part from that prescribed by the will. G.S. 105-2, G.S. 105-4, G.S. 105-15, G.S. 105-18, G.S. 105-20.

2. Same—

Will devising certain lands to three devisees as tenants in common was established by verdict and judgment, and by compromise agreement a fourth person was let in as a tenant in common and the land sold for partition. An additional inheritance tax assessed was paid by the commissioner out of the proceeds of sale. *Held:* The share of each of the three devisees is chargeable with one-third the tax, and no part thereof is chargeable against the share of the person let in by the compromise agreement or her transferee in the absence of an express or implied agreement to pay same.

APPEAL by Gordon L. Thrash, John E. Thrash and Janie Thrash Pulliam, from an order entered by *Clarkson, J.*, September Civil Term, 1956, of BUNCOMBE.

A partition sale proceeding involving real estate in Buncombe County was commenced 14 May, 1956. Admittedly, Janie Thrash Pulliam, John E. Thrash, Gordon L. Thrash and Max Polansky were the owners thereof, each owning an undivided one-fourth interest. A sale of said real estate by a commissioner was made and confirmed. Thereafter, the commissioner paid to the State of North Carolina, out of the proceeds of said sale, the amount of additional inheritance taxes assessed by the Commissioner of Revenue in respect of the estate of Carolyn Thrash Dorsett.

This question arose: Should the entire amount of this additional inheritance tax assessment be charged (one-third each) against the shares of Janie Thrash Pulliam, John E. Thrash and Gordon L. Thrash, or should one-fourth thereof be charged against Max Polansky's share? The relevant facts are stated below.

The said Buncombe County real estate was owned by Carolyn Thrash Dorsett on 16 May, 1953, the date of her death. In addition thereto, Mrs. Dorsett then owned real estate in Transylvania and Henderson Counties and personal property.

Mrs. Dorsett was a resident of Transylvania County. Upon her death, the Clerk of Superior Court of Transylvania County appointed Mrs. Jacksie McGaha Wolfe as administratrix. Thereafter, Janie Thrash Pulliam and Gordon L. Thrash presented to said clerk for probate in common form a paper writing dated 3 January, 1934. After hearing evidence, the said clerk entered an order dated 2 July, 1953, refusing to probate said paper writing. Janie Thrash Pulliam and Gordon L. Thrash excepted and appealed; and the cause came on for trial in the Superior Court of Transylvania County at December Term, 1953, upon the issue *devisavit vel non.*

By jury verdict, the said paper writing was established as the last will and testament of Carolyn Thrash Dorsett; and it was so adjudged. Mrs. Wolfe had withdrawn her opposition. In consideration thereof, it was agreed that the real and personal property of Carolyn Thrash Dorsett should be divided, one-fourth each to Janie Thrash Pulliam, John E. Thrash, Gordon L. Thrash and Jacksie McGaha Wolfe. This agreement was incorporated in a consent judgment; and, in compliance with the terms thereof, by deed dated 14 December, 1953, duly recorded in the Buncombe County Registry and elsewhere, John E. Thrash and wife, Louise Harrison Thrash, and Gordon L. Thrash and wife, Trudell Thrash, and Janie Thrash Pulliam and husband, William D. Pulliam, conveyed to Jacksie McGaha Wolfe, her heirs and assigns, an undivided one-fourth interest in all lands owned by Mrs. Dorsett and in all her personal property. No reference to inheritance taxes appears in the consent judgment or in the deed.

After the said verdict and judgment, Gordon L. Thrash, named as such in the will, qualified as executor.

Thereafter, the said four owners sold and conveyed the Transylvania and Henderson real estate. The record does not disclose when this was done or the price received therefor. It does state that, "by agreement with the State of North Carolina," such sales and conveyances were made "free and clear of any claim for inheritance tax on the said estate."

An examination of said last will and testament discloses that Mrs. Dorsett made certain specific bequests, not relevant in connection with this appeal. She disposed of her residuary estate as follows: "And whatever else my estate may consist of at time of my death, either in land notes, mortgages, moneys, real and personal *et al,* I want equally divided between nieces and nephews share and share alike including Gordon L. Thrash, but exclusive of my niece, Mrs. Jacksie McGaha Wolfe and her issue, and heirs at law." Janie Thrash Pulliam, John E. Thrash and Gordon L. Thrash were the persons to whom property was bequeathed and devised by said residuary clause.

The executor prepared and filed an inheritance tax return, based on the supposition that there were four beneficiaries, and paid the tax due thereon. It does not appear when this was done. It does appear that "the Commissioner of Revenue of the State of North Carolina filed a tax judgment against Gordon L. Thrash, Executor of the Estate of Carolyn Thrash Dorsett, and Gordon L. Thrash, John E. Thrash and Janie Thrash Pulliam and other beneficiaries of the Estate of Carolyn Thrash Dorsett in the Office of the Clerk of the Superior Court of Buncombe County . . ." This tax judgment bears date of 18 January, 1956, and was filed 20 January, 1956, and docketed and recorded as a judgment. The said additional assessment ($776.91) was made on the ground that the tax was determinable on the basis of three beneficiaries, the said devisees.

While the record is not clear, it implies that the executor distributed the personal property to Janie Thrash Pulliam, John E. Thrash, Gordon L. Thrash and Jacksie McGaha Wolfe prior to his receipt of notice of said additional tax assessment. The answer filed herein by the executor contains this allegation: "That there are no funds and no other property in the Estate except the property involved in this proceeding from which such taxes can be paid, and your respondent respectfully requests that the Commissioner be directed to pay such inheritance tax out of the proceeds of the sale of this property."

By deed dated 30 January, 1956, and duly recorded in Buncombe County, Jacksie McGaha Wolfe, unmarried, sold and conveyed her one-fourth interest in and to said *Buncombe County real estate* to Max Polansky, his heirs and assigns. In said deed, the grantor, in her warranty of title, covenanted "that said land and premises are free from any and all encumbrances other than taxes for the years 1953 and subsequent; and that the estate of Mrs. Carrie Thrash Dorsett will not make any attempt to subject the property above described to the payments of obligations of the estate."

The order of the court below was "that the Commissioner shall charge all payments on account of the additional assessment of inheritance tax and costs or obligations of the Estate against the share of GORDON L. THRASH, JOHN E. THRASH, JANIE THRASH PULLIAM, and shall not charge any part thereof against the share of the proceeds of sale of the interest belonging to MAX POLANSKY." Gordon L. Thrash, John E. Thrash and Janie Thrash Pulliam excepted and appealed.

Potts & Ramsey for appellant Gordon L. Thrash.
W. W. Candler for appellant John E. Thrash.
Cecil C. Jackson for appellant Janie Thrash Pulliam.
Horner & Gilbert for appellee Polansky.

BOBBITT, J. The arguments presented deal largely with whether the court's finding that Polansky is "in the position of a *bona fide* purchaser for value without notice more than two years after the death of Mrs. Dorsett," is supported by evidence; and if so, whether Polansky is protected by the provisions of G.S. 28-83. In our view, other factors control decision.

We are not concerned with whether, as between the State of North Carolina and Polansky, the additional inheritance tax assessment was a lien on his interest in the Buncombe County lands until paid. G.S. 105-20, G.S. 105-31. The tax has been paid. The question here is whether, as between him and the three devisees, Polansky is obligated for the payment of any part thereof.

Our statutes impose inheritance taxes upon transfers of property by will, by intestate laws or in contemplation of death. G.S. 105-2. The amount of the tax is determined on the basis of the value of the property so transferred to each beneficiary. G.S. 105-4, *et seq.* The obligation of a devisee to pay the tax assessed on the property transferred to him by will is primary. G.S. 105-15, G.S. 105-18, G.S. 105-20. No provision is made for the assessment of inheritance taxes on a different basis because, pursuant to a contract made by the devisees after the testator's death, the ultimate disposition differs in whole or in part from that prescribed by the will.

In 36 A.L.R. 2d 917, the subject annotated is this: "Succession, estate, or inheritance tax as affected by compromise of will contest." There is a conflict of authority, due in part to diversity in statutory provisions. The annotator states: "The majority view appears to be that in this situation the succession tax is computable in accordance with the terms of the will, unaffected by the compromise agreement." *Fidelity & C. Trust Co. v. Commonwealth,* 241 Ky. 656, 44 S.W. 2d 603, 78 A.L.R. 710, is one of the cases cited as authority for the majority view. The Commissioner of Revenue assessed the inheritance taxes involved here in accordance with that view. So far as the record shows, neither the executor nor the devisees contested the assessment.

The will having been established by verdict and judgment, it must be regarded as valid *ab initio.* In *Bailey v. McLain,* 215 N.C. 150, 1 S.E. 2d 372, 120 A.L.R. 1487, this Court, in opinion by *Seawell, J.,* quotes with approval these two excerpts from *Fidelity & C. Trust Co. v. Commonwealth, supra:* "Whilst the legatees could not receive the property under the will until it was duly established, neither could the heirs inherit the property unless the will was set aside." Again, speaking of the caveator: "While his right to maintain the contest of the will is derived from his relationship to the testator, his title to the money came from the contract with the legatees."

Liability, if any, of Mrs. Wolfe or of Polansky to pay any part of the devisees' primary obligation in respect of inheritance taxes must be based on contract, express or implied. See *Bailey v. McLain, supra.*

Whether Mrs. Wolfe, by her contract with the devisees, became obligated to pay one-fourth of the amount of the inheritance taxes, is not presented for decision. She has no interest in the proceeds derived from the sale of the Buncombe County real estate.

It is clear that Polansky made no agreement, express or implied, with the devisees or with Mrs. Wolfe, to pay any part of the inheritance taxes. Indeed, as indicated above, Mrs. Wolfe's covenant with Polansky was to the effect that he acquired her interest in the Buncombe County real estate free from any obligations of the estate of Carolyn Thrash Dorsett.

The order of the court below is

Affirmed.

C. M. HARRINGTON AND W. G. BROADFOOT, CO-PARTNERS, TRADING AND DOING BUSINESS AS HYMAN SUPPLY COMPANY, v. R. M. RICE AND WIFE, LORA E. RICE.

(Filed 20 March, 1957.)

1. Judgments § 25—

The proper procedure to attack a judgment as void for nonservice of summons in contradiction of regular return of summons of record is by motion in the cause.

2. Judgments § 18—

The officer's return showing service of process raises a legal presumption and is in itself sufficient predicate for a finding that service was made as shown by the return, and this presumption cannot be rebutted by a single contradictory affidavit or contradictory testimony of a single witness.

3. Process § 5a—

Delivery of copy of summons and the complaint to the male defendant with instructions to him to deliver it to the *feme* defendant is not valid service on the *feme*.

4. Judgments § 27b—

Clear and unequivocal testimony of a defendant that summons and complaint were not served on her and that she was not within the county at the time the process officer left a copy of the summons and complaint at her home, together with testimony of other witnesses and written evidence tending to show that at that time she was in another county for medical treatment, is sufficient to sustain the court's finding that notwithstanding the officer's return showing service, the defendant had not been personally

served, and judgment setting aside default judgment entered against her in the cause is affirmed.

5. Same: Appearance § 1—

Defendant's appearance in connection with her motion to set aside a default judgment on the ground of want of service does not validate the void judgment.

6. Judgments § 27a—

A meritorious defense is not essential or relevant on motion to set aside a default judgment for want of jurisdiction for lack of service.

APPEAL by plaintiffs from *Bundy, J.*, October Civil Term, 1956, of NEW HANOVER.

Motion in the cause by *feme* defendant to set aside a default judgment for want of service of process.

Summons was issued 21 December, 1949, for service by the Sheriff of New Hanover County. The deputy sheriff's return shows: "Executed Dec. 23, 1949, By leaving a copy of the within summons & complaint with R. M. Rice & wife Lora E. Rice."

On 11 September, 1951, the assistant clerk, based on the facts alleged in the verified complaint, entered judgment by default final against the defendants, jointly and severally, for $1,952.45 with interest and costs.

A writ of execution was issued 11 September, 1951. It was returned, bearing this notation: "Returned at request of plaintiff, this 13 day of Sept. 1951." No further reference to this writ of execution appears in the record.

In September, 1956, another writ of execution was issued. It appears that the sheriff was proceeding to allot the *feme* defendant's homestead and to sell her lands in accordance therewith. Thereupon, on or about 17 September, 1956, the *feme* defendant made her said motion in the cause. Pending hearing and decision thereon, the sheriff was restrained from proceeding further under said execution.

In her said motion, the *feme* defendant alleged that in fact service of the summons and complaint "was not made upon her by an officer of New Hanover County, or any other person," and that she had no knowledge of the action or of the judgment until 1956 when the recorded judgment was discovered by her son. In addition, she alleged facts which, if true, constituted a meritorious defense to plaintiffs' action. Plaintiffs, answering said motion, denied the *feme* defendant's said allegations and averred, *inter alia*, that personal service was made on 23 December, 1949, as shown by the deputy sheriff's said return.

At the hearing, evidence was offered by the respective parties, consisting of affidavits and records. At the conclusion thereof, Judge

Bundy made eleven separately numbered findings of fact, and entered judgment setting aside said default judgment of 11 September, 1951.

Plaintiffs excepted and appealed, assigning errors.

Stevens, Burgwin & McGhee for plaintiffs, appellants.
J. H. Ferguson for defendant Lora E. Rice, appellee.

BOBBITT, J. If in fact the summons and complaint were not served on the *feme* defendant as prescribed by G.S. 1-94 and G.S. 1-121, the default judgment of 11 September, 1951, is void; and, since the return shows service, the appropriate procedure to set aside the judgment for nonservice was by motion in the cause. *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311, and cases cited; *Caviness v. Hunt,* 180 N.C. 384, 104 S.E. 763; *Stocks v. Stocks,* 179 N.C. 285, 102 S.E. 306.

The motion and answer thereto raised questions of fact. It was for the court to hear the evidence, find the facts and render judgment. *Monroe v. Niven, supra; Cleve v. Adams,* 222 N.C. 211, 22 S.E. 2d 567; *Dunn v. Wilson,* 210 N.C. 493, 187 S.E. 802; *Trust Co. v. Nowell,* 195 N.C. 449, 142 S.E. 584.

When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. *Downing v. White,* 211 N.C. 40, 188 S.E. 815; *Smathers v. Sprouse,* 144 N.C. 637, 57 S.E. 392. Upon hearing such motion, the burden of proof is upon the party who seeks to set aside the officer's return or the judgment based thereon to establish nonservice as a fact; and, notwithstanding positive evidence of nonservice, *the officer's return* is evidence upon which the court *may* base a finding that service was made as shown by the return. *Downing v. White, supra; Long v. Rockingham,* 187 N.C. 199, 121 S.E. 461; G.S. 1-592.

Service of process, and the return thereof, are serious matters; and the return of a sworn authorized officer should not "be lightly set aside." *Burlingham v. Canady,* 156 N.C. 177, 72 S.E. 324; *Mason v. Miles,* 63 N.C. 564; *Hunter v. Kirk,* 11 N.C. 277.

Therefore, this Court has consistently held that an officer's return or a judgment based thereon may not be set aside unless the evidence consists of more than a single contradictory affidavit (the contradictory testimony of one witness) *and* is clear and unequivocal. *Dunn v. Wilson, supra; Penley v. Rader,* 208 N.C. 702, 182 S.E. 337; *Hooker v. Forbes,* 202 N.C. 364, 162 S.E. 903; *Jordan v. McKenzie,* 199 N.C. 750, 155 S.E. 868; *Glass v. Moore,* 195 N.C. 871, 142 S.E. 585; *Trust Co. v. Nowell, supra; Commissioners v. Spencer,* 174 N.C. 36, 93 S.E. 435; *Caviness v. Hunt, supra.*

There are two assignments of error. Assignment of error #1 is as follows: "That the Court erred in the third, fifth, sixth, eighth, ninth and tenth findings of fact in the Judgment, for that the evidence to support said findings of fact was not clear and unequivocal." Each finding of fact so challenged relates to a different subject. This assignment does not comply with Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 554; *S. v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. See also, *Armstrong v. Howard,* 244 N.C. 598, 94 S.E. 2d 594.

Assignment of error #2 challenges the court's eleventh finding of fact, to wit, "that the defendant Lora E. Rice has shown by clear and unequivocal proof that she was not in the County of New Hanover on the 23rd day of December, 1949; that valid personal service was not had upon her nor an appearance made on her part; and that judgment taken against her on the 11th day of September, 1951, should be set aside and vacated."

The evidence offered by the *feme* defendant and the plaintiffs was contradictory. The credibility of the witnesses and the weight of the evidence were for determination by the court below in discharging its duty to find the facts. Assignment of error #2 raises the crucial question of law presented for decision, that is, whether the evidence offered in behalf of the *feme* defendant, if accepted by the court authorized to find the facts, was sufficient to meet the said legal requirements.

Lora E. Rice, the *feme* defendant, states clearly and unequivocally that the summons and complaint were not served on her on 23 December, 1949, or at any other time; that between the late morning of 21 December, 1949, and the late afternoon of 24 December, 1949, she was not in New Hanover County; and that from 21 December, 1949, until the afternoon of 24 December, 1949, she was in the home of her brother-in-law, Dr. W. H. Braddy, in Burlington, North Carolina, who was treating her for a kidney ailment.

The affidavits of R. M. Rice, Jr., son of the *feme* defendant, and of Mattie Braddy, widow of Dr. W. H. Braddy, and the appointment book of Dr. Braddy, corroborate the *feme* defendant's statements that she was in the home of Dr. Braddy in Burlington, North Carolina, on said dates.

R. M. Rice, Sr., husband of Lora E. Rice and codefendant herein, states clearly and unequivocally that, while his wife was in Burlington, North Carolina, a deputy sheriff came to their home in New Hanover County; that the summons and complaint were served upon him; that the deputy sheriff left with him another copy of the summons and complaint with instructions to deliver this copy to his wife, Lora E. Rice, when she returned; and that (for reasons we need not consider in detail)

he did not deliver said copy of the summons and complaint to the *feme* defendant or inform her of the incident.

It is noted that the delivery of a copy of the summons and of the complaint to R. M. Rice, Sr., with instructions to deliver to the *feme* defendant, was not valid service. *Bank v. Wilson,* 80 N.C. 200; *Jordan v. McKenzie, supra.*

The evidence in behalf of the *feme* defendant consisted of substantially more than a single contradictory affidavit. Moreover, the evidence in behalf of the *feme* defendant is clear and unequivocal to the effect that the summons and complaint were not served on her. True, there was contradictory evidence, consisting principally of said return and of affidavits by the deputy sheriff that he personally served the summons and complaint on the *feme* defendant on 23 December, 1949, and thereupon noted such service on the return. The credibility and weight of the evidence were for the court below. His findings of fact based thereon will not be disturbed.

There is no evidence, nor do plaintiffs contend, that the court, at the time said default judgment was rendered, had obtained jurisdiction otherwise than by personal service on 23 December, 1949, as shown by said return. Her appearance in connection with said motion did not validate a judgment rendered when the court had no jurisdiction. *Monroe v. Niven, supra; Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283.

The *feme* defendant's motion was to set aside said default judgment, not to dismiss the action; and, in accordance therewith, the judgment of the court below was that "the default judgment entered against the defendant Lora E. Rice on the 11th day of September, 1951, be, and the same is hereby set aside and vacated." See *Harrell v. Welstead, supra.*

While the court below found that the *feme* defendant has a meritorious defense to plaintiffs' cause of action, this was not essential or relevant to the allowance of her motion. *Monroe v. Niven, supra.* Hence, we do not discuss the evidence bearing on this subject.

No question is raised as to the original jurisdiction of the judge to pass on the motion to set aside a judgment by default final entered by the clerk pursuant to G.S. 1-211. In this connection, see *Caldwell v. Caldwell,* 189 N.C. 805, 128 S.E. 329; *Moody v. Howell,* 229 N.C. 198, 49 S.E. 2d 233; *Rich v. R. R.*, 244 N.C. 175, 179, 92 S.E. 2d 768.

Affirmed.

STATE v. PERCY BRYANT.

(Filed 20 March, 1957.)

1. Intoxicating Liquor § 9d—

Evidence that three quarts of intoxicating liquor in two fruit jars, without tax stamps, were found on defendant's premises, near his house, with further evidence tending to show that defendant was seen to take a drink from one of the jars shortly before the search and arrest, *is held* sufficient to overrule motion for nonsuit in a prosecution for possession of an alcoholic beverage upon which taxes had not been paid. G.S. 18-60.

2. Criminal Law § 28: Evidence § 7e—

Prima facie evidence is sufficient to take the issue to the jury and support, but not compel, an affirmative finding, it being for the jury to weigh the evidence, but *prima facie* evidence does not in itself establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of proof on the issue.

3. Intoxicating Liquor §§ 9b, 9f—

In instructing the jury as to the statutory effect created by the absence of stamps on containers holding an alcoholic beverage, G.S. 18-48, the court charged that *prima facie* evidence was sufficient proof until overcome and contradicted by other evidence. *Held:* The charge constitutes prejudicial error in giving undue weight and effect to *prima facie* evidence.

4. Criminal Law § 81c(2)—

Conflicting instructions upon a material point necessitate a new trial, since it cannot be determined that the jury did not follow the erroneous instruction.

APPEAL by defendant from *Moore (Clifton L.), J.*, August-September 1956 Term, WILSON.

Defendant was tried on a warrant charging him with unlawfully having in his possession in two half-gallon fruit jars three quarts of "alcoholic beverages upon which the taxes imposed by the laws of Congress of the United States and by the laws of the State of N. C. had not been paid." The jury returned a verdict of guilty, whereupon judgment was entered imposing a jail sentence. Defendant appealed.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Robert A. Farris for defendant appellant.

RODMAN, J. The State offered in evidence two one-half gallon jars. Witnesses for the State testified these jars were discovered in a search of defendant's premises, one behind the smokehouse under some paper

fertilizer bags, the other on the front seat in a broken down Ford pickup truck sitting in defendant's yard.

There were no stamps affixed to either container. There was testimony from a witness who at a distance of 150 yards saw defendant, shortly before the search and arrest, take a drink from one of the containers and then hide the container near the smokehouse where it was found by the officers.

Defendant disclaimed any knowledge of the jars and contents. There was evidence that the whisky was brought to defendant's farm while defendant was absent, and that he had no knowledge of it.

There was sufficient evidence for the jury to find: (1) defendant was the owner and had the legal possession of the jars and contents; (2) the jars contained an alcoholic beverage as defined by statute (G.S. 18-60); (3) the taxes lawfully imposed had not been paid on the contents of the jars in question. Defendant's motion to nonsuit was properly overruled.

Defendant's fifteenth assignment of error is directed to that portion of the charge defining the effect of the statutory evidence (G.S. 18-48) created by the absence of stamps on containers holding alcoholic beverages. The court charged: "*Prima facie* evidence or a *prima facie* case is meant that which is received and continues until the contrary appears. It is meant such as in the judgment of the law is sufficient to establish the facts and, if not disputed, remains sufficient for that purpose. In other words, *prima facie* evidence is meant the evidence sufficient to carry the case to the jury and to justify but not compel a verdict. *Prima facie* evidence is merely that which suffices for the proof of the particular fact until contradicted and overcome by other evidence."

Defendant contends, and we think properly so, that the charge is inaccurate and endows *prima facie* evidence with undue weight and effect. The charge defines the weight and force to be given to *prima facie* evidence in four distinct sentences. Do these separate sentences each mean the same thing? If not, which should the jury accept?

Much has been written in defining *prima facie* evidence, its weight and effect. Statements are to be found that it is sufficient to shift the burden of proof, *e.g.*, *S. v. Roten*, 86 N.C. 701, where it is said: "But what is *prima facie* evidence of a fact? It is simply such evidence in judgment of law as is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose. Its effect is to shift the burden of proof from the State to the defendant, that is all."

But, when an analysis is made of the decisions of this Court rather than a single sentence or a paragraph, it is manifest that no burden or duty is imposed on the defendant merely because a statutory rule of evidence has come into play.

"A *prima facie* case simply carries the case to the jury for determination and no more." *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163.

"It may, therefore, be taken as settled in this Court, at least, and we believe the same may be said of most, if not all, of the courts, that *prima facie* or presumptive evidence does not, of itself, establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of the issue, which always remains with him who holds the affirmative. It is no more than sufficient evidence to establish the vital facts without other proof, if it satisfies the jury. The other party may be required to offer some evidence in order to prevent an adverse verdict, or to take the chances of losing the issue if he does not, but it does not conclude him or forestall the verdict. He may offer evidence, if he chooses, or he may rely alone upon the facts raising the *prima facie* case against him, and he has the right to have it all considered by the jury, they giving such weight to the presumptive evidence as they may think it should have under the circumstances." *S. v. Wilkerson*, 164 N.C. 431, 79 S.E. 888.

In *S. v. Russell*, 164 N.C. 482, 80 S.E. 66, the Court gave its approval to this charge: "The statutory presumption in this case, to the effect that keeping or having on hand or under one's control more than 2½ gallons of intoxicating liquor, shall be *prima facie* evidence of an intent to sell same contrary to law, is not binding upon the jury, though the defendant does not see fit to introduce any testimony or to go on the stand as a witness for himself. The jury is still at liberty to acquit the defendant, if they find his guilt is not proved beyond a reasonable doubt."

Speaking with reference to the statutory *prima facie* case of evidence as to intent to sell based on possession of a fixed quantity of alcoholic beverages, *Hoke, J.* (later *C. J.*), said in *S. v. Bean*, 175 N.C. 748, 94 S.E. 705: "In construing this and other statutes of like kind, however, our Court has often held that while the guilty purpose may be inferred from the fact of possession established, and the court should instruct the jury to consider the evidence in view of the artificial weight given to such possession, the presumption of innocence is also present, and if on the entire testimony there is reasonable doubt of the defendant's guilt, either as to fact of the possession or of the forbidden purpose, the defendant should be acquitted." *S. v. Helms*, 181 N.C. 566, 107 S.E. 228; *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416; *Hunt v. Eure*, 189 N.C. 482, 127 S.E. 593; *Vance v. Guy*, 224 N.C. 607, 31 S.E. 2d 766; *S. v. Ellis*, 210 N.C. 166, 185 S.E. 663; *Manufacturing Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32.

The statute creates a factual inference or conclusion to be drawn from other facts recited in the statute. This inference or conclusion is denominated *prima facie* evidence. It, like all the other evidence, must

be weighed before the jury can render a verdict. In criminal cases this evidence, coupled with other evidence, must establish defendant's guilt beyond a reasonable doubt. Defendant is entitled to have the jury scrutinize this evidence as it does all of the other evidence with a presumption of innocence in his favor. It does not suffice for proof "until contradicted and overcome by other evidence." It may fall because of its own weakness. The facts which call for an application of the statutory rule of evidence may, when viewed in their proper perspective, cause the jury to reject as unworthy of belief the *prima facie* evidence created by the statute. The *prima facie* evidence created by the statute had no greater legal force than the testimony of the witness that defendant's breath had the odor of nontaxpaid whisky. It was the duty of the jury to weigh and assess each.

The court correctly charged the jury that the *prima facie* evidence was sufficient to carry the case to the jury and to justify but not compel a verdict adverse to the defendant, but the next sentence of the charge declaring the *prima facie* evidence sufficient proof *until overcome and contradicted by other evidence* imposed a burden on defendant which he was not required to carry and gave to the evidence a force and effect which it did not possess.

"It is well settled that where there are conflicting instructions with respect to a material matter, a new trial must be granted, as the jury are not supposed to know which of the two states the law correctly, and we cannot say they did not follow the erroneous instruction." *S. v. Falkner*, 182 N.C. 793, 108 S.E. 756. Defendant, for the error in the charge, is entitled to a

New trial.

K. CLAYTON BRIGHT, ADMINISTRATOR OF JOHN P. LEATH, DECEASED, v. WOODROW W. WILLIAMS AND WIFE, BERTHA WILLIAMS, AND GEORGE A. GASH, ADMINISTRATOR OF THE ESTATE OF BEULAH MAE LEATH, DECEASED.

(Filed 20 March, 1957.)

1. Appearance §§ 1, 2—

Where a defendant served by publication and attachment files answer denying the material allegations of the complaint and moves to dismiss for want of valid service, G.S. 1-134.1, and thereafter plaintiff files an additional affidavit upon which an *alias* summons is issued and order of service by publication is entered, defendant's subsequent demurrer for failure of the complaint to state a cause of action, without attempting to protect and preserve his rights in regard to the second attachment and publication, constitutes a general appearance, giving the court jurisdiction.

2. Partnership § 12—

A complaint alleging the existence of a partnership, a conspiracy to deprive plaintiff partner of possession and control of the partnership assets pursuant to which defendant partner transferred all the partnership property to defendant transferee, and seeking a settlement and an accounting of the partnership affairs, *is held* to state a cause of action, and demurrer of defendant transferee is properly overruled, the allegations being sufficient predicate for the dissolution of the partnership, G.S. 59-62, entitling plaintiff to an accounting and proper application of all the partnership property.

3. Same—

The interest of the partners in the partnership properties is personal property even though part of the partnership property is real estate, G.S. 59-56. Hence the personal representatives of deceased partners are proper parties in an action for an accounting and proper application of the partnership property.

4. Same—

The transferee of partnership property pursuant to a conspiracy with one of the partners to wrongfully deprive the other partner of possession and control of the property, is a proper party to an action for the dissolution and proper application of the partnership property because of his wrongful possession and assertion of title to the partnership assets, and the fact that he happens to be an heir of the deceased tranferror is immaterial.

5. Same: Executors and Administrators § 15a—

Upon the death of one partner, the other partner is not relegated to a claim against the estate of the deceased partner, but may maintain an action against the personal representative to recover his share of the partnership assets as ascertained upon an accounting.

6. Parties § 3: Partnership § 12—

In an action by a partner for the dissolution of the partnership and for the proper application of the partnership assets, plaintiff partner may join as a defendant the transferee of the defendant partner upon allegation that the transfer was wrongful, in order to have the entire controversy settled in one action, G.S. 1-69, and plaintiff is not compelled first to bring an action to establish the fact of the existence of the partnership and then another action for an accounting.

APPEAL by defendant Woodrow Williams from *Clarkson, J.*, 19 November 1956 Civil Term of BUNCOMBE.

On 22 March 1956 John P. Leath procured a summons and warrant of attachment from the Superior Court of Buncombe County for Beulah Leath and defendants Williams. An order was made extending the time to file complaint. Defendants Williams are nonresidents. The summons and warrant of attachment were served on Mrs. Leath and Bertha Williams in March, and on Woodrow Williams on 17 April 1956. On 24 April 1956, pursuant to application and order, *alias* summons issued

for Woodrow Williams. It was that day returned unserved. Thereupon the court, on affidavit of plaintiff, ordered service by publication. Notice was published and mailed as required by statute.

The action is for an accounting and settlement of the partnership alleged to have existed between John P. Leath and Beulah Leath and to determine the title to real and personal property, assertedly partnership property wrongfully and fraudulently conveyed by Mrs. Leath to defendant Woodrow Williams.

Defendant Woodrow Williams, 16 May, filed an answer denying the material allegations of the complaint and, as authorized by G.S. 1-134.1, moved to dismiss for that the court was without jurisdiction of the person or property of defendant.

Beulah Leath died in April. The administrator of her estate was made a party defendant. On 20 June 1956 plaintiff filed an additional affidavit on which an *alias* warrant of attachment issued, and order for service of summons by publication on Woodrow Williams was entered. Pursuant to this order, notice of the summons and warrant of attachment was duly published and mailed as required by statute. Defendant Woodrow Williams has not specifically pleaded in response to the order and service of process of June 1956.

Plaintiff Leath having died, his administrator was made party plaintiff.

In November a hearing was had on the motion of Woodrow Williams to declare noneffective the service of process on him. Judge Clarkson found the facts and adjudged the court had jurisdiction of the properties attached and as to those properties, defendant was in court.

Defendant Woodrow Williams then demurred to the complaint for failure to state a cause of action. The demurrer was overruled. He excepted to the order overruling the demurrer and appealed from the order holding there had been service of process.

William J. Cocke and Landon Roberts for plaintiff appellee.
Sanford W. Brown and Edward Jerome for defendant appellant.

RODMAN, J. Defendant insists that his motion made with the answer filed in May should have been sustained for that the purported personal service on 17 April had no validity, *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215, and that the order of 24 April for service by publication, having been made more than thirty-one days after the order for the attachment, likewise is ineffective. G.S. 1-440.7.

If it be conceded that neither defendant nor his property were subject to the jurisdiction of the court when he entered his special appearance and moved to dismiss in May, no objection has been taken or reason assigned to invalidate the attachment and service of process in June.

Judge Clarkson was correct in adjudging the court had jurisdiction of the property attached with authority to determine the rights of the parties thereto.

Following the hearing on the motion to dismiss, defendant Williams filed a demurrer. This was his first pleading or response to the process served by publication in June. The filing of the demurrer, without attempting to protect and preserve his rights as respects the attachment and publication of process in June, was a general appearance. *Motor Co. v. Reaves,* 184 N.C. 260, 114 S.E. 175. Hence he is subject to the jurisdiction of the court.

Notwithstanding his demurrer for failure to state a cause of action was overruled when in the Superior Court, defendant has demurred here for the same reason.

The complaint in brief alleges that plaintiff Leath and Mrs. Leath were, from April 1944 until her death, partners engaged in operating hotels and boarding houses; that the partnership owned a lot at 24 Grove Street, Asheville, hotel equipment consisting of stoves, kitchen equipment, dining room equipment, beds, mattresses, etc., cash amounting to $19,000, bank deposits in the amount of $6,000; that Mrs. Leath and the defendant Williams in 1956 entered into a conspiracy to defraud plaintiff of his rights in the partnership property and pursuant to said conspiracy the bank deposit and other personal property of the partnership had been transferred and delivered by Mrs. Leath to the defendant Williams; that she had conveyed to Williams the partnership real estate; that Mrs. Leath was, in February 1956, physically and mentally unable to perform her part of the partnership contract; that defendants Williams had wrongfully excluded plaintiff from possession and control of the partnership properties.

Plaintiff seeks an adjudication of title and right to possession of the real and personal properties conveyed by Mrs. Leath to defendants, a settlement and accounting of the partnership affairs, and distribution of the partnership properties to the partners in accord with their respective rights after the discharge of partnership obligations.

The demurrer admits the truth of the allegations. The partnership was dissolved, G.S. 59-62. Upon dissolution plaintiff was entitled to an accounting and appropriate application of all of the partnership property. *Casey v. Grantham,* 239 N.C. 121, 79 S.E. 2d 735.

The interest of John P. Leath and Beulah Leath in the partnership was personal property, even though part of the partnership assets was real estate. G.S. 59-56. Hence upon the death of the partners, their respective personal representatives were properly made parties to prosecute and defend on behalf of their intestates. *Ewing v. Caldwell,* 243 N.C. 18, 89 S.E. 2d 774.

Woodrow Williams is properly a party defendant, not because he happens to be the heir of Beulah Leath, but because of his wrongful possession and assertion of title to the partnership assets. The fact that he happens to be the heir of a deceased partner affords him no immunity. There is nothing in *Ewing v. Caldwell, supra,* that lends support to that argument.

Plaintiff is not, as defendant argues, limited to a claim against the estate of Mrs. Leath. He is entitled to his share of the partnership assets ascertained upon an accounting. Nor is plaintiff compelled to bring an action to establish the partnership (a fact admitted by the demurrer), and when that fact has been judicially declared, then another action for an accounting. He is entitled to have the entire controversy settled in one action. G.S. 1-69; *Bank v. Harris,* 84 N.C. 206; *Owen v. Hines,* 227 N.C. 236, 41 S.E. 2d 739.

The demurrer filed here is overruled. The judgment appealed from is Affirmed.

HENRY H. MALLETTE, JR., v. IDEAL LAUNDRY AND DRY CLEANERS, INC.

(Filed 20 March, 1957.)

1. Negligence § 19c—

A motion for nonsuit on the ground of contributory negligence shown by the plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom.

2. Same—

In determining whether plaintiff's evidence discloses contributory negligence as a matter of law, the evidence favorable to him must be taken as true, giving him the benefit of every reasonable intendment therefrom, and all contradictions and discrepancies must be resolved in plaintiff's favor.

3. Automobiles § 17—

Where there are no stop signs or traffic control devices at a street intersection, neither street is favored over the other, notwithstanding that the one is paved and the other is not, and the right of way at such intersection is governed by G.S. 20-155(a), giving the car on the right the right of way when two vehicles approach the intersection at approximately the same time, and G.S. 20-155(b), giving the car first in the intersection the right of way.

4. Automobiles § 42g—

Plaintiff's evidence, susceptible to the interpretation that he was traveling 15 miles an hour in entering the intersection, that his view of defendant's vehicle, approaching the intersection from plaintiff's left, was obscured by a house at the intersection, and that as plaintiff entered the

intersection defendant's vehicle was some 35 or 40 feet away, traveling at excessive speed, and that defendant's vehicle hit the left side of plaintiff's car as it was half way across the intersection, *is held* not to disclose contributory negligence on the part of plaintiff as a matter of law.

APPEAL by plaintiff from *Bundy, J.*, October Civil Term, 1956, of NEW HANOVER.

W. K. Rhodes, Jr., for Plaintiff, Appellant.

Poisson, Campbell & Marshall for Defendant, Appellee.

JOHNSON, J. Civil action in tort arising out of collision of two motor vehicles in a street intersection.

At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit on the stated ground that the plaintiff's evidence discloses he was contributorily negligent as a matter of law. The motion was allowed. The single question presented for review is whether this ruling was correct.

It is firmly established by the decisions of this Court that a motion for nonsuit on the ground of contributory negligence shown by the plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom. *Wright v. Pegram,* 244 N.C. 45, 92 S.E. 2d 416; *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

In analyzing and testing the plaintiff's evidence to see if it discloses contributory negligence as a matter of law, the trial court is required to take for granted that the evidence favorable to the plaintiff is true and give to it every reasonable intendment favorable to the plaintiff. *Donlop v. Snyder, supra; Powell v. Lloyd,* 234 N.C. 481, 67 S.E. 2d 664; *Bundy v. Powell, supra.* All conflicts in plaintiff's evidence are to be resolved in favor of the plaintiff (*Bundy v. Powell, supra; Scarborough v. Veneer Co.,* 244 N.C. 1, 92 S.E. 2d 435), the rule being that contradictions and discrepancies are for the jury and not the court. *Donlop v. Snyder, supra; Fowler v. Atlantic Co.,* 234 N.C. 542, 67 S.E. 2d 496; *Maddox v. Brown,* 232 N.C. 244, 59 S.E. 2d 791.

The collision occurred in the daytime at the intersection of Eighth and Ann Streets in a residential district of the City of Wilmington. Eighth Street runs north and south; Ann, east and west. Each street is about 30 feet wide. Eighth Street is paved, whereas Ann is an unimproved dirt street. There is a dwelling house on the southwest corner of the intersection. The set back distances of the house are not shown by the evidence, except by photographs. These indicate that the house is relatively close to both streets at the intersection, thus leaving a limited side-view sight distance for motorists approaching the inter-

section on either street. The evidence discloses no stop sign on the side of either street-approach to the intersection, nor any traffic control device over the center of the intersection. Therefore, upon the record as presented neither street was favored over the other, and the evidence is to be interpreted in the light of G.S. 20-155, which provides in part: "(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right . . ."

"(b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction: . . ."

The plaintiff was driving a Cadillac automobile northwardly on Eighth Street. The defendant's laundry truck was being driven eastwardly on Ann Street. Therefore, as the two vehicles approached the intersection the Cadillac driven by the plaintiff was on the right.

The plaintiff testified in part: "As I got to the corner I saw the Laundry truck approximately 35 or 40 feet around the corner. . . . I was traveling at approximately 15 to 20 miles an hour at the time . . . of the accident. . . . I was in the intersection when I first saw the vehicle with which I had the collision. There is a house sitting on the corner, and when I got close enough to see, I saw this vehicle coming beyond the left-hand side of the house. At that time that vehicle was approximately . . . 35 or 40 feet from the intersection, traveling in an eastern direction. . . . As I entered the intersection and my car got about half way across the intersection, my car was hit from the left hand side, right between the two doors. . . . My car turned over and landed . . . on the sidewalk on the northeast corner. . . . It was raining at that time. . . . I was injured . . . and was carried to the hospital."

Cross-Examination: ". . . before I got to the intersection I was going 15 to 20 miles an hour. I reduced my speed as I got to the intersection enough to see the oncoming traffic from both directions, from the east and west. . . . I reduced my speed to see around the east corner. . . . at the time I entered the intersection . . . the Laundry truck was on Ann Street . . . about 40 feet westwardly from the western line of Eighth Street. . . . I was about the center of the right-hand lane of Eighth Street while I was driving into the intersection. . . .

"I said I estimated the Laundry truck was running between 35 and 40 an hour at the time I saw it. . . . When I saw the Laundry truck coming in . . . I was increasing my speed at that time; I was entering the intersection to see around the corner. I increased my speed to approximately 15 miles per hour. I was making approximately 15 miles

an hour as I entered the intersection. . . . I did not attempt to stop my automobile before I got into the intersection, when I saw this car coming . . . 58 feet away. . . . When I saw the truck coming I was into the intersection; in fact, I was approximately going across the intersection. I assumed if I stopped in the intersection there would be a head-on. I said I was approximately 10 feet from the intersection when I first saw the Laundry truck. . . . I was in position to stop if I assumed I would be in the way of the Laundry truck. I could have put on my brakes at my slow speed. I don't know whether I would have stopped immediately or not. I could have stopped almost immediately traveling at 15 miles an hour."

Randolph Corbett testified he was driving along Eighth Street behind the plaintiff's Cadillac when it reached the intersection. The witness said: "When this car got to the intersection . . . we were . . . about 40 or 50 feet behind it, and all of a sudden, after the Cadillac got into the intersection, I saw this Laundry truck strike this car. . . . I could not say how fast the Laundry truck was going . . .; it just dashed right out; it was a little misty, raining; it had been raining, but it was not then. . . ."

It may be conceded that the plaintiff's evidence is not free of discrepancies and contradictions. Nevertheless, the portions on which the plaintiff relies, when weighed and considered and given every reasonable intendment favorable to him, as is the rule on motion for nonsuit, are sufficient to justify a jury-finding of actionable negligence against the defendant, free of contributory negligence on the part of the plaintiff. True, the evidence in some aspects is sufficient to justify the inference that the defendant's negligence, if such be found, was not the proximate cause of the collision, or that the plaintiff was contributorily negligent. The evidence being susceptible of these diverse inferences makes it a case for the jury.

The judgment as of nonsuit entered below is

Reversed.

E. MAXWELL AMMONS, SR., AND WIFE, MARY M. AMMONS, v. THE NORTH AMERICAN ACCIDENT INSURANCE COMPANY.

(Filed 20 March, 1957.)

1. Trial § 31b—

It is the duty of the trial court to apply the law to all substantial features of the case arising on the evidence. G.S. 1-180.

2. Insurance § 41—

In this action on an insurance policy to recover for death from accidental bodily injury, the charge of the court, given in response to request by the jury for additional instructions, defining the word "accident" without applying the law to the facts in evidence, *held* prejudicial.

APPEAL by plaintiff from *Clarkson, J.*, 24 September, 1956 Civil Term, BUNCOMBE Superior Court.

Civil action to recover insurance benefits under a policy issued by the defendant payable to the plaintiffs in case of death of the insured, E. Maxwell Ammons, Jr., "resulting directly, independently, and exclusively of all other causes from accidental bodily injury effected while this policy is in force."

The evidence disclosed that on 15 April, 1954, at about three o'clock, a.m., the police officers of the City of Asheville, while on patrol, observed a car which passed them and continued on the left-hand side of the street. The officers gave chase and when the car did not obey the stop signal by siren and spotlight, the officers, being unable to overhaul the car, alerted the sheriff and the latter's deputies picked up and continued the chase at the time the speeding automobile left the city limits. However, the car turned back into the city at a high rate of speed, ran across a number of street intersections, and, in making a turn, crashed. The insured was the lone occupant. He sustained bodily injuries from which he died during the day. No evidence of contraband was found on the car and no violation of the law by the insured was shown other than the speed and reckless driving which occurred after the chase started. The defendant did not offer evidence.

The court submitted to the jury the following issue:

> "1. Was the plaintiffs' intestate E. Maxwell Ammons, Jr.'s death caused by an accident which resulted directly, independently and exclusively of all other causes from accidental bodily injury, as set forth in the policy issued by the defendant, and attached to the complaint, and marked Exhibit 'A'?"

The parties stipulated that the court should answer the issue as to the amount of recovery in accordance with the jury's answer to the first issue. The jury answered the first issue, "No," and from the judgment based on the verdict, the plaintiff appealed, assigning as error the further instruction given to the jury at its request.

J. W. Haynes for plaintiffs, appellants.

Carl W. Greene for defendant, appellee.

HIGGINS, J. After deliberating for some time the jury returned to the courtroom and the following took place:

Court: "Have you arrived at a verdict?"

Juror: "No, your Honor, we have not. We have returned to ask for further clarification of point one."

Court: "What point is that?"

Juror: "If I may read it (here juror read the first issue)."

Court: "Gentlemen, I have tried to instruct you very fully on what 'accidental' means. I will be glad to read that to you again if you again would like to hear it. Our Supreme Court has held as follows: 'We regard it as established by the numerous decisions on the subject that in case of accident insurance as expressed in the general terms of this policy,' (that is, the policy in that particular case, and in that case the word 'accident,' these words were used: 'external, violent and accidental means'), 'that the word "accident" should receive its ordinary and popular definition as an unusual and unexpected occurrence, one that takes place without the foresight or expectation of the person affected and that in a given case the question is to be determined by reference to the facts as they may affect the holder of the policy, or, rather, the person injured, an event which under the circumstances is unusual and unexpected by the person to whom it happens.' That is the definition of 'accident' the Supreme Court gave in that case, where the policy was to the effect that where the death had been caused by external, violent and accidental means."

It is obvious from the foregoing that the jurors were uncertain about the law involved and its application to the facts in the case. In answer to their request for clarification, the learned trial judge quoted from a former opinion of this Court defining the word "accidental" and the term "accidental means." The court did not apply the law to the facts, thus leaving the jury to make its own application. "The courts have been rather meticulous . . . in requiring that the law be explained in its connection with the facts in evidence. We feel that the court was inadvertent to this necessity and the fact that perhaps the jury, being laymen, would not be so apt to see the connection between the principles of law laid down and the facts in the case, which so clearly appears to an experienced lawyer or judge." *Smith v. Bus Co.*, 216 N.C. 22, 3 S.E. 2d 362. "It is the duty of the court to instruct the jury on all substantial features of the case arising on the evidence, . . . and the court's failure to do so will be held for error." (citing cases) "The statute, G.S. 1-180, makes it incumbent on the trial judge to declare and explain the law arising on the evidence given in the case." *Finch v. Ward*, 238 N.C. 290, 77 S.E. 2d 661.

"Implicit in the meaning of this statute (G.S. 1-180) as interpreted by numerous decisions of this Court is the requirement that the judge

must declare and explain the law as it relates to the various aspects of the evidence . . . in the case." *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323. "It is the duty of the court to state the evidence to the extent necessary and to declare and explain the law as it relates to the pertinent aspects of the testimony offered (citing cases) and the duty of the court to declare and explain the law arising on such evidence remains unchanged by the present provisions of G.S. 1-180." *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Finch v. Ward, supra.*

The confusion in the minds of the jurors probably arose with respect to the application of the law to the facts. The evidence was all offered by the plaintiff and was not in dispute. When the court, therefore, charged again as to the law it was its duty to do more than read from the book. It was its duty to apply the law, as given, to the evidence in the case. This the court failed to do. The plaintiffs' assignment of error No. 1, based on exception No. 1, must be sustained.

"It is not our purpose now to suggest what instructions might be given to the jury on the evidence as it may be presented on a new trial, since we are not considering the subject of erroneous instructions, but the absence of sufficient instructions." *Bradshaw v. Warren,* 215 N.C. 442, 2 S.E. 2d 375. We deem it not inappropriate, however, to call attention to the distinction this Court has heretofore drawn between insurance policies indemnifying against "accidental bodily injury" as provided by the policy in suit, and bodily injury by "accidental means" as provided in the policy involved in the case from which the court quoted. For the distinction, we refer to *Scott v. Insurance Co.,* 208 N.C. 160, 179 S.E. 434; and *Fletcher v. Trust Co.,* 220 N.C. 148, 16 S.E. 2d 687.

For the error indicated, it is ordered that the cause be sent back to the Superior Court of Buncombe County for a

New trial.

STATE v. JAMES R. WALKER, JR.

(Filed 20 March, 1957.)

Criminal Law § 74—

Where an appeal in a criminal case is not docketed during the next succeeding term of the Supreme Court as required by Rule 5 of the Rules of Practice in the Supreme Court, and defendant does not docket the record proper and move for *certiorari* before the expiration of the time allowed, the appeal must be dismissed, notwithstanding any order of the trial judge extending the time for settling case on appeal.

STATE *v.* WALKER.

APPEAL by defendant from *Stevens, J.*, August Term 1956 of NORTHAMPTON.

The defendant was tried and convicted upon an indictment charging him with an assault upon a female, he being a male person over 18 years of age, and from the judgment imposed he appeals, assigning error.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

Taylor & Mitchell for defendant.

DENNY, J. This case was tried at the August Term 1956 of the Superior Court of Northampton County. The defendant was allowed 60 days by the judge in which to serve case on appeal and the State 30 days thereafter to serve exceptions or countercase. The State accepted service of the case on appeal on 5 October 1956. It was stipulated on 19 November 1956, by and between the solicitor for the State and counsel for the defendant, that the statement of the case as served shall constitute the case on appeal. The case on appeal was not docketed in this Court until 18 January 1957.

Rule 5 of the Rules of Practice in the Supreme Court (221 N.C. 546, as amended in 233 N.C. 749, in 242 N.C. 766, and in Appendix, Advance Sheets No. IV, Volume 245, issued 18 February 1957), provides among other things, that the transcript of the record on appeal from a judgment "rendered before the commencement of a term of this Court" must be brought to the next succeeding term and docketed at such term 21 days before entering upon the call of the docket of the district to which it belongs, with the proviso that appeals in civil cases (but otherwise in criminal cases) from the First, Second, Third, Fourth, Fifth, Sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth and Thirtieth Districts, tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand for argument in its order.

As pointed out in *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126, by *Stacy, C. J.*, "The single modification of this requirement, sanctioned by the decisions is, that where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for a *certiorari*, which motion may be allowed by the Court in its discretion, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right. The issuance of a writ of *certiorari*, however, does not change the time already fixed by

agreement of the parties, or by order of court, for serving statement of case on appeal, and exceptions or countercase."

Under Rule 5, as amended, all criminal cases from the above named districts which are tried between the first day of January and the first Monday in February, and between the first day of August and the fourth Monday in August, must be docketed within 45 days from the last day of the term at which the respective cases were tried. The defendant, not having docketed his case on appeal within the time prescribed by Rule 5, as amended, nor having docketed the record proper and moved for a writ of *certiorari* before the expiration of time now allowed for docketing criminal appeals from the above designated districts, tried during a period set forth above, the case is subject to dismissal either upon motion of the Attorney-General or *ex mero motu* by the Court. *Stone v. Ledbetter,* 191 N.C. 777, 133 S.E. 162.

It clearly appears from the record in this case that the trial was concluded on Wednesday, 8 August 1956. The case was not required to be docketed in this Court until 28 August 1956, for hearing at the call of the docket of the Sixth District on Tuesday, 18 September 1956, if the additional time allowed by the amendment to Rule 5, published in Appendix, Advance Sheets IV, Volume 245, is disregarded.

It is further said in *Pruitt v. Wood, supra, that* "We have held in a number of cases that the rules of this Court, governing appeals, are mandatory and not directory. *Calvert v. Carstarphen,* 133 N.C. 25, 45 S.E. 353. They may not be disregarded or set at naught (1) by act of the Legislature (*Cooper v. Commissioners,* 184 N.C. 615, 113 S.E. 569), (2) by order of the judge of the Superior Court (*Waller v. Dudley,* 193 N.C. 354, 137 S.E. 149), (3) by consent of litigants or counsel. *S. v. Farmer,* 188 N.C. 243, 124 S.E. 562. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. *Womble v. Gin Co.,* 194 N.C. 577, 140 S.E. 230."

When by consent of the appellant, or by order of the judge, such a long extension of time is granted for settling case on appeal, so as to put it beyond the power of appellant to have the case ready for hearing, as required by the Rules, the appellant runs the risk of losing his right of appeal. In such instances, unless the appellant gets his appeal docketed in time, as required by the Rules of the Court, notwithstanding the time allowed, or dockets the record proper and moves for a writ of *certiorari,* as pointed out hereinabove, the right of appeal will be lost. The appellant in this case did neither one. Consequently, he has lost his right of appeal. The following cases support the conclusion we have reached: *S. v. Scriven,* 232 N.C. 198, 59 S.E. 2d 428; *S. v. Lampkin,* 227 N.C. 620, 44 S.E. 2d 30; *S. v. Harrell,* 226 N.C. 743, 40 S.E. 2d 205; *S. v. Moore,* 210 N.C. 459, 187 S.E. 586; *Pruitt v. Wood, supra; Pentuff*

v. Park, 195 N.C. 609, 143 S.E. 139; *S. v. Crowder*, 195 N.C. 335, 142 S.E. 222; *S. v. Surety Co.*, 192 N.C. 52, 133 S.E. 172; *Stone v. Ledbetter, supra; S. v. Butner*, 185 N.C. 731, 117 S.E. 163; *S. v. Johnson*, 183 N.C. 730, 110 S.E. 782; *S. v. Barksdale*, 183 N.C. 785, 111 S.E. 711, and *S. v. Trull*, 169 N.C. 363, 85 S.E. 133.

Appeal dismissed.

STATE v. STEPHEN BLOCK.

(Filed 20 March, 1957.)

1. Embezzlement § 1—

In order for a conviction under G.S. 14-90 the State must show that the defendant was the agent of the prosecuting witness, that by the terms of his employment and in the course thereof he received property of his principal, and knowing it was not his own, converted it to his own use.

2. Criminal Law § 52a(1)—

On motion to nonsuit, the evidence must be taken in the light most favorable to the State, giving it every reasonable inference fairly deducible therefrom, and the motion overruled if there is any competent evidence to support the allegations of the bill of indictment.

3. Embezzlement § 7—

Evidence that defendant was employed on a commission basis to procure construction contracts for his principal, that he procured such contract, collected from the contractee the entire contract price and converted it to his own use, notwithstanding he was entitled to only a small part thereof as commission, *is held* sufficient to overrule defendant's motion for nonsuit in a prosecution under G.S. 14-90.

Appeal by defendant from *Huskins, J.*, at October 1956 Term, of MECKLENBURG.

Criminal prosecution upon a bill of indictment charging defendant Stephen Block with the embezzlement of the sum of $1,555.00 in lawful money of the United States belonging to one Andrew Roby, contractor.

Upon trial in Superior Court the evidence offered by the State was through one witness Andrew Roby. His testimony tends to show this narrative:

During the early part of the year 1953, Andrew Roby was a general contractor, engaged in construction business in Charlotte, North Carolina, and Stephen Block worked for him as a salesman, whose duties were to get business for Roby, for which Roby paid him as a commission one-half the profits. In this connection Block made a written contract or estimate with Lula Walker to do some repair work on her house. Block proposed to Roby that if he would do the work, they would split

the profits. Roby checked the estimate, and told Lula Walker that he was going to do the job, and pay for the material, and, as Roby testified, "She was supposed to pay me and she agreed to do that." After the job was finished Roby presented the bills to Block "to show him how much the job cost."

Roby testified: "I had no contract with Stephen Block." The completed job on Lula Walker's house amounted to $1,555.00. There was a profit of $458.61, of which Block was entitled to one-half, $229.31. Of this amount Roby paid Block by check $200.00 on 10 February, "leaving a balance on the commissions of $29.31." And on 16 February, 1953, Lula Walker, by endorsement of check of Mutual Building & Loan Association in the amount of $1,500.00, and by delivery of $55.00 in cash, paid the $1,555.00 to Block, and he endorsed the check. Quoting Roby: "$29.31 . . . was the total amount due Mr. Block at the time he picked up, for his own use, the $1,555.00." And Roby testified: "Stephen Block sold this job for me . . . Mr. Block did not exactly have any duty or instructions from me to collect for the job. I was supposed to collect for it. However, he did collect for the job . . . the full amount of $1,555.00 and did not turn over any of it to me, as employer. After finding out that he had collected for the job, I immediately tried to locate him several times, and found that he lived in Atlanta. I drove down to Atlanta a couple of times but I could not find him."

Verdict: Guilty as charged.

Judgment: Confinement in the State Prison for a term of not less than five (5) years nor more than seven (7) years.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney-General Patton and Assistant Attorney-General Bruton for the State.

Taylor, Kitchin & Taylor for Defendant Appellant.

WINBORNE, C. J. The sole assignment of error presented on this appeal is based upon exception to the denial by the trial court of motion of defendant for judgment as in case of nonsuit. G.S. 15-173.

In this connection the statute, G.S. 14-90, under which defendant is indicted and convicted, provides in pertinent part that "If . . . any agent . . . of any person shall embezzle or . . . knowingly and willfully . . . convert to his own use . . . any money . . . belonging to any other person . . . which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny."

This statute, G.S. 14-90, has been the subject of numerous decisions of this Court, notably: *S. v. Hill,* 91 N.C. 561; *S. v. McDonald,* 133

N.C. 680, 45 S.E. 582; *S. v. Blackley,* 138 N.C. 620, 50 S.E. 310; *S. v. Gulledge,* 173 N.C. 746, 91 S.E. 362; *S. v. Eubanks,* 194 N.C. 319, 139 S.E. 451; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863.

In the light of the provisions of this statute, as interpreted and applied by this Court, in order to convict a defendant of embezzlement, as declared in opinion by *Clark, C. J.,* in *S. v. Blackley, supra,* "four distinct propositions of fact must be established: (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use." To like effect is decision in *S. v. Eubanks, supra,* citing other cases.

Now, defendant stressfully contends that when the evidence offered upon the trial below is tested by these elements necessary to constitute embezzlement the State has failed to make out such a case against him.

In this connection it is well settled rule of law in this State that in considering a motion for judgment as in case of nonsuit in a criminal prosecution, the evidence must be taken in the light most favorable to the State, and if when so taken there is any competent evidence to support the allegation of the bill of indictment, the case is one for the jury. And, on such motion the State is entitled to the benefit of every reasonable inference that may be fairly deduced from the evidence. See *S. v. Gentry, supra,* and cases cited.

Applying this rule the present case is not free from difficulty. Yet, this Court holds that there is evidence tending to show, or from which reasonable inferences may be drawn as tending to show every essential element which so enters into the crime of embezzlement within the purview of the statute, G.S. 14-90. Hence the motions for judgment as in case of nonsuit were properly denied.

No error.

WILLIAM J. BRIDGERS v. RUDOLPH WIGGS.

(Filed 20 March, 1957.)

1. Automobiles § 41l—

Evidence tending to show that defendant was driving his car at an excessive speed and struck plaintiff who was walking in the same direction on the shoulder on his right side of the highway, but entirely off the hard surface, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Trial § 22c—

Discrepancies and contradictions in plaintiff's evidence are for the jury to resolve and do not justify nonsuit.

3. Automobiles § 42k—

Evidence that plaintiff was walking on the right shoulder of the highway, but completely off the hard surface, when struck from the rear by a car traveling at excessive speed, does not disclose contributory negligence on the part of plaintiff as a matter of law.

4. Negligence § 19c—

Motion for nonsuit on the ground of contributory negligence may be sustained when, and only when, no other reasonable inference is deducible from the plaintiff's evidence.

APPEAL by plaintiff from *Stevens, J.*, January Civil Term, 1957, of WILSON.

Lucas, Rand & Rose and Naomi E. Morris for Plaintiff, Appellant.
Gardner, Conner & Lee for Defendant, Appellee.

JOHNSON, J. Civil action in tort by plaintiff pedestrian to recover for personal injuries sustained when struck by automobile driven by defendant.

At the close of the plaintiff's evidence the trial court allowed the defendant's motion for judgment as of nonsuit. The single question presented for decision is whether this ruling was correct.

On the night of 18 July, 1952, at about 11:00 o'clock, the plaintiff was walking along U. S. Highway 301 at a point north of the City of Wilson, near the Pine Valley Drive-in Theatre. U. S. Highway 301 is a double-lane, paved north-south highway.

The evidence on which the plaintiff relies tends to show that he was walking northwardly along the dirt shoulder on the east side of the highway when hit by the defendant's car traveling in the same direction at 75 to 80 miles per hour; that as a result the plaintiff suffered substantial injuries; that there was a pedestrian path on the shoulder about four feet from the pavement; that the plaintiff was in or near this path when hit; that the highway was straight and level for three-quarters of a mile to the south and a quarter of a mile to the north.

The plaintiff testified: "At the time I was struck I was on no part of the hardsurfaced road." Cross-Examination: "I didn't say I was walking along the path. I said I was off the pavement. . . . Yes, sir, I was walking on the path. I might have been a little closer to the pavement but I won't on the pavement. I will say I was in the path then."

Hugh M. Bunn testified he saw the plaintiff about 20 or 30 seconds before he was struck and that he was then "walking in that path."

The plaintiff's wife testified that the defendant told her "he was meeting an approaching truck and that the truck did not dim its lights

and that he swerved his car to the far edge, right edge of his side of the road."

Our examination of the evidence leaves the impression it was sufficient to overthrow the motion for nonsuit and justify the inference of negligence on the part of the defendant as the proximate cause of the plaintiff's injuries. Discrepancies and contradictions in the plaintiff's evidence are for the jury and not for the court, and do not justify nonsuit. *Fowler v. Atlantic Co.*, 234 N.C. 542, 67 S.E. 2d 496. The nonsuit below may not be upheld on the theory of contributory negligence as a matter of law. *Landini v. Steelman*, 243 N.C. 146, 90 S.E. 2d 377. Motion for nonsuit on the ground of contributory negligence may be sustained when, and only when, no other reasonable inference is deducible from the plaintiff's evidence. *Donlop v. Snyder*, 234 N.C. 627, 68 S.E. 2d 316.

Since the case goes back for retrial, we refrain from further discussion of the evidence and the applicable principles of law.

The judgment below is

Reversed.

STATE v. BENJAMIN EDGAR RENFROW.

(Filed 20 March, 1957.)

Automobiles § 59—

Evidence that defendant drove his car at a speed of 70 to 75 miles per hour, in a 35 mile per hour speed zone, skidded 285 feet, ran over a four foot shoulder and then the ditch, striking and killing a boy standing at the edge of the ditch, and then 65 feet before it stopped, with further evidence that defendant had been drinking, *is held* sufficient to be submitted to the jury in a prosecution for manslaughter.

APPEAL by defendant from *Paul, J.*, August, 1956 Term, DUPLIN Superior Court.

Criminal prosecution upon an indictment charging manslaughter. The evidence for the State disclosed that on the morning of 30 October, 1955, around eleven o'clock, the defendant, driving his Oldsmobile 88 on North Carolina Highway 28, ran over and killed Philamon Bouyer, age 10 years. At the time the car struck him, the boy was standing "at the edge of the ditch eating an ice cream cone." . . . "The shoulder is about four feet wide . . . the speed was approximately 70-75 miles per hour." The skid marks measured 285 feet to the point where the car ran over the ditch and 65 feet from that point to where it stopped. The accident occurred in the corporate limits of the Town of Warsaw

in a 35-mile speed zone. There was evidence the defendant had been drinking.

The defendant, testifying in his own behalf, denied that he was either speeding or drinking. He testified the boy ran out in front of his car and the accident was unavoidable on his part. The jury returned a verdict of guilty, and from the judgment of imprisonment, the defendant appealed.

George B. Patton, Attorney General, and T. W. Bruton, Asst. Attorney General, for the State.

A. M. Britt for defendant, appellant.

PER CURIAM. The evidence was abundantly sufficient to go to the jury and to sustain the verdict and judgment. The exceptions to the admissibility of evidence are without merit. The charge was free from error. No reason appears why the judgment should be disturbed.

No error.

STATE v. JAMES HAGEN.

(Filed 20 March, 1957.)

APPEAL by defendant from *McKeithen, Special Judge,* and a jury, at September, 1956, Special Term of CRAVEN.

Attorney-General Patton and Assistant Attorney-General McGalliard for the State.

Charles L. Abernethy, Jr., for defendant, appellant.

PER CURIAM. This is a criminal prosecution tried upon a bill of indictment charging the defendant with assault with a deadly weapon. From a verdict of guilty and judgment imposing penal servitude, the defendant appeals.

The appeal involves no new question or feature requiring extended discussion. We have examined the record and find no substantial merit in any of the defendant's assignments of error. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment will be upheld.

No error.

STATE v. JAMES EDWARD MILLER.

(Filed 20 March, 1957.)

APPEAL by defendant from *Huskins, J.*, 1 October, 1956 "A" Term, MECKLENBURG Superior Court.

This criminal prosecution resulted in a conviction of involuntary manslaughter. From the judgment imposed, the defendant appealed, assigning as error the refusal of the court to grant his motion for a directed verdict.

George B. Patton, Attorney General, and T. W. Bruton, Asst. Attorney General, for the State.

Ray S. Farris and James B. Ledford for defendant, appellant.

PER CURIAM. The evidence, when viewed in the light most favorable to the State, is sufficient to go to the jury on the question of defendant's culpable negligence in the operation of the automobile in which the deceased was riding and to sustain a conviction of involuntary manslaughter. No valid reason is made to appear why the judgment should be disturbed.

No error.

PEOPLES BANK AND TRUST COMPANY, ADMINISTRATOR OF HUGH R. MAY, DECEASED, v. JOHNNIE ORR AND JAMES HINTON.

(Filed 20 March, 1957.)

APPEAL by defendants from *Moore (Clifton L.), J.*, September Term 1956 of NASH.

This action was instituted 14 April 1954 by Hugh R. May to recover for personal injuries and property damage sustained in a collision on 7 October 1953 between his Buick automobile, driven by his son, Hugh R. May, Jr., on State Highway No. 95, near Rocky Mount, and a jeep, owned by the defendant Johnnie Orr and operated by his co-defendant James Hinton. On 20 March 1956, the court was informed of the death of Hugh R. May, and the Peoples Bank and Trust Company, administrator of the estate of Hugh R. May, was duly substituted as party-plaintiff.

The case was submitted to the jury on appropriate issues which were answered in favor of plaintiff.

Judgment was entered on the verdict, and the defendants appeal, assigning error.

Thorp & Thorp for plaintiff appellee.

O. B. Moss for defendant appellants.

PER CURIAM. The only exceptions entered by the appellants in the trial below were to the failure of the court to sustain their motion for judgment as of nonsuit at the close of plaintiff's evidence and at the close of all the evidence. A careful review of the evidence leads us to the conclusion that it was sufficient to justify its submission to the jury.

The ruling of the court below will be upheld.

Affirmed.

GEORGE LLOYD (CLAIMANT) v. ADDIE BONEY LETSON AND HUSBAND, WILLIAM RALPH LETSON (OWNERS).

(Filed 20 March, 1957.)

APPEAL by defendants from *Paul, J.*, November 1956 Term of ONSLOW.

Plaintiff seeks payment for materials alleged to have been purchased by defendants for the construction of a motel in Jacksonville and to impose a lien on defendants' property on which the motel was constructed.

Defendants admitted purchasing materials to the amount of $23.80 for which they tendered payment. They denied purchasing any other materials and allege that the motel was constructed under a contract with one Kelly, and if in fact plaintiff furnished any materials entering into the construction of the motel other than the $23.80, the materials were sold and delivered to contractor Kelly and not to defendants. Judgment was entered on the verdict and defendants appeal.

Beasley & Stevens for plaintiff appellee.

Jones, Reed & Griffin for defendant appellants.

PER CURIAM. The liability of defendants was made to depend on the answer to the question: Who purchased plaintiff's goods—defendants, as asserted by plaintiff, or Kelly, the contractor, as asserted by defendants? The jury answered the issue submitted to it in accord with the contention of plaintiff. Scrutiny of the record and briefs fails to disclose error of any legal questions justifying discussion.

No error.

EMMA ANDREWS, WIDOW; LEWIS ANDREWS, DECEASED, EMPLOYEE, v. TOWN OF PRINCEVILLE, EMPLOYER, NON-INSURER.

(Filed 20 March, 1957.)

APPEAL by defendant from *Moore (Clifton L.), J.*, November Term, 1956, of EDGECOMBE.

Proceeding under the Workmen's Compensation Act for compensation claimed by the widow of Lewis Andrews, deceased policeman of the Town of Princeville. The Industrial Commission, on findings of hearing Commissioner Ransdell that the deceased came to his death as a result of an injury by accident arising out of and in the course of his employment as policeman, awarded compensation. The defendant appealed to the Superior Court. There all exceptions and assignments of error were overruled and judgment was entered affirming the opinion and award of the Commission. From the judgment so entered, the defendant appeals.

Fountain, Fountain, Bridgers & Horton for plaintiff.

Weeks & Muse for defendant.

PER CURIAM. This appeal presents no new question of law requiring discussion. A careful examination of the record discloses that the findings of fact made by the hearing Commissioner, affirmed on appeal by the Full Commission, support the award. The assignments of error, when tested by settled principles of law, reveal no error. The judgment of the Superior Court will be upheld.

Affirmed.

FLOYD E. WADDELL v. ADELAIDE G. CARSON.

(Filed 27 March, 1957.)

1. Appeal and Error § 1—

The theory of trial in the lower court must prevail in considering the appeal.

2. Trusts § 4—

Where one party pays the consideration for lands but title is conveyed to another, a resulting trust arises by operation of law when it is made to appear from all the attendant facts and circumstances that at the time of the transfer the parties so intended, and as a general rule such intent will be assumed, in the absence of evidence to the contrary, when the person

furnishing the consideration is under no legal obligation to the party to whom the conveyance is made.

3. Same—

Where the husband furnishes consideration for a conveyance of land to the wife, there is a rebuttable presumption of fact that the deed is a gift, and no resulting trust can arise unless this presumption is rebutted by clear, strong, cogent and convincing proof.

4. Same—

Evidence in this case that the husband furnished the entire consideration for lands conveyed to his wife, that both husband and wife signed the purchase money mortgage and deed of trust, that the grantor prepared and had registered the deed and the deed of trust, that the husband did not know that the conveyance had been made to his wife alone, rather than to himself and wife, until some years later, and that then the wife attempted to convey the premises to him, *is held* sufficient to be submitted to the jury in his action to establish a resulting trust as against the wife's heir.

5. Evidence § 32—

A husband, who has testified that he knows his wife's handwriting, is competent to testify after his wife's death, that her signature was on the note in question, and while his further testimony that she signed the instruments in question is technically incompetent under G.S. 8-51, such further testimony will not be held prejudicial when this fact is established by other competent testimony.

6. Same—

Testimony of a witness as to what he himself did in regard to the transaction does not come within the prohibition of G.S. 8-51 when it does not relate to acts or communications with the deceased person in regard to such transaction.

7. Appeal and Error § 19—

An assignment of error not supported by an exception will be disregarded.

8. Appeal and Error § 41—

Where deed is admitted in evidence without objection, testimony of the notary public that she took the married woman's acknowledgment to the deed and as to the circumstances of its execution, introduced for the purpose of showing intent, cannot be prejudicial, it being admitted that the deed was inoperative for failure to comply with G.S. 52-12.

9. Appeal and Error § 38—

Assignments of error not supported by any argument or citation of authority are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

10. Trusts § 4—

In the husband's action to establish a resulting trust in lands paid for by him but conveyed to his wife, evidence that after the conveyance he

paid the taxes on the property is competent upon the question of intent and as tending to rebut the presumption of a gift.

11. Trial § 36—

Assignment of error to the form of the issue cannot be sustained when the issue is sufficient in view of the instructions of the court.

12. Trusts § 4—

In the husband's action to establish a resulting trust in lands paid for by him but conveyed to his wife, no statute of limitations is applicable when the evidence discloses that he has been in continuous possession of the property.

13. Same: Trial § 31b—Failure of court to instruct jury as to presumption of fact, as distinguished from presumption of law, held not prejudicial in absence of request for instructions.

In the husband's action to establish a resulting trust in lands on the ground that he furnished the entire consideration therefor and did not know that the conveyance had been made to his wife alone until shortly before the institution of the action, the failure of the court to charge on the rebuttable presumption of fact that the law presumed, nothing else appearing, that the conveyance was a gift, will not be held for prejudicial error in the absence of a request for such instructions when the court repeatedly charges that the burden of proof to establish the trust was on the husband to satisfy the jury by evidence, strong, clear and convincing.

14. Appeal and Error § 40—

A new trial will not be granted for mere technical error, but the burden is upon appellant to show error which in reasonable probability affected the result.

BOBBITT, J., concurring in result.

RODMAN, J., concurs in concurring opinion.

APPEAL by defendant from *Clarkson, J.*, Regular September Civil Term 1956 of BUNCOMBE.

Civil action to have defendant declared a trustee for plaintiff's benefit in certain real property.

This issue was submitted to the jury: "Is the defendant trustee of a resulting trust, in favor of the plaintiff, of the real property described in the complaint?" The jury answered the issue Yes.

To the judgment entered in accordance with the verdict defendant excepted, and appeals.

J. Marvin Glance and Ward & Bennett for Plaintiff, Appellee.

William C. Hampton, Charles M. Fortune and Zebulon Weaver, Jr., for Defendant, Appellant.

PARKER, J. Plaintiff married Alice Fortune Guffey on 2 May 1927. They lived together as man and wife, until her death on 12 May 1954. No issue was born of the marriage. By a prior marriage Alice Fortune Guffey was the mother of one child, the defendant Adelaide G. Carson, who was born in 1908. She married in November 1927, and has since lived in Fort Myers, Florida. On 25 March 1932 plaintiff and his wife, owning no home, entered into a written "Land Contract" with the Prudential Insurance Company of America, in which it agreed to sell, and they agreed to buy, the real property described in the complaint to be used by them as a home. The contract designates the Insurance Company, "party of the first part, vendor," and Alice Fortune Waddell, and Floyd E. Waddell, her husband, the plaintiff, "party of the second part, vendee." The purchase price was $6,000.00. The contract provided that $610.83 should be paid within a fixed period, and when that was paid, the Insurance Company would convey to the party of the second part by proper deed the land therein described, and that the party of the second part would execute and deliver to the Insurance Company a mortgage on the property and note to secure the remainder of the purchase price.

Plaintiff was a Pullman car conductor, and out of his salary paid the $610.83. Thereafter, on 1 September 1932 plaintiff and his wife went to the office of the Insurance Company in Asheville, and executed and delivered to it their note signed by both in the sum of $5,389.17, representing the balance of the purchase money due on the property on that date, and a deed of trust upon the property securing their note. When this was done, the agent of the Insurance Company said the deed to the property would have to be executed at the home office in New Jersey, that it would be mailed to him, that the deed of trust and deed would be registered at the same time, and then the deed would be delivered to them.

The deed of trust is not in evidence. On cross-examination plaintiff testified he did not read the deed of trust before he signed it, and that under the description of the property in the deed of trust appear these words, "being the same premises conveyed to Alice F. Waddell, one of the parties of the first part, by the party of the third part by deed of even date herewith."

The executed and delivered deed of the Prudential Insurance Company designated Alice F. Waddell as sole grantee of the real property therein conveyed, which is the property described in the Land Contract, the Deed of Trust and the Complaint. The deed bears date of 1 September 1932, was acknowledged by the company on 27 September 1932, and was duly recorded in the public registry of Buncombe County in Book 453, page 21, on 27 December 1932. The Insurance Company had the deed and deed of trust recorded.

In March 1932 plaintiff and wife moved into the house on the property they bought, and he and his wife used it as a home as long as she lived, and he has so used it since then. At the time of the delivery of the deed, his wife owned no real estate or money, and did not work thereafter.

Plaintiff worked as a Pullman car conductor from September 1919 to December 1943 at a monthly salary of about $250.00. Since then he has been a postal clerk, running out of Asheville. He has paid every penny of the purchase price of the property bought from the Insurance Company out of his salary as a Pullman car conductor. He has paid for improvements on the property in the amount of about $4,000.00, and has listed and paid all the taxes on this property from 1932 up to the present time, all out of his salary.

In 1945 plaintiff's wife had a stroke of paralysis. For six months she was in bed, then up for a while, then she was in bed about two years before her death in May 1954. Plaintiff and his wife were the only persons living in the house during her illness.

In July 1950 plaintiff was searching through some files at home, and ran across the deed from the Prudential Insurance Company, and read it. He saw the mistake that his name did not appear in the deed, and that was the first time he knew his name was not in the deed.

Plaintiff offered in evidence, not for the purpose of showing title in his wife, but for the purpose of corroborating himself a recorded deed, dated 18 July 1950, from Alice F. Waddell to himself, conveying to him in fee simple the property conveyed to her by the Insurance Company. The defendant did not object to the introduction of this deed. The court instructed the jury that this deed conveying the property therein described was void, and conveyed no title to plaintiff, for the reason that it did not have attached to it the certificate of the probate officer as required by G.S. 52-12.

Plaintiff alleged that the defendant claims an estate in the real property adverse to him, and that he is entitled to have this claim, which is a cloud upon his title, removed, but if it should be held, that the deed from his wife to him did not vest in him a fee simple title to the property, that the defendant be declared by the court to be a trustee in equity of the naked legal title to the property for his benefit.

The case was tried below on the theory of a resulting trust. That theory must prevail in considering the appeal. *Paul v. Neece,* 244 N.C. 565, 94 S.E. 2d 596.

The defendant assigns as error the denial of her motion for judgment of nonsuit made at the close of plaintiff's evidence. The defendant offered no evidence.

In this case no rights of a *bona fide* purchaser for value, without notice, actual or constructive, of the alleged trust have intervened.

A resulting trust is a creature of equity, and arises by implication or operation of law to carry out the presumed intention of the parties, that he, who furnishes the consideration for the purchase of land, intends the purchase for his own benefit. *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289; *Lawrence v. Heavner,* 232 N.C. 557, 61 S.E. 2d 697. "This being true, a resulting trust does not arise where a purchaser pays the purchase price of property and takes the title to it in the name of another unless it can be reasonably presumed from the attending circumstances that the parties intend to create the trust at the time of the acquisition of the property." *Lawrence v. Heavner, supra.* In the final analysis, whether or not a resulting trust arises in favor of the person paying the consideration for a transfer of property to another, depends on the intention, at the time of transfer, of the person furnishing the consideration, and such intention is to be determined from all the attendant facts and circumstances. 89 C.J.S., Trusts, p. 966. See 89 C.J.S., Trusts, Sec. 133, as to admissibility of evidence to establish a resulting trust.

The general rule, which is supported by the overwhelming weight of authority, is, that in the absence of circumstances indicating a contrary intention, where on the purchase of property, the conveyance of the legal title is taken in the name of one person, for whom the purchaser is under no legal obligation to provide, and the purchaser has paid part of the purchase price and has incurred an absolute obligation to pay the remainder as a part of the original transaction of purchase at or before the time of conveyance, a resulting trust arises by operation of law in favor of the person furnishing all the consideration, and the person thus obtaining the title is a trustee for his benefit. *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265; *Bullman v. Edney,* 232 N.C. 465, 61 S.E. 2d 338; *Creech v. Creech,* 222 N.C. 656, 24 S.E. 2d 642; *Wilson v. Williams,* 215 N.C. 407, 2 S.E. 2d 19; *Tire Co. v. Lester,* 190 N.C. 411, 130 S.E. 45; *Summers v. Moore,* 113 N.C. 394, 18 S.E. 712; *Bank v. Scott,* 184 N.C. 312, 114 S.E. 475; *Scanlon v. Scanlon,* 6 Ill. 2d 224, 127 N.E. 2d 435; 89 C.J.S., Trusts, pp. 973-974.

However, as here, where the husband seeking to establish a resulting trust offers evidence to the effect that the conveyance was made to his wife on a consideration paid in full by him, nothing else appearing, the law presumes that it is a gift, and no resulting trust arises. *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598; *Shue v. Shue,* 241 N.C. 65, 84 S.E. 2d 302; *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48; *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418. This is a rebuttable presumption of fact. *Bass v. Bass, supra; Carlisle v. Carlisle, supra; Bank v. Crowder,* 194 N.C. 312, 139 S.E. 601. To rebut the presumption of a gift to his wife and to establish a resulting trust, the evidence must be clear,

strong, cogent and convincing. *Honeycutt v. Bank, supra; Shue v. Shue, supra; Carlisle v. Carlisle, supra.*

In *Flanner v. Butler,* 131 N.C. 155, 42 S.E. 547, the following issues were submitted to the jury: "1. Was the land described in article three of the complaint purchased with the money of the plaintiff? 2. If so, was the deed to the defendant made to it without his knowledge or consent? 3. Is the plaintiff's cause of action barred by the statute of limitations?" The jury answered the first two issues Yes, and the third No. The Court in considering whether a trust could be established between husband and wife, since property purchased by the husband and conveyed to the wife is presumed to be a gift, said: "But this is only the presumption of a fact the law makes, which may be rebutted by evidence, and when this is done the parties then stand as if they were not man and wife, that is, they stand as other parties, and the general rule prevails. *Faggart v. Bost,* 122 N.C. 517. This being so, and the jury having found that this 'Front street property' was bought with the plaintiff's money, that the plaintiff directed Larkins to buy it for him, and that the deed was made to the defendant Carrie *without his knowledge or consent,* the plaintiff has a clear case for the enforcement of the general rule and to have the defendant Carrie declared a trustee for his benefit."

Bowen v. Darden, supra, was an action to establish a constructive or resulting trust in land. In that case plaintiff's evidence was that a mother furnished the consideration for the deed to the lands in question, that her son-in-law had the conveyance made to his wife, her daughter, that the mother had confidence in her son-in-law and did not read the deed, and when she found the deed was written like it was, she "near 'bout had a heart attack." The court held that the evidence was sufficient to overrule defendant's motion for judgment of nonsuit.

In *Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321, a husband and wife purchased land with the agreement the deed should be made to them jointly, each having a one-half interest. Unknown to the wife the conveyance was made to the husband alone. The Court said under such facts equity creates a trust in favor of the wife commensurate with her interest in the subject matter.

In *Spence v. Pottery Co.,* 185 N.C. 218, 117 S.E. 32, according to the allegations of the plaintiff's complaint, she and her husband purchased a tract of land; one-half of the proceeds came from plaintiff's individual funds; and it was the mutual understanding and agreement that the title to the property was to be taken in their names, vesting in them as grantees an estate by the entirety. It was also alleged that by inadvertence or mistake of the draftsman the deed was made solely to the husband. This error was discovered 15 years after the purchase of the land. Plaintiff and her husband had been in the continuous possession

of the property since its purchase. The Court held plaintiff's complaint alleged sufficient facts to establish a trust.

In *Roberson v. Roberson,* 261 Ala. 371, 74 So. 2d 445, it was held that where a husband contracted to purchase realty, and paid the purchase price and the deed through mistake or inadvertence included his wife's name as grantee, and it appears that this was done without explanation to or the concurrence of the purchaser as to how the deed should be made, a resulting trust was established, and the divorced wife was divested of claim or title she had in the realty.

In *Bosworth v. Bosworth,* 285 Mass. 82, 188 N.E. 612, a ninety-year old uncle directed the defendant, his nephew, to buy a tract of real estate with money furnished by him. The nephew took title in his own name. It was held that the defendant held title upon a resulting trust for his uncle, the plaintiff. See also *Druker v. Druker,* 308 Mass. 229, 31 N.E. 2d 524; *Siemientkoskie v. Graboskie,* 324 Pa. 516, 188 A. 537.

In 89 C.J.S., Trusts, p. 968, it is said: "Where the title to the property is taken in the name of a third person without the knowledge or assent of the person paying the consideration, the resulting trust therein arises, as of course, in favor of the latter, as where the purchase price is paid by one person, with the real intention that the title thereto shall be taken in his name, but by mistake or otherwise it is taken without his knowledge or consent in the name of a third person . . ."

Considering plaintiff's evidence with the liberality we are required to do on a motion for judgment of nonsuit, and giving to him the logical inferences reasonably to be drawn therefrom, it tends to show that he furnished the entire consideration as a part of the original transaction of purchase at or before the time of conveyance with the real intention that the title thereto should be taken in the name of himself and his wife, vesting in them an estate by the entirety, but by mistake or inadvertence title was taken without his knowledge or consent in the name of his wife alone. His evidence is sufficient to carry the case to the jury on the theory of a resulting trust, and the motion for judgment of nonsuit was properly overruled.

Defendant in her brief groups forty assignments of error, and states they "all relate to the introduction of evidence over the objection of the defendant regarding a personal transaction between the plaintiff and his deceased wife under whom he claims."

Plaintiff testified without objection that he knew his wife's handwriting, and over objection was permitted to testify that his wife's signature was under his on the note given to the Insurance Company. This testimony was competent. *Batten v. Aycock,* 224 N.C. 225, 29 S.E. 2d 739. Plaintiff later testified we signed the note, the contract and the deed of trust, and left it with the Insurance Company. This evidence as to his wife's signing seems to be technically incompetent

(*Batten v. Aycock, supra*), but it is not sufficiently prejudicial to justify a new trial, for the reason that plaintiff offered the testimony of Mrs. Stella R. Britt to the effect, that she was a Notary Public, and plaintiff and his wife appeared before her, and she saw them sign the Land Contract, that later they appeared before her and acknowledged their signatures to the deed of trust, and she put her certificates on as a Notary Public.

Other assignments of error under this grouping relate to the plaintiff testifying over defendant's objection that the note and deed of trust were left with the Insurance Company, that the deed was not delivered when the deed of trust was executed, that he never saw the deed before it was delivered, that he did not record it, as to when he first read the deed and first discovered the mistake, as to their living in the house after its purchase, and that he made all the payments to the Insurance Company. This evidence does not come within the prohibition of G.S. 8-51, because it relates primarily to what the plaintiff did, and is not evidence concerning a personal transaction or communication between the witness and a deceased person. Plaintiff testified we bought the property. In the light of Mrs. Stella R. Britt's testimony, this would not justify a new trial.

Prejudicial error sufficient to justify a new trial is not shown under these grouped forty assignments of error, and they are all overruled.

Defendant next groups twenty assignments of error, which she states in her brief relate to the introduction over her objection of a deed from plaintiff's wife to him, which she contends is void by virtue of G.S. 52-12.

The Record shows plaintiff introduced in evidence without objection the deed from his wife to himself. Defendant assigns this as error. However, this assignment of error 67 has no exception to support it, and will be disregarded. *Rigsbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926; *Suits v. Ins. Co.,* 241 N.C. 483, 85 S.E. 2d 602. Many of these assignments of error relate to the testimony of Mrs. Lois P. Boatwright that in July 1950 she was a Notary Public, that she took the acknowledgment of Mrs. Waddell to the deed to her husband, and the circumstances of its execution. As the deed was admitted in evidence without objection, Mrs. Boatwright's testimony was not prejudicial.

Under this grouping assignment of error 73 is to the introduction in evidence of a discharge in bankruptcy of Mrs. Waddell. No argument is made, or citation of authority given in support of this assignment of error, and it is deemed abandoned. Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 563.

Under defendant's twenty grouped assignments of error, error sufficient to justify a new trial is not made to appear, and all are overruled.

Defendant groups six assignments of error in her brief, and contends

that the court committed error in admitting in evidence over her objection that plaintiff paid the taxes out of his salary on the property from the time of purchase to the present. This evidence was competent for the jury to consider in arriving at plaintiff's intention at the time of the conveyance, and as tending to rebut the presumption of a gift of the property to his wife. *Scanlon v. Scanlon, supra;* Bogert's The Law of Trusts and Trustees, Vol. 2A, p. 483.

The other assignments of error as to the admission of evidence have been examined, and are overruled.

Defendant assigns as error the form of the issue. We think it was sufficient, where proper instructions are given. *Thompson v. Davis,* 223 N.C. 792, 28 S.E. 2d 556.

Defendant assigns as error the judge's charge that the Statute of Limitations was not applicable. The charge in that respect was correct. All the evidence shows that plaintiff and his wife were in the continuous possession of the property purchased until her death, and that he has been in the continuous possession of it since. Therefore, his right of action to have defendant declared a trustee for his benefit is barred neither by any Statute of Limitations, nor by lapse of time. *Bowen v. Darden, supra; Spence v. Pottery Co., supra.*

Plaintiff assigns as error that the judge failed to charge the law on the substantive features of the case arising on the evidence, in that the judge failed to charge that when a conveyance is made to a wife on a consideration paid in full by the husband, nothing else appearing, the law presumes that it is a gift, that it is a rebuttable presumption of fact, and to rebut it the evidence must be clear, strong, cogent and convincing.

In *S. v. Boswell,* 194 N.C. 260, 139 S.E. 374, the Court in a well reasoned opinion by *Brogden, J.,* held that where upon a homicide trial the judge has fully and sufficiently charged the jury that the State must satisfy them of the defendant's guilt beyond a reasonable doubt, the mere failure of the judge to instruct the jury as to the presumption of the defendant's innocence will not be sufficient to grant a new trial in the absence of a special request to that effect, this presumption not being considered as evidence in the case.

The Court said in *In re Will of Wall,* 223 N.C. 591, 27 S.E. 2d 728: "The term presumption as connotating a presumption of law is generally used as indicative of a mandatory deduction which the law directs to be made, in the sense of a rule of law laid down by the Court, while a presumption of fact used in the sense of an inference is a deduction from the evidence, having its origin in the well recognized relation between certain facts in evidence and the ultimate question to be proven. In that case the Court quoted from *Gillett v. Michigan United Traction Co.,* 205 Mich. 410, 171 N.W. 537, as follows: "It is now quite generally

held by the courts that a rebuttable or *prima facie* presumption has no weight as evidence. It serves to establish a *prima facie* case; but, if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself." This language of the Michigan Court has been quoted with approval in *Jeffrey v. Manufacturing Co.*, 197 N.C. 724, 150 S.E. 503.

In *Com. v. Malbon,* 195 Va. 368, 78 S.E. 2d 683, the Court, speaking by its learned *Chief Justice,* said: "The presumption sought to be established by the instruction is a presumption of fact and not one of law. 'As a general rule a court will always instruct a jury with reference to presumptions of law, but it will ordinarily not instruct a jury with reference to presumptions of fact, for this would be obviously an encroachment on their province, they being the judges of fact. 7 Michie's Jurisprudence of Virginia and West Virginia, Sec. 18, pp. 349-350.' "

In the instant case the judge instructed the jury that the burden of proof to establish the trust was upon the plaintiff to satisfy the jury by evidence strong, clear and convincing. He further charged that, if the plaintiff had satisfied the jury by evidence that was strong, clear and convincing, that in 1932 he and his deceased wife entered into a contract with the Prudential Insurance Company, whereby he and his wife agreed to buy as tenants by the entirety, and the Insurance Company agreed to sell them the land described in the complaint, and that thereafter through a mistake a deed was made by the Insurance Company to the wife alone, but that it was the intention of the plaintiff and his wife that both should be named grantees in the deed, so that the estate should be vested in them as tenants by the entirety, and that the plaintiff furnished the entire consideration for the purchase out of his own funds then, and in that event, that is, if the plaintiff has satisfied you by strong, clear and convincing evidence of all these facts, and every one of them, it would be the jury's duty to answer the issue Yes; but if the plaintiff had failed to satisfy the jury by clear, strong and convincing evidence of each and every one of those facts, the jury should answer the issue No.

In view of this instruction by the judge as to what facts the jury must find by clear, strong and convincing evidence to answer the issue Yes, we do not feel constrained to upset the verdict and judgment for failure of the judge to charge the jury as to the rebuttable presumption of fact of a gift to the wife in the absence of a special request by the defendant for such an instruction.

The other assignments of error to the charge have been examined, and all are overruled.

The defendant offered no evidence. There is no evidence, or even a suggestion, that a penny of her money or of her mother's was paid for the purchase of this property. Plaintiff paid the entire purchase price, and listed the property and paid all the taxes, made $4,000.00 of improvements, all out of his salary, ministered to his wife in her protracted illness to the end, and, if he cannot prevail in his action, will be put out of his home in his old age. All the equities are with him.

Technical error is not sufficient to disturb a verdict and judgment. The burden is on the appellant to show prejudicial error amounting to the denial of some substantial right; or to phrase it differently, to show, if the error had not occurred, there is a reasonable probability the result of the trial might have been materially more favorable to her. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657. This she has not shown.

No error.

BOBBITT, J., concurring in result: I concur in the result. As to one feature, my ideas differ from those expressed in the Court's opinion.

Where the husband purchases property and *causes* it to be conveyed to his wife, the law presumes that it is a gift and no resulting trust arises. *Shue v. Shue,* 241 N.C. 65, 84 S.E. 2d 302, and cases cited. This, in my opinion, is a true presumption. Although rebuttable, the significance of this true presumption is that the fact is deemed established unless and until it is rebutted by clear, strong, cogent and convincing evidence. Stansbury, N. C. Evidence, sec. 215 *et seq.; Shue v. Shue, supra.*

True, in *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418, and in other cases, we have referred to such presumption as a presumption of fact; but, upon analysis of such cases, I think it clear that the phrase, a presumption of fact, as used therein, signifies only that the fact of gift is presumed. Its status as a true presumption casts the burden of proof upon any person who asserts that the true fact is otherwise. Stansbury, N. C. Evidence, sec. 215 *et seq.*

We have here a different situation from that considered in *Carlisle v. Carlisle, supra,* and similar cases. In that case, the husband *caused* the deed to be made to his wife. He undertook to rebut the true presumption of gift by evidence tending to show that he directed the deed to be so made pursuant to their agreement that she was to hold title for their joint benefit.

Here there is no allegation or evidence that the deed was made to plaintiff's wife under such an agreement. Therefore, if in fact plaintiff *caused* the deed to be made to his wife, there is no evidence to rebut the aforesaid true presumption.

The difference here is that plaintiff's case rests on two elements, first, that he paid the entire purchase price, *and* second, that the deed

was made to his wife, rather than to husband and wife, *by mistake,* without his knowledge or consent.

In the absence of testimony tending to show that he *caused* the deed to be made to his wife, this question arises: What presumption, if any, arises from the fact, standing alone, that the deed was made to his wife? In my opinion, the greatest significance that can be given thereto is that it gives rise to a presumption of fact, but only in the sense of an inference that he caused the deed to be so made. Such inference constitutes evidence for consideration by the jury.

Under the facts of this case, the burden of proof was not on defendant to establish that the deed was a deed of gift. The court properly placed upon plaintiff the burden of establishing the aforesaid *two* elements of his case by clear, strong, cogent and convincing evidence; and the jury found that he had done so.

In *Flanner v. Butler,* 131 N.C. 155, 42 S.E. 547, the distinction I am now considering was not drawn into focus; and the Court may well have used the phrase, "presumption of fact," in the sense so often used, to wit, an inference of fact. Too, in view of the jury's verdict, to wit, that the deed was made to the wife without the husband's knowledge and consent, the expression, if used in a sense different from that indicated, did not materially affect the decision and may well be regarded as a *dictum.* Moreover, the case cited in *Flanner v. Butler, supra,* in support of the statement that, nothing else appearing, "the law, owing to the relation of the parties, will presume that the husband intended it as a gift or present to his wife," is *Thurber v. LaRoque,* 105 N.C. 301, 11 S.E. 460. In that case, it was established that the deed was made to the wife "at the instance and request of" the husband. The question involved was whether such deed of gift should be set aside as a fraudulent conveyance at the instance of the husband's creditors.

In short, my view is that the fact, standing alone, that the deed was made to the wife gave rise to no more than an inference of gift. If this be true, it was a subsidiary feature of the case; and, certainly so in the absence of a special request therefor, no instruction relating to the nature of this inference was required.

Hence, in respect of the feature here concerned, I reach the same conclusion by a different course of reasoning.

RODMAN, J., concurs in concurring opinion.

FRANK SHOUP v. AMERICAN TRUST COMPANY, A CORPORATION, EXECUTOR AND TRUSTEE OF THE ESTATE OF CURTIS B. JOHNSON, DECEASED, GEORGE LEE, S. M. LEE, JR., AND HARRY LEE.

D. WATSON SMITH v. AMERICAN TRUST COMPANY, A CORPORATION, EXECUTOR AND TRUSTEE OF THE ESTATE OF CURTIS B. JOHNSON, DECEASED, GEORGE LEE, S. M. LEE, JR., AND HARRY LEE.

C. W. WALLACE v. AMERICAN TRUST COMPANY, A CORPORATION, EXECUTOR AND TRUSTEE OF THE ESTATE OF CURTIS B. JOHNSON, DECEASED, GEORGE LEE, S. M. LEE, JR., AND HARRY LEE.

(Filed 27 March, 1957.)

1. Wills § 34b—

A bequest of a designated sum to all persons who had been employed by testator's newspaper for a specified number of years, *is held* to include part-time employees regularly reporting for work each Saturday to perform a recurring job necessary in the issuance of the Sunday paper, even though they also had other employment. The distinction between "casual employees" and regular part-time employees, pointed out.

2. Wills § 39—

While ordinarily extrinsic evidence is admissible to identify persons embraced within a class to whom a devise or bequest has been made, such evidence is not competent when the language of the will is not ambiguous.

APPEAL by defendants from *Sharp, Special Judge,* October Term 1956 of MECKLENBURG.

These are three civil actions commenced in July 1952, individually by Frank Shoup, D. Watson Smith and C. W. Wallace against American Trust Company, a corporation, executor and trustee of the estate of Curtis B. Johnson, deceased, to have themselves adjudicated legatees under the will of Curtis B. Johnson and to have their claims in the amount of $1,000 each proved to be valid and proper claims. The executor and trustee filed answer in each case denying the claims of the respective plaintiffs. Subsequently, George Lee, S. M. Lee, Jr., and Harry Lee, who are the residuary legatees under the will of Curtis B. Johnson, were ordered to be made additional parties defendant in each of the three actions. These additional parties defendant filed an answer in each case. The cases were consolidated for trial and were tried before Sharp, Special J., and a jury at the 22 October 1956 Special Term of the Superior Court for Mecklenburg County.

Curtis B. Johnson of Charlotte, North Carolina, died on 6 October 1950. For many years prior to his death, he was the publisher of *The Charlotte Observer* and president of The Observer Company. On his death Mr. Johnson left a holographic will dated 9 April 1947 making,

among others, the following bequests: "To all employees of the Charlotte Observer who have been with the paper for twenty years or more I direct that they be paid One Thousand Dollars ($1,000.00) each and all of those who have been with the paper for ten to twenty years, ($500.00) Five Hundred Dollars each."

The plaintiff Smith worked regularly each week in the mail room of *The Charlotte Observer* for more than thirty years prior to the death of Curtis B. Johnson. Plaintiffs Shoup and Wallace worked regularly each week in the mail room of *The Charlotte Observer* for more than twenty years prior to the death of Curtis B. Johnson.

The duties of the plaintiffs consisted of assembling sections of the Sunday and special editions of *The Observer*, including comic sections and other material to be included in such editions, and in "jogging" the papers together and stacking them in bundles for distribution. This was an essential task, without which the paper could not have been gotten out and distributed satisfactorily.

All of the plaintiffs reported regularly for work, without notice, each Saturday and worked Saturday night and until early Sunday morning in getting out the Sunday edition of *The Charlotte Observer*. In addition thereto, they were called from time to time to do extra work in getting out special editions of the paper.

The plaintiffs were not full-time employees of *The Charlotte Observer* but were regular employees, working each Saturday night and Sunday morning. Smith began working for *The Charlotte Observer* in 1919, and was supervisor over the men in the mail room from 1940 to 1950, and would average working from eleven to twelve hours each week; he was receiving for his services an annual remuneration of between six and seven hundred dollars. At the time of Mr. Johnson's death this plaintiff had from fifty to fifty-five men working under him in the mail room. Shoup began working for *The Charlotte Observer* in 1929; he usually reported for work at 10:00 o'clock on Saturday night and got off around 4:30 or 5:00 a.m. on Sunday; his remuneration, since he returned from the Army in 1945, averaged about ten or twelve dollars per week. Wallace began working for *The Charlotte Observer* in 1929, and usually reported for work about 5:00 o'clock Saturday afternoon and would work until 5:00 or 5:30 o'clock Sunday morning. He was paid approximately five hundred dollars per annum for his work for The Observer Company.

The plaintiffs received the paper at half price, which was the regular employee rate; they were given a Christmas bonus each year based upon the length of their service with *The Charlotte Observer;* were designated as employees on the official records of *The Charlotte Observer*, and had social security and withholding deductions made from their weekly pay checks at *The Observer.*

Plaintiffs had other jobs during the week but such jobs did not interfere in any way with their work at *The Observer.*

During World War II, while plaintiffs Shoup and Wallace were in service, their names were carried on the Honor Roll of *The Charlotte Observer* on the editorial page, along with the names of full-time employees.

At the close of all the evidence, the court being of the opinion that this was not a matter for the jury, held as a matter of law that the plaintiffs are entitled to recover and entered judgment accordingly. Defendants appeal, assigning error.

Carswell & Justice and B. Kermit Caldwell for plaintiffs.

Helms & Mulliss and John D. Hicks for American Trust Company.

Taliaferro, Grier, Parker & Poe and Covington & Lobdell for defendants S. M. Lee, Jr., and Harry Lee.

Cochran, McCleneghan & Miller for defendant George Lee.

DENNY, J. The appellants seriously contend that the plaintiffs, being only part-time help, were not "employees of *The Charlotte Observer*" within the meaning of the will of Curtis B. Johnson and, therefore, the trial court erred in ruling that plaintiffs are entitled to legacies under the provisions of his will, citing Schouler on Wills (5th Ed.), Vol. 1, section 566a; Page on Wills, Lifetime Edition, Vol. 3, section 1035; Rood on Wills, section 460; *Metcalf v. Sweeney,* 17 R.I. 213, 21 A. 364, and *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12.

It is stated in the above cited section of Schouler on Wills: "A devise or legacy is not unfrequently given to a servant or servants of the testator. Where a gift is made to such as may answer that description, and without identifying particular persons as the objects of one's bounty, courts incline to limit its benefit if not to strict 'household' servants, at least to such as spend their whole time in the master's employ; not extending the gift, in its scope, to persons who come back and forth for casual employment and work also for others."

The cited section of Page on Wills contains the following language: "A gift to employes or servants is a gift to those who are employed with some degree of regularity and continuity. It does not include those who do merely casual work for the designated employer. A gift to 'such servants as shall be in my employ at my death' does not include persons who were hired a day or so at a time to assist the regular servants."

Section 460 of Rood on Wills states: "Gifts to servants, unexplained, include only those directly and regularly employed."

The case of *Metcalf v. Sweeney, supra,* involved the interpretation of a provision in the will of one Henry J. Steere, reading as follows: "I

direct my said executor to transfer and pay over to such servants as shall be in my employ at my death the sum of twelve thousand dollars in such manner that each of said servants shall receive equal portions of said sum."

There were six servants employed by the testator regularly and continuously at the time of his death. Mrs. Annie Crosby claimed to be entitled equally with the six. The opinion recites the following with respect to Mrs. Crosby's employment: "The most trustworthy testimony as to the extent of her employment comes from a Miss Arnold, housekeeper for Mr. Steere, who testifies from memoranda made for purposes of payment. She testified that Mrs. Crosby worked 37 days in 1885, 131 in 1886, 65½ in 1887, 34 in 1888, and 35 in 1889; that as a rule she was not employed more than two days a week, and then to help the regular servants."

Upon this evidence, the Court held: "It seems to us that the service rendered by her lacks the continuity, the fixity and permanence, of relation that is needed to give validity to the claim. Our decision is that she is not entitled to share in the bequest."

Likewise, the appellants here, in support of their contention that these plaintiffs were not employees within the meaning of the provisions of the will of Mr. Johnson, recite the following statement from the opinion in *In re Will of Johnson, supra:* "The solution of the problem is found in the expressed purpose of the testator. His intention is his will. This intention is to be gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if it is not also within the intention."

In our opinion, the foregoing authorities do not support the appellants' contention in light of the facts before us. It is clear that *Metcalf v. Sweeney, supra,* as well as the textbook authorities cited, support the view that the servant or employee should be excluded where the employment was casual, but included where there was continuity and permanence of employment. Therefore, it becomes pertinent and important to see what is meant by "casual employment." Black's Law Dictionary, 2nd Edition, page 288, defines "casual" in this connection as meaning "occasional; incidental; happening at uncertain times; not stated or regular." In the case of *Van Nuys v. Levine,* 11 N. J. Misc. 309, 165 A. 885, the Court defined as "casual employment," employment for "a particular job which is not to be continued at regular or recurring intervals." In *Dobrich v. Pittsburgh Terminal Coal Corp.,* 145 Pa. Super. 87, 20 A. 2d 898, the Court quoted with approval from the case of *Cochrane v. William Penn Hotel,* 140 Pa. Super. 323, 13 A. 2d 875, affirmed 339 Pa. 549, 15 A. 2d 43, the following: "Applying it

(casual) as practically as possible to the subject of employment, it may be said in general that if a person is employed only occasionally, at comparatively long and irregular intervals, for limited and temporary purposes, the hiring in each instance being a matter of special engagement, such employment is casual in character. On the other hand, even though an employment is not continuous, but only for the performance of occasional jobs, it is not to be considered as casual if the need for the work recurs with a fair degree of frequency and regularity, and, it being thus anticipated, there is an understanding that the employee is to perform such job as the necessity for it may from time to time arise." Likewise, in *Flynn v. Carson,* 42 Idaho 141, 243 P. 818, the Court held that regular recurring employment, though only on Saturday nights, of an extra bus trip, is not a "casual employment." Moreover, the above quotation from Page on Wills contains the statement that "a gift to employes or servants is a gift to those who are employed with some degree of regularity and continuity."

In the case of *Johnson v. Hosiery Co.,* 199 N.C. 38, 153 S.E. 591, this Court, in discussing what is and what is not "casual employment," quoted with approval from the opinion in *Hoffer Bros. v. Smith,* 148 Va. 220, 138 S.E. 474, the following: "The test is the nature of the employment and not the nature of the contract. An employment cannot be said to be casual where it is in the usual course of the trade, business, or occupation of the employer. But it is casual when not permanent nor periodically regular, but occasional or by chance, and not in the usual course of the employer's trade or business." *Hunter v. Peirson,* 229 N.C. 356, 49 S.E. 2d 653; *In re Monroe, Exrs.,* 132 Misc. Rep. 279, 229 N.Y.S. 476; *Cox v. Brown,* 227 Mo. 157, 50 S.W. 2d 763. *Cf. Raines v. Osborne,* 184 N.C. 603, 114 S.E. 846.

The facts revealed by the record on appeal in the instant case lead us to the conclusion that, while these plaintiffs had not been full-time employees of *The Charlotte Observer* for twenty years at the time of the death of the testator, Curtis B. Johnson, nevertheless, they had been with the paper as regular and continuous employees of *The Observer* for that period of time and that their employment was in no sense casual. It is conceded by all parties that the time spent in the military service by any employee of *The Observer,* during World War II, should not be considered in ascertaining the period of employment with *The Observer.* Consequently, we hold that the plaintiffs are entitled to the legacies bequeathed "to all employees of *The Charlotte Observer* who have been with the paper for twenty years or more." We think these plaintiffs come within the letter and the intention of the testator when the language used by him is given its natural and ordinary meaning. Furthermore, we find nothing in the language used that supports the view that the testator intended to limit the benefits

to "all employees of The Charlotte Observer who have been with the paper for twenty years or more" to full-time employees only. *Marks v. Thomas,* 238 N.C. 544, 78 S.E. 2d 340; *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151; *Bank v. Phillips,* 235 N.C. 494, 70 S.E. 2d 509.

The appellants are relying on certain extrinsic evidence introduced by them in the hearing below, among which was a form letter sent out over the facsimile signature of Mr. Johnson to the regular full-time employees of The Observer Company in December 1949, more than 2½ years after he had executed his will, to show his intent in connection with the use of the word "employees." The appellants contend the letter shows clearly that Mr. Johnson did not consider these plaintiffs as employees. On the other hand, the appellants assign as error extrinsic evidence introduced by the plaintiffs which tend to show The Observer Company and Mr. Johnson recognized them as employees of *The Observer.*

Ordinarily, extrinsic evidence is admissible to identify persons embraced within a class to whom a devise or bequest has been made. However, in the absence of ambiguous language in the will, extrinsic evidence, either parol or written, may not be admitted "to vary, contradict, or add to the terms of the will, or to show a different intention on the part of the testator from that disclosed by the language of the will, . . ." 57 Am. Jur., Wills, section 1040, page 674; *Field v. Eaton,* 16 N.C. 283; *Reeves v. Reeves,* 16 N.C. 386; *Blacknall v. Wyche,* 23 N.C. 94; *Kinsey v. Rhem,* 24 N.C. 192; *Barnes v. Simms,* 40 N.C. 392, 49 Am. Dec. 435; *Thomas v. Lines,* 83 N.C. 191; *Wooten v. Hobbs,* 170 N.C. 211, 86 S.E. 811; *Trust Co. v. Wolfe, ante,* 535, 96 S.E. 2d 690, and cited cases; Anno.—Will—Construction—Extrinsic Evidence, 94 A.L.R. 26.

The remaining assignments of error, in our opinion, present no prejudicial error. The judgment of the court below will be upheld.

Affirmed.

VIRGINIA LAMM HAYES AND HUSBAND, J. F. HAYES, BESSIE H. LAMM, ZELMA LAMM POYTHRESS AND HUSBAND, T. M. POYTHRESS, AND TEMPIE ANN HAYES, AN INFANT APPEARING HEREIN BY HER NEXT FRIEND, J. W. HARRISON, v. EUNICE WILLIAMSON DECKER RICARD AND FREE WILL BAPTIST ORPHANAGE, INCORPORATED.

(Filed 27 March, 1957.)

1. *Ejectment* § 15—

In all actions in the nature of ejectment, plaintiff must show ownership and right to possession, and, if he seeks a monetary judgment, wrongful possession of defendant and the amount of damages resulting therefrom.

2. Deeds § 1a—

A quitclaim deed reciting a valuable consideration and that the grantors did thereby bargain, sell, quitclaim and convey all right, title and interest to the described lands, is an instrument of conveyance and passes whatever right, title and interest grantors had power to convey at the time of its execution and delivery.

3. Deeds § 5—

The registration of a deed raises the presumption of execution and delivery.

4. Registration § 4—

A subsequently dated but prior recorded deed, including a quitclaim deed supported by consideration, takes precedence over a prior dated but subsequently recorded fee simple deed. G.S. 47-18.

5. Ejectment § 17—

Where plaintiffs in ejectment introduce a registered fee simple conveyance from the common source of title and also, for the purpose of attack, a subsequently dated but prior recorded quitclaim deed to defendant from the common source, but failed to offer any evidence attacking the quitclaim deed or rebutting its recitation of a valuable consideration, nonsuit is proper for their failure to show a superior title from the common source. Plaintiff's contention that the quitclaim deed disclosed on its face that it conveyed nothing, since at the time of its execution the grantor had already executed a warranty deed and therefore had nothing left to convey, is untenable under our registration laws.

APPEAL by plaintiffs from *Fountain, S. J.*, September, 1956 Term, WILSON Superior Court.

This is a civil action in the nature of ejectment. Decision on a former appeal is reported in 244 N.C. 313, 93 S.E. 2d 540, to which reference is made for analysis of the pleadings. On the hearing from which the present appeal was taken, the plaintiffs introduced a record chain of title to the land in controversy culminating in a deed to R. A. Stamper, under whom both the plaintiffs and the defendants claim. The plaintiffs introduced a fee simple warranty deed dated 30 April, 1945, from R. A. Stamper and wife to Grover T. Lamm (subject to a deed of trust which Grover T. Lamm paid). This deed recited a consideration of $10.00 and other valuable consideration. They also introduced the will of Grover T. Lamm probated on 18 December, 1952. If the plaintiffs and the defendant Free Will Baptist Orphanage acquired the land in controversy, they did so under items of Mr. Lamm's will devising to them certain interests "in all real estate owned by me and located in Wilson County." No further identification or description of the devise is given.

The plaintiffs also introduced in evidence (for the purpose of attack) a deed as follows, (omitting the description which is not in dispute):

"NORTH CAROLINA
WILSON COUNTY

THIS QUITCLAIM DEED made this 7th day of September, 1946, by R. A. Stamper and his wife, Sophie P. Stamper, parties of the first part, to Eunice Williamson Decker, party of the second part, all of Wilson County, North Carolina, WITNESSETH:

That for and in consideration of the payment unto them of One Dollar and other valuable consideration, the receipt of which is hereby acknowledged, the said R. A. Stamper and wife, Sophie P. Stamper, have bargained and sold and do hereby bargain, sell, quitclaim and convey unto the said Eunice Williamson Decker, all of the right, title and interest in and to the following described tract of land, to-wit: (description omitted)

TO HAVE AND TO HOLD all of the right, title and interest of the parties of the first part in and to the above described tract of land unto the said Eunice Williamson Decker, her heirs and assigns, in fee simple forever.

IN WITNESS WHEREOF, the said R. A. Stamper and his wife, Sophie P. Stamper, have hereunto set their hands and affixed their respective private seals the day and year first above written.

R. A. Stamper (SEAL)
Sophie P. Stamper (SEAL)."

The parties entered into stipulations material to the controversy as follows:

"1. It is admitted that the land in question in this controversy was conveyed by one Parker and others to R. A. Stamper by deed dated March 24, 1945, and which is of record in the office of the Register of Deeds of Wilson County in Book 297 at page 374. . . .

3. It is admitted that a deed from R. A. Stamper and wife to Grover Lamm, dated April 30, 1945, appears of record in the office of the Register of Deeds of Wilson County in Book 487, page 314, and that said deed was filed for registration at 3 p.m. on December 23, 1952.

4. It is admitted that R. A. Stamper and wife executed an instrument of conveyance dated September 7, 1946, to Eunice W. Ricard, which is recorded in Book 487, at page 301, in the office of the Register of Deeds of Wilson County, and which instrument was filed for registration at 10:15 a.m. on December 23, 1952."

It was further stipulated that the interests of the plaintiffs and the defendant orphanage are identical and that R. A. Stamper listed and

Grover T. Lamm paid the taxes on the land for the years 1946 through 1952.

At the close of the plaintiffs' evidence the court sustained the defendant's motion for judgment of nonsuit and the plaintiffs appealed.

Lamb, Lamb & Daughtridge
By: Vernon F. Daughtridge,
Cooley & May,
By: Hubert E. May, for plaintiffs, appellants.
Gardner, Connor & Lee,
By: Cyrus F. Lee, for defendant Eunice Williamson Decker Ricard, appellee.

HIGGINS, J. The record in this case presents for decision the question whether the evidence is sufficient to entitle the plaintiffs to go to the jury on the issues of (1) their ownership, (2) their right to possession of the lands described in Exhibit "A" attached to the complaint.

As in all actions in the nature of ejectment, the plaintiffs, in order to prevail, must show ownership and right to possession. If, in addition, they seek to recover a monetary judgment, they must show wrongful possession and the amount of damages resulting therefrom. The law recognizes a number of ways in which a plaintiff may show title. *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759; *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593.

In this case the plaintiffs sought to establish their better title from R. A. Stamper—a common source. They introduced a deed by which R. A. Stamper and wife, for $10.00 and other valuable consideration purported to convey a fee simple estate to Grover T. Lamm. This deed bears date 30 April, 1945. It was filed for registration at 3:00 p.m. 23 December, 1952. The plaintiffs also introduced for the purpose of attack Stamper and wife's quitclaim deed, stipulated to be an instrument of conveyance, dated 7 September, 1946, for One Dollar and other valuable consideration. This deed was filed for registration at 10:15 a.m. 23 December, 1952.

After introducing the Ricard deed "for the purpose of attack" the plaintiffs offer nothing by way of attack. They contend the deed on its face, regardless of the time of registration, is insufficient to defeat the plaintiffs' title.

Thus squarely presented, is the question whether the prior dated but subsequently recorded fee simple deed takes precedence over the subsequently dated but prior recorded "conveyance" to the defendant Ricard. If it does, the court committed error and the case should go back for a jury trial. If it does not, the plaintiffs prove themselves out

of court by showing a superior title in the defendant Ricard from the common source, and the judgment should be affirmed.

The plaintiffs contend that the defendant Ricard received a quitclaim deed which is in itself notice that it may not convey anything. Nevertheless, the deed, by its terms, is for a valuable consideration, and no evidence has been introduced to the contrary. By its terms Stamper and wife "have bargained and sold and do hereby bargain, sell, quitclaim and convey . . . all right, title and interest" to the described lands. It must be admitted that she took what right, title, and interest Stamper and wife had power to convey at the time of the execution and delivery of the conveyance. "The title to realty may be as effectually transferred by quitclaim deed as by any other form of conveyance and such a deed will convey whatever interest the grantor may have at the time it is given." 26 C.J.S., sec. 118, p. 946, citing cases from 31 states under footnotes 97 and 98. A release to any right, title, and interest she may have "is not only sufficient to release her indebtedness against the land described . . . but also to convey all right, title, and interest she had in the premises." *Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440.

The plaintiffs further contend that the defendant who claims under a conveyance of later execution but of prior registration "has a burden of proving she is a *bona fide* purchaser for value and, therefore, entitled to the protection of the registration laws." However, the plaintiffs introduced the deed from the Stampers to Ricard, showing its prior registration. In so doing they do not leave to the defendant Ricard the burden of showing she has the superior title from Stamper which she acquired for value, but they carry the burden for her by introducing her deed which shows on its face that it was executed for value and that it was of prior registration. Introduced for the purpose of attack, it remains as evidence in the case, put there by the plaintiffs and unimpeached by them. True, the plaintiffs alleged the quitclaim deed was without consideration and was never delivered. On all matters relating to invalidity the plaintiffs rest on allegation without proof. The deed shows consideration. The registration raises the presumption both of execution and delivery. *Bank v. Sherrill,* 231 N.C. 731, 58 S.E. 2d 741.

The plaintiffs have proceeded on the assumption that the quitclaim deed conveyed nothing because the grantor had nothing left after having executed the warranty deed to Lamm. The assumption overlooks the registration statutes. Without doubt a second warranty deed first registered takes precedence over a prior executed but subsequently registered warranty deed. The form of the second conveyance has no bearing on what the grantor has left to convey. In *Glass v. Shoe Co.,* 212 N.C. 70, 192 S.E. 899, this Court said: "We, therefore, hold that where one makes a deed for a valuable consideration, and the grantee fails to register it, . . . such deed does not . . . bar the entry of a

grantee in a subsequent deed for valuable consideration who has duly registered his deed." G.S. 47-18 provides: "No conveyance of land . . . shall be valid to pass any property, as against creditors or purchasers for a valuable consideration . . . but from the registration thereof in the county where the land lies." The purpose of the statute is to point out to prospective purchasers the one place where they must go to find the condition of land titles—the public registry. "Notice, however full or formal, cannot take the place of registered documents." *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892; *Eller v. Arnold,* 230 N.C. 418, 53 S.E. 2d 266; *Winston v. Lumber Co.,* 227 N.C. 339, 42 S.E. 2d 218; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Hinton v. Williams,* 170 N.C. 115, 86 S.E. 994; *Austin v. Staten,* 126 N.C. 783, 36 S.E. 338. "Under this Section (G.S. 47-18) a grantee in a deed acquires title to the land there conveyed as against subsequent purchasers for value from the date of the registration of the instrument. *Sills v. Ford,* 171 N.C. 733, 88 S.E. 636. And among two or more contracts to sell land, the first one registered will confer the superior right." *Clark v. Butts,* 240 N.C. 709, 83 S.E. 2d 885.

The defendant Ricard's deed, though styled a quitclaim deed, goes somewhat beyond the original purpose and concept of such a deed. Originally the purpose, as the name implies, was to release or abandon a previously asserted claim to some interest in land. The operative words were usually to release, remise and quitclaim. The defendant Ricard's deed recites that Stamper and wife "have bargained and sold, and do hereby bargain and sell, quitclaim and convey . . . all right, title and interest in the lands involved, . . . to have and to hold all of the right, title and interest . . . unto Eunice Williamson Decker (now Ricard), her heirs and assigns in fee simple forever." While the deed purports to convey only such right, title, and interest as the Stampers had, the public registry, upon which the grantee had a right to rely, showed the Stampers had a fee simple title. "Where A conveys . . . to B and later conveys to C, with C recording first, our court has uniformly held that C has the better title, saying, '. . . one first registered will confer the superior right.' . . . Thus under the recordation acts the grantor retains a power to defeat his earlier conveyance, if not recorded, by a subsequent conveyance to a second grantee. This encourages a prompt recordation. In North Carolina, even though C has actual notice of the prior conveyance he will prevail." N. C. Law Review, Vol. 27, p. 377; *Combes v. Adams,* 150 N.C. 64, 63 S.E. 186; *Eaton v. Doub,* 190 N.C. 14, 128 S.E. 494; *Patterson v. Bryant,* 216 N.C. 550, 5 S.E. 2d 849. Until the contract or conveyance is recorded, third parties may deal with the property as if no contract or conveyance existed. *Grimes v. Guion,* 220 N.C. 676, 18 S.E. 2d 170; *Case v. Arnold,*

215 N.C. 593, 2 S.E. 2d 694; *Smith v. Turnage-Winslow Co.*, 212 N.C. 310, 193 S.E. 685.

In an action for the recovery of real property the plaintiffs must make out a *prima facie* title; otherwise nonsuit is proper. *Allgood v. Trust Co.*, 242 N.C. 506, 88 S.E. 2d 825; *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909; *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248; *McDonald v. McCrummen*, 235 N.C. 550, 70 S.E. 2d 703.

The plaintiffs failed to make out a case in that they failed to show a superior title from R. A. Stamper. The judgment of nonsuit was properly entered, and the judgment of the Superior Court of Wilson County is

Affirmed.

J. W. EDWARDS, J. H. EDWARDS AND PLANTERS NATIONAL BANK & TRUST COMPANY, ROCKY MOUNT, N. C., GUARDIAN OF CADMUS EDWARDS, v. WILLIAM FREDERICK BATTS, WILLIAM E. PULLY, JR., YOUNG A. PULLY AND HIS WIFE, MARSHALL S. PULLY, WILLIAM E. PULLY, JR., AND YOUNG A. PULLY, EXECUTORS OF THE ESTATE OF WILLIAM E. PULLY, SR., AND W. M. SPEARS, TRUSTEE FOR THE CITY INDUSTRIAL BANK OF ROCKY MOUNT, ROCKY MOUNT, N. C., AND CITY INDUSTRIAL BANK OF ROCKY MOUNT, ROCKY MOUNT, N. C.

(Filed 27 March, 1957.)

1. Pleadings § 15—

A demurrer admits the relevant facts alleged but not the conclusions of law.

2. Husband and Wife § 14—

A deed to husband and wife, nothing else appearing, vests the title in them as tenants by the entirety, with right of survivorship.

3. Partition § 1—

Partition is the division of land between two or more co-owners, and deeds executed by the sole owner of a parcel of land for division thereof among her children does not effect a partition.

4. Descent and Distribution § 13—

The doctrine of advancements is relevant solely in determining the share of a child in the real or personal estate owned by the parent at the time of death, and is irrelevant in the construction of a gift *inter vivos*.

5. Husband and Wife § 12c—

The mother, for the purpose of dividing her lands between her four children, executed deeds conveying separate tracts to each respectively, and in the deed to her daughter made the conveyance to her daughter and the daughter's husband. *Held:* The daughter had no interest in the land prior to the conveyance or right to determine the disposition the parent should

make of it by deed or will, and therefore there was no conveyance of any interest in the land by the daughter to her husband, and G.S. 52-12 is not applicable.

6. Deeds § 1a—

The owner of land executed deeds to each of her four children for a separate parcel thereof for the purpose of making an equal division, but the deed to her daughter was made to her daughter and her daughter's husband. The deed of gift was recorded within the time prescribed by G.S. 47-26. *Held:* The owner had the right to convey the property as she pleased, and the deed of gift to her daughter and to her daughter's husband is valid and created an estate by the entirety in them.

7. Deeds § 4—

A deed of gift registered within the time prescribed by G.S. 47-26 is an executed contract and is valid, notwithstanding the absence of consideration.

APPEAL by plaintiffs from *Moore (Clifton L.), J.,* November Term, 1956, of EDGECOMBE.

The hearing below was on defendants' demurrers *ore tenus,* interposed on the ground that the amended complaint did not state facts sufficient to constitute a cause of action.

Summarized, the amended complaint alleges:

Prior to 14 February, 1941, Mrs. Lena P. Edwards, a widow, owned in fee simple certain lands in Edgecombe County. She had four children, J. W. Edwards, J. H. Edwards, Adelia Edwards Batts and Cadmus Edwards.

Mrs. Edwards decided: (1) "To partition her lands in the nature of a Family Division"; (2) "to divide her lands into four equal shares in value"; (3) to convey one of said shares to each of her said four children; (4) to reserve a life estate in the share, embracing the homeplace, to be conveyed to her son, Cadmus Edwards; and (5) to reserve to herself for her lifetime, for her support and maintenance, certain "charges or rents" on each of the shares to be conveyed to J. W. Edwards, J. H. Edwards and Adelia Edwards Batts, wife of William Frederick Batts.

"In pursuance of her plan of partition of her lands in the nature of a Family Division," she selected three disinterested persons who, with assistance of a competent surveyor, divided said lands into four parcels of equal value. Thereupon, she employed an attorney to draft deeds to effectuate her said plan. ". . . her desire, intention and purpose to convey said lands to her said four children was that each of her said children might have an equal share of her lands and enjoy the use of same prior to as well as after her death."

"9. That at said time, however, Adelia Edwards Batts and her husband, William Frederick Batts, or one of them, requested that the share

which the said Adelia Edwards Batts was to receive be made to them as husband and wife; that the said Mrs. Lena P. Edwards agreed to comply with said request, and she then instructed her attorney to draw the deed for the share of Adelia Edwards Batts in and to said land to Adelia Edwards Batts and William Frederick Batts, her husband."

The four deeds "for the partition of said lands" were then drafted. The execution thereof by Mrs. Lena P. Edwards, the grantor, was acknowledged 25 February, 1941, and all were duly recorded.

One parcel, the land now in controversy, by deed dated 14 February, 1941, was conveyed by Lena P. Edwards (widow) to Adelia Edwards Batts and husband, William Frederick Batts, their heirs and assigns. A copy of this deed, marked Exhibit A, is attached to and made a part of the amended complaint. A special provision thereof obligated "the parties of the second part" to pay to the "party of the first part" the sum of $125.00 on the first day of November, 1941, and on the first day of November of each and every year thereafter during the lifetime of the "party of the first part," and to pay 1941 taxes on the land conveyed.

"No monetary consideration, or anything of value," passed from any of the said grantees to Mrs. Edwards when the four deeds were made, or at any time prior thereto, "except the right of each of her children to his or her share in the division of said lands."

The "said conveyances to said grantees were advancements made by the said Mrs. Lena P. Edwards to her four children and represent a voluntary partition of her said lands," subject to said reservations.

Mrs. Edwards died 6 April, 1946, intestate, leaving said four children as her heirs at law. She left "no property of consequence." There was no administration of her estate. No inheritance tax was paid to the State of North Carolina.

Thereafter, to wit, 3 February, 1949, Adelia Edwards Batts died, intestate. There was no issue born alive of the marriage between Adelia Edwards Batts and William Frederick Batts, her husband. William Frederick Batts survived his said wife.

J. W. Edwards, J. H. Edwards and Cadmus Edwards, plaintiffs herein, are the heirs at law of Adelia Edwards Batts and as such own the real property described in Exhibit A. Plaintiff trust company is the general guardian of Cadmus Edwards and acts herein in his behalf.

The defendants are William Frederick Batts and persons who derive their title from him. Upon the death of Adelia Edwards Batts, William Frederick Batts continued in possession of the property in controversy until he executed and delivered a deed therefor in 1954. Since then other defendants have been in possession.

Plaintiffs pray that the "purported" deed, Exhibit A, "be declared inoperative as to the defendant, William Frederick Batts"; that the

subsequent purported conveyances by Batts and those who derive title from him be adjudged null and void, in so far as they attempt to convey the property now in controversy, and removed as clouds from plaintiffs' title; that, in the alternative, defendants be declared trustees for plaintiffs; that defendants' possession be adjudged unlawful and that a writ of possession issue in plaintiffs' behalf; and that defendants account to plaintiffs for the reasonable rental value for said property for 1949 and subsequent years.

At the conclusion of said hearing, the court sustained defendants' demurrers *ore tenus* to the amended complaint and dismissed the action at the cost of the plaintiffs. Plaintiffs excepted and appealed.

William W. Jones and Philips & Philips for plaintiffs, appellants.
Thorp & Thorp for defendant William Frederick Batts, appellee.
Spruill & Spruill and John M. King for other defendants, appellees.

BOBBITT, J. Decision must be based on the relevant facts alleged by plaintiffs. *Pressly v. Walker,* 238 N.C. 732, 78 S.E. 2d 920. Plaintiffs' conclusions of law are not admitted by the demurrers. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440.

A deed to husband and wife, nothing else appearing, vests the title in them as tenants by entirety. *Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45, and cases cited. Upon the death of husband or wife, the survivor becomes the sole owner by virtue of the deed creating the tenancy by entirety. *Woolard v. Smith,* 244 N.C. 489, 493, 94 S.E. 2d 466, and cases cited.

Clear analysis requires that we keep in mind that plaintiffs' claim of ownership is based on their status as heirs at law of Adelia Edwards Batts, not as heirs at law of Mrs. Lena P. Edwards. Plaintiffs do not attack the deed made by Mrs. Lena P. Edwards nor do they seek to reform it. On the contrary, they base their claim of ownership on the deed. Their position is that the deed is effective as a conveyance to Adelia Edwards Batts, but not as to William Frederick Batts.

Plaintiffs' allegations that Mrs. Lena P. Edwards planned and effected a "partition" of her lands in the nature of "a Family Division" are erroneous conclusions of law. The facts alleged disclose that Mrs. Edwards was the sole owner and that the entire transaction was her voluntary act. She could divide her lands and convey all or separate parcels thereof as she saw fit.

Partition presupposes co-ownership by two or more persons. 40 Am. Jur., Partition sec. 2; 68 C.J.S., Partition sec. 1. Whether effected by partition proceeding or by an exchange of deeds, the sole purpose and effect is to sever the unity of possession and to fix the physical boundaries of the several parts of the common property to be held in severalty

by the respective tenants. Partition creates no new estate and conveys no title. *McLamb v. Weaver,* 244 N.C. 432, 436, 94 S.E. 2d 331, and cases cited. The principles underlying decision in such cases as *McLamb v. Weaver, supra, Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474, and *Sprinkle v. Spainhour,* 149 N.C. 223, 62 S.E. 910, have no application here.

Plaintiffs' allegation that the four deeds constituted "advancements" is irrelevant. This action does not relate to property owned by Mrs. Edwards at the time of her death. When she died, according to plaintiffs' allegation, she owned no property. Advancements affect the child's right to share by inheritance or by distribution in the real estate and personal property *owned by the parent* at the time of death. *Atkinson v. Bennett,* 242 N.C. 456, 88 S.E. 2d 76.

Ignoring the fact that, by the terms of said deed, both Adelia Edwards Batts and husband, William Frederick Batts, were obligated to pay the stipulated amount to Mrs. Lena P. Edwards each year during her lifetime, we consider plaintiffs' allegation that there was no consideration for the deed "except the right of each of her children to his or her share in the division of said lands." Plaintiffs contend that Adelia Edwards Batts, individually, was entitled to the deed; and that, in the absence of compliance with G.S. 52-12, the deed was void as to her husband, William Frederick Batts. The facts alleged disclose that this contention is without merit.

Prior to the execution and delivery of said deed, Adelia Edwards Batts owned no interest or estate in her mother's land, only the possibility of inheritance if perchance her mother died intestate and then owned the land. Mrs. Lena P. Edwards, as owner, could convey the land (or devise it) as she saw fit. She could have conveyed it to William Frederick Batts, individually, if she had wished to do so. A child has no legal right to determine the disposition a parent shall make, by deed or by will, of the parent's property.

Adelia Edwards Batts, individually, was not legally entitled to the deed. The relationship of parent and child, although a good and sufficient consideration to support an executed deed, did not entitle her to compel or direct a conveyance of her mother's lands. 12 Am. Jur., Contracts sec. 78; 17 C.J.S., Contracts sec. 91; *Exum v. Lynch,* 188 N.C. 392, 396, 125 S.E. 15. It was for Mrs. Edwards, the sole owner, to determine whether and to whom she would convey her property. She made her decisions of her own free will; and her decisions control, whatever the reasons she considered a sufficient basis therefor. There was no conveyance by Adelia Edwards Batts to her husband, William Frederick Batts, direct or indirect. Hence, G.S. 52-12 has no application.

Accepting plaintiffs' allegations, the said deed was a deed of gift from Mrs. Lena P. Edwards to Adelia Edwards Batts and husband, William Frederick Batts. A deed of gift, duly signed and delivered, is an executed contract. If recorded within the time prescribed by G.S. 47-26, it is valid, as between the parties and their heirs, without consideration, good or valuable. 16 Am. Jur., Deeds sec. 57; 26 C.J.S., Deeds sec. 16; *Howard v. Turner*, 125 N.C. 107, 34 S.E. 229; *Little v. Little*, 205 N.C. 1, 169 S.E. 799.

Examination of decisions cited by plaintiffs disclose that different factual situations, calling for the application of different principles of law, were involved.

Upon the facts alleged, Adelia Edwards Batts and husband, William Frederick Batts, by virtue of said deed, acquired title to the land in controversy, as tenants by entirety; and upon the death of Adelia Edwards Batts, intestate, William Frederick Batts, as surviving tenant, became sole owner thereof.

Affirmed.

STATE v. BENNY MOORING.

(Filed 27 March, 1957.)

Criminal Law § 55—

Denial of motion in a criminal action for a new trial for attaint of jury and for newly discovered evidence, made at the next succeeding term of the Superior Court after affirmance of judgment of conviction by the Supreme Court, *held* properly denied on authority of *S. v. Grass*, 223 N.C. 859.

APPEAL by defendant from *Moore, J.*, January, 1957 Criminal Term, LENOIR Superior Court.

Criminal prosecution upon a charge of felonious assault tried at the March Term, 1956, Lenoir Superior Court. From a verdict of guilty of assault with a deadly weapon and judgment thereon, the defendant appealed to this Court and the judgment was affirmed. *S. v. Mooring*, 244 N.C. 624, 94 S.E. 2d 573. At the next term of Lenoir Superior Court after the opinion was certified, the defendant lodged a motion for a new trial on two grounds: (1) That two jurors gave false and deceptive answers on their *voir dire* as to their qualifications; and (2) that the defendant could produce newly discovered and material evidence not available at the former trial. Judge Clifton L. Moore heard the motion, found that the jurors had truthfully answered questions, and that the newly discovered evidence was merely cumulative; and

upon the findings denied the motion. The defendant excepted and appealed.

George B. Patton, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

White & Aycock for defendant, appellant.

PER CURIAM. On the authority of *S. v. Grass*, 223 N.C. 859, 27 S.E. 2d 443, and cases cited in that opinion, the judgment of the Superior Court of Lenoir County is

Affirmed.

STATE v. DOROTHY HEATH CAULEY.

(Filed 27 March, 1957.)

APPEAL by defendant from *Parker, J.*, at December 1956 Term, of LENOIR.

Criminal prosecution upon a bill of indictment containing two counts —the second being that upon which defendant now stands convicted. It charges "That Dorothy Heath Cauley, late of Lenoir County, on the 27th day of June A. D. 1956, at and in said County, did wilfully and unlawfully assault Dorothy Diane Heath, a female child about three years of age, with a deadly weapon, to-wit: a heavy leather belt strap with a metal buckle thereon, resulting in serious injury to said child, in that she, the said Dorothy Heath Cauley, was present encouraging, assisting, aiding and abetting William David Cauley, a male person over 18 years of age, in perpetrating such assault upon a female, resulting in serious injury, and in that she, said Dorothy Heath Cauley, rendered personal assistance to him, the said William David Cauley, to aid him in concealing such assault on said child and in escaping arrest and punishment therefor,"—it being made to appear that Dorothy Diane Heath is child of defendant, and that William David Cauley is husband of defendant.

Upon a former trial the jury found this defendant guilty on the second count in the indictment against her, and said nothing as to the first count. That this Court held in former appeal, 244 N.C. 701, 94 S.E. 2d 915, was equivalent to a verdict of not guilty as to the first count, citing *S. v. Choate*, 228 N.C. 491, 46 S.E. 2d 476. On such former appeal error was found in the charge,—the Court saying that "when a wife commits a crime like the offense charged in the present case in the presence of her husband, there is a rebuttable presumption that she

acted under his constraint, and that before the jury could convict the wife, the State must carry the burden of proof of rebutting this presumption and of satisfying the jury beyond a reasonable doubt from the evidence that the wife in such case was acting of her own free will and volition and free from any constraint upon the part of her husband in committing the crime." In accordance therewith a new trial was ordered and subsequently had.

The jury returned a verdict of guilty. Thereupon the court entered judgment that defendant be confined in quarters provided for women by the State Highway and Public Works Commission (G.S. 148-27) for a period of two years.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General Patton and Assistant Attorney-General Love for the State.

Jones, Reed & Griffin for Defendant Appellant.

PER CURIAM. Defendant appellant presents foremost assignment of error based upon exception to denial of her motion for judgment as of nonsuit. But, in this connection, the evidence offered taken in the light most favorable to the State is sufficient to support the verdict rendered. And since the charge of the court is not set forth in the record of case on appeal, it is presumed that the trial judge correctly instructed the jury. Indeed there is no exception to the charge.

And while the case on appeal contains three hundred and sixty-four other exceptions taken in the course of the trial in Superior Court, error for which the judgment below should be disturbed is not made to appear.

Hence there is

No error.

APPENDIX.

Amendment to Rules of Practice in the Supreme Court.

Upon motion duly made and seconded it was unanimously RESOLVED that the Rules of Practice in the Supreme Court as published in 221 N.C. 544, as amended and published in 233 N.C. 749, be further amended in the following particular:

At the end of paragraph three of Rule 5, add the following:

"All criminal cases from the foregoing districts which are tried between the first day of January and the first Monday in February, and between the first day of August and the fourth Monday in August must be docketed within forty-five days from the last day of the term at which the respective cases were tried."

(s) CARLISLE W. HIGGINS,
For the Court.

8 March 1956.

APPENDIX.

ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR

NUMBERS 147-197

Previous Opinions Numbers 1-144 appear in Volume 241, N. C. Reports.
(Opinions 145 and 146 withdrawn.)

BY PERMISSION OF THE SUPREME COURT

(The cost of printing these opinions is borne by The North Carolina State Bar.)

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ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 147 (January 14, 1955)

Inferior Courts—Partner or father of solicitor.

Inquiry. Dated November 8, 1954. Facts stated in opinion.

Opinion. If partnership exists between father and son it would be improper for father to practice in court of which son is solicitor. If no partnership between them, it would not be improper for father to practice in such court—although embarrassing situations might arise being matters of personal taste rather than ethics.

In event partnership formed between son and father, father's criminal practice in criminal courts of county, other than Recorder's Court of which son is solicitor, would not be affected. (Opinions Nos. 79 and 133.)

OPINION No. 148 (January 14, 1955)

Solicitation of Business—Real estate transaction.

Inquiry. Dated January 8, 1955.

"A" is regular attorney for lending loan correspondent. "B" has client who has bound himself to purchase of real estate through agent doing business with loan correspondent who has applied for loan for "B's" client. "B's" client requests "B" do legal work connected with title. Loan correspondent declines. Attorney "B" informs loan correspondent that if he does not get the legal work he will advise client to get loan elsewhere at a place which will give the legal work to "B." Is "B's" action improper?

Opinion. Such action would be improper. (Opinion No. 115.)

OPINION No. 149 (January 14, 1955)

Conflicting Interest—Representing administratrix and subrogation of Industrial Commission award against tort-feasor.

Inquiry. Dated January 11, 1955. Facts stated in opinion.

Opinion. In death case where widow is awarded maximum by Industrial Commission and insurance company assigns subrogation it is not unethical for attorney to bring suit in the name of administratrix and insurance company against tort-feasor.

OPINION No. 150 (January 14, 1955)

Fees.

Inquiry. Dated January 10, 1955. Facts stated in opinion.

Opinion. Where attorney represents client whose automobile is destroyed in collision, and finance company and its affiliate insurance company are involved due to unpaid balance on note representing portion of purchase price advanced for car, and where attorney effects settlement with insurance carrier of other party at fault in collision and where finance company gives written authority to attorney to settle their interest, the attorney is justified in charg-

ing fee for his services and is justified in retaining such fee out of the proceeds collected.

OPINION No. 151 (January 14, 1955)

Fee Schedule.

Inquiry. Dated January 14, 1955. Facts stated in opinion.

Opinion. It is not improper for minimum fee schedule of local Bar Association to provide for minimum fees for particular transaction or for minimum fees to be placed in schedule for particular parts of services in transaction rendered by attorney.

OPINION No. 152 (April 15, 1955)

Conflicting Interests.

Inquiry. Dated January 17, 1955. Facts stated in opinion.

Opinion. Where insured employs attorney, said attorney may accept employment from client covering both personal injuries and property damage. There is no conflict of interests between the client and insurance company as both the damage and the injuries are the result of one and the same cause.

OPINION No. 153 (April 15, 1955)

Solicitation.

Inquiry. Dated January 15, 1955. Is it unethical for attorney to receive fees and perform services under an agreement designating him to do the legal work in connection with purchase of property, the said contract being signed by the purchaser with real estate company making the sale?

Opinion. The question is not easy to answer and the contract may involve many ramifications. If the attorney is the salaried counsel of the realty company, then such company would be engaged in the unauthorized practice of law if it received the legal fees to be paid by the purchaser. If company merely designates attorney to do necessary legal work connected with the transaction and the attorney is paid by purchaser, the same would not appear to be unethical.

OPINION No. 154 (April 15, 1955)

Inferior Courts—Partner of solicitor.

Inquiry. Dated February 15, 1955. Facts stated in opinion.

Opinion. Partner of solicitor of Recorder's Court may not appear in such court either as counsel for defendant or as attorney for the state. There would be nothing improper in partner appearing in criminal case in Superior Court of the county where the matter did not originate in Recorder's Court of which partner is solicitor.

OPINION No. 155 (April 15, 1955)

Conflicting Interests—Representing insurance company on subrogation.

Inquiry. Dated February 16, 1955. Facts stated in opinion.

Opinion. Attorney may represent insurance company to enter suit on subrogation claim but may not, after accepting employment for subrogation claim, represent insured for personal injuries if there were any such.

OPINION No. 156 (April 15, 1955)

Conflicting Interests.

Inquiry. Dated February 18, 1955. Automobile driven by insured struck car on which there was collision insurance with "S" company. "S" company turned over subrogation claim to attorney "B." After disposal of property damage claim together with "extra" that attorney "B" demanded for his client's personal injury, attorney "B" thereafter represented passenger in property damage claimant's car. Is this not a conflict of interests?

Opinion. There certainly may arise a conflict of interests if Attorney "B" handles claim for the passenger.

OPINION No. 157 (April 15, 1955)

Inferior Courts—Substitute judge.

Inquiry. Dated March 29, 1955. Facts stated in opinion.

Opinion. Substitute Judge of City Court is precluded from appearing in any criminal case in any court in the county in which he acts as substitute judge. The Canons of Ethics apply to attorneys irrespective of a portion of a local act undertaking to allow the appearance of the said substitute judge in other criminal courts of his county.

OPINION No. 158 (April 15, 1955)

Fees.

Inquiry. Dated March 29, 1955. Facts stated in opinion.

Opinion. The Canons of Ethics of The North Carolina State Bar does not make it obligatory upon the part of a member of a local Bar Association to conform to a schedule of minimum fees adopted by such an association. While members of a local Bar should conform to the rules and regulations of such Bar, there is no Canon of Ethics of the North Carolina State Bar requiring them to do so.

OPINION No. 159 (April 15, 1955)

Inferior Courts—Waiver of appearance.

Inquiry. Dated April 1, 1955. Facts stated in opinion.

Opinion. A written form of waiver of appearance signed by the defendant authorizing the Judge to enter a plea of guilty upon the record in the absence of defendant does not involve a question of ethics. Any defendant in a misdemeanor case may be permitted to enter a plea of guilty *in absentia* and the judge of the court is apparently invested with power as to the entry of pleas in said court.

OPINION No. 160 (April 15, 1955)

Advertising.

Inquiry. Dated April 5, 1955. Facts stated in opinion.

Opinion. The Canons of Ethics prohibits advertising either directly or indirectly by members of the profession and the same includes the distribution by an attorney or the exhibition by an attorney of automobile emblems or wall plaques which undertake to advertise the fact that the bearer or exhibitor is an attorney.

OPINION No. 161

Conflicting Interests.

Inquiry. Dated June 14, June 15, 1955. Attorney A employed to represent one of passengers in automobile accident and at the same time attorney A employed by driver of automobile who was indicted for manslaughter. Attorney for insurance carrier objects to Attorney A appearing for passenger in car since Attorney A was employed to represent driver indicted for manslaughter. Attorney A advised and informed by driver of car that he had no objection to Attorney A appearing for passenger, and further Attorney A had consent of both passenger and driver to appear for each. May Attorney A represent passenger and driver?

Opinion. If Attorney A fully advised passenger and driver and consent and employment by both takes place, the same is not unethical (Canon 6). If, however, Attorney A does not have full consent of both parties, his representation will be unethical. If Attorney A decides not to represent one of the parties, there would be nothing improper in his representation of the other party. Insurance carrier has nothing to do with the matter if both parties consent and agree to employ Attorney A.

OPINION No. 162

Advertising.

Inquiry. Dated May 18, 1955. Facts stated in opinion.

Opinion. It is improper for attorney to have his name listed in bold-face type in city directory unless all attorneys are listed in the same type.

OPINION No. 163

Inferior Courts.

Inquiry. Dated May 30, 1955. Facts stated in opinion.

Opinion. Canon D makes it unethical for any Judge or Solicitor of any criminal court inferior to the Superior Court to appear in any criminal proceeding for the defendant or the state in other courts of his county, *et cetera.* This Canon, likewise, applies to Vice-Recorders of Recorder's and Municipal courts, as well as solicitors of said courts. If the Recorder's or Municipal court has jurisdiction in more than one county, then the prohibition as to appearances shall apply to all counties in which the court has jurisdiction.

OPINION No. 164

Conflicting Interests—Inferior courts.

Inquiry. Dated June 8, 1955. Is it proper for attorney to accept employment to represent for parole a party sentenced to the State Prison for a felony when attorney as Judge of the Recorder's Court presided at the preliminary hearing and bound defendant over for trial in the Superior Court?

Opinion. It would be highly improper for attorney to represent said defendant in efforts to obtain a parole (see Opinion No. 103).

OPINION No. 165

Advertising—Announcements.

Inquiry. Dated June 15, 1955. Facts stated in opinion.

Opinion. It is not unethical for attorney to announce an opening or reopening of law office. The publication and distribution of such announcements

must be in accord with propriety and simply be in the form of an announcement, and not the nature of an advertisement, as indicated by numerous previous opinions; for example, Opinions No. 118 and 140.

OPINION No. 166

Inferior Courts.

Inquiry. Dated July 2, 1955. Facts stated in opinion.

Opinion. It would be improper for Solicitor of Recorder's Court having jurisdiction in two counties to engage in practice of criminal matters in any of the courts of either county (see Canon D, see Opinion 163).

OPINION No. 167

Competitive Bidding.

Inquiry. Dated July 15, 1955. Inquiry in the form of notice that Federal Government submitting invitations for competitive bidding on title matters.

Opinion. The Council approved the notice of the Secretary issued to the Federal authorities calling attention to Canon F, in part, reading as follows: It is the sense of this Council . . . "any competitive bidding for any legal work is deemed to be unethical."

OPINION No. 168

Advertising—Specialized service.

Inquiry. Dated June 27, 1955. Facts stated in opinion.

Opinion. It is not improper for attorney to advise other members of the Bar of his offer of his services only to the Bar in a specialized capacity where it undertakes to afford to other lawyers only beneficial information and service.

OPINION No. 169 (October 27, 1955)

Advertising—Letterhead.

Inquiry. Dated October 26, 1955. Facts stated in opinion.

Opinion. It is not improper for attorney to have his name and designation "General Counsel" listed on letterhead of organization where he occupies such position with such organization.

OPINION No. 170 (October 27, 1955)

Inferior Courts—Substitute judge domestic relations court.

Inquiry. Dated July 15, 1955. A and B are partners in general practice. A is nominated as substitute judge of county domestic relations court. If A accepts appointment, would this disqualify B to practice in criminal courts of the county?

Opinion. By virtue of Canon B of the Canons of Ethics, in this case B would be disqualified to practice in the domestic relations court during the terms at which A was presiding as judge. If A accepts the appointment, it would not disqualify B from practicing in the other criminal courts of the county.

OPINION No. 171 (October 27, 1955)

Advertising.

Inquiry. Dated July 21, 1955. Is it contrary to ethics for an attorney to allow his picture to be exhibited in newspapers announcing attorney's approval to handle title insurance?

Opinion. It would be highly unethical and improper for attorney to engage in such advertising as posed by the inquiry.

OPINION No. 172 (October 27, 1955)

Conflicting Interests.

Inquiry. Dated August 15, 1955. Husband, driver of automobile, and wife, passenger in same, have an accident. Husband's car is covered by collision and liability insurance. Husband employs attorney X to represent both him and wife against defendant driver of other car. Collision carrier employs attorney Y to represent subrogation interests. Attorneys X and Y file complaints as counsel of record for husband. Attorney X files complaint for wife as her attorney. The defendant files answers to both complaints. In defendant's answer to husband's complaint, he files counterclaim against husband. In answer to wife's complaint, defendant asks to join husband as defendant for contribution. Husband's liability carrier asks attorney X to represent their interest on counterclaim in husband's suit and attempted joinder of husband in wife's suit. May attorney X continue as counsel of record for both husband and wife? Would it be proper for attorney X to withdraw as counsel for husband and appear only for wife? Would there be any difference if the two cases were tried separately or if both were consolidated for trial. May attorney Y appear for husband in either case?

Opinion. Attorney X would occupy an inconsistent position if defendant succeeds in having husband made party defendant in wife's suit and it would be proper for attorney X to withdraw either as counsel for husband or as counsel for wife as he cannot represent both. It would not make any difference if the two cases were tried separately since attorney X if appearing for wife might jeopardize her case if he attempted to appear for husband. It would make no difference if cases were consolidated for trial.

Since Y represents subrogation interests only, there would be no objection to his appearing for husband indirectly by reason of subrogation which necessarily involves a defense of husband upon any counterclaim set up by defendant.

OPINION No. 173 (October 27, 1955)

Conflicting Interests.

Inquiry. Dated August 30, 1955. Governmental unit entered into agreement with owner of realty to purchase the same to be used for governmental purposes. Attorney was requested by governmental unit to examine title and prepare abstract. Title rejected by governmental unit, but owner of realty agreed to make no objections to acquirement of title by condemnation. Attorney requested to examine title and prepare abstract has represented owner for many years. There is no conflict of interest between owner and governmental unit as purchase price agreed upon and no objection made by owner to amount fixed. A number of possible claimants to interest in property appearing living and condemnation proceeding will have all parties properly before the court and monies paid into court by governmental unit which will acquire title which would seem to remove conflict of interest between governmental unit and present owner. The practice appears in the past to have been for attorney designated by the unit to prepare abstract, to file complaint or petition for condemnation. It would not appear proper for such attorney to file complaint and then file answer on behalf of owner and yet, would it be proper for said attorney to

furnish information as to all claimants and parties and guardians as to unknown persons and minors but have Attorney General or assistant execute the pleadings and thereafter attorney file a formal answer for owner, regular client for many years?

Opinion. It would appear proper that attorney withdraw with governmental unit's consent and appear in case for owner provided owner was fully advised in the premises and understood that attorney represented him only.

OPINION No. 174 (October 27, 1955)

Bonds.

Inquiry. Dated September 23, 1955. Facts stated in opinion.

Opinion. It is improper for an attorney representing bonding company as its agent to execute bail bond for defendant in criminal action when attorney is representing defendant for whom he signs the bond. This is not only unethical but in violation of statute and the rule of the Supreme Court, see 238 N.C. 747, which reads as follows:

> "No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit or for the appeal, or upon appeal from a Justice of the Peace, or is surety in any undertaking to be effected by the result of the trial of the action, shall appear as counsel or attorney in the same cause."

To permit attorney to engage in such practice would be most unethical and contrary to the intent of the statute and the rules of the Court, as well as ethics of the Bar.

OPINION No. 175 (October 27, 1955)

Certified Public Accountants.

Inquiry. Dated October 7, 1955. Attorneys, father and son, are also certified public accountants. They desire to discontinue all practice of law or holding themselves out as such and as they understand that it is not proper for practicing attorney to be a member of accounting firm, they desire to have their right to practice law suspended upon formation of accounting partnership.

Opinion. It is not improper for these parties to form a partnership to engage in accounting so long as nothing appears in connection therewith indicating that they are also engaged in the practice of law or acting as attorneys at law.

OPINION No. 176 (October 27, 1955)

Inferior Courts—Solicitors.

Inquiry. Dated October 14, 1955. Attorney acted as defense counsel for client in recorder's court of county and appealed the case to the Superior Court. Since that time attorney has become solicitor of recorder's court and the case is coming on for trial in the Superior Court. Can attorney, now solicitor of recorder's court, ethically defend client in Superior Court?

Opinion. It would not be proper for attorney to appear for defendant in Superior Court. It is in order for attorney to advise client of his position and request that he secure other counsel to represent him in the Superior Court.

ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 177 (October 27, 1955)

Solicitation—Conflicting interests.

Inquiry. Dated October 13, 1955. Is it improper for attorneys whose first contact with the case is receipt of complaint from insurance carrier against its insured under public liability policy and who is employed by insurance company to represent insured in the action and who, in preparation of answer and for trial, necessarily must make investigation and probably efforts to settle to undertake representation?

Opinion. Attorneys are not precluded from representing insurance company in such a matter referred to and to make such investigation as may be deemed proper in order to prepare answer and if necessary, setting up counterclaim for personal injuries or property damage.

OPINION No. 178 (October 27, 1955)

Conflicting Interests—Receivership.

Inquiry. Dated October 22, 1955. Is it ethical for attorney in receivership or bankruptcy matter to represent creditor or creditors and in the same matter for partner or associate in firm of said attorney to be appointed and serve as receiver or trustee for debtor estate or to be appointed and serve as attorney for trustee or trustees no matter who receiver or trustee may be.

Opinion. It would be highly unethical for one member of a firm to act as receiver or attorney for receiver and for another member of firm at the same time to represent a creditor or creditors. The positions represented by the partners are entirely inconsistent and opens the door to fraud and unfair dealing. Such situations should be brought to the attention of the court handling the receivership so that the court might take proper action.

OPINION No. 179 (January 13, 1956)

Conflicting Interests—Solicitation.

Inquiry. Dated November 22, 1955. Attorney, representing the insurer, investigated an accident involving the collision of two automobiles. Subsequently, suit was instituted against the insured, and the attorney who investigated was employed by the insurer to defend the suit. The insured, desiring to make a counterclaim for personal injury, retained personal counsel for this purpose. Could the attorney representing the insurer ethically sign, along with insured's personal counsel, the answer and counterclaim as attorney for the insured if there is no agreement with the insured or insured's personal counsel for compensation in connection with the counterclaim and he was to receive no compensation therefor?

If not, could the attorney ethically appear, along with insured's personal counsel, in the ensuing trial of the case although he had signed the pleading as attorney for the insured, along with insured's personal counsel?

If the answer to both the above questions is "no," could the attorney for the insurer ethically appear for the insured in defense of the suit if he read into the record of the case prior to trial a letter he had written to insured's personal counsel prior to the filing of answer, advising that by signing the counterclaim drawn by insured's personal counsel, he subscribed to the pleadings only as attorney for insured in defense of the suit and did not vouch for the truth of the counterclaim?

If the answer to all the above questions is "no," could the attorney for the insurer ethically appear in the insured's defense in companion suits brought by guests in plaintiff's automobile, when the insured's answer contained no counterclaim and the suits were to be tried separately?

Opinion. Under Canon "G" as it now obtains, it would not be improper for insurance company's attorney to set up counterclaim in behalf of the insured if the insured requested him to do so. Attorney might ethically appear in trial of the case along with insured's personal counsel. In view of the above, it was unnecessary to answer the third paragraph of the inquiry. It would not be improper for insured's attorney to continue to appear for insured in the event actions were brought against the insured by guests in plaintiff's automobile.

OPINION No. 180 (January 13, 1956)

Conflicting Interests.

Inquiry. Dated November 22, 1955. Attorney "F" is employed by liability insurer to investigate an accident involving car driven by non-resident insured, "A," and an uninsured car in which "C," a policyholder of same insurer, was riding. Investigation revealed uninsured car to have been driven by its owner, "B"; that "C" was occupying uninsured car at the time of the accident as guest of "B," who was charged by investigating police officer with criminal offenses arising out of the accident; that "A" was guilty of no negligence, and that "C's" insurance was involved only to the extent that it would pay medical bills incurred by "C" under medical payments coverage. One month after accident date, non-resident Attorney "H," representing "A" and "A's" injured passengers, notified Attorney "F" that he had information that "C" was driving "B's" car at the time of the accident, but refused to disclose source of information. Attorney "F" re-investigated and found no evidence to substantiate "H's" suggestion that "C" was driving. "A" and "A's" passengers sue "C" alleging "C" was driver of "B's" car. "C" retains personal counsel to file counterclaim. Insurer employs Attorney "F" to defend "C" and employs other counsel to defend "A" on "C's" counterclaim. May "F" ethically appear for "C" in insurer's behalf if he does so for the sole purpose of defending "C"?

If answer is "yes," may he ethically sign an answer for "C" which contains the counterclaim if he notifies all parties concerned that he does not represent "C" in connection with the counterclaim?

If first question is answered "no," would it be unethical for "F" to appear for "C" in insurer's behalf in the separate suits by "A's" passengers where no counterclaim was involved?

Opinion. Canon "G" as it now obtains in reference to the particular inquiry states as follows:

> "When any member of the North Carolina State Bar shall investigate or adjust any claim for any insurance company or agency or through the services of any other person, such member, his associates, and the person making such investigation are forbidden to represent, as attorney, any person, firm or corporation in any wise identified with said claim, as a result of the facts or circumstances on account of which said claim originated, except the insurance company or agency for which the aforesaid claim was investigated or adjusted or the insured."

Attorney "F" who was originally employed by insurer to investigate an accident involving car driven by non-resident insured "A" and an uninsured car in which "C," a policyholder of same insurer was riding. The investigation disclosed that "A" was in no wise negligent and that "C" at the time of the accident was not driving "B's" car. However, "A's" personal attorney "H" brings suit in behalf of "A" and "A's" injured passengers against "C," claiming that "C" was driving the car. The insurer who originally employed "F" to investigate the accident is likewise the liability carrier for "C." May "F" ethically appear for "C" in insurer's behalf if he does so for the sole purpose of defending "C"?

The question has a double-barrelled aspect which does not appear to be covered by Canon "G."

Canon "G" provides that "F" may ethically represent the insurer and the insured on account of which the claim was investigated. It now appears that "A," for whom the insurance company had "F" to investigate the accident, now brings suit against "C," who was riding in the other car involved in the accident, "C" having one and the same insurer as "A."

The question presents itself—Did "F," by reason of his investigation, acquire any information as regards the accident which would be to "A's" disadvantage in the suit which he now brings against "C"? If he did, it would be unethical for "F" to appear for "C" in "A's" suit, and this on the theory, "Not that there is any evil in the situation, but there is the appearance of evil." (Even if "F" acquired no information to the detriment of "A," if he defended "C" and "A" lost his suit, "F" would never be able to convince "A" that "C's" defense was not based upon information gathered by "F" in investigating the accident.)

While "F" would be representing the insurer for whom the investigation was made, he would not be representing the insured for whom it was made but representing another insured of the same insurer.

Under the factual situation as set forth, "F" is precluded from an ethical standpoint from representing "C."

In view of the foregoing, it is unnecessary to answer the inquiry raised in paragraph two.

For the reasons set forth above, "F" could not properly appear for "C" in the separate suit by "A's" passengers.

OPINION No. 181 (January 13, 1956)

Conflicting Interests.

Inquiry. Dated January 9, 1956. Attorneys employed by client "A" to represent him in action for personal injuries arising out of automobile collision. Client "A" was driver of vehicle owned by Corporation "B" and was in the employment of said corporation and it is admitted by all parties that he was acting within the course and scope of his employment and about his master's business. While operating said vehicle, he was struck in the rear by another vehicle owned by corporation "C." Attorneys filed complaint for client against corporation "C" and their driver alleging negligence and asking damages for personal injury sustained by client "A." Attorneys for corporation "C" filed answer and set up counterclaim and cross action against "A" and move that corporation "B" as "A's" principal be made party defendant. Corporation "B" requests attorneys for "A" to file answer for them, it appearing to attorneys that there were no adverse interests between client "A" and corporation "B,"

answer was filed for corporation "B" and the counterclaim set up against corporation "C." Is it improper for attorneys to act for corporation "B" and for client "A" under such circumstances?

Opinion. There would be nothing improper in attorneys representing both "A" and "B."

OPINION No. 182 (January 13, 1956)

Conflicting Interests.

Inquiry. Dated December 7, 1955. "A" is owner of automobile involved in accident with "C." "B," who is "A's" wife, was passenger in "A's" automobile. Both automobiles damaged and "D" received personal injuries. Both "A" and "C" carry liability insurance. "A" and "B" consult attorney and request that he represent them. Preliminary investigation by attorney indicates that "C" was negligent and is responsible for injury and damage. If "A" and "B" each bring action against "C," is there any reason why attorney could not represent both "A" and "B"? Suppose "C" joins "A" as a party in action instituted by "B," what is attorney's duty in event that "B" finds it necessary to sue both "A" and "C"?

Opinion. In the event "B" finds it necessary to sue both "A" and "C," attorney's representation of "A" would be inconsistent with his representation of "B" or in the event of "B" suing "C," "C" should join "A" as party defendant and allege that "A's" negligence concurred with his negligence, proximately causing the injuries to "B." The attorney in such event might find his position inconsistent in representing "A" while prosecuting "B's" action. In order to avoid embarrassing situations that might arise, attorney should only represent "A" or "B" but not both. Investigation indicated would hardly warrant attorney in defending "A" as against "C's" charge that "A" was negligent since if "A" were negligent, he would be liable to "B" along with "C."

OPINION No. 183 (January 13, 1956)

Conflicting Interests.

Inquiry. Dated December 21, 1955. Driver "A" and passenger "B" are involved in collision with another automobile. Both employ attorney to represent them in suit against driver of other vehicle. Attorney advises passenger "B" that he might have cause of action against driver of his own car, "A," but passenger "B" insists that collision was caused solely by negligence of driver of other vehicle. Attorney advises passenger "B" that probably defendant in suit will have driver "A" of passenger "B's" car made party defendant for contribution and in such circumstances, conflict of interests would arise and attorney could not represent both parties unless passenger "B" wished to waive all right of recovery which he may have against his driver "A." Passenger "B" agrees to do this and signs written waiver of any claim against driver "A." Would it be proper for attorney to represent passenger "B" and driver "A."

Opinion. Opinion No. 172 dated October 27, 1955, appears controlling. Upon the factual situation presented in the inquiry, it would appear that somewhere along the line the driver of the car sued by attorney in behalf of the driver and passenger in the other car ("A" and "B"), might develop a case of negligence against driver "A" which might prove embarrassing in the dual representation by attorney; but for such a possible situation, it appears that there would be nothing unethical involved in the dual representation in view of the waiver referred to.

ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 184 (January 13, 1956)

Witnesses—Discovery.

Inquiry. Dated December 30, 1955. (a) Attorney contemplates negligence action against municipality. Before making demand on municipality, is it proper for attorney to interview officials or employees of municipality with a view to discovering whether or not facts justify such an action? (b) Is it proper for attorney to interview such officials or employees either before or after action is instituted with a view toward discovering evidence for use in such action? (c) Is it proper to interview either before or after action is instituted a former official or employee of municipality when he may or may not be called as witness for the municipality?

Opinion. There would be nothing improper or unethical in interviewing officials or employees of municipality in each case, (a), (b) and (c). See Ethics Opinion No. 44, 241 N.C. 762.

OPINION No. 185 (April 13, 1956)

Attorney—County commissioner.

Inquiry. Dated March 23, 1956. Is there any rule, regulation or law prohibiting a practicing attorney from serving on the board of county commissioners?

Opinion. Section 2, Chapter 84, provides as follows: "No Clerk of the Superior or Supreme Court, nor Deputy or Assistant Clerks of said Court, nor Register of Deeds, nor Sheriff nor any Justice of the Peace, nor County Commissioner shall practice law." Under the section of the statute referred to, a lawyer may become a County Commissioner but during his term of office, he may not practice law.

OPINION No. 186 (April 13, 1956)

Conflicting Interests.

Inquiry. Dated February 29, 1956. Some eight years ago "A" and "B" were involved in an automobile accident. Both were arrested and cases tried in recorder's court. Both cases were dismissed. Attorney "C" represented "A." A suit has now been instituted by "A" against "B." Attorney "C" no longer represents "A." "B" is now a resident of another state. Attorney "C" has recently formed partnership with another attorney, "D," who knows nothing about the case nor was he resident in the county when the accident occurred some eight years ago. Insurer of "B" has requested attorney "D" to represent them on their indemnity covering the liability of "B." Attorneys "C" and "D" regularly handle cases for insurance company.

Opinion. There would be nothing unethical or improper in representation by attorney "D."

OPINION No. 187 (April 13, 1956)

Advertising.

Inquiry. Dated February 9, 1956. Is it improper for an attorney to join the Chamber of Commerce?

Opinion. No.

OPINION No. 188 (April 13, 1956)

Conflicting Interests—Law partner of administrator.

Inquiry. Dated January 12, 1956.

Attorneys "A" and "B" are partners. Attorney "B" is administrator of an estate. It appears that there will be litigation in which administrator will have to be represented by counsel. Administrator would retain all compensation going to him as such and none would go into partnership. Any fee received by partner representing administrator would be retained personally by him.

Opinion. Opinion No. 67 appears to control the situation and it would not be proper under the circumstances for attorney partner to represent administrator.

OPINION No. 189 (April 13, 1956)

Attorney—Witness.

Inquiry. Dated February 25, 1956.

Attorney "A" exchanged a few words with "B" in store. He had known "B" before this incident and after leaving the store met "C" and "D." As he approached them, "B" drove away from the store and his speed was remarked upon by "C" and "D" and attorney "A." "C" thereafter swore out a warrant against "B" charging him with drunken driving and named attorney "A" as a state's witness. "C" advised solicitor that by placing attorney "A" as state's witness he would be prevented from representing "B." Attorney "A" if called would be unable to testify as to his opinion of "B's" condition and was primarily, in his opinion, named as state's witness to prevent him from representing "B." "B" has been to attorney "A" and asked that he represent him.

Opinion. Under the factual situation related in the inquiry, it would not be proper for attorney to represent defendant in trial of this case.

OPINION No. 190 (July 13, 1956)

Fees—Fee charged client by attorney.

Inquiry. Dated April 17, 1956. Facts stated in opinion.

Opinion. When there is no contract between attorney and client for fee to be paid for legal services rendered, and the client and the attorney are unable to agree on a fee, then the court will rule as to what is reasonable under the circumstances.

OPINION No. 191 (July 13, 1956)

Attorney—Acting as issuing agent for title insurance company.

Inquiry. Dated May 22, 1956. Facts stated in opinion.

Opinion. It is not improper for an attorney to act as an issuing agent or validating officer for a title insurance company, so long as the title insurance company will not advertise attorney's name as issuing agent or validating officer.

OPINION No. 192 (July 13, 1956)

Attorney—Releasing information of a confidential nature.

Inquiry. Dated May 25, 1956. Facts stated in opinion.

Opinion. Where the relationship of attorney and client was not clearly established, yet letters addressed from prospective client to attorney were of a

confidential nature, then it would be improper for attorney to voluntarily permit federal authorities to see or obtain correspondence in attorney's possession which had been previously communicated to attorney by the prospective client. It would be improper for attorney to turn over letters of a confidential nature which would tend to incriminate, and attorney should refuse the request of the authorities until a proper order of court is served upon him requiring that he produce the correspondence in court and that attorney should advise the court that he would only surrender the correspondence if the court was of the opinion that it was perfectly proper for such correspondence to be surrendered.

OPINION No. 193 (July 13, 1956)

Advertising—Professional card.

Inquiry. Dated July 3, 1956.

Is it proper for attorney to have a card made similar to a regular calling card to give to clients in attorney's office in order that the client may call back and give information or make inquiry?

Opinion. The use of a simple professional card for the purposes stated is entirely ethical. Canon 27 provides: "The customary use of simple professional cards is permissible."

OPINION No. 194 (October 25, 1956)

Solicitation of Business.

Inquiry. Dated August 17, 1956. Two attorneys are elected by Board of Directors of Savings and Loan Association and Board of Directors prescribe their duties, among which are examination of titles to all real property offered as security for loans. Board of Directors directed that Attorney "A" should examine three-fourths of titles as measured in fees and Attorney "B" one-fourth as measured in fees. Such arrangement followed for several years. Attorney "B" now approaches Directors individually and advised that he should have at least one-half of such business and requested their consideration. Thereafter, at a meeting of the Board of Directors it was stated that Attorney "B" felt that the division was unfair. Attorney "B" did not make any statement other than offering himself for questioning. No questions were asked and both Attorney "A" and Attorney "B" withdrew from the meeting. Is Attorney "B" guilty of unethical conduct?

Opinion. The inquiry is very perplexing. Both "A" and "B" are attorneys for the Association. It would appear that Attorney "B" already being attorney for the Association was not acting unethically when he requested that he be compensated with one-half of the fees instead of the one-fourth he was receiving and would therefore, not be guilty of unethical conduct in this regard.

From the Committee, Mr. Fairley dissents from the opinion. As part of the opinion, it should be observed that the opinion is only directed as to whether or not "B" was unethical in making a request for a larger division of the fees and is neither an endorsement of or lack of endorsement of the practice by Building and Loan Associations, such item not being a part of the inquiry.

ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 195 (October 25, 1956)

Conflicting Interest.

Inquiry. Dated August 17, 1956.

Attorney represented D on the criminal charge of failing to yield the right of way, and failure to stop at a stop sign. D was driving the car of his sister, who was a passenger in the car driven by D.

Now the sister desires to employ the Attorney to represent her in a civil action against D and a third party.

Would it be ethical for the Attorney to now represent the sister in an action for damages against D?

Opinion. The Council has heretofore ruled that if the Attorney has the full consent of the defendant whom he represented in a criminal action to appear for a plaintiff in an action brought against the same defendant in a civil action for damages, he may properly do so. Both the original defendant, and the present plaintiff being fully acquainted with the facts.

It appears that such a situation should be avoided, for certainly, representing the sister, Attorney would necessarily have in his possession facts unfavorable to the original defendant, or it might be favorable to him, and it might be that Attorney would reach a point in the litigation where he could not represent the best interests of client in the civil action without injury to client in the criminal action.

OPINION No. 196 (October 25, 1956)

Solicitor of Superior Court—Restrictions on Law Practice.

Inquiry. Dated September 6, 1956. Prior to January 1, 1956, attorney was employed to defend police officer in civil action arising out of automobile collision. Officer's vehicle was not actually involved in impact but alleged in civil action that he negligently stopped automobile forcing vehicle behind him to pull out causing collision and occupant of one of the other vehicles involved was killed. On January 1, 1956, attorney became assistant solicitor of Superior Court and after entering into his duties of said office discovered that there was a case upon the criminal docket, not as yet calendared for trial charging operator of one of the other vehicles involved with manslaughter, indictment returned some months prior to attorney assuming office. Would it be proper for attorney to represent defendant in civil action as he was employed prior to assuming office and case arose prior to such date?

Opinion. It would be in order and ethical for attorney to continue to appear in civil action as same arose prior to date upon which he became assistant solicitor. Under the circumstances, attorney should not appear as solicitor for prosecution in particular case since employed in civil action prior to assuming office. It is suggested that such matter be brought to the attention of the presiding judge who would relieve attorney of any participation in criminal action.

OPINION No. 197 (October 25, 1956)

Fees—Division of.

Inquiry. Dated October 20, 1956. Commercial claims are received occasionally at rates amounting to two-thirds of said rates suggested by Commercial Law League of America. It is assumed that forwarder is claiming one-third of such rate and attorney declines such claims as attorney assumes that ac-

ceptance under such conditions would be equivalent to agreement to division of fees with non-attorney. To what extent should attorney inquire into the manner in which agency is being compensated?

If attorney insists upon full rate or arrangements made for larger fee or if claim forwarded at a rate of 50 per cent of amounts collected attorney still assumes that forwarder will be compensated out of proceeds collected from claim. Is it proper in the first instance to handle such matters through lay intermediaries? If so, may attorney properly arrange for satisfactory fee basis remitting net collections to forwarder and not inquire further into arrangement which forwarder has made with claimant?

Opinion. If the attorney knows or assumes that the lay forwarding agency is retaining or receiving any part of the fee, it would be unethical. See also Canons 34 and 35.

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§ 6. Tacking Possession.

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APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction.

A matter which has not been ruled upon in the lower court is not presented for decision in the Supreme Court. *Collier v. Mills*, 200.

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The theory of trial in the lower court must prevail in considering the appeal. *Waddell v. Carson*, 669.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

Where a new trial is awarded on respondent's appeal for error in the admission of evidence as to an item of damage not recoverage upon the theory upon which the case was tried, but petitioners maintain that the theory of trial erroneously excluded certain items of damage, which contention could not be presented on respondent's appeal from the verdict in favor of petitioners, the Supreme Court may nevertheless determine the basic question in order to avoid protraction of the litigation. *DeBruhl v. Highway Com.*, 139.

§ 3. Judgments Appealable.

A defendant is authorized to file petition for writ of *certiorari* to an order overruling demurrer when, in its opinion, the order will prejudicially affect a substantial right to which it is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits. *Winston-Salem v. Coach Lines*, 179.

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§ 12. Jurisdiction and Powers of Lower Court After Appeal.

An order directing the husband to pay stipulated sums monthly for the support of the wife may not be entered pending an appeal by the husband to a like order theretofore entered in the cause, nor may jurisdiction be conferred on the Superior Court pending the appeal by consent of the parties, and when such order is entered prior to the withdrawal of the appeal, the order is void. *Holden v. Holden*, 1.

§ 16. Certiorari as Method of Review.

Where *certiorari* is allowed to review an order, the writ does not eliminate the necessity for the preservation of exceptions, entered in the court below, bearing on the question or questions sought to be reviewed, but the allowance of the writ constitutes an exception to the judgment, presenting for review errors of law appearing on the face of the record. *Winston-Salem v. Coach Lines*, 179; *Collier v. Mills*, 200.

APPEAL AND ERROR—*Continued.*

§ 19. Form and Necessity for Objections, Exceptions and Assignments of Error in General.

Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered. *Holden v. Holden*, 1.

Assignments of error may not be filed initially in the Supreme Court but must be filed in the trial court and certified with the case on appeal. G.S. 1-282, and assignments not so supported by the record will not be considered. *Lowie & Co. v. Atkins*, 98.

An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment itself. *Ibid.*

An assignment of error must present a single question of law for consideration by the Court. *Weavil v. Trading Post*, 106.

An assignment of error not supported by an exception will be disregarded. *Waddell v. Carson*, 669.

§ 21. Exception and Assignment of Error to Judgment.

Even in the absence of any exceptions or when no exceptions have been preserved, the appeal itself will be taken as an exception to the judgment, which presents the question whether error appears on the face of the record. *Holden v. Holden*, 1; *Lowie & Co. v. Atkins*, 98; *Horn v. Furniture Co.*, 173; *Bennett v. Attorney-General*, 312; *Lockleair v. Martin*, 378; *Putnam v. Publications*, 432; *Bishop v. Bishop*, 573.

An exception to the judgment must fail if the record proper fails to disclose error, and where the judgment is supported by the verdict, errors in matters of law do not appear upon the face of the record. *Lowie & Co. v. Atkins*, 98.

An exception to a judgment rendered upon a verdict challenges the correctness of the judgment and whether it is supported by the verdict properly interpreted, but cannot affect the verdict. *Wynne v. Allen*, 421.

§ 22. Objections, Exceptions and Assignment of Error to the Findings of Fact.

An assignment of error to the findings of fact on the ground that the findings are not supported by the evidence is ineffectual as a broadside assignment of error, it being required that the assignment designate the particular rulings to which the exceptions were taken so that the alleged error is presented by the assignment of error itself. *Putnam v. Publications*, 432; *Kovacs v. Brewer*, 630.

§ 24. Exceptions and Assignments of Error to Charge.

As a general rule, objections to the statement of contentions and review of the evidence must be made before the jury retires or they are deemed to have been waived. *S. v. Saunders*, 338.

It is not required that a party bring to the trial court's attention an inadvertence in the court's statement of contentions when such statement contains an erroneous view of the law or an incorrect application thereof, and such error must be held prejudicial, even though in another portion of the charge the law is correctly stated. *Burns v. Crump*, 360; *Lookabill v. Regan*, 500.

APPEAL AND ERROR—*Continued.*

§ 27. Objections, Exceptions and Assignments of Error to Proceedings in Superior Court Upon Appeal from Inferior Courts or Administrative Boards.

On appeal to the Supreme Court from judgment of the Superior Court affirming or reversing an order of the Industrial Commission, review is limited to assignments of error relating to matters of law at the trial in the Superior Court. *Horn v. Furniture Co.*, 173.

§ 33. Necessary Parts of Record.

The court considered verified pleadings in making its findings of fact, but the complaint was not included in the record on appeal upon exceptions to the findings. *Held:* The appeal must be dismissed under the mandatory rule that the pleadings, issues and judgment shall be a part of the transcript in all cases and that memoranda of pleadings may not be substituted even by consent of counsel. Rules of Practice in the Supreme Court Nos. 19 and 20. *Thrush v. Thrush*, 63.

§ 35. Presumption as to Matters Not Appearing of Record.

Where the charge of the trial judge is not in the record, it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts. *White v. Lacey*, 364.

§ 38. Abandonment of Exceptions by Failure to Discuss Same in the Brief.

Exceptions not set out in the brief and in support of which no reason or argument is stated or authority cited are taken as abandoned. *Harmon v. Harmon*, 83; *Waddell v. Carson*, 669.

§ 40. Harmless and Prejudicial Error in General.

Where the court erroneously holds that tenants in severalty were tenants in common, but the judgment correctly locates the true dividing line between the lands of the parties as in a processioning proceeding, the error is harmless and cannot be ground for a new trial. *Lockleair v. Martin*, 378.

A new trial will not be granted for mere technical error, but the burden is upon appellant to show error which in reasonable probability affected the result. *Waddell v. Carson*, 669.

§ 41. Harmless and Prejudicial Error in the Admission or Exclusion of Evidence.

The admission of testimony over objection cannot be held prejudicial when the objecting party's own witnesses thereafter testify to the same import. *Hughes v. Enterprises*, 131.

Where voluminous evidence as to an item of damages not recoverable upon the issue upon which the case was tried is admitted and it is obvious from the verdict that the jury considered such incompetent testimony in fixing the amount of damages, the admission of such testimony must be held prejudicial notwithstanding an instruction to the jury that they should not consider evidence as to such items of damages. *DeBruhl v. Highway Com.*, 139.

Where the evidence admitted and the evidence excluded over plaintiff's objection are insufficient, considered together, to make out a case, the exclusion of the evidence cannot be held prejudicial on appeal from judgment as of nonsuit. *Bennett v. R. R.*, 261.

APPEAL AND ERROR—*Continued.*

The admission of testimony over objection is not prejudicial when testimony of the same import is admitted without objection. *Wood v. Ins. Co.*, 383.

The exclusion of testimony of a witness is not prejudicial when the same witness is permitted to testify to the same fact a few moments later. *Ibid.*

Where lessees rely upon waiver of breach of the least contract, the exclusion of evidence as to negotiations between lessor and one of lessees in regard to a collateral dispute, relevant solely because settlement thereof was made to depend upon the continuance of the lease, is harmless even if such evidence was competent, since there is nothing in the excluded evidence to show waiver. *Mesimore v. Palmer*, 488.

Where deed is admitted in evidence without objection, testimony of the notary public that she took the married woman's acknowledgment to the deed and as to the circumstances of its execution, introduced for the purpose of showing intent, cannot be prejudicial, it being admitted that the deed was inoperative for failure to comply with G.S. 52-12. *Waddell v. Carson*, 669.

§ 42. Harmless and Prejudicial Error in the Charge.

A charge must be read as a composite whole and not disjointedly. *Weavil v. Trading Post*, 106; *Barwick v. Rouse*, 391.

Where the parties do not object to the issues submitted, an exception to the charge on the ground that its subject matter related to an issue which should not have been submitted, is untenable. *Deaton v. Coble*, 190.

§ 46. Review of Discretionary Matters.

Ordinarily, the doing or refusing to do an act within the discretion of the court is not reviewable on appeal. *Harmon v. Harmon*, 83.

§ 49. Review of Findings or of Judgments on Findings.

Where the findings of the trial court are based in part on testimony of a witness heard by the court in chambers in the absence of the adverse party, the judgment on the findings must be vacated. *In re Gibbon*, 24.

§ 50. Review of Injunctive Proceedings.

Upon appeal from dismissal of temporary restraining order, the Supreme Court may review the evidence and find the facts and, when its findings warranting the continuance of the order, remand the cause with direction that an interlocutory order be issued in accordance with law. *Deal v. Sanitary District*, 74.

In injunction proceedings the Supreme Court is not bound by the findings of the lower court but may examine the evidence and reach its own conclusions as to the facts. *Roberts v. Cameron*, 373; *Roller v. Allen*, 516.

§ 51. Review of Judgments on Motion to Nonsuit.

Where motion to nonsuit is made at the close of plaintiff's evidence and renewed after the close of all the evidence, only the second motion is to be considered on appeal. *Murray v. Wyatt*, 123; *White v. Lacey*, 364.

Admitted testimony, whether competent or incompetent, must be considered in passing on defendants' motions for nonsuit. *Keintz v. Carlton*, 236.

§ 60. Law of the Case.

Where the Supreme Court holds that the evidence, exclusive of opinion testimony improperly admitted, was sufficient to take the case to the jury, the deci-

APPEAL AND ERROR—*Continued.*

sion is the law of the case upon the subsequent trial upon substantially the same evidence, with the exclusion of the incompetent opinion testimony. *Wood v. Ins. Co.*, 383.

APPEARANCE.

§ 1. Distinction Between Special and General Appearance.

The filing of an answer is equivalent to a general appearance. *Harmon v. Harmon*, 83.

An appearance in connection with a motion to set aside a judgment for want of service does not validate the void judgment. *Harrington v. Rice*, 640.

Even though defendant aptly challenges the validity of service by publication, his filing of a demurrer after for failure of the complaint to state a cause of action after the issuance of a second order of service by publication and service thereunder, without preserving objection to the second service, is a general appearance. *Bright v. Williams*, 648.

§ 2. Effect of General Appearance.

A general appearance waives all defects and irregularities in process and gives the court jurisdiction of the answering party even though there may have been no service of summons. *Harmon v. Harmon*, 83; *Bright v. Williams*, 648.

ARBITRATION AND AWARD.

§ 1. Arbitration Agreements.

Agreement to arbitrate is the foundation on which arbitration must rest, and in the absence of agreement the award cannot be binding. *Cotton Mills v. Duplan Corp.*, 496.

ASSAULT AND BATTERY.

§ 4. Criminal Assault in General.

In prosecutions for assault by intimidation, each case must depend upon its own peculiar circumstances, but it is sufficient to constitute a criminal assault if there is such show of violence as to cause reasonable apprehension of immediate bodily harm so as to put a reasonable person in fear whereby he is forced to leave a place where he has a right to be. *S. v. Allen*, 185.

§ 14. Sufficiency of Evidence and Nonsuit.

Evidence of assault on female by show of violence causing her to leave place where she had a right to be, *held* sufficient. *S. v. Allen*, 185.

Evidence of guilt of defendant as aider and abettor in assault on witness to recover money lost by witness on trip for purchase of liquor, *held* sufficient. *S. v. Burgess*, 304.

ASSOCIATIONS.

§ 4. Property and Conveyances.

Where all the members of an association concur in transferring the property to a corporation created by the association for the purpose of taking title, and have the corporation issue stock to the association and its individual members, *held*, the corporation acquires the legal title and the interest of the members of the association in the property is sufficient consideration for the issuance of the stock to them by the corporation. *Solon Lodge v. Ionic Lodge*, 281.

ATTORNEY AND CLIENT.

§ 4. Testimony by Attorney.

A party has a right to examine an attorney in regard to a transaction made by the attorney for the client, the testimony not being related to any communication between the attorney and client in respect thereto. *Goldston v. Tool Co.*, 226.

AUTOMOBILES.

§ 3½. Duty to Exhibit Driver's License.

Where there is no accident, a person is required to exhibit his driver's license only when he is operating or is in charge of a motor vehicle and is requested to do so by an officer. Therefore, warrant charging defendant with refusal to show his operator's license to a public officer does not charge the offense, and judgment upon such warrant must be arrested. The warrant should also charge the name of the officer who demands the right to inspect the license. *S. v. Danziger*, 406.

§ 7. Attention to Road, Look-out and Due Care in General.

The operator of a motor vehicle must be reasonably vigilant and anticipate the use of the highways by others, and his failure to maintain a reasonable lookout is negligence. *Clark v. Emerson*, 387.

It is the duty of a motorist not merely to look, but to keep a proper lookout, and he is held to the duty of seeing what he ought to have seen. *Taylor v. Brake*, 553.

§ 8. Turning and Turning Signals.

The evidence disclosed that the main lighting fuse in defendant's truck blew out, that the driver stopped the truck and immediately knocked on the flashing red signal lights on the front and rear of the left of the truck, which lights were round without signal arrows. There was no evidence that the signal device was of a type approved by the Department of Motor Vehicles. G.S. 20-154. *Held:* Plaintiff's contention that the truck gave the statutory left-turn signal is not supported by the evidence, and the conflicting contentions of the parties upon the evidence as to whether the red signal lights flashing on and off were sufficient to indicate a left turn or merely indicated the presence of the vehicle on the highway at that particular point, were properly submitted to the jury in the charge of the court. *Weavil v. Trading Post*, 106.

The statutory requirement that a driver, before turning, shall first ascertain that such movement can be made in safety does not preclude a left turn except when the circumstances render such movement absolutely free from danger, but merely imposes upon the driver the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made in safety to himself and others, without requiring him to anticipate the violation of statutory duty on the part of other motorists. *White v. Lacey*, 364.

§ 9. Stopping, Parking, Signals and Lights.

A red light is recognized by common usage as a method of giving warning of danger during hours of darkness, and a driver is required in the exercise of due care, upon seeing a red light, to heed its warning and reduce his speed. *Weavil v. Trading Post*, 106.

Parking on left side of highway partly on hard surface, with lights burning, *held* not proximate cause of collision with parked car by vehicle driven along highway. *Basnight v. Wilson*, 548.

AUTOMOBILES—*Continued.*

§ 10. Negligence and Contributory Negligence in Hitting Vehicle Stopped or Parked on Highway.

A motorist is required, in the exercise of reasonable care, to keep a proper lookout in his direction of travel, and while he is not required to anticipate that a truck will be standing on the highway without flares or other warning signs of danger prescribed by statute, he remains under duty to proceed as a reasonably prudent person would under the circumstances to avoid collision with the rear of such truck. *Weavil v. Trading Post*, 106.

The charge of the court on the rule that the inability of a motorist, traveling within the statutory maximum speed, to stop before hitting a stationary vehicle without lights ahead of him on the highway, is not contributory negligence *per se, is held* without error, construing the charge contextually *Ibid.*

§ 11. Lights.

A motorist, until he sees or should see to the contrary, has the right to assume that another vehicle will not approach him along the highway at nighttime without lights. *White v. Lacey*, 364.

§ 12. Backing.

Before backing a vehicle the driver is under duty in the exercise of due care to see that he can make the movement in safety. *Murray v. Wyatt*, 123.

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

Attempt to pass vehicle where ditch digging operations were in progress along highway *held* to raise question of negligence for jury, but not to constitute negligence as matter of law. *Sloan v. Glenn*, 55.

Notwithstanding the provisions of G.S. 20-149, a following vehicle may pass a vehicle in front of it on the highway on its right side when the driver of the front vehicle has given a clear signal of his intention to make a left turn and has left sufficient space to the right to permit the overtaking vehicle to pass in safety, and the circumstances are such that ordinary care dictates such course in order to avoid a collision. But this rule does not apply when the driver of the front vehicle has stopped and given no clear signal of his intention to make a left turn, but merely has red lights flashing on and off on the left rear and left front of his vehicle, in which instance the driver of the overtaking vehicle, in the exercise of due care, should approach with his automobile under control and reduce his speed or stop, if necessary, to avoid injury. *Weavil v. Trading Post*, 106.

A violation of G.S. 20-149(a) in overtaking and passing a motor vehicle is negligence. *Clark v. Emerson*, 387.

§ 17. Right of Way at Intersections.

Where at about the same time two vehicles approach an intersection which has no stop signs or traffic control signals, the vehicle on the right has the right of way, G.S. 20-155(a), and they approach the intersection at approximately the same time within the purview of this rule when their respective distances from the intersection and relative speeds, and other attendant circumstances, show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed. *Taylor v. Brake*, 553.

AUTOMOBILES—*Continued.*

Where a vehicle approaches an intersection and no other vehicle is then approaching within such distance as reasonably to indicate danger of collision, the driver is under no obligation to stop or wait in the absence of stop signs or traffic control signals, but may proceed to use the intersection as a matter of right, and if he thus first enters the intersection, he has the right of way over a vehicle approaching the intersection from his right. *Ibid.*

Where there are no stop signs or traffic control devices at a street intersection, neither street is favored over the other, notwithstanding that the one is paved and the other is not, and the right of way at such intersection is governed by G.S. 20-155(a), giving the car on the right the right of way when two vehicles approach the intersection at approximately the same time, and G.S. 20-155(b), giving the car first in the intersection the right of way. *Mallette v. Cleaners*, 652.

§ 19. Sudden Emergency.

If, under the circumstances, a reasonably prudent man could foresee and anticipate that an emergency would arise as a result of defendant's own conduct, defendant may not excuse himself on the ground that he was called upon to act in the emergency thus created. *Brunson v. Gainey*, 152.

§ 21. Brakes.

The failure to use the brakes when such use would prevent a collision is negligence. *Clark v. Emerson*, 387.

§ 25. Speed in General.

Any speed may be unlawful and excessive if the operator of a motor vehicle knows or by the exercise of due care should reasonably anticipate that a person or vehicle is standing in his line of travel. *Murray v. Wyatt*, 123.

A motorist is required by statute to operate his vehicle so as not to endanger or be likely to endanger any person or property, and to reduce speed when special hazards exist with respect to a narrow or winding roadway, pedestrians or other traffic. *Brunson v. Gainey*, 152.

Excessive speed is negligence. *Clark v. Emerson*, 387.

§ 34. Children on or Near Highway.

A motorist approaching a place where he knows children of tender years are likely to be on or near the highway is under duty to exercise care for their protection in recognition of their childish impulses. *Brunson v. Gainey*, 152.

§ 36. Presumptions and Burden of Proof.

Where defendants allege that the operator of the vehicle causing the injury was backing at the direction of the injured person, by way of new matter constituting a defense, and by way of contributory negligence, the burden of proving such affirmative defenses is on defendants, the allegations being expressly denied in the reply. *Murray v. Wyatt*, 123.

§ 37. Relevancy and Competency of Evidence.

Contention that witnesses could not have seen what they testified they did see *held* not supported by record. *Murray v. Wyatt*, 123.

§ 41b. Sufficiency of Evidence of Negligence in Failing to Use Due Care and Traveling at Excessive Speed in General.

Evidence tending to show that a guest in a car had remonstrated with the driver as to speed, that the driver had just passed a highway sign indicating he was approaching a winding road, and that as he entered a curve to his left, he swerved over to the right and went off the road on the right side into a swamp, resulting in personal injury to the guest, *is held* sufficient to take the case to the jury on the question of actionable negligence. G.S. 20-140. *Tatem v. Tatem*, 587.

§ 41d. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Passing Vehicle Traveling in Same Direction.

Attempt to pass vehicle where ditch digging operations were in progress along highway *held* to raise question of negligence for jury, but not to constitute negligence as matter of law. *Sloan v. Glenn*, 55.

Plaintiff's evidence tended to show that a tractor-trailer pulled out of a filling station on the east side of the street and turned left, that defendant, traveling south through the green light at an intersection, was confronted with the tractor-trailer in his line of travel, attempted to pass to the right of that vehicle, and collided wih defendant's car, which was parked on the west side of the street. The evidence further tended to show that the driver of defendant's vehicle acknowledged he was at fault. *Held:* Under the evidence, whether the collision resulted from excessive speed or defendant driver, his failure to maintain a proper lookout and apply his brakes after he saw or should have seen the tractor-trailer in his lane of travel, and whether he should have attempted to pass to the left rather than to the right of the tractor-trailer, are for the determination of the jury, and nonsuit was error. *Clark v. Emerson*, 387.

§ 41g. Negligence in Failing to Yield Right of Way at Intersection.

Plaintiff's evidence *held* insufficient to show negligence on part of defendant in entering intersection. *Taylor v. Brake*, 553.

§ 41i. Sufficiency of Evidence of Negligence in Entering Highway.

Evidence that defendant drove his tractor-trailer into the street from a filling station and turned left into the street directly in the path of a car traveling south at a lawful speed along the street only 200 feet away, so that the driver of the car was forced to turn right and attempt to pass to the right of the tractor-trailer, causing him to collide with a vehicle parked on the west side of the street, *is held* sufficient to overrule motion for nonsuit in an action by the owner of the parked car to recover damages to his vehicle. *Clark v. Emerson*, 387.

§ 41k. Sufficiency of Evidence of Negligence and Nonsuit on Question of Negligence in Backing.

Evidence that truck driven, under supervision of foreman who was giving each truck driver orders, backed truck without first obtaining signal or order to do so, *held* to take issue of negligence to jury. *Murray v. Wyatt*, 123.

§ 41l. Sufficiency of Evidence of Negligence and Nonsuit in Striking Pedestrian.

Evidence tending to show that defendant was driving his car at an excessive speed and struck plaintiff who was walking in the same direction on the shoul-

der on his right side of the highway, but entirely off the hard surface, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Bridgers v. Wiggs*, 663.

§ 42g. Nonsuit for Contributory Negligence—In Failing to Yield Right-of-Way at Intersection.

Plaintiff's evidence, susceptible to the interpretation that he was traveling 15 miles an hour in entering the intersection, that his view of defendant's vehicle, approaching the intersection from plaintiff's left, was obscured by a house at the intersection, and that as plaintiff entered the intersection defendant's vehicle was some 35 or 40 feet away, traveling at excessive speed, and that defendant's vehicle hit the left side of plaintiff's car as it was half way across the intersection, *is held* not to disclose contributory negligence on the part of plaintiff as a matter of law. *Mallette v. Cleaners*, 652.

§ 42h. Contributory Negligence in Turning.

Whether negligence in turning left without passing beyond center of intersection was proximate cause of collision *held* for jury. *White v. Lacey*, 364.

§ 42k. Contributory Negligence of Pedestrians.

Whether foreman directing movement of trucks was contributorily negligent *held* for jury in action for his death resulting from being hit by backing truck. *Murray v. Wyatt*, 123.

Evidence that plaintiff was walking on the right shoulder of the highway, but completely off the hard surface, when struck from the rear by a car traveling at excessive speed, does not disclose contributory negligence on the part of plaintiff as a matter of law. *Bridgers v. Wiggs*, 663.

§ 46. Instructions in Auto Accident Cases.

Peremptory instruction that attempt to pass vehicle traveling in same direction at place where ditch digging operations were in progress along highway constituted negligence *held* error. *Sloan v. Glenn*, 55.

The charge of the court upon the evidence in this case as to whether flashing signal lights on the left rear and left front of defendant's stationary truck were left-turn signals or merely warning signals of the presence of the truck on the highway, together with the law applicable to the duty of a motorist approaching from the rear of such vehicle, *is held* without error. *Weavil v. Trading Post*, 106.

Refusal to give peremptory instruction on issue of contributory negligence is proper when determinative facts are in dispute. *Murray v. Wyatt*, 123.

Evidence *held* to require instruction that doctrine of sudden emergency does not apply if defendant's own negligence causes emergency. *Brunson v. Gainey*, 152.

This action involved the alleged negligence of defendant in failing to yield to plaintiff's intestate one-half the highway as the respective vehicles, traveling in opposite directions, passed each other. G.S. 20-148. *Held:* An instruction embracing the statutory duty of a driver of a vehicle overtaking and passing another vehicle traveling in the same direction, G.S. 20-149, is prejudicial error. *Lookabill v. Regan*, 500.

AUTOMOBILES—*Continued.*

§ 47. Duties and Liabilities of Driver to Passenger in General.

The failure of the driver of a car to warn a guest, alighting from the car, that a vehicle was approaching, is without significance when the guest already knew of the approaching vehicle. *Basnight v. Wilson*, 548.

§ 49. Contributory Negligence of Guest or Passenger.

The evidence disclosed that the driver of a vehicle, traveling north, parked it on the shoulder on the west side of the highway with its right wheels some 10 inches on the 20-foot hard surface, and with its lights burning, in violation of G.S. 20-161, G.S. 20-161.1, that plaintiff passenger got out of the car to open the trunk, and observed the location of the vehicle and saw a car approaching, traveling south at a high rate of speed, some distance away. As plaintiff was standing at the rear of the parked car, the oncoming vehicle collided therewith head-on. *Held:* Even if it be conceded that the evidence supports an inference that the negligence in parking the car was a concurring proximate cause of the collision, the evidence discloses that plaintiff had knowledge of all the facts and circumstances and therefore was under equal duty to foresee that the car parked in such manner might be hit by a vehicle traveling along the highway, and therefore nonsuit was proper on the ground of contributory negligence. *Basnight v. Wilson*, 548.

§ 50. Negligence of Driver Imputed to Guest or Passenger.

The doctrine of joint enterprise does not apply as to the liability between the operator of a vehicle and a passenger, but applies only in regard to third persons not parties to the enterprise. *Gilreath v. Silverman*, 51.

§ 54a. Who Are Employees or Agents in Operating Vehicles.

The lessee under a trip lease agreement in interstate commerce is an employer of the lessor-driver and his assistant driver. *McGill v. Freight*, 469.

§ 54f. Sufficiency of Evidence on Issue of Respondeat Superior.

Where the evidence tends to show that at the time of the collision between plaintiff's car and a truck, the truck was actually owned by one defendant and was being driven at the time by his employee, although the registered title was in the name of a stranger to the action, proof of ownership takes the issue of *respondeat superior* to the jury as to the defendant employer, G.S. 20-71.1 (a), and the granting of nonsuit was error. *Scott v. Lee*, 68.

Where action is instituted more than a year after the cause of action accrued, so that plaintiff does not have the benefit of G.S. 20-71.1, nonsuit is properly entered as to the alleged superior when there is no evidence that the driver was operating the truck in the course of his employment as an agent or employee of the superior. *Floyd v. Dickey*, 589.

§ 55. Family Car Doctrine.

A father who keeps a motor vehicle for the use and benefit of his minor son is liable for the negligent operation of the vehicle by his son. *Clark v. Emerson*, 387.

§ 59. Sufficiency of Evidence and Nonsuit in Homicide and Assault Prosecutions.

Evidence that defendant drove his car at a speed of 70 to 75 miles per hour, in a 35 mile per hour speed zone, skidded 285 feet, ran over a four foot shoulder

and then the ditch, striking and killing a boy standing at the edge of the ditch, and then 65 feet before it stopped, with further evidence that defendant had been drinking, *is held* sufficient to be submitted to the jury in a prosecution for manslaughter. *S. v. Renfrow*, 665.

§ 71. Relevancy and Competency of Evidence in Prosecutions for Drunken Driving.

Testimony of expert as to alcoholic content of defendant's blood and effect of such percentage, *held* competent. *S. v. Moore*, 158.

§ 72. Sufficiency of Evidence in Prosecution for Drunken Driving.

Where the State's evidence is amply sufficient to be submitted to the jury on the question of defendant's guilt of operating an automobile on the highways of the State while under the influence of intoxicating liquor, and is also sufficient as to defendant's prior conviction for a like offense, the fact that the evidence is insufficient as to a second prior conviction alleged in the indictment, does not justify nonsuit, since the entire case does not stand or fall upon whether the State had established beyond a reasonable doubt that the defendant was convicted on each and all the prior occasions alleged in the warrant or indictment. *S. v. Stone*, 42.

§ 75. Punishment for Drunken Driving.

A plea of *nolo contendere* is a prosecution for driving while under the influence of intoxicating liquor may not be made the basis for a higher penalty in a subsequent prosecution. *S. v. Stone*, 42.

BASTARDS.

§ 1. Willful Failure to Support—Elements of Offense.

Under G.S. 49-2 each parent is made criminally liable for willful failure or refusal to support his or her illegitimate child, and, the willful failure to support being the offense, the crime cannot be committed before the child is born. *S. v. Robinson*, 10.

§ 2. Jurisdiction and Procedure.

Domestic Relations Court has jurisdiction of prosecution for willful failure to support illegitimate child. *S. v. Robinson*, 10.

In proceedings under G.S. 49-2, *et seq.*, the paternity of an illegitimate child must be established beyond a reasonable doubt before conviction of a male defendant and the question of paternity may be determined even before the birth of the child in any court having criminal jurisdiction in excess of a justice of the peace. *Ibid.*

Proceedings under G.S. 49-2, *et seq.*, can be instituted only by the mother of an illegitimate child, her personal representative or the superintendent of public welfare. *Ibid.*

§ 3. Limitations.

Where the question of paternity is judicially determined within three years after the birth of the illegitimate child, the defendant may thereafter be prosecuted for his willful neglect and refusal to support the child. *S. v. Robinson*, 10.

BASTARDS—*Continued.*

§ 6½. Instructions in Prosecutions for Willful Failure to Support.

In a prosecution for willful failure of defendant to support his illegitimate child, a charge to the jury which does not instruct them that the failure to support must be willful in order to constitute the offense, must be held for prejudicial error. *S. v. Robinson*, 10.

§ 7. Issues, Verdict and Judgment.

In proceedings in a Domestic Relations Court upon an affidavit charging defendant with being the father of the unborn child of prosecutrix and failing to provide her with medical care and a warrant of arrest to answer the charge, the court found that defendant was the father of the child. *Held:* The fact that the offense of willfully neglecting his illegitimate child had not been committed at the time the affidavit was filed, and the fact that the court exceeded its power in ordering defendant to make payments for the support of the child, do not vitiate the court's determination of the question of paternity. *S. v. Robinson*, 10.

BILLS AND NOTES.

§ 3. Consideration.

A pre-existing debt, or a release or waiver of a legal right, or a forbearance to exercise a legal right, is sufficient consideration to support a note. *Bumgardner v. Groover*, 17.

While neither a debt due by a father and mother nor the fact of the relationship is sufficient consideration to support the execution of a note by the daughter, forbearance to exercise a legal right against the parents is sufficient consideration. *Ibid.*

§ 29. Actions on Notes—Defenses.

Allegations that note sued on was executed for money borrowed to pay installment due on another note executed to plaintiff *held* no defense. *Bumgardner v. Groover*, 17.

Agreement to reconvey in satisfaction of mortgage note *held* no defense in action on another note for money borrowed to pay installment on mortgage note. *Ibid.*

BOATING.

§ 2. Liability to Passengers.

Evidence of the negligent operation of a motor boat causing a passenger to be thrown therefrom and drowned, *held* sufficient, when considered in the light most favorable to plaintiff, to take the issue to the jury. *Gilreath v. Silverman*, 51.

Doctrine of joint enterprise does not apply, and issue of contributory negligence is for jury where controlling facts are in dispute. *Ibid.*

BOUNDARIES.

§ 3d. Contemporaneous Surveys.

The corners marked and the line actually run in the survey of a State grant is the line of the grant. *Meekins v. Miller*, 567.

§ 5b. Parol Evidence in General.

Anyone present at the time of the survey of a State grant is competent to testify where the corners were marked and the lines actually run. *Meekins v. Miller*, 567.

BOUNDARIES—*Continued.*

Testimony as to physical facts, such as that the line contended for by one party would be on a ridge distant from any water, and that when viewed from the air an island in a sound corresponded in detail with the location of the island upon a map introduced in evidence, is competent. *Ibid.*

§ 5f. Surveys.

Explanations of the court surveyor as to how he illustrated on the map the respective contentions of the parties are not evidence and are not prohibited. *Meekins v. Miller*, 567.

Certified copy of a State grant with certificate of the county surveyor and his description and map of the land covered by the grant, while not conclusive as to the location of the land granted, is competent to be considered by a jury or a referee. G.S. 8-6. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS.

§ 6. Possession of Implements of House Breaking.

In a prosecution under G.S. 14-55, the burden is on the State to prove beyond a reasonable doubt that the possession of the implements specified was "without lawful excuse" within the spirit of the statute, and the possession of a pistol for personal protection, even though unauthorized, cannot be unlawful possession within the meaning of the statute. *S. v. McCall*, 146.

§ 11. Sufficiency of Evidence and Nonsuit.

Upon an indictment charging possession, without lawful excuse, of a crowbar, hack saw and automatic pistol, in a prosecution under G.S. 14-55, without charge or evidence of possession of such implements with intent to use them for the purpose of unlawfully and feloniously breaking and entering, the State's evidence of possession, with further testimony that the crowbar and hack saw were ordinary implements used by carpenters and mechanics, and without contention that either is an implement designed for the purpose of housebreaking or that in combination they may not be used for legitimate purposes, is insufficient to be submitted to the jury. *S. v. McCall*, 146.

CARRIERS.

§ 5. Franchises, Extensions and Curtailment of Services.

Where a municipality has granted a franchise to a utilities company to operate passenger buses over its streets, the parties may mutually agree upon extensions and services, changes in routes, or curtailment of services, when in the opinion of the governing board of the municipality such changes are, under the existing conditions, for the best interest of all concerned, including the public. However, when the parties are unable to agree to a proposed curtailment of existing services, the matter is within the exclusive jurisdiction of the Utilities Commission, G.S. 62-121.47(h), and the municipality may not enjoin the utility from proposed curtailment of services, although the utility may not change its schedules or curtail its services unless given authority to do so by the Utilities Commission. *Winston-Salem v. Coach Lines*, 179.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 7b. After-Acquired Property.

To embrace after-acquired property, a mortgage or deed of trust must be so worded as to show, expressly or by implication, the mortgagor's unmistakable intention to convey such property. *Sales Co. v. Weston*, 621.

Instruments in this case *held* to cover after-acquired property. *Ibid.*

§ 10. Notice, Lien and Priorities.

An unregistered chattel mortgage on after-acquired property is good as between the parties and therefore is superior to the claims of general creditors of the deceased mortgagor. *Sales Co. v. Weston*, 621.

COMPROMISE AND SETTLEMENT.

§ 2. Operation and Effect of Settlement.

Settlement by widow, in capacity of administratrix, of claim for wrongful death against intestate's employer, under mistake of law that Compensation Act was not applicable, bars widow as dependent but does not bar minor child of deceased. *McGill v. Freight*, 469.

CONSPIRACY.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of conspiracy to commit armed robbery *held* sufficient. *S. v. Saunders*, 338.

CONSTITUTIONAL LAW.

§ 6½. Right to Raise Question of Constitutionality.

While ordinarily the constitutionality of a statute cannot be tested by suit to enjoin its enforcement, injunction will lie when equitable relief is necessary to protect fundamental property or human rights guaranteed by the organic law. *Roller v. Allen*, 516.

§ 8d. Legislative Branch—Lobbying.

The Attorney-General has no specific enforcement duty in connection with G.S. Ch. 120, Art. 10, requiring organizations engaged in the activity of influencing public opinion or legislation in this State to register with the Secretary of State. *N.A.A.C.P. v. Eure, Secretary of State*, 331.

§ 10b. Duty and Power of Courts to Determine Constitutionality of Statute.

While the Court must assume that the Legislature acted within its powers until the contrary clearly appears, and in cases of doubt will resolve the question of constitutionality in favor of validity, where a statute unreasonably obstructs the common right of the persons affected to engage in an ordinary and harmless occupation in violation of the organic law, it is the duty of the Court to declare the Act unconstitutional. *Roller v. Allen*, 516.

§ 11. State Police Power in General.

The police power is a necessary attribute of sovereignty and is coextensive with the necessity of safeguarding the interests of the public. *Hedrick v. Graham*, 249.

CONSTITUTIONAL LAW—*Continued.*

A statute must have some substantial relation to the public health, morals, order, safety or general welfare in order to be valid as an exercise of the police power. *Roller v. Allen*, 516.

§ 17. Police Power—Regulation of Trades and Professions.

G.S. Chapter 87, Article 3, requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls, *is held* unconstitutional as an unwarranted interference with the fundamental right to engage in an ordinary and innocuous occupation in contravention of Article 1, Sections 1, 7, 17 and 31 of the Constitution of North Carolina. The statute cannot be upheld as an exercise of the police power, since its provisions have no substantial relation to the public health, safety or welfare but tend to create a monopoly. *Roller v. Allen*, 516.

§ 20. Due Process of Law—Nature and Scope of Mandate.

Whether a foreign corporation is doing business in this State so as to be subject to service of process under our laws is essentially a question of due process to be determined by the Federal decisions. *Putnam v. Publications*, 432.

§ 21. What Constitutes Due Process.

Parties have the fundamental right to be present in court when evidence is offered and to an opportunity to rebut it, and when parol evidence is offered, to cross-examine the witnesses. *In re Gibbons*, 24.

§ 28. Full Faith and Credit to Foreign Judgments.

A decree of another state adjudicating the right to custody of child domiciled in this State and not present in such other state at the time of its proceedings is not binding here. *Kovacs v. Brewer*, 630.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

Consent judgment for support will not justify contempt proceedings, nor will void subsequent orders for support entered in conflict with consent judgment. *Holden v. Holden*, 1.

CONTRACTS.

§ 7a. Validity—Contracts in Restraint of Trade.

A covenant by the seller of a business not to engage in competition with the purchaser thereof is valid if the covenant is reasonable in protecting the purchaser from competition from his vendor without detriment to the public. *Thompson v. Turner*, 478.

A covenant by the seller of a business not to engage in competition with the purchaser in the territory "now covered" is not void for indefiniteness of description when the territory may be specifically located by parol evidence. Such parol evidence does not contradict the terms of the writing, but merely makes them definite and certain. *Ibid.*

§ 8. General Rules of Construction.

The legal effect of the language in a written instrument is a question of law to be determined by the court. *DeBruhl v. Highway Com.*, 139.

CONTRACTS—*Continued.*

In construing a written instrument, the court must seek to ascertain from the language used, the subject matter, the end in view and the purpose sought to be accomplished, the intention of the parties at the time the document was executed. *Ibid.*

All instruments should receive a sensible and reasonable construction and not one which will lead to absurd consequences or unjust results. *Ibid.*

The fact that several instruments between the same parties bear the same date is sufficient to support a finding that they were executed at the same time, and when their terms disclose their interrelation as parts of a single transaction, they should be construed together. *Sales Co. v. Weston*, 621.

CORPORATIONS.

§ 2½. Registration of Foreign Corporations.

Whether N.A.A.C.P. is required to register under G.S. 55-118, *quaere? N.A.A.C.P. v. Eure, Secretary of State*, 331.

§ 13b. Transfer of Ownership of Stock.

The delivery by the owner of certificates of stock, duly endorsed to the donees or their agent is sufficient delivery to constitute a valid gift, both as to certificates issued prior to 15 March 1941 (C.S. 1164), and as to certificates issued thereafter (G.S. 55-81), and this notwithstanding any agreement between the corporation and its affiliate that it would not transfer any stock on its books unless the new owners were approved by the affiliate, since C.S. 1170 applies only between the corporation and the transferee. *Bank v. Atkinson*, 563.

§ 16. Dividends.

Whether payment by subsidiary of interest on parent corporation's debentures, based upon ownership of subsidiary's common stock by parent corporation, is payment of dividend by subsidiary, *quaere? Bakeries v. Ins. Co.*, 408.

COSTS.

§ 3a. Civil Action—Successful Party.

Where plaintiff fails to recover in an action involving title to real property in which a court survey is ordered, the clerk is without authority to tax the surveyor's fees in the bill of costs, but on appeal from the clerk's order, the Superior Court, while properly affirming the clerk's order, should pass upon the motion for taxing such fees as a part of the costs as a matter of right. G.S. 6-19. *Ipock v. Miller*, 585.

COURTS.

§ 4b. Appeals From Inferior Courts to Superior Court.

Where the record supports the findings that notice of appeal to the Superior Court from a municipal-county court was not given within the time required by statute, order of the Superior Court affirming the judgment of the municipal-county court and dismissing the appeal will be sustained. *Thorpe v. Burns*, 103.

§ 18. Domestic Relations Courts.

A Domestic Relations Court has jurisdiction to determine the question of paternity in a proceedings under G.S. 49-2, *et seq.* G.S. 7-103. *S. v. Robinson*, 10.

CRIMINAL LAW.

§ 8b. Aiders and Abettors.

An aider or abettor is one who, being present, encourages, aids or assists the commission of a crime, or who is present for such purpose to the knowledge of the actual perpetrator, or who, whether present or not, instigates or procures another to commit the offense. *S. v. Burgess*, 304.

§ 17b. Plea of Guilty.

A plea of guilty is equivalent to a conviction. *S. v. Stone*, 42.

§ 17c. Plea of Nolo Contendere.

A plea of *nolo contendere* authorizes the court in that particular case to pronounce judgment as though there had been a conviction by verdict or plea of guilty, but a plea of *nolo contendere* cannot be used against the defendant as an admission of guilt in a subsequent civil or criminal action. *S. v. Stone*, 42.

§ 27. Judicial Notice.

Courts will take judicial notice of distances between important cities. *S. v. Saunders*, 338.

§ 28. Presumptions and Burden of Proof.

Prima facie evidence is sufficient to take the issue to the jury and support, but not compel, an affirmative finding, it being for the jury to weigh the evidence, but *prima facie* evidence does not in itself establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of proof on the issue. *S. v. Bryant*, 645.

§ 29a. Evidence of Motive.

Evidence of a strong motive or interest to commit the offense proved to have been committed is a circumstance competent to be shown in evidence, since a man's conduct may be gathered from the motive known to have influenced him. *S. v. Adams*, 344.

§ 31c. Competency of Experts.

Competency of witness as expert is addressed to discretion of trial court, and after evidence of competency is introduced the action of the court in permitting him to testify over objection is tantamount to holding the witness to be an expert in his field. *S. v. Moore*, 158.

§ 31h. Ouinion Evidence—Intoxication.

Testimony of expert as to alcoholic content of defendant's blood and effect of such percentage, *held* competent. *S. v. Moore*, 158.

§ 31m. Opinion Evidence—Distances.

It is competent for a witness to testify from her own knowledge gained from official maps over a period of years as travel counsel as to distances between important cities and towns in this and another state. Further, such matters are within common knowledge of which the courts may take judicial notice. *S. v. Saunders*, 338.

§ 32d. Evidence—Bloodhounds.

Where the State fails to introduce evidence of the breeding, training or proven qualities of a dog used by a witness in trailing defendant, but the court excludes all testimony as to the activities of the dog, and instructs the jury

not to consider the testimony of the witness that he was running with a bloodhound, but that they might consider the testimony that the man found had with him a bag similar to the bag with the stolen money, etc., exception to the statement of the witness that he had a bloodhound with him on the day in question cannot be sustained. *S. v. Dorsett*, 47.

§ 42f. Whether Party Is Bound by Testimony of Own Witness.

The State is not bound by the exculpatory parts of statements of defendant introduced in evidence by it, but may show facts in contradiction thereof. *S. v. Mangum*, 323.

§ 48c. Admission of Evidence Competent for Restricted Purpose.

The general admission of evidence which is competent for a restricted purpose will not be held for error in the absence of a request by defendant that its admission be restricted. *S. v. Adams*, 344.

§ 49. Course of Trial—Custody of Defendant.

Where defendant is late for the opening of court for the resumption of his trial, the court has the discretionary power to order the defendant into custody. *S. v. Mangum*, 323.

§ 50d. Expression of Opinion by Court on Evidence During Progress of Trial.

The interrogation of a witness by the court solely to obtain a definite answer to a question theretofore asked the witness by defendant's counsel *held* not prejudicial, the interrogation not tending to discredit the witness or express an opinion. *S. v. Furley*, 219.

Where a defendant is late for the opening of court for the resumption of his trial, the court has the discretionary power to order the defendant into custody, and the court's action in doing so in the presence of the jury will not be held for error on defendant's exception when it is apparent that the jury understood the reason for the court's action and that the court's action could in no way be regarded by them as a reflection upon the credibility of the defendant as a witness. *S. v. Mangum*, 323.

§ 51. Function of Court and Jury in Regard to Evidence.

It is the function of the jury, not the court, to determine the credibility of the testimony. *S. v. Hipp*, 205.

§ 52a(1). Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, the evidence must be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable inference to be drawn therefrom. *S. v. Burgess*, 304; *S. v. Block*, 661.

§ 52a(2). Sufficiency of Evidence to Overrule Nonsuit in General.

The unsupported evidence of an accomplice is sufficient to sustain a conviction in this State if it satisfies the jury of guilt beyond a reasonable doubt. *S. v. Saunders*, 338.

§ 52a(4). Nonsuit for Exculpatory Evidence Introduced by State.

The introduction by the State of statements or a confession made by defendant does not entitle defendant to nonsuit because of exculpatory averments therein when the State introduces other incriminating evidence, since the State

CRIMINAL LAW—*Continued.*

is not precluded from showing facts in contradiction of the exculpatory statements, and the jury is not required to believe the whole of a confession, but may believe a part and reject a part. *S. v. Mangum*, 323.

§ 52b. Directed Verdict and Peremptory Instructions.

A peremptory instruction may not be given when willfulness is an essential element of the offense. *S. v. Gibson*, 71.

§ 53b. Instructions on Presumptions and Burden of Proof.

The court's charge on reasonable doubt and the caution given the jury in the admission of evidence in corroboration *held* without error. *S. v. Furley*, 219.

§ 53f. Expression of Opinion by Court on Evidence in the Charge.

Defendant's objection that the court failed to stress his contentions equally with those of the State, *held* not supported by the record. *S. v. Morgan*, 215.

§ 53k. Instructions—Statement of Contentions.

Where defendant does not contend that any of his contentions were omitted or incorrectly stated, assignment of error to the statement of contentions solely on the ground that the statement of the respective contentions of the parties were not of equal length, is untenable. *S. v. Adams*, 344.

§ 53n. Instructions on Right to Recommend Life Imprisonment.

In a prosecution for murder in the first degree, it is required that the court instruct the jury not only as to their right to recommend life imprisonment, but he must also instruct the jury as to the effect of such recommendation. G.S. 14-17. *S. v. Cook*, 610.

§ 55. Jurisdiction of Court to Hear Motions After Verdict.

Denial of motion in a criminal action for a new trial for attaint of jury and for newly discovered evidence, made at the next succeeding term of the Superior Court after affirmance of judgment of conviction by the Supreme Court, *held* properly denied on authority of *S. v. Grass*, 223 N.C. 859. *S. v. Mooring*, 698.

§ 56. Arrest of Judgment.

Where court withdraws from jury offense charged in the warrant, conviction "as charged" cannot stand, and judgment must be arrested. *S. v. Poe*, 402.

§ 57b. Motions for New Trial for Newly Discovered Evidence.

Where an appeal is taken and subsequently abandoned after the termination of the trial term, the Superior Court is without jurisdiction to entertain a motion for a new trial on the ground of newly discovered evidence. *S. v. Smith*, 230.

§ 60b. Judgment and Sentence—Conformity to Verdict.

The fact that the sentence imposed is not justified by the verdict does not vacate the verdict. *S. v. Robinson*, 10.

§ 62f. Suspended Sentences and Execution.

Where appeal is taken to the entry of judgment suspending the prison term, the judgment will be stricken on appeal and the cause remanded for proper judgment. *S. v. Moore*, 158.

CRIMINAL LAW—*Continued.*

Where the judgment upon verdict of guilty in a criminal prosecution also activates a suspended sentence entered against defendant in a prior prosecution, and it is determined on appeal that judgment of nonsuit should have been entered, defendant is entitled to have the provision activating the suspended sentence stricken from the record. *S. v. Harrelson*, 604.

§ 62h. Sentence—Repeated Offenses.

Question of prior convictions for purpose of increased punishment should be submitted to jury separate from questions of guilt of offense charged. *S. v. Stone*, 42.

A plea of *nolo contendere* may not be made the basis for a higher penalty in a subsequent prosecution. *Ibid.*

§ 74. Term of Supreme Court for Which Appeal Must Be Docketed.

Where an appeal in a criminal case is not docketed during the next succeeding term of the Supreme Court as required by Rule 5 of the Rules of Practice in the Supreme Court, and defendant does not docket the record proper and move for *certiorari* before the expiration of the time allowed, the appeal must be dismissed, notwithstanding any order of the trial judge extending the time for settling case on appeal. *S. v. Walker*, 658.

§ 77a. Necessary Parts of Record.

The indictment or warrant, the plea, the verdict, and the judgment appealed from are essential parts of the transcript on appeal in criminal cases, and absence of the indictment or warrant may not be cured by stipulation of the parties. *S. v. Hunter*, 607.

Where it is made to appear that defendant was tried upon warrants issued by the police court of a municipality, but the record fails to disclose what disposition was made of the prosecutions in the inferior court or how they reached the Superior Court, appeal to the Supreme Court must be dismissed. *Ibid.*

The failure of the record to contain the bill of indictment is fatal, and such defect cannot be cured by certificate of the clerk that there was a true bill of indictment but that it had been lost, but where a copy of the bill of indictment as returned by the grand jury is certified by the clerk pursuant to an order of the Superior Court, the order and copy of the bill, so certified, become a part of the record on appeal, thus supplying the deficiency and precluding dismissal. *S. v. Vandiford*, 609.

§ 78c. Objections and Exceptions in General.

While ordinarily an assignment of error must be supported by an exception duly taken, where the exception relates to remarks of the court in the absence of defendant's counsel so that no exception could then be taken, and exception is taken immediately after the discussion of the matter by the attorney with the court upon the attorney's coming into court, the exception will be considered. *S. v. Mangum*, 323.

§ 78e(2). Exception to Charge—Necessity for Calling Court's Attention to Misstatement of Evidence or Contentions.

Inadvertence of the court, in stating the contention of the State that the testimony of defendant should be scrutinized in the light of his interest, that defendant "still maintains some hope that he may not be" convicted, will not be held for prejudicial error in the absence of apt objection when the jury could

CRIMINAL LAW—*Continued.*

not have understood the instruction as anything more than a statement of the State's contentions, the misstatement not being sufficient to take the matter out of the general rule that a misstatement of contentions must be brought to the court's attention in apt time. *S. v. Saunders*, 338.

§ 79. The Brief.

Assignments of error not brought forward in the brief are deemed abandoned. *S. v. Adams*, 344.

§ 81c(2). Harmless and Prejudicial Error in Instructions.

Exceptions to the charge will not be sustained if it is without prejudicial error when construed contextually. *S. v. Burgess*, 304.

Conflicting instructions upon a material point necessitates a new trial, since it cannot be determined that the jury did not follow the erroneous instruction. *S. v. Bryant*, 645.

§ 81c(3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Form of testimony of expert witness *held* not prejudicial under facts of this case. *S. v. Furley*, 219.

Exception to testimony of the State's witness cannot be sustained when defendant or his witness testifies to substantially the same facts or the defendant admits such facts in his own testimony. *S. v. Adams*, 344.

§ 81c(4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Where defendant is convicted of a lesser degree of a crime, error in the charge relating to a higher degree thereof cannot be prejudicial when there is nothing to show that the verdict was affected thereby. *S. v. Mangum*, 323.

CUSTOMS AND USAGES.

§ 3. Sufficiency of Evidence of Custom.

Where the evidence discloses that truck drivers in the performance of their duties in dumping their trucks on a particular project had a safety rule to await a signal from the foreman before maneuvering their trucks to the "refuse pile," and that such practice was known to defendant driver, an instruction to the jury that if they found from the evidence that defendant driver moved his truck at the time in question without awaiting signal from the foreman, such failure would be negligence is warranted. *Murray v. Wyatt*, 123.

DAMAGES.

§ 12. Sufficiency of Evidence of Damages.

Failure to prove the monetary loss sustained to plaintiff's property as a result of concurring negligence of defendants does not justify nonsuit but only precludes an award of compensatory damages. *Clark v. Emerson*, 387.

DEATH.

§ 10. Compromise and Settlement of Claim for Wrongful Death.

An executor or administrator may compromise and settle a claim for the wrongful death of his testate or intestate. *McGill v. Freight*, 469. Such

DEATH—*Continued.*

settlement with the employer by the widow as administratrix bars her from claiming as a defendant under the Workmen's Compensation Act, but does not bar the minor son of deceased who is without guardian. *Ibid.*

DECLARATORY JUDGMENT ACT.

§ 2. Causes Which May Be Litigated Under the Act.

A proceeding under the Declaratory Judgment Act for a declaration as to how the estate of deceased passed by his purported will must be dismissed when the record of probate of the instrument discloses on its face that the paper writing had not been proven as required by statute, since in such instance the question of title to property under the paper writing is moot, and a moot question is not within the scope of the Declaratory Judgment Act. *Morris v. Morris*, 30.

In an action under the Declaratory Judgment Act the court has no jurisdiction to nullify a duly probated will or any part thereof. *Bennett v. Attorney-General*, 312.

§ 6. Proceedings and Judgment.

The court, in a proceeding under the Declaratory Judgment Act, has the discretionary power, upon its finding that a decision based on one of the alleged causes of action would not settle the controversy, to dismiss that cause. *N.A.A.C.P. v. Eure, Secretary of State*, 331.

This action was brought against the Secretary of State and the Attorney-General to determine the applicability to plaintiff of G.S. Ch. 120, Art. 10, and G.S. 55-118. *Held:* Upon severance of the causes upon demurrer, the court in its discretion properly dismissed the first cause of action on the ground that a declaration would not settle that controversy since it would not be binding on the solicitors, and retained the second cause for trial, the Attorney-General being a proper nominal party thereto since he is empowered to prosecute for the penalty provided by G.S. 55-118 for failure of a foreign corporation to register in accordance with its mandate. *Ibid.*

DEDICATION.

§ 4. Acceptance.

Where dedication of streets to a municipality is made by the recording of a map showing such streets, no lapse of time precludes the municipality from accepting such dedication in the absence of withdrawal of the offer, G.S. 136-96, and therefore in the absence of such withdrawal the municipality is not barred from accepting the dedication unless it has lost title by adverse possession. *Roberts v. Cameron*, 373.

DEEDS.

§ 1a. Nature and Essentials of Conveyances of Real Estate in General.

A quitclaim deed reciting a valuable consideration and that the grantors did thereby bargain, sell, quitclaim and convey all right, title and interest to the described lands, is an instrument of conveyance and passes whatever right, title and interest grantors had power to convey at the time of its execution and delivery. *Hayes v. Ricard*, 687.

The owner of land executed deeds to each of her four children for a separate parcel thereof for the purpose of making an equal division, but the deed to her

DEEDS—*Continued.*

daughter was made to her daughter and her daughter's husband. The deed of gift was recorded within the time prescribed by G.S. 47-26. *Held:* The owner had the right to convey the property as she pleased, and the deed of gift to her daughter and to her daughter's husband is valid and created an estate by the entirety in them. *Edwards v. Batts*, 693.

§ 4. Consideration.

A deed of gift registered within the time prescribed by G.S. 47-26 is an executed contract and is valid, notwithstanding the absence of consideration. *Edwards v. Batts*, 693.

§ 5. Signing, Sealing and Delivery.

The registration of a deed raises the presumption of execution and delivery. *Hayes v. Ricard*, 687.

§ 15. Reservations and Exception.

A statement after the description that the grantor "is to have a home on and full possession of said land as long as he lives," is insufficient to reserve a life estate in the grantor, the deed being otherwise a regular fee simple warranty deed. *Burns v. Crump*, 360.

DESCENT AND DISTRIBUTION.

§ 13. Advancements.

The doctrine of advancements is relevant solely in determining the share of a child in the real or personal estate owned by the parent at the time of death, and is irrelevant in the construction of a gift *inter vivos*. *Edwards v. Batts*, 693.

DIVORCE AND ALIMONY.

§ 2½d. Recrimination.

After decree of absolute divorce, the husband remarried. Thereafter, the first wife had the decree set aside for defective service for that the clerk had not mailed her a copy of the order of service by publication, although the affidavit of the husband had given her correct address. Upon intimation that the court would set aside the decree, the husband ceased to cohabit with the second wife, and continued his action for absolute divorce on the ground of separation. The first wife filed answer alleging his adulterous cohabitation as a bar. *Held:* The husband having done all required of him by law for service by publication and the evidence disclosing no intentional wrong on his part or fraud or collusion in procurement of the divorce decree, his cohabitation with the second wife up to the time he knew the decree would be set aside was not adulterous so as to bar his right of action. *Harmon v. Harmon*, 83.

§ 15. Alimony Pendente Lite.

Neither alimony *pendente lite* nor permanent alimony may be awarded unless there is an action pending in which verified pleadings have been filed and in which the wife has alleged facts at least sufficient to meet the requirements of the statute for divorce *a mensa et thoro*. *Holden v. Holden*, 1.

§ 15½. Subsistence by Consent Approved by Decree of Court.

Where, in a husband's action for divorce *a mensa*, the parties enter into a consent judgment providing that the parties should continue to live separate

DIVORCE AND ALIMONY—*Continued.*

and apart and stipulating that the husband should pay a designated sum monthly for the support of his wife and a designated sum for the support of the minor child of the marriage, *held*, the consent judgment terminates the action in regard to the wife, and therefore in regard to support for the wife such judgment may not thereafter be modified by a judge of the Superior Court without the consent of the parties, nor may the court enter a judgment for the support of the wife in direct conflict therewith, since there is no action pending in which such judgment may be entered. *Holden v. Holden*, 1.

§ 16. Enforcing Payment of Alimony.

Where action for divorce *a mensa* is terminated by consent judgment for support, court may not enter further order for support, and neither consent judgment nor subsequent order for support constitute basis for contempt. *Holden v. Holden*, 1.

§ 17. Jurisdiction to Award Custody of Children.

A modification of provisions of a foreign divorce decree in regard to the custody of a minor child of the marriage, entered in the foreign jurisdiction while the child of the marriage was domiciled in this State with her resident grandfather, is not binding on the courts of this State, and does not come under the full faith and credit clause of the Federal Constitution. *Kovacs v. Brewer*, 630.

§ 19. Award of Custody of Children—Findings and Decree.

In a proceeding under G.S. 50-13 to determine the question of the right to custody of the minor child of parents divorced in another state, decree awarding the custody to the resident paternal grandfather upon findings, supported by evidence, that the welfare and best interest of the child so required, will be affirmed. *Kovacs v. Brewer*, 630.

§ 20½. Support of Children—Modification.

The fact that support for minor children is provided for in a deed of separation between the parties, entered as a consent judgment by the court, cannot deprive the court of its power to increase the allowance to the children upon finding of change of conditions. *Bishop v. Bishop*, 573.

§ 22. Attack of Domestic Decrees.

Evidence *held* to support findings that divorce was obtained by wife by practicing fraud on the court in preventing husband from having notice of the action, and decree setting aside the decree was proper upon motion in the cause made by the husband after the wife's death. *Patrick v. Patrick*, 195.

EASEMENTS.

§ 2. Easements by Necessity and Implication.

The owner of land abutting a highway has a right of egress from and ingress to his own property, which right constitutes an easement appurtenant beyond the right enjoyed by the public in general. *Hedrick v. Graham*, 249.

An easement by implication is created upon separation of title when a use has been so long continued and is so obvious as to show it was meant to be permanent, and the easement is necessary to the beneficial enjoyment of the land conveyed. *Barwick v. Rouse*, 391; *Bradley v. Bradley*, 483.

EASEMENTS—*Continued.*

The owner of land, in dividing same among his children, conveyed a part of one tract to his daughter and the remainder of that tract to his son. Defendants acquired the son's land by *mesne* conveyances. The daughter claimed an easement appurtenant to the highway over defendants' land upon evidence tending to show the existence of a road or cartway thereover for a number of years before and after the severance of title. Defendants' evidence tended to show there never had been such road or cartway. *Held:* The verdict of the jury in defendants' favor as to the existence and use of the road is conclusive. *Barwick v. Rouse*, 391.

In plaintiff's action to establish an easement by implication, plaintiff's evidence which discloses that the use of the claimed easement would be a mere convenience in providing a shorter way to other lands owned by plaintiff, is insufficient, since the grant of an easement by implication cannot be based upon mere convenience but is to be implied only where the easement is necessary for the full enjoyment of the land granted. *Bradley v. Bradley*, 483.

An easement by implication arises only in relation to the land granted in the severance of title, and may not rest upon the convenient use of lands acquired by claimant from other sources. *Ibid.*

§ 5. Nature and Extent of Right.

Under terms of easement, owner had right to relocate power line without payment of additional compensation. *Cooke v. Electric Membership Corp.*, 453.

Landowner having failed in apt time to designate line for relocation, could not complain of relocation by owner of easement. *Ibid.*

The purchaser of an easement granting to it, its successors and assigns, the right to maintain power lines and poles, the right of ingress and egress, and the right to increase or decrease the number of wires, may not grant to another utility a license to attach its crossarms and wires to the poles without the payment of additional compensation to the landowner for the additional burden. The second utility is not an assignee of the first, since the first utility retains its full right to use the easement granted. *Grimes v. Power Co.*, 583.

EJECTMENT.

§ 15. Burden of Proof.

In all actions in the nature of ejectment, plaintiff must show ownership and right to possession, and, if he seeks a monetary judgment, wrongful possession of defendant and the amount of damages resulting therefrom. *Hayes v. Ricard*, 687.

§ 17. Sufficiency of Evidence and Nonsuit.

Where plaintiffs in ejectment introduce a registered fee simple conveyance from the common source of title and also, for the purpose of attack, a subsequently dated but prior recorded quitclaim deed to defendant from the common source, but failed to offer any evidence attacking the quitclaim deed or rebutting its recitation of a valuable consideration, nonsuit is proper for their failure to show a superior title from the common source. Plaintiff's contention that the quitclaim deed disclosed on its face that it conveyed nothing, since at the time of its execution the grantor had already executed a warranty deed and therefore had nothing left to convey, is untenable under our registration laws. *Hayes v. Ricard*, 687.

ELECTRICITY.

§ 4. Territory and Facilities.

Public utility may, with the approval of the Utilities Commission, sell to a municipality facilities for servicing territory annexed by the municipality. *Utilities Com. v. Casey*, 297.

EMBEZZLEMENT.

§ 1. Nature and Elements of the Offense.

In order for a conviction under G.S. 14-90 the State must show that the defendant was the agent of the prosecuting witness, that by the terms of his employment and in the course thereof he received property of his principal, and knowing it was not his own, converted it to his own use. *S. v. Block*, 661.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence that defendant was employed on a commission basis to procure construction contracts for his principal, that he procured such contract, collected from the contractee the entire contract price and converted it to his own use, notwithstanding he was entitled to only a small part thereof as commission, with evidence tending to show his apparent authority at least to collect the money, *held* sufficient to overrule nonsuit. *S. v. Block*, 661.

EMINENT DOMAIN.

§ 1. Nature and Extent of Power in General.

Eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation. *Hedrick v. Graham*, 249.

§ 3. Acts Constituting "Taking" of Property.

The deprivation, by the exercise of the right of eminent domain or the police power, of the right of the owner of land abutting a public highway to access to the highway is a taking of his property *pro tanto* for which compensation must be allowed. *Hedrick v. Graham*, 249.

§ 5. Delegation of Power in General.

The right to authorize the power of eminent domain and the mode of the exercise thereof are wholly legislative, subject to the constitutional limitations that private property may not be taken for public use without just compensation and reasonable notice and opportunity to be heard. *Hedrick v. Graham*, 249.

§ 6. Delegation of Power to Highway Commission.

The State Highway and Public Works Commission has been given statutory authority, in the construction or reconstruction of a public highway, to condemn or severely curtail an abutting landowner's right of access to the highway, upon payment of just compensation, in order to constitute the highway one of limited-access. *Hedrick v. Graham*, 249.

§ 8. Amount of Damages.

Where a part of a tract of land is condemned, the owner is entitled to recover compensation for the part taken and compensation for injury to the remaining portion, and thus receive as compensation the difference between the fair market value of the entire tract before the taking and the fair market value of the

EMINENT DOMAIN—*Continued.*

remaining land immediately after the taking, to be offset by general and special benefits when applicable under the controlling statute. *Statesville v. Anderson*, 208.

Where land is condemned for sidewalk and street purposes, the possibility of the later abandonment of the easement is ordinarily too speculative and conjectural to be considered in diminution of damages. *Ibid.*

Right to remove house from right of way taken should not be considered in absence of evidence by condemnor that right exists and as to cost of removal. *Ibid.*

§ 17. Exceptions to Report.

Where, in condemnation proceedings, the record discloses that no notice was given of the final meeting of the appraisers at which the assessment of damages was made, and that such meeting was not at a time and place fixed by court, the record sustains the findings of the court that the filing of exceptions by the landowner the twenty-first day after the filing of the report was timely, G.S. 40-17, G.S. 40-19, since, in the absence of notice, it may not be held that the filing of exceptions by the landowner was not timely. *Gatling v. Highway Com.*, 66.

§ 18b. Burden of Proof.

While defendant in condemnation proceedings has the burden of establishing by competent evidence the damage he will sustain by reason of the taking, the burden is on petitioner to show matters in diminution of damages by reason of defendant's right to remove structures from that part of the land condemned. *Statesville v. Anderson*, 208.

§ 18c. Competency and Relevancy of Evidence.

Where, in condemnation proceedings, a pretrial order establishes that petitioner is entitled to recover compensation only for the value of the land taken excluding the value of a house thereon, evidence as to the value of the house is not germane, and when voluminous testimony as to the value of the house is admitted and it is apparent that such testimony affected the verdict, the admission of such testimony must be held prejudicial notwithstanding an instruction to the jury that it should not consider the testimony as to the value of the house. *DeBruhl v. Highway Com.*, 139.

§ 26. Nature and Extent of Title and Rights Acquired.

Right-of-way agreement *held* not to give Commission title to residence but gave owners right to remove that part lying within the right of way acquired. *DeBruhl v. Highway Com.*, 139.

EQUITY.

§ 3. Laches.

The court may not dismiss an action on the ground of laches except upon facts disclosed by the evidence of the complaining party or the verdict of a jury. *Solon Lodge v. Ionic Lodge*, 281.

ESTATES.

§ 11. Sale for Reinvestment.

All living persons who would take upon happening of contingency must be parties to proceeding to sell for reinvestment. *Barnes v. Dortch*, 369.

ESTATES—*Continued.*

§ 17. Life Estates and Remainders in Personalty.

A bequest of personalty to a named person with provision that should the legatee have no bodily heirs at his death, the property should go back to testator's estate, is valid, and if the legatee should die without bodily heirs, the limitation over becomes effective and his estate must account for the *corpus* of the fund, an executory limitation over in personalty not being in violation of any rule of law in this State. *Barton v. Campbell*, 395.

ESTOPPEL.

§ 4. Estoppel by Record.

Where the pleadings, theory of trial and consent order are based upon partition of the land between the parties as tenants in common, the parties are estopped by the record from maintaining that partition was not applicable. *Lockleair v. Martin*, 378.

§ 6a. Equitable Estoppel in General.

There can be no estoppel unless one party has been misled to his prejudice by the other. *Miller v. Casualty Co.*, 526.

§ 11a. Pleadings.

Estoppel, or the facts constituting the basis thereof, must be pleaded. *Miller v. Casualty Co.*, 526.

§ 11b. Evidence and Burden of Proof.

A party pleading estoppel by way of an affirmative defense has the burden of proof upon the issue. *Solon Lodge v. Ionic Lodge*, 281.

EVIDENCE.

§ 7e. Presumptions and Burden of Proof—Prima Facie Case.

Prima facie evidence is sufficient to take the issue to the jury, and support, but not compel, an affirmative finding, it being for the jury to weigh the evidence, but *prima facie* evidence does not in itself establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of proof on the issue. *S. v. Bryant*, 645.

§ 13. Privileged Communications—Attorney and Client.

Where the evidence tends to show that the owners constituted an attorney their agent for the distribution among subcontractors of the amount remaining due on the main contract for the construction of a dwelling, and plaintiff testifies that he gave the attorney notice of his claim for labor and material and the attorney stated no further notice was necessary, plaintiff has the right to examine the attorney for the purpose of showing that the claim was filed or that filing was waived, there being nothing to indicate that the examination would relate to any confidential communication between attorney and client. *Goldston v. Tool Co.*, 226.

§ 22. Cross-Examination.

While the court has power to confine cross-examination to its proper scope and proper limits, it may not entirely deny a party the right to cross-examine the witnesses of his adversary. *In re Gibbons*, 24.

EVIDENCE—*Continued.*

§ 25. Facts in Issue and Relevant to Issues.

Where a pretrial order fixes the issue to be submitted to the jury, such issue becomes the theory upon which the case must be tried, and evidence irrelevant to such issue is incompetent. *DeBruhl v. Highway Com.*, 139.

Where the issue raised by the pleadings and evidence is whether lessor waived breach of the lease, evidence offered by lessees for the purpose of showing that there had been no breach is irrelevant to the issue and properly excluded. *Mesimore v. Palmer*, 488.

§ 32. Transactions or Communications With Decedent.

The husband of the donee of a gift may testify as to direction given and declarations made by the donor to the donee, since the testimony is not in behalf of the husband or in behalf of a party succeeding to his interest, nor as to a transaction or communication between him and the deceased, the testimony being as to a transaction between donor and donee. *Bank v. Atkinson*, 563.

A husband, who has testified that he knows his wife's handwriting, is competent to testify after his wife's death, that her signature was on the note in question, and while his further testimony that she signed the instruments in question is technically incompetent under G.S. 8-51, such further testimony will not be held prejudicial when this fact is established by other competent testimony. *Waddell v. Carson*, 669.

Testimony of a witness as to what he himself did in regard to the transaction does not come within the prohibition of G.S. 8-51 when it does not relate to acts or communications with the deceased person in regard to such transaction. *Ibid.*

§ 37. Best and Secondary Evidence.

Testimony as to the contents of weather bureau records is properly excluded, since the records themselves should have been put in evidence. *Wood v. Ins. Co.*, 383.

§ 39. Parol Evidence Affecting Writings.

Parol evidence not in conflict with writing is competent to explain and make definite the terms of the written instrument. *Thompson v. Turner*, 478.

While parol evidence is incompetent to contradict an unambiguous written instrument, where the writing is insufficient to constitute a legally effective instrument, parol evidence is competent to show facts which would render the writing inoperative or unenforceable. *Deaton v. Coble*, 190.

§ 42d. Admissions by Agents.

Testimony of a statement made by an agent which is merely narrative of a past occurrence and not a part of the *res gestae* is hearsay and incompetent as substantive evidence against either the principal or the agent, but is competent as bearing upon the credibility of the agent as a witness when the statement is in direct conflict with the testimony of the agent at the trial. *Hughes v. Enterprises*, 131.

But a statement of an agent promising to pay hospital expenses is incompetent as an admission of negligence. *Ibid.*

EVIDENCE—*Continued.*

§ 42f. Competency of Pleadings.

It is competent for defendant to introduce in evidence a statement in the original complaint even though the original complaint has been superseded as a pleading by an amended complaint. *Hughes v. Enterprises*, 131.

§ 45. Expert and Opinion Evidence in General.

In the absence of a finding or admission that a witness is an expert, the competency of his opinion testimony is to be determined by the rules applicable to testimony of nonexpert witnesses. *Kientz v. Carlton*, 236.

§ 47f. Expert Testimony—Blood Tests.

Testimony of expert as to alcoholic content of defendant's blood and effect of such percentage, *held* competent. *S. v. Moore*, 158.

§ 47g. Opinion Evidence—Distances.

It is competent for a witness to testify from her own knowledge gained from official maps over a period of years as travel counsel as to distances between important cities and towns in this and another state. Further, such matters are within common knowledge of which the courts may take judicial notice. *S. v. Saunders*, 338.

§ 49. Invasion of Province of Jury by Opinion Evidence.

Testimony of nonexpert witnesses to the effect that a certain power lawn mower was unsafe for use on embankments is not a statement of a composite fact or a shorthand statement of fact, and is incompetent. *Kientz v. Carlton*, 236.

In an action to recover for death of an employee resulting from lightning, testimony of a witness to the effect that weather conditions were too bad for a person to be out in, is incompetent as invading the province of the jury. *Bennett v. R. R.*, 261.

§ 51. Competency and Qualification of Experts.

Qualification of witness as an expert is primarily addressed to the trial court and its action, after the introduction of evidence of qualification, in permitting the witness to testify over objection is tantamount to holding the witness to be an expert. *S. v. Moore*, 158.

EXECUTORS AND ADMINISTRATORS.

§ 8. Title and Right to Possession of Assets of Estate.

The personal representative takes only that title which the deceased had in the property at the time of his death, and an unrecorded mortgage lien has the same status as against the personal representative that it had against the deceased, regardless of whether the estate is solvent or insolvent. *Sales Co. v. Weston*, 621.

§ 9. Collection of Assets—Compromise and Settlement.

A personal representative has the right to compromise any disputed or doubtful claim of his decedent, including a claim for wrongful death, provided he acts in good faith and exercises due care. *McGill v. Freight*, 469.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 15a. Claims Against Estate in General.

Upon the death of one partner, the other partner is not relegated to a claim against the estate of the deceased partner, but may maintain an action against the personal representative to recover his share of the partnership assets as ascertained upon an accounting. *Bright v. Williams*, 648.

§ 15g. Claims of and Allowances to Widow and Children.

The estate of the father is not liable to his minor children for sums paid out by their mother for their support, and sums paid out by her for their support may not be recovered out of funds bequeathed them for distribution upon their majorities. *Lee v. Coffield*, 570.

§ 15h. Claims Against the Estate—Priorities.

The rights of secured and unsecured creditors alike are fixed at the instant of intestate's death, and the circumstance of death cannot have the effect of fastening a lien upon property of the estate in favor of unsecured creditors. *Sales Co. v. Weston*, 621.

At the time of intestate's death lumber owned by him was subject to the lien of an unrecorded mortgage on after-acquired property. The estate was insolvent. *Held:* The mortgagee has a lien on the property as against the administratrix superior to the claim of unsecured creditors of the estate who had not fastened a lien upon the property at the time of intestate's death. *Ibid.*

FRAUDS, STATUTE OF.

§ 5. Contracts to Answer for Debt or Default of Another.

A memorandum stating that defendant owed a stipulated sum to a certain person for plumbing and heating work on a house and that defendant "agreed to" plaintiff "$1000.00 of this amount when I pay off" *is held* insufficient under the statute of frauds to charge defendant with the debt due by the third person to plaintiff, there being no special promise to answer for the debt of the third person. *Deaton v. Coble*, 190.

GIFTS.

§ 1. Nature and Essentials of Gifts Inter Vivos.

The delivery by the owner of certificates of stock duly endorsed, to the donees or their agent is insufficient delivery to constitute a valid gift, without transfer on the books of the corporation. *Bank v. Atkinson*, 563.

HIGHWAYS.

§ 8b. Powers and Duties of Highway Commission.

The State Highway and Public Works Commission was created for the purpose of constructing and maintaining the State highways, and all other powers it possesses are incidental to the purpose of its creation. G.S. 136-18. Therefore, in acquiring a right of way it has no power to acquire title to any building or part of a building not within the boundaries of the right of way sought, no more by deed than by condemnation. *DeBruhl v. Highway Com.*, 139.

HOMICIDE.

§ 11. Self-Defense.

A defendant may set up self-defense under a plea of not guilty to a charge of murder. *S. v. Hipp*, 205.

Evidence tending to show a felonious assault on defendant by her husband in their home *held* sufficient to present question of self-defense notwithstanding her testimony to the effect that the shooting was accidental. *Ibid.*

§ 16. Presumptions and Burden of Proof.

The State's evidence establishing an intentional killing with a deadly weapon raises the presumptions that the killing was unlawful and that it was done with malice, casting the burden upon defendant of showing to the satisfaction of the jury matters in mitigation or excuse. *S. v. Mangum*, 323.

§ 20. Evidence of Motive.

Where motive for killing is ill will resulting from indictment, State may prove indictment to establish motive. *S. v. Adams*, 344.

§ 22. Evidence Competent on Issue of Self-Defense.

Where defendant contends he acted in self-defense, evidence of the general reputation of deceased for violence is competent, but this rule does not render admissible evidence of specific acts of violence which have no connection with the homicide, and therefore, the court in such case properly excludes proof of a conviction of the deceased in the recorder's court on an unrelated charge of assault with a deadly weapon. *S. v. Morgan*, 215.

§ 25. Sufficiency of Evidence and Nonsuit.

The State's introduction of statements of defendant that he was assaulted and threatened with death, ran in an attempt to get away from his assailant, who was pursuing him with an open knife, and finally shot his assailant in self-defense, does not entitle defendant to nonsuit when the State also introduces evidence tending to show that defendant shot deceased as they were standing still, facing each other a car's length distant, since the State's evidence does not bring the defendant within the principle of self-defense exculpating him as a matter of law. *S. v. Mangum*, 323.

The State's evidence tending to show that defendant sought out and shot the deceased with a pistol because of his belief that deceased had reported him for the illegal manufacture of liquor, *held* sufficient to overrule defendant's motions for nonsuit and sustain conviction of murder in the first degree. *S. v. Adams*, 344.

Conflicting evidence as to whether defendant was the person who intentionally fired the pistol shot that killed deceased requires the submission of the issue to the jury and is sufficient to support verdict of guilty of manslaughter. *S. v. Jones*, 407.

§ 27*f*. Charge on Self-Defense.

Where the evidence, even though contradictory, is sufficient to raise question of self-defense, it is error for the court to fail to charge the jury thereon. *S. v. Hipp*, 205.

The court's charge to the jury on defendant's plea of self-defense *held* without error. *S. v. Morgan*, 215.

HOMICIDE—*Continued.*

§ 27i. Instructions on Right to Recommend Life Imprisonment.

In a prosecution for murder in the first degree, it is required that the court instruct the jury not only as to their right to recommend life imprisonment, but he must also instruct the jury as to the effect of such recommendation. G.S. 14-17. *S. v. Cook*, 610.

HUSBAND AND WIFE.

§ 12c. Conveyances Between Husband and Wife.

The mother, for the purpose of dividing her lands between her four children, executed deeds conveying separate tracts to each respectively, and in the deed to her daughter made the conveyance to her daughter and the daughter's husband. *Held:* The daughter had no interest in the land prior to the conveyance or right to determine the disposition the parent should make of it by deed or will, and therefore there was no conveyance of any interest in the land by the daughter to her husband, and G.S. 52-12 is not applicable. *Edwards v. Batts*, 693.

§ 12d. Separation Agreements.

Provisions in a deed of separation for support of the minor children of the marriage, entered as a consent judgment by the court, cannot deprive the Superior Court of its inherent and statutory authority to protect the interests and provide for the welfare of the infants, and therefore judgment increasing the allowance for the minor children upon findings of change of circumstances warranting such increase, will be affirmed. *Bishop v. Bishop*, 573.

§ 14. Estates by Entireties.

A deed to husband and wife, nothing else appearing, vests the title in them as tenants by the entirety, with right of survivorship. *Edwards v. Batts*, 693.

Deed executed by parent, in division of land among children, to daughter and daughter's husband creates estate by entireties in them. *Ibid.*

§ 26. Actions for Alienation of Affections.

A cause of action for alienation of affections exists in this State when a third party, by wrongful and malicious conduct, causes one party to a marriage to lose the affection or consortium of the spouse. *Bishop v. Glazener*, 592.

When there has been no adultery, seduction or improper relationship, malice constituting an essential part of an action for alienation of affections need not be express malice, but may be implied from intentional, unjustifiable and wrongful conduct. *Ibid.*

A third party's wrongful conduct need not be the sole cause of the alienation of affections of a spouse in order for him to be liable to the injured party, but it must be the controlling or effective cause, even though there may be other causes. *Ibid.*

A parent of one spouse, when sued for alienation of affections by the other, occupies a markedly different situation from that of a stranger or unrelated third person, and the parent may be held liable only for conduct which arises from malice or other improper motive, with the presumption being that the parent acted in good faith and for the child's welfare. *Ibid.*

Evidence *held* insufficient for jury in this action against father-in-law for alienation of affections. *Ibid.*

INFANTS.

§ 15½. Validity and Attack of Judgments Against Infants.

In an action against an infant, the failure to appoint a guardian *ad litem* is an irregularity, but is not a jurisdictional defect, and therefore judgment rendered against the infant is not void. *Franklin County v. Jones*, 272.

§ 21. Jurisdiction to Determine Right to Custody.

The courts of this State have jurisdiction to hear and determine the question of the custody of a child living with her grandfather at his domicile in this State. *Kovacs v. Brewer*, 630.

A modification of provisions of a foreign divorce decree in regard to the custody of a minor child of the marriage, entered in the foreign jurisdiction while the child of the marriage was domiciled in this State with her resident grandfather, is not binding on the courts of this State, and does not come under the full faith and credit clause of the Federal Constitution. *Ibid.*

§ 22. Right to Custody.

In determining the right to custody of an infant, the paramount consideration, to which all other factors must yield, is the welfare and best interest of the child. *In re Gibbons*, 24.

In a proceeding to determine the right of custody of a minor child, the action of the court in conferring with witnesses in his chambers in the absence of one of the parties deprives such party of a constitutional right, vitiating the decree awarding custody. *Ibid.*

INJUNCTIONS.

§ 4f. Enjoining Institution or Prosecution of Civil Action.

Plaintiff sought to enjoin defendant from arbitrating a dispute between them, plaintiff claiming that it had not agreed to arbitration and defendant contending to the contrary. *Held:* Injunction will not lie since, if plaintiff's contention be correct, the award would not be binding and therefore would not be hurtful, while if defendant's contention be correct, equity cannot be enlisted to aid plaintiff in breaching its agreement to arbitrate. *Cotton Mills Co. v. Duplan Corp.*, 496.

A party may not force his adversary to litigate a claim against him in the courts of this State, since, if his adversary bring suit in the wrong jurisdiction, he has the remedy of a motion to dismiss, or if in the wrong venue, the remedy of a motion to remove, or if in the proper jurisdiction and correct venue, opportunity to appear, answer and defend, and therefore, he has an adequate remedy at law. *Ibid.*

§ 4g. Enjoining Enforcement of Statute.

A person seeking to engage in a particular occupation may challenge by injunction the constitutionality of the statute requiring a license to engage in such occupation when he alleges and offers evidence tending to show that his fundamental right to earn a livelihood was circumscribed by the Act. *Roller v. Allen*, 516.

§ 8. Continuance, Modification and Dissolution of Temporary Orders.

Where on appeal it is determined that plaintiffs are entitled *pendente lite* to the injunctive relief for which they have applied, the judgment denying such relief will be vacated and the cause remanded with direction that an

interlocutory order be entered in accordance with law. *Deal v. Sanitary District*, 74.

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter, and ordinarily a temporary order will be continued to the hearing if plaintiff has made out a primary equity and there is reasonable apprehension of irreparable loss to plaintiffs if the order is dissolved or continuance is necessary to protect plaintiffs' rights. *Roberts v. Cameron*, 373.

Continuance of temporary order is error upon failure to show probability of establishing primary equity and irreparable injury. *Ibid.*

INSURANCE.

§ 3. Rates.

Unprotected farm dwellings cannot be charged higher premium than unprotected non-farm dwellings similar in location, construction and hazards and having substantially the same degree of protection. *In re Rating Bureau*, 444.

§ 13a. Construction of Policy Contracts in General.

Where the terms of an insurance policy are clear and unambiguous and of the essence of the contract, they will be interpreted and enforced according to the usual, ordinary and accepted meaning of the language. *Rivers v. Ins. Co.*, 461.

§ 25a. Actions on Fire Policies.

A provision in a fire insurance policy, written in accordance with the standard form prescribed by statute, that action on the policy must be commenced within twelve months next after inception of the loss is a valid contractual limitation and not a statute of limitation, and is binding upon and enforceable between the parties. *Boyd v. Ins. Co.*, 503.

The provision in the standard form of a fire insurance policy that suit must be commenced within twelve months next after inception of the loss is made a conjunctive limitation by the 1945 Act, so that compliance with this requirement is necessary in addition to compliance with the other statutory conditions of the policy. *Ibid.*

Revisal 4809 (G.S. 58-31) was repealed by Chapter 378, Session Laws of 1945 (G.S. 58-176) in so far as the former act is in conflict with the contractual limitation in a standard form of a fire insurance policy that suit on the policy be instituted within one year of the inception of loss. *Ibid.*

Under the terms of the standard fire insurance policy in effect in this State, no action may be maintained on a policy unless proof of loss shall be filed within the prescribed period. *Ibid.*

§ 32c. Cancellation of Certificates Under Group Policies.

Facts agreed *held* to disclose final discharge terminating certificate under group policy. *Lineberger v. Trust Co.*, 166.

Employee is not entitled to notice that termination of employment terminates the certificate or as to his right of conversion of certificate, the certificate itself containing such information. *Ibid.*

The employer is not the agent of the insurer, and the employer's error in reporting to insurer that a certain person was an employee is not chargeable to insurer. *Ibid.*

INSURANCE—*Continued.*

Even though a group insurance policy is executed between the employer and the insurance company, it is primarily for the benefit of the insured employees and their beneficiaries. *Rivers v. Ins. Co.*, 461.

A provision in a certificate under a group policy that the certificate should terminate upon cessation of payment of premiums thereon when due or within the grace period thereafter, must be given effect in the absence of extension or waiver. *Ibid.*

Tender of premiums under a certificate of group insurance to the employer does not prevent a lapse of the certificate for nonpayment of premiums in the absence of waiver or estoppel, since ordinarily the employer is not the agent of the insurer. *Ibid.*

Insured is charged with notice of the provisions of his certificate under a group policy in regard to lapse for nonpayment of premiums and the absence of provision for paid-up insurance, cash or loan value. *Ibid.*

§ 37. Actions on Life Policies.

Nonsuit may be granted upon an affirmative defense when plaintiff's own evidence establishes such defense as a matter of law, and therefore where plaintiff's own evidence establishes that the certificate of insurance sued on had lapsed for nonpayment of premiums, nonsuit is proper, notwithstanding defendant has the burden of establishing such defense. *Rivers v. Ins. Co.*, 461.

§ 41. Actions on Accident and Health Policies.

In this action on an insurance policy to recover for death from accidental bodily injury, the charge of the court, given in response to request by the jury for additional instructions, defining the word "accident" without applying the law to the facts in evidence, *held* prejudicial. *Ammons v. Ins. Co.*, 655.

§ 43a. Auto Insurance—Construction of Policies.

The Motor Vehicle Safety and Financial Responsibility Act of 1953 has no application to the rights and liabilities of the parties arising out of a collision occurring prior to 1 January 1954. *Miller v. Casualty Co.*, 526.

The requirement of the Motor Vehicle Safety and Financial Responsibility Act that the statute be liberally construed, G.S. 20-225, cannot be invoked to permit recovery under a policy beyond the express limitation of coverage stipulated in the policy contract. *Ibid.*

§ 43b. Auto Insurance—Risks Covered.

An assigned risk policy of automobile insurance specifying the vehicle covered by the policy does not cover another vehicle owned by insured in the absence of a provision in the policy for extension of coverage or approval by insurer of a change in the vehicle covered. Motor Vehicle Safety and Financial Responsibility Act of 1947; G.S. 20-227(2)(a). *Miller v. Casualty Co.*, 526.

The registration of a vehicle by the Department of Motor Vehicles in violation of G.S. 20-252(b) cannot have the effect of enlarging the coverage of an assigned risk policy of liability insurance beyond its express terms. *Ibid.*

§ 52. Windstorm Insurance.

The policy of windstorm insurance in suit provided that insurer should not be liable for loss caused directly or indirectly by "tidal wave, high water, overflow or ice, whether driven by wind or not." *Held:* Insurer is liable for loss resulting from windstorm as the efficient and predominating cause which pro-

INSURANCE—*Continued.*

duced the damage without any new or intervening cause sufficient of itself to produce the damage, and it is immaterial that the damage may have been indirectly and incidentally enhanced by high water, and further if the loss was caused by the windstorm, the fact that rains may have created a condition which permitted destruction of the property by wind, would not relieve insurer of liability, the policy not excluding from its terms rains, no matter how heavy. *Wood v. Ins. Co.*, 383.

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Control Statutes.

Unlawful possession of intoxicating liquor, G.S. 18-48, and unlawful possession of intoxicating liquor for the purpose of sale, G.S. 18-50, are separate and distinct offenses of equal dignity, and neither charge includes the other. *S. v. Poe*, 402.

§ 9b. Prosecutions—Presumptions and Burden of Proof.

The presumption arising under G.S. 18-11 from the possession of more than one gallon of intoxicating liquor does not apply to a charge of unlawful possession of intoxicating liquor, but only to a charge of possession for the purpose of sale, G.S. 18-50, and relates solely to purpose of the possession. *S. v. Poe*, 402.

The possession of less than one gallon of gin and the possession of less than five gallons of beer, G.S. 18-32(4), raises no presumption that the possession of the gin or beer was for the purpose of sale. *S. v. Harrelson*, 604.

While constructive possession of intoxicating liquor for the purpose of sale is sufficient to constitute the offense under G.S. 18-2, defendants' pleas of not guilty put in issue every element of the offense charged. *Ibid.*

In instructing the jury as to the statutory effect created by the absence of stamps on containers holding an alcoholic beverage, G.S. 18-48, the court charged that *prima facie* evidence was sufficient proof until overcome and contradicted by other evidence. *Held:* The charge constitutes prejudicial error in giving undue weight and effect to *prima facie* evidence. *S. v. Bryant*, 645.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that less than five gallons of beer and less than one gallon of gin was found in the house occupied by defendants, and that a quantity of intoxicating liquor was found in a trap under a trash pile across the road from defendants' house, with several paths leading from the trash pile, only one of which went to defendants' house, *is held* insufficient to be submitted to the jury in a prosecution for possession of intoxicating liquor for the purpose of sale. *S. v. Harrelson*, 604.

Evidence that three quarts of intoxicating liquor, upon which taxes had not been paid, were found in two fruit jars on defendant's premises, near his house, with further evidence tending to show that defendant was seen to take a drink from one of the jars shortly before the search and arrest, *is held* sufficient to overrule motion for nonsuit in a prosecution for possession of an alcoholic beverage upon which taxes had not been paid. *S. v. Bryant*, 645.

§ 9g. Verdict and Judgment.

Where the warrant charges unlawful possession of taxpaid liquor for the purpose of sale, and the court submits only the charge of unlawful possession

of taxpaid liquor, the action of the court has the effect of withdrawing from the jury the only charge before it and is equivalent to a verdict of not guilty on the charge of possession of taxpaid liquor for the purpose of sale, and judgment upon verdict of guilty as charged must be arrested. *S. v. Poe*, 402.

JUDGMENTS.

§ 4. Operation of Consent Judgment, Attack and Setting Aside.

Consent judgment for support terminates suit for divorce *a mensa*, and may not be set aside except by consent in absence of finding that its provision for the division of the property and for the wife's support were unfair to her or that her consent thereto was obtained by fraud or mutual mistake. *Holden v. Holden*, 1.

§ 18. Process, Notice and Service.

Where service by publication is defective for failure of clerk to mail copy of process to defendant, the court, in setting aside the judgment, need not dismiss the action, but may order that service be completed. *Harmon v. Harmon*, 83.

The officer's return showing service of process raises a legal presumption and is in itself sufficient predicate for a finding that service was made as shown by the return, and this presumption cannot be rebutted by a single contradictory affidavit or contradictory testimony of a single witness. *Harrington v. Rice*, 640.

§ 25. Attack and Setting Aside—Procedure.

The procedure to set aside a consent judgment for fraud or mutual mistake is by independent action. *Holden v. Holden*, 1.

The Superior Court has jurisdiction of a motion in the cause to set aside a judgment on the ground that it was obtained and the court induced to assume jurisdiction by fraud upon the court intrinsic to the cause of action. *Patrick v. Patrick*, 195.

The proper procedure to attack a judgment as void for nonservice of summons in contradiction of regular return of summons of record is by motion in the cause. *Harrington v. Rice*, 640.

§ 26. Time Within Which Attack May Be Made.

Where the institution of a cause of action and the rendition of a decree therein is fraudulently concealed from defendant, his motion in the cause to set aside the judgment for intrinsic fraud made less than a month after his discovery of the decree is made in apt time. *Patrick v. Patrick*, 195.

§ 27a. Setting Aside Default Judgment for Surprise.

Where the findings of the trial court that movants had failed to show a meritorious defense or show that the judgment against them had been taken through their surprise or excusable neglect, are supported by the evidence, order refusing to set aside the judgment under G.S. 1-220 will be affirmed. *Supply Co. v. Roberson*, 588.

A meritorious defense is not essential or relevant on motion to set aside a default judgment for want of jurisdiction for lack of service. *Harrington v. Rice*, 640.

JUDGMENTS—*Continued.*

§ 27b. Void Judgments.

Where judgment is void for defect in service by publication, court, in setting aside the judgment need not dismiss the action, but may order that service be completed. *Harmon v. Harmon*, 83.

Clear and unequivocal testimony of a defendant that summons and complaint were not served on her and that she was not within the county at the time the process officer left a copy of the summons and complaint at her home, together with testimony of other witnesses and written evidence tending to show that at that time she was in another county for medical treatment, is sufficient to sustain the court's finding that notwithstanding the officer's return showing service, the defendant had not been personally served, and judgment setting aside default judgment entered against her in the cause is affirmed. *Harrington v. Rice*, 640.

Defendant's appearance in connection with her motion to set aside a default judgment on the ground of want of service does not validate the void judgment. *Ibid.*

§ 27d. Attack of Irregular Judgments.

One who seeks relief from an irregular judgment must show that he has been prejudiced by the judgment and that he has acted diligently. *Franklin County v. Jones*, 272.

§ 27e. Attack of Judgment for Fraud.

Findings *held* to support decree setting aside absolute divorce on the ground of fraud on the court. *Patrick v. Patrick*, 195.

JUDICIAL SALES.

§ 5. Report and Confirmation.

Confirmation of a judicial sale by a court of competent jurisdiction with knowledge of an irregularity ends the right to complain of the defect. *Franklin County v. Jones*, 272.

§ 7. Title and Rights of Purchaser.

The purchaser at a judicial sale is the equitable owner, and the decree of confirmation entered by a court of competent jurisdiction may not be set aside as to the purchaser when the proceedings are merely irregular except for mistake, fraud or collusion. *Franklin County v. Jones*, 272.

KIDNAPPING.

§ 2. Prosecutions.

Evidence *held* sufficient to take the case to the jury. *S. v. Dorsett*, 47.

LABORERS' AND MATERIALMEN'S LIENS.

§ 5. Notice and Filing of Claim.

Where the evidence, considered in the light most favorable to plaintiff, tends to show that plaintiff filed his claim for labor and material with the owners before they had completed payment to the main contractor, or that the owners' agent, entrusted with the duties of disbursing the funds, waived the requirement of filing notice, nonsuit is erroneous. *Goldston v. Tool Co.*, 226.

LANDLORD AND TENANT.

§ 1. Creation and Effect of the Relationship.

A lease is a chattel real, and as such is a species of intangible personal property. *Investment Co. v. Cumberland County*, 492.

§ 11. Liability of Landlord for Injuries from Defective or Unsafe Condition of Premises.

In an action against a corporation maintaining apartments with adjacent streets and sidewalks, evidence that plaintiff, in walking from the street along a sidewalk to an apartment, tripped at the slight elevation of the sidewalk and fell to her injury, is insufficient to be submitted to the jury on the issue of negligence, since the construction of a sidewalk some inch or two above the street level is customary. *Murchison v. Apartments*, 72.

LIBEL AND SLANDER.

§ 7c. Absolute Privilege.

Where it appears from the allegations in an action for slander that the defendant, in his argument to the jury in a prior action, stated that plaintiff had "a mental condition" for the purpose of showing why plaintiff testified against his client in that case, the action for slander is properly dismissed upon demurrer, since it appears from the allegations that the defamatory words were in a judicial proceeding and were material and pertinent thereto, and therefore were absolutely privileged. *Wall v. Blalock*, 232.

LIMITATION OF ACTIONS.

§ 9. Fiduciary Relations and Trusts.

The statute of limitation begins to run against an action to establish a trust as of the date it is shown the trust was in some manner repudiated. *Solon Lodge v. Ionic Lodge*, 281.

MASTER AND SERVANT.

§ 4a. Distinction Between Employee and Independent Contractor.

Proof that plaintiff was employed by defendant to cut the grass around defendant's home with implements furnished by defendant is sufficient to support plaintiff's contention that he was an employee and not an independent contractor. *Kientz v. Carlton*, 236.

§ 6f. Actions for Wrongful Discharge and Blacklisting.

A complaint alleging plaintiff's wrongful and malicious discharge from his job and wrongful blacklisting by defendant employer, but failing to allege that the discharge was in breach of any contract of employment, fails to state a cause of action for wrongful termination of the employment, since without a contract of employment a discharge is not wrongful, and therefore the complaint is not demurrable on the ground that it joined a cause of action for wrongful discharge with an action for blacklisting. *Scott v. Burlington Mills*, 100.

§ 14. Employer's Liability for Injury to Employee in General.

The duty rests upon an employer to exercise that degree of care which a man of ordinary prudence would exercise under like circumstances, having regard

to his own safety, to furnish the employee a reasonably safe place to work and reasonably safe machinery, implements and appliances with which to perform the work. *Kientz v. Carlton*, 236.

§ 15. Tools, Machinery and Appliances.

In respect of implements and appliances purchased for personal use and for use by a domestic servant or other employee engaged to perform ordinary household or yard chores on the employer's residence premises, the employer cannot be held responsible solely on the ground that a particular implement or appliance was not known, approved or in general use for the purpose for which it was made and sold. *Kientz v. Carlton*, 236.

The relative knowledge and experience of the employer and employee in the use of power mowers must be considered upon the question whether the employer exercised reasonable care in providing such appliance for use by the employee, especially when there is no latent or concealed defect or hazard but only such danger as is obvious. *Ibid.*

Evidence *held* insufficient to show negligence on part of employer in furnishing power lawn mower for use of employee. *Ibid.*

§ 25b. Federal Employers' Liability Act—Federal Decisions Control.

An action under the Federal Employers' Liability Act is governed by the Federal rules of law. *Bennett v. R. R.*, 261.

§ 25c. Federal Employers' Liability Act—Applicability.

In order to be subject to the Federal Employers' Liability Act, an employee need not be at the precise moment of the injury engaged in interstate rather than intrastate commerce, and where the conductor on a run starts with cars destined for interstate as well as for intrastate commerce, the fact that at the time of his injury his train was composed solely of cars for intrastate shipment does not preclude the application of the Federal Act. *Futrelle v. R. R.*, 36.

§ 26. Federal Employers' Liability Act—Negligence of Railroad Employer.

Evidence tending to show that defendant's engine was pushing freight cars in switching operations, so that its headlight and oscillating light were obstructed by a boxcar immediately in front of the engine, is insufficient to be submitted to the jury on the question of negligence of the carrier in causing the death of the conductor of the train, presumably hit by the front freight car in the course of his duties relating to the switching operation, when the evidence further shows that the place where the conductor was killed was in a well lighted area, that he was standing on the opposite side of the train from the side on which he knew the signals with respect to the movement of the train would be made, and that the switching operations were being performed in the usual and customary manner theretofore followed in this particular yard and in accordance with the express instructions given to the crew by the conductor. *Futrelle v. R. R.*, 36.

Recovery under the Federal Employers' Liability Act must be based upon negligence of the employer which constitutes the proximate cause or one of the proximate causes of injury or death, the employer not being an insurer under the Act. *Bennett v. R. R.*, 261.

MASTER AND SERVANT—*Continued.*

Under the Federal Employers' Liability Act, it is the duty of the employer to use reasonable care to provide his employees with a safe place to work, and the reasonableness of the care must be commensurate with the danger of the business. *Ibid.*

The evidence favorable to plaintiff tended to show that her intestate, a brakeman on a freight train, was ordered, while a violent electrical storm was still in progress, to leave shelter and resume work, and that he was struck and killed by a bolt of lightning while walking beside the tracks in the performance of his duties: *Held:* The evidence is insufficient to show negligence on the part of the railroad employer as a concurring proximate cause of the injury and death, and therefore nonsuit was properly entered. *Ibid.*

As a general rule, a railroad company is not liable to its employees for injuries resulting from climatic conditions. *Ibid.*

Motion to nonsuit is proper procedure to test sufficiency of evidence under Federal Employers' Liability Act. *Ibid.*

§ 27. Federal Employers' Liability Act—Assumption of Risk.

Assumption of risk by whatever name called is not applicable to an action under the Federal Employers' Liability Act. *Bennett v. R. R.*, 261.

§ 28. Federal Employers' Liability Act—Contributory Negligence.

Nonsuit for contributory negligence of the employee is not permissible under the Federal Employers' Liability Act, since under the Act contributory negligence does not bar recovery, but is to be considered only in diminution of damages. *Futrelle v. R. R.*, 36.

Contributory negligence of the employee is not a bar to recovery under the Federal Employers' Liability Act. *Bennett v. R. R.*, 261.

§ 39a. Compensation Act—"Employees" Within Coverage of Act—Injuries Outside the State.

Where the accident, resulting in an employee's death, occurs in another state, but the contract of employment was made in this State between the resident employee and the resident employer, and the contract of employment is not expressly for services exclusively outside of the State, the North Carolina Industrial Commission has jurisdiction. *McGill v. Freight*, 469.

§ 39b. Compensation Act—"Employees" Within Coverage of Act—Independent Contractors and Subcontractors.

Where the owner of a truck drives same on a trip in interstate commerce for an interstate carrier under a trip-lease agreement providing that the carrier's I.C.C. license plates should be used and the carrier retain control and direction over the truck, an assistant driver employed by the owner-lessor is an employee of the carrier within the coverage of the North Carolina Compensation Act. Further, if the owner-lessor be considered an independent contractor, but had less than five employees and no compensation insurance coverage, the carrier would still be liable under G.S. 97-19. *McGill v. Freight*, 469.

§ 40c. Compensation Act—Whether Injury Arises Out of the Employment.

In order for an injury to be compensable under the Workmen's Compensation Act, the injury must be traceable to the employment as a contributing proximate cause. *Horn v. Furniture Co.*, 173.

MASTER AND SERVANT—*Continued.*

Whether an injury arises out of the employment is a mixed question of law and fact. *Ibid.*

Injury to employee from accident on highway while going to place of his own choice for lunch is not compensable. *Ibid.*

An injury sustained by an employee as a result of a medical blood test required by statute (G.S. 130-20) in the interest of public health because of the nature of the work, does not arise out of her employment within the meaning of G.S. 97-2(f). *King v. Arthur*, 599.

§ 40f. Occupational Diseases.

Where the evidence supports the findings of the Industrial Commission that claimant had not been injuriously exposed to the inhalation of silica dust for as much as two years in the ten years prior to the last exposure, the denial of his claim for compensation must be affirmed. *Hicks v. Granite Corp.*, 233.

§ 41. Rights of Employee, Employer and Insurance Carrier Against Third Person Tort-Feasor.

Where an injured employee has accepted compensation under the Workmen's Compensation Act, no action instituted within six months from the date of the injury may be maintained in the name of the injured employee unless the complaint discloses that the action was instituted in the name of the employee by either the employer or the insurance carrier. G.S. 97-10. *Taylor v. Hunt*, 212.

Where employer is party to settlement between widow of employee, in capacity of executrix, and third person tort-feasor, employer is barred thereby from asserting claim against tort-feasor. *McGill v. Freight*, 469.

§ 43. Notice and Filing of Claim.

A minor dependent under 18 years of age and who is without guardian, trustee or committee, is not barred during such disability by failure to give notice of claim for compensation as required by G.S. 97-22, *et seq.* *McGill v. Freight*, 469.

§ 47. Exclusiveness of Remedy Under Compensation Act.

Settlement by widow, in capacity of administratrix, of claim for wrongful death against intestate's employer, under mistake of law that Compensation Act was not applicable, bars widow as dependent but does not bar minor child of deceased. *McGill v. Freight*, 469.

§ 51. Prosecution of Claim and Proceedings Before Commission.

Claim for compensation for a dependent under 18 years of age must be prosecuted in the dependent's name by a general guardian, and the administratrix of the deceased employee is a proper claimant only when there are no dependents, so that the joinder of the administratrix with the dependents in the prosecution of a claim will be treated as surplusage. *McGill v. Freight*, 469.

§ 53a. Form and Rendition of Award and Approval of Agreement.

An agreement for the payment of compensation when approved by the Industrial Commission is as binding on the parties as an order, decision or award of the Commission. *Smith v. Red Cross*, 116.

The Workmen's Compensation Act contemplates but a single recovery for disability for an injury regardless of whether the injury be total or partial, temporary or permanent. *Ibid.*

MASTER AND SERVANT—*Continued.*

Compromise and settlement of the common law claim of the administratrix of a deceased employee for the wrongful death of the employee, executed under the mistaken belief that the Workmen's Compensation Act was not applicable, will not be disturbed on the ground that the Industrial Commission did not approve such settlement, since the "settlement" contemplated by G.S. 97-17, G.S. 97-82, is a settlement in respect of the amount of compensation to which claimants are entitled under the Act. *McGill v. Freight*, 469.

§ 53b(1). Compensation Act—Compensation for Injury.

Evidence that fingers of the employee's hand were severed in the accident supports a conclusion of a percentage loss of the use of the hand upon which an award of compensation for such loss of use is proper. *Pridmore v. McCrary*, 544.

§ 53c. Change of Condition and Review of Award.

The parties entered into an agreement for compensation for total temporary disability for a specified number of weeks, and the injured employee executed a receipt stating that claim for further compensation for change of condition would have to be made within one year from the date of final payment under the agreement. More than a year thereafter, upon discovery that the injury resulted in a permanent partial disability, the employee filed claim therefor. *Held:* The claim was barred by G.S. 97-47. *Smith v. Red Cross*, 116.

§ 55d. Appeal and Review of Award of Industrial Commission.

Findings of the Industrial Commission which involve mixed questions of law and fact are not conclusive if the conclusion of law is not supported by the facts found. *Horn v. Furniture Co.*, 173.

Exceptions to the findings of fact of the Industrial Commission cannot be sustained when there is sufficient evidence to support each of the findings, and the findings are sufficient to support the conclusions of law and the award pursuant thereto. *Pridmore v. McCrary*, 544.

§ 60. Right to Unemployment Compensation.

Where the findings of the Employment Security Commission that at the time of filing claim claimant was unemployed because of his misconduct connected with his work, are supported by the evidence, such findings are conclusive and support decision that claimant was disqualified for unemployment benefits for nine consecutive weeks. *In re Stutts*, 405.

MORTGAGES.

§ 11. Conditions and Covenants.

A provision in a deed of trust that the borrower should pay a premium in addition to accrued interest at the legal rate, upon the exercise of its privilege of prepaying the notes before maturity, is valid. G.S. 22-4. *Bakeries v. Ins. Co.*, 408.

A provision in notes and deed of trust securing same that the borrower should maintain a working capital in a specified amount and should not pay dividends on its stock when the payment of such dividends would reduce its working capital below the minimum specified, is valid. *Ibid.*

The borrower was a wholly owned subsidiary, the parent corporation being the owner of all its common stock. The subsidiary undertook to pay interest

MORTGAGES—*Continued.*

on the parent corporation's debentures. *Held:* The payment of the interest on the parent company's debentures, being based solely on the ownership by the parent corporation of the common stock of the subsidiary, is sufficiently analogous to the payment of a dividend by the subsidiary to justify the lender in asserting that such payment constituted the payment of a dividend within the terms of its loan agreement proscribing the payment of dividends by the borrower which would reduce its working capital below a specified amount. *Ibid.*

Lender's threat to declare default if borrower violated conditions of deed of trust cannot constitute duress, and borrower's election to refinance before maturity entitles lender to premium for prepayment. *Ibid.*

NARCOTICS.

§ 2. Possession of Paraphernalia for Administering.

Evidence that there was found in the glove compartment of defendant's car a glass tumbler, three hypodermic needles, a hypodermic syringe, gauze, and a small bottle of water labeled for use in injections, without finding any habit forming drugs and without evidence that the articles had been used or were possessed for the purpose of administering habit forming drugs, is insufficient to be submitted to the jury in a prosecution under G.S. 90-108. *S. v. Dunn*, 102.

NEGLIGENCE.

§ 1. Definition of Negligence.

Actionable negligence is the breach of a legal duty owed by defendant to plaintiff, under the relationship existing between the parties and the attendant circumstances, which proximately causes plaintiff's injury. *Kientz v. Carlton*, 346.

§ 2. Sudden Peril and Emergencies.

If, under the circumstances, a reasonably prudent man could foresee and anticipate that an emergency would arise as a result of defendant's own conduct, defendant may not excuse himself on the ground that he was called upon to act in the emergency thus created. *Brunson v. Gainey*, 152.

§ 3½. Acts of God.

Lightning is an act of God, but if there is negligence of defendant which joins with an act of God so that the negligence of defendant operates as an efficient and contributing cause of injury, defendant is liable. *Bennett v. R. R.*, 261.

§ 4d. Condition and Use of Land and Buildings.

An owner is charged with knowledge of an unsafe condition of the premises created by its employee in discharge of his duties, but an unsafe condition created by a third party must have existed for such length of time that the owner knew, or, by the exercise of due care, should have known of its existence before the owner may be held responsible therefor. *Hughes v. Enterprises*, 131.

Plaintiff's evidence tended to show that she slipped and fell in leaving defendant's restaurant at a place at the entrance made slippery by reason of soapy and slimy substances splattered on the floor by an employee in mopping the floor. Defendant's evidence was in conflict in material respects. *Held:*

NEGLIGENCE—*Continued.*

The evidence considered in the light most favorable to plaintiff is sufficient to require the submission of the case to the jury. *Ibid.*

An invited guest or visitor in the owner's home is a licensee and not an invitee, and the fact that the guest, at the time of the injury, was performing a trifling or incidental service for the owner or his wife does not change the guest's *status*. *Murrell v. Handley*, 559.

Res ipsa loquitur does not apply to injuries resulting from slipping or falling on a waxed or oiled floor. *Ibid.; Copeland v. Phthisic*, 580.

Evidence tending to show that an invited guest, while on a personal and gratuitous errand for the wife of the owner, slipped and fell when she stepped on a small rug covering a newly waxed floor, without evidence that the wax was applied in an improper manner or that an improper material was used or that the rug was not of a kind in general use, is insufficient to be submitted to the jury on the issue of negligence, even if the guest be considered an invitee. *Murrell v. Handley*, 559.

The proprietors of a store are not insurers of the safety of their customers, but are liable only for injuries resulting from negligence on their part. *Copeland v. Phthisic*, 580.

Evidence that a patron in a store, while walking down an aisle where customers were invited to inspect the merchandise, slipped and fell at a place where more wax had been allowed to accumulate than at any other place in the store, so that plaintiff's shoe heel made a print in the wax, is sufficient to support the inference that defendants had not properly applied the wax at this point, and nonsuit was properly denied in an action to recover for the resulting injury. *Ibid.*

No notice to a store proprietor is necessary of a condition created by him. *Ibid.*

Nonsuit *held* proper in this action by an electrician employed in the repair of a burned building, who was injured in doing his work when a board broke under his foot as he was walking, in the progress of his work, near to a ragged burned-out hole in the floor. *Swanger v. Rice*, 612.

§ 9. Anticipation of Injury.

Breach of a legal duty is not sufficient predicate for liability for an injury which could not have been foreseen according to ordinary and usual experience. *Kientz v. Carlton*, 236.

A defendant is not required to foresee events which are merely possible, but only those which are reasonably foreseeable. *Bennett v. R. R.*, 261.

Reasonable foreseeability is an essential element of proximate cause. *White v. Lacey*, 364.

§ 10½. Assumption of Risk.

The doctrine of assumption of risk is not available as a defense when there is no contractual relationship between the parties. *Gilreath v. Silverman*, 51.

§ 11. Contributory Negligence in General.

The law imposes upon every person the duty to exercise for his own safety that degree of care which a reasonably prudent person would employ in the circumstances. *Basnight v. Wilson*, 548.

NEGLIGENCE—*Continued.*

§ 16. Pleadings.

Mere allegation that defendants' conduct was negligent, without alleging the facts constituting the alleged negligence, is insufficient. *Taylor v. Brake*, 553.

§ 17. Presumptions and Burden of Proof.

Defendant has the burden of proof on the issue of contributory negligence. *White v. Lacey*, 364.

§ 18. Competency and Relevancy of Evidence.

In the absence of other relevant statements or circumstances, evidence of an offer or promise made by a defendant or its agent to pay the hospital and medical expenses of the injured person is not competent as an admission of negligence when the statements do not relate to the cause of plaintiff's injuries. *Hughes v. Enterprises*, 131.

§ 19c. Nonsuit on Ground of Contributory Negligence.

When there is conflict in the evidence as to the pertinent facts bearing on the issue of contributory negligence, nonsuit on that ground is error. *Gilreath v. Silverman*, 51.

A motion for nonsuit on the ground of contributory negligence shown by the plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom. *Mallette v. Cleaners*, 652; *Rogers v. Wiggs*, 663.

In determining whether plaintiff's evidence discloses contributory negligence as a matter of law, the evidence favorable to him must be taken as true, giving him the benefit of every reasonable intendment therefrom, and all contradictions and discrepancies resolved in plaintiff's favor. *Mallette v. Cleaners*, 652.

§ 20. Instructions.

The refusal of the court to give peremptory instructions on the issue of contributory negligence is proper when the determinative facts are in dispute. *Murray v. Wyatt*, 123.

PARENT AND CHILD.

§ 5. Liability for Support.

The estate of a father is not liable to his minor children for sums paid out by their mother for their support and maintenance. *Lee v. Coffield*, 570.

The law in this State imposes a duty on both parents to provide, within their means, for the necessary support of their minor children, and while this is primarily the obligation of the father, upon his death the duty rests on the mother to provide for their support to the best of her ability. *Ibid.*

Under a deed of separation the father provided for monthly sums for the support of his minor children. After his death the mother expended sums in excess of the amount provided in the deed of separation for their support and maintenance. *Held:* Neither the minors nor their estates are liable to their mother for such sums, and the properties willed them by their father, to be distributed upon their twenty-fifth birthdays, may not be used to reimburse the mother for such sums. *Ibid.*

PARENT AND CHILD—*Continued.*

§ 15. Abandonment—Instructions.

In a prosecution of a father for abandonment and for nonsupport of his minor child, a peremptory instruction for the State is prejudicial error in depriving the defendant of his right to have the jury consider the essential element of willfulness. *S. v. Gibson*, 71.

PARTIES.

§ 3. Parties Defendant.

Transferee of deceased partner is properly joined in action against estate of deceased partner to recover partnership funds, since such transferee claims title and right to possession adverse to plaintiff partner. *Bright v. Williams*, 648.

PARTITION.

§ 1a. Nature and Extent of Right in General.

Tenancy in common in land is the necessary basis for the maintenance of partition proceedings. *Lockleair v. Martin*, 378.

Partition is the division of land between two or more co-owners, and deeds executed by the sole owner of a parcel of land for division thereof among her children does not effect a partition. *Edwards v. Batts*, 693.

§ 4f. Operation and Effect.

Partition by the life tenants is not binding on the remaindermen who are not parties. *Barnes v. Dortch*, 369.

PARTNERSHIP.

§ 12. Dissolution—Accounting and Settlement Between Members and Their Representatives.

Complaint *held* sufficient to allege cause for dissolution of partnership and recovery of partnership property for settlement as against estate of deceased partner and his transferee. *Bright v. Williams*, 648.

The interest of the partners in the partnership properties is personal property even though part of the partnership property is real estate, G.S. 59-56. Hence the personal representatives of deceased partners are proper parties in an action for an accounting and proper application of the partnership property. *Ibid.*

The transferee of partnership property pursuant to a conspiracy with one of the partners to wrongfully deprive the other partner of possession and control of the property, is a proper party to an action for the dissolution and proper application of the partnership property because of his wrongful possession and assertion of title to the partnership assets, and the fact that he happens to be an heir of the deceased transferor is immaterial. *Ibid.*

PATENTS.

§ 3. Licensing Agreements.

The royalties paid by patent licensee are compensation or rent for the use of the invention, and the licensing contract creates a relationship analogous to that of landlord and tenant. *Wynne v. Allen*, 421.

There is no implied warranty or covenant of quiet enjoyment in the sale or lease of a patent. *Ibid.*

PATENTS—*Continued.*

An eviction which deprives the licensee of the right to enjoy the patent licensed relieves him of the duty of making further payments under the license, but if, notwithstanding that the use of the license is an asserted infringement of a patent of a third person, he continues to recognize the right to use the patent under his license, he is liable for royalties. *Ibid.*

Where the right of a licensee of a patent to use the patent is terminated by an eviction, the licensee is discharged from liability for royalties thereafter accruing, but is not relieved from liability for royalties that have accrued. *Ibid.*

Where the licensee voluntarily pays money for the privilege of exercising rights under the licensing contract with full knowledge of all facts which may impose liability to a third person claiming infringement of a prior patent, he cannot, in the absence of an agreement to reimburse, recover the money so paid. *Ibid.*

PHYSICIANS AND SURGEONS.

§ 14. Liability for Malpractice in General.

A dentist, under the same rules of liability applicable to physicians and surgeons, is required to bring to his patient's case a fair, reasonable and competent degree of skill, which others similarly situated ordinarily possess, and to apply that skill with ordinary care and diligence in the exercise of his best judgment. *Hazelwood v. Adams*, 398.

§ 20. Sufficiency of Evidence and Nonsuit in Actions for Malpractice.

Evidence that defendant dentist in extracting two molars from plaintiff's mouth left imbedded roots, that infection in and around the broken roots was permitted to continue for some five months with two or three weekly operations which did nothing more than drain the infected area, that defendant then sent plaintiff to a specialist, who located the position of the roots by X-ray and removed them, is sufficient to be submitted to the jury on the issue of defendant's liability, and involuntary nonsuit was error. *Hazelwood v. Adams*, 398.

PLEADINGS.

§ 2. Complaint—Joinder of Causes.

Several causes of action arising out of the same transaction or transactions connected with the same subject of action may be united in the complaint provided all the causes of action affect all the parties to the action. This proviso is not applicable to actions to foreclose a mortgage. *N.A.A.C.P. v. Secretary of State*, 331.

§ 6. Time for Answering.

Where service by publication is fatally defective, court, in setting aside judgment, may order that service be completed and enlarge time for answering. *Harmon v. Harmon*, 83.

§ 15. Office and Effect of Demurrer.

The sufficiency of a further answer and defense and cross-action may be tested by demurrer. *Bumgardner v. Groover*, 17.

A demurrer admits the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom, but it does not admit

PLEADINGS—*Continued.*

any legal inferences or conclusions. *Hedrick v. Graham*, 249; *Edwards v. Batts*, 693.

Upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. *Hedrick v. Graham*, 249.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

Where complaint sufficiently states one cause of action, but fails to state a second cause of action because of want of essential averment, demurrer for misjoinder of causes is bad. *Scott v. Burlington Mills*, 100.

A defendant may demur to a complaint when it appears on the face thereof that two or more causes of action have been improperly united. *N.A.A.C.P. v. Secretary of State*, 331.

The court, upon sustaining demurrer for misjoinder of causes of action, has the power to sever the causes for trial. *Ibid.*

This action was brought under the Declaratory Judgment Act against the Secretary of State and the Attorney-General to obtain a declaration as to the applicability to plaintiff of G.S. Ch. 120, Art. 10, and G.S. 55-118. *Held:* The court properly sustained a demurrer for misjoinder of parties and causes of action, since the Attorney-General is not affected by the cause of action relating to the registration of persons and organizations engaged in influencing public opinion or legislation, and therefore the causes do not affect all the parties. *Ibid.*

§ 24. Variance.

The issues arise upon the pleadings, and recovery must be based upon the cause alleged. *Wynne v. Allen*, 421.

§ 31. Motions to Strike.

G.S. 1-153 does not apply to a motion to strike allegations from a pleading which relate solely to questions of fact addressed to the court. *Collier v. Mills*, 200.

PRINCIPAL AND AGENT.

§ 13c. Relevancy and Competency of Evidence.

Testimony of a statement made by an agent which is merely narrative of a past occurrence and not a part of the *res gestae* is hearsay and incompetent as substantive evidence against either the principal or the agent, but is competent as bearing upon the credibility of the agent as a witness when the statement is in direct conflict with the testimony of the agent at the trial. *Hughes v. Enterprises*, 131.

But testimony of a statement of the agent of a promise to pay hospital expenses is incompetent as an admission of negligence. *Ibid.*

PROCESS.

§ 6. Service by Publication.

Upon motion to vacate a judgment based upon service by publication on the ground that the clerk of the Superior Court had not sent a copy of the notice of service as required by G.S. 1-99.2, the court may vacate the judgment, and, instead of dismissing the action, may in his discretion order that service be

PROCESS—*Continued.*

completed in accordance with the provisions of statute and enlarge the time for answering. *Harmon v. Harmon*, 83.

The purpose of service of process is to give notice and an opportunity to be heard, and, even though the letter of the law may be followed with respect to the affidavit for publication, when this method of service is not intended to give notice, but to conceal it, in accordance with a calculated effort on the part of plaintiff to keep actual notice from defendant, jurisdiction of defendant is not acquired. *Patrick v. Patrick*, 195.

§ 8d. Service on Foreign Corporations by Service on Secretary of State.

Whether a foreign corporation is doing business in North Carolina so as to subject it to the jurisdiction of the State's Courts is essentially a question of due process of law under the 14th Amendment to the Federal Constitution, which must be decided in accord with the decisions of the U. S. Supreme Court. *Putnam v. Publications*, 432.

A foreign publishing company which delivers to a common carrier in another state magazines for shipment to a wholesale dealer in this State for resale in this State by the dealer, with provision for credit to the dealer for unsold magazines, and which employs sales promotion representatives who make occasional visits in this State, *is held* not doing business in this State for the purpose of service of process by service upon the Secretary of State under G.S. 55-38. *Ibid.*

G.S. 55-38.1(a)(3) in regard to an action for libel against a foreign publishing corporation which delivers magazines to a common carrier for shipment to a wholesale dealer in this State for resale by the dealer, and which employs sales promotion representatives who make only occasional visits in this State, is unconstitutional, since such corporation has no contacts, ties or relations within this State so as to make it amenable to service of process here for the purpose of a judgment *in personam*. *Ibid.*

A foreign publishing corporation purchased an article from a nonresident and published same in its magazine. Its magazines were delivered by it to a common carrier in another state for shipment to wholesale dealers in this State. Plaintiff brought a suit for libel based upon the article. *Held:* The tortious act was not committed in this State, and therefore G.S. 55-38.1(a)(1), (2), and (4) are inapplicable and do not authorize service of process on the corporation by service on the Secretary of State. *Ibid.*

In an action against a nonresident corporation for wrongfully taking plaintiff's property by duress and threats of arrest without legal process and for invasion of privacy and public humiliation, findings of fact that the tortious acts were committed in this State are sufficient to support adjudication that service of process on it by service on the Secretary of State under G.S. 55-38.1 is valid. *Painter v. Finance Co.*, 576.

PUBLIC OFFICERS.

§ 8. Civil Liabilities of Public Officers to Individuals.

Even if it be conceded that the duty rests upon members of a county alcoholic beverage control board to require a person employed by the board as an enforcement officer to give bond, G.S. 128-9, the individual members of the board cannot be held liable to a person assaulted by such enforcement officer for failure to require him to give the bond, since the duty to require bond is

purely ministerial and a public officer is not individually liable for negligent breach of a ministerial duty which is of a public nature unless the statute creating the office or imposing the duty makes provision for such liability. "Ministerial" defined.' *Langley v. Taylor*, 59.

In the absence of statute expressly imposing such liability, a public officer cannot be held liable for the neglect of duty of the governmental body of which he is a member if he acts in good faith. *Ibid.*

REFERENCE.

§ 3. Compulsory Reference.

In an action to establish a trust in real property of a value in excess of $500, the court may of its own motion order a compulsory reference. *Solon Lodge v. Ionic Lodge*, 281.

§ 4. Pleas in Bar.

The rule that a plea in bar which extends to the whole cause of action so as to defeat it entirely precludes a compulsory reference until the plea in bar is first determined, applies only when there are two distinct controversies, one as to the right to recover and the other as to the amount of recovery in the event the right to recover is established, as for an accounting. But where the cause of action is entire and indivisible so that the party asserting the right is entitled to recover entirely or not at all, pleas in bar of statutes of limitation, laches and estoppel will not preclude compulsory reference. *Solon Lodge v. Ionic Lodge*, 281.

§ 14b. Right to Jury Trial on Exceptions.

Where a party objecting to a compulsory reference complies with all procedural requirements for a jury trial upon exceptions to the referee's report, it is error for the court to deny the demand for jury trial and to proceed to consider the evidence and to pass upon the exceptions. *Solon Lodge v. Ionic Lodge*, 281.

§ 14e. Trial on Exceptions.

Trial by jury upon exceptions to the referee's report is only upon the written evidence taken before the referee, and the referee's findings of fact and conclusions of law are not competent evidence before the jury. *Solon Lodge v. Ionic Lodge*, 281.

Upon appeal from the referee's report in a compulsory reference where right to jury trial has been preserved, the court cannot determine as a matter of law, prior to the introduction of evidence, the defenses of pleaded statutes of limitation, laches and estoppel, since only after the introduction of evidence can the court ascertain if plaintiff's own evidence establishes these defenses or if defendant's evidence entitles him to a preemptory instruction thereon. *Ibid.*

REGISTRATION.

§ 4. *Effect of* Registration.

Registration does not protect every creditor against unrecorded mortgages, but only purchasers for a valuable consideration from the mortgagor and creditors who have first fastened a lien upon the property in some manner sanctioned by law. *Sales Co. v. Weston*, 621.

REGISTRATION—*Continued.*

An unregistered instrument is valid as between the parties. *Ibid.*

A subsequently dated but prior recorded deed, including a quitclaim deed supported by consideration, takes precedence over a prior dated but subsequently recorded fee simple deed. *Hayes v. Ricard*, 687.

ROBBERY.

§ 8. Prosecutions.

Evidence of defendant's guilt of robbery with firearms *held* sufficient to be submitted to the jury. *S. v. Dorsett*, 47.

Testimony of a State's witness to the effect that defendant joined in making plans for a robbery, furnished the perpetrators a pistol, gave his accomplices the name of the victim and was nearby when they induced the victim to go with them to a secluded spot in the victim's car, and robbed him, together with incriminating admissions of defendant as to his meeting and being with the other conspirators, and corroborative evidence of the accomplice's testimony, *held* sufficient to be submitted to the jury in a prosecution of defendant for conspiracy to rob and armed robbery. *S. v. Saunders*, 338.

SALES.

§ 11. Transfer of Title and Consummation of Sale.

Delivery of goods to common carrier in another State is delivery to purchaser. *Putnam v. Publications*, 432.

Allegations and evidence tending to establish a written contract to sell a business, supported by the payment of a part of the purchase price as a binder, which writing stipulated that price of the fixtures and equipment had been agreed upon but that price of the merchandise should be agreed upon, and the business turned over to the purchasers when the financial arrangements had been completed, together with allegations and evidence that thereafter a substantial sum was paid to the seller by the purchasers and the business turned over to the purchasers, *is held* sufficient to be submitted to the jury on the question of a consummated sale of the business, it not being necessary that the consummation of the sale be evidenced by any writing. *Thompson v. Turner*, 478.

§ 15. Implied Warranties.

There can be no implied warranty in regard to a defect which is as equally visible or discoverable by the purchaser as the seller. *Driver v. Snow*, 223.

§ 23½. Remedies of Seller—Sales in Bulk by Purchaser.

Evidence, taken in the light most favorable to plaintiff tending to show sale by a retailer of a sufficiently large part of his stock in trade, for which he had not paid his wholesaler, to enable his transferee to start a like business of his own, without notice to the wholesaler or otherwise complying with the provisions of the statute, *held* sufficient to make out a case against the transferee to recover the value of the goods sold by the transferee in the ordinary course of his business or to recover the specific merchandise, when it can be identified in the transferee's hands, a sale within the definition of the statute being void. G.S. 39-23. *Kramer Brothers v. McPherson*, 354.

SALES—*Continued.*

§ 30. Actions for Injuries from Use of Article Sold.

Plaintiff's evidence was to the effect that he purchased a second-hand stove, equipped with a jacket for the purpose of heating water, upon the seller's representation that the stove would be equally usable for heating a room, that the seller furnished him plugs to stop up the two water holes of the jacket, that plaintiff took the stove home, fitted the plugs, built a fire, and that there was an explosion which seriously and permanently injured plaintiff. *Held:* While the evidence supports the inference that the explosion occurred from steam created from water left in the water jacket, it discloses that this fact was at least as easily discoverable by the purchaser as the seller, and therefore nonsuit was properly entered in an action to recover for the injuries on the theory of breach of an implied warranty that the article was fit for the purpose for which it was sold. *Driver v. Snow*, 223.

Evidence *held* insufficient to show that injuries from accident while using power lawn mower were result of absence of safety features. *Kientz v. Carlton*, 236.

In the absence of express warranty, the seller can have no greater liability than the manufacturer for injuries to third persons resulting from alleged defective condition of the article sold. *Ibid.*

A merchant of power lawn mowers is not required by law to sell only the latest models or only those having specified safety features. *Ibid.*

SANITARY DISTRICTS.

§ 1. Creation and Establishment.

The signature of 51% or more of the freeholders in the territory described in a petition for the creation of a sanitary district is prerequisite to the jurisdiction of the board of county commissioners to approve such petition, and such petition thus approved is prerequisite to the jurisdiction of the State Board of Health to define the boundaries of and create the district. *Deal v. Sanitary District*, 74.

Where 51% of the freeholders within the boundaries described therein sign a petition for the creation of a sanitary district, and the board of county commissioners approve such petition, the State Board of Health has jurisdiction, after hearing, to approve or disapprove the petition, and upon its approval to create the district, but the State Board of Health has no authority to exclude a portion of the territory described in the approved petition and create as a sanitary district a territory substantially less in area and in property values than the territory described in the petition. *Ibid.*

The State Board of Health does not have authority to exclude from the territory described in an approved petition for the creation of a sanitary district, territory within the boundaries of the proposed district served by a municipal water system, notwithstanding that such territory would not benefit from the creation of the proposed district, since the authority of the State Board of Health to create a sanitary district is limited by statute to territory embraced within the boundaries described in an approved petition. *Ibid.*

SCHOOLS.

§ 3a. Enlargement and Consolidation of Districts.

Where a proper petition, signed by a majority of the qualified voters of an area less than a school district, for the annexation of the area to an adjoining city administrative unit, is approved by such city unit, the commissioners of the county have the ministerial duty, enforceable by *mandamus*, to call an election upon the question, even though the county board of education does not approve the petition, since the approval of the county board is necessary only in the absence of such petition. *Jordan v. Comrs. of Durham*, 290.

STATE.

(Executive, Legislative and Judicial Branches, see Constitutional Law.)

§ 1a. Office of Attorney-General.

The Attorney-General has no specific enforcement duty in regard to the initiation of a prosecution for the violation of a criminal statute in the absence of express provision therefor in the statute, since his duties in regard to the solicitors of the State are purely advisory and he has no constitutional authority to issue a directive to any of them, and the solicitors have the constitutional and statutory duty to prosecute criminal actions in the Superior Courts. *N.A.A.C.P. v. Secretary of State*, 331.

§ 3b. State Tort Claims Act—Negligence of State Employees and Contributory Negligence.

Evidence *held sufficient* to support findings of the Industrial Commission that death of intestate resulted from negligence of State employees while acting in the scope of their employment in administering corrective measures at the prison, and that intestate was not guilty of contributory negligence, and award of damages under the State Tort Claims Act is upheld. *Gould v. Highway Comm.*, 350.

STATUTES.

§ 5a. General Rules of Construction.

While the words of a statute must be taken in the sense in which they were understood at the time the statute was enacted, this rule does not preclude a statute from applying to things and conditions not in existence at the time of the enactment when the language of the statute is sufficiently broad and comprehensive to include them by a fair and reasonable interpretation. *Hedrick v. Graham*, 249.

Where the language of a statute expresses the legislative intent in clear and unambiguous terms, the words employed must be taken as the final expression of the meaning intended unaffected by its legislative history. *Ibid.*

Legislative acquiescence in the practical interpretation of a statute by the administrative agency is entitled to some weight by the courts in construing the act. *Ibid.*

TAXATION.

§ 19. Property Exempt from Taxation in General.

All property privately owned within this State is subject to taxation unless exempt by strict construction of pertinent statute. *Investment Co. v. Cumberland County*, 492.

TAXATION—*Continued.*

§ 19½. Property Exempt from Taxation—Governmental.

Fixtures and improvements placed upon lands in a military reservation leased from the Federal Government, as well as the value of the leasehold estate, are subject to taxation in this State, Congress having waived any immunity of such property from taxation. *Investment Co. v. Cumberland County*, 492.

§ 26. Listing and Assessment of Personal Property.

Stoves and refrigerators placed in houses on a military reservation by the lessee as well as the value of the leasehold estate, is subject to *ad valorem* tax. *Investment Co. v. Cumberland County*, 492.

§ 26½. Levy and Assessment of Real Property.

Structures and improvements placed by lessee on lands within a military reservation leased from the Federal Government, are subject to taxation by the county in which the property is situate as realty. *Investment Co. v. Cumberland County*, 492.

§ 28. Levy and Assessment of Inheritance and Estate Taxes.

The primary liability of the devisees for the inheritance tax on the value of property devised to them under the will is not affected by any compromise agreement under which the ultimate disposition of the lands differs in whole or in part from that prescribed by the will. G.S. 105-2, G.S. 105-4, G.S. 105-15, G.S. 105-18, G.S. 105-20. *Pulliam v. Thrash*, 636.

Will devising certain lands to three devisees as tenants in common was established by verdict and judgment, and by compromise agreement a fourth person was let in as a tenant in common and the land sold for partition. An additional inheritance tax assessed was paid by the commissioner out of the proceeds of sale. *Held:* The share of each of the three devisees is chargeable with one-third the tax, and no part thereof is chargeable against the share of the person let in by the compromise agreement or her transferee in the absence of an express or implied agreement to pay same. *Ibid.*

§ 40c. Foreclosure of Tax Lien.

Where the true owners are served with summons in an action to foreclose a tax lien, the fact that the land had not been properly listed in the name of the true owners does not defeat the jurisdiction of the court. *Franklin County v. Jones*, 272.

§ 40g. Attack and Validity of Foreclosure.

The fact that sale of land for taxes was postponed for six days, rather than postponed from day to day for a period of six days, does not render the sale void, but is at most an irregularity which does not affect the title of the purchaser, C.S. 690, C.S. 692, the sale not being held on a Sunday, since there is nothing in the record to give the purchaser notice. *Franklin County v. Jones*, 272.

Decree of confirmation of tax sale may not be attacked for mere irregularity except upon showing of prejudice and diligence. *Ibid.*

In an action to sell lands to satisfy tax liens, the defense that the land had not been properly listed would entitle defendants only to have the land properly listed with the limitation that it could be so listed only for the prior

TAXATION—*Continued.*

five years, but would not defeat the right of foreclosure, and the failure of a guardian *ad litem* for minor defendants to raise such defense is not shown to be prejudicial when it does not appear that had the defense been made foreclosure would have been avoided. *Ibid.*

TENANTS IN COMMON.

§ 1. Nature and Incidents of Estates in Common.

Tenancy in common is characterized by the single unity of possession or right to possession of the common property, and cannot arise when several persons own distinct portions of the same tract of land. *Lockleair v. Martin*, 378.

TORTS.

§ 5. Liabilities of Tort-Feasors to Person Injured.

Where the acts of several persons concur in producing a single tortious injury, the injured person may sue them either jointly or separately, notwithstanding that their liability as between themselves may be primary and secondary. *Denny v. Coleman*, 90.

§ 6. Right to Contribution and Joinder.

Where the owner sues some of the parties participating in a tortious conversion of his property and obtains judgment by default and inquiry, regular in all respects, the original defendants are not entitled to bring in the other tort-feasors as against plaintiff, and as between plaintiff and the original defendants, the action is pending solely to determine the amount of damages to be ascertained by the jury, G.S. 1-212, although the original defendants may seek to enforce their right of contribution against the other tort-feasors in the manner provided in G.S. 1-240. *Denny v. Coleman*, 90.

TRIAL.

§ 5½. Pre-Trial.

A pre-trial order fixing the issue to be submitted determines the theory of trial. *DeBruhl v. Highway Com.*, 139.

§ 17. Admission of Evidence Competent for Restricted Purpose.

A general objection to testimony competent for a restricted purpose, without request that its admission be limited, is ineffectual. *Hughes v. Enterprises*, 131.

§ 21½. Nonsuit—Necessity for Motion and Renewal.

Failure to renew motion to nonsuit at the conclusion of all the evidence waives the question of the sufficiency of the evidence to be submitted to the jury. *Wynne v. Allen*, 421.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, the evidence, whether offered by plaintiff or by defendants, must be considered in the light most favorable to plaintiff. *Murray v. Wyatt*, 123.

On motion to nonsuit, plaintiff's evidence is to be taken as true, and he is entitled to every reasonable intendment and legitimate inference fairly deducible therefrom. *Taylor v. Brake*, 553.

TRIAL—*Continued.*

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Defendants' evidence in direct conflict with that of plaintiff is not to be considered on motion for compulsory nonsuit. *Taylor v. Brake*, 553.

§ 22c. Nonsuit—Contradictions and Discrepancies in Plaintiff's Evidence.

Discrepancies and contradictions in plaintiff's evidence are for the jury to resolve and do not justify nonsuit. *Bridgers v. Wiggs*, 663.

§ 22c. Nonsuit—Contradictions and Discrepancies in Evidence.

Discrepancies and contradictions, even in plaintiff's evidence, are for the jury and not the court. *Gilreath v. Silverman*, 51; *White v. Lacey*, 364; *Clark v. Emerson*, 387.

§ 23a. Sufficiency of Evidence in General.

Failure to prove monetary loss does not justify nonsuit. *Clark v. Emerson*, 387.

§ 23c. Sufficiency of Evidence—Positive and Negative Evidence.

The admission of testimony of witnesses that they did not see intestate, who was supervising the movement of the trucks, give defendant driver a signal to back and did not hear defendant driver give warning by sounding his horn will not be held prejudicial on the ground that the witnesses, from where they were, could not have seen what they testified they did see, when the evidence fails to prove such impossibility, and there is testimony, not objected to, of the same import, the probative value of the testimony objected to being for the jury. *Murray v. Wyatt*, 123.

§ 24. Nonsuit on Affirmative Defense.

A nonsuit on an affirmative defense is proper when plaintiff's own evidence establishes such defense as a matter of law. *Rivers v. Ins. Co.*, 461.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

Where the court, relative to one of the determinative issues, charges only on plaintiff's evidence as the basis for an affirmative finding, without charging upon defendant's evidence thereon or any hypothesis upon which the jury could answer the issue in the negative, the charge must be held prejudicial on defendant's appeal. *Williamson v. Williamson*, 228.

It is the duty of the court to declare the law applicable to each factual situation relevant to the question of liability presented by the evidence, and the court's action in so doing cannot be erroneous on the ground that the charge gave abstract statements of legal principles not applicable to the case. *Wood v. Ins. Co.*, 383.

It is the duty of the trial court to apply the law to all substantial features of the case arising on the evidence. *Ammons v. Ins. Co.*, 655.

Failure of court to instruct jury as to presumption of fact, as distinguished from presumption of law, *held* not prejudicial in absence of request for instructions. *Waddell v. Carson*, 669.

§ 31c. Instructions—Conformity to Pleadings and Theory of Trial.

Where plaintiff tries her case solely on the claim of an easement appurtenant, she may not complain that the court failed to charge upon the questions of a

TRIAL—*Continued.*

right of way by prescription or by adverse possession, since these contentions are not embraced in the theory of trial. *Barwick v. Rouse*, 391.

§ 31e. Instructions—Expression of Opinion on Evidence.

Negative evidence may be for the court on the question of whether it has any probative value in determining the sufficiency of all the evidence to make out a case, but when the evidence, apart from such negative evidence, is sufficient to take the case to the jury, the trial court may not comment on the weight of the evidence, negative or otherwise. *Murray v. Wyatt*, 123.

§ 36. Form and Sufficiency of Issues.

Where the issue submitted comprehends the question in controversy, the fact that the court formulates the issue in its own phraseology rather than that suggested by a party is not ground for objection. *Wood v. Ins. Co.*, 383.

The allegations set forth waiver by lessor of breach of the lease conditions on a specified date. *Held:* The refusal of the court to submit an issue relative to the sufficiency of notice of default at a subsequent date is proper, since the trial must be limited to matters put into dispute by the pleadings. *Mesimore v. Palmer*, 488.

Assignment of error to the form of the issue cannot be sustained when the issue is sufficient in view of the instructions of the court. *Waddell v. Carson*, 669.

§ 39. Form and Sufficiency of Answers to Issues.

The verdict rendered by the trial court upon waiver of trial by jury must be interpreted in the light of the pleadings and evidence, there being no charge to the jury. *Wynne v. Allen*, 421.

§ 49. Motion to Set Aside Verdict as Contrary to Evidence.

A motion to set aside the verdict as contrary to the evidence is addressed to the discretion of the court. *Wynne v. Allen*, 421.

§ 55. Trial by the Court by Agreement.

Where the parties waive jury trial and agree to trial by the court, it is preferable that the court make separate findings of fact and conclusions of law rather than render a verdict on issues submitted to itself. *Wynne v. Allen*, 421.

TROVER AND CONVERSION.

§ 2. Actions.

Each party participating in a wrongful conversion may be sued by the owner without joinder of the others, since each is jointly and severally liable. *Denny v. Coleman*, 90.

TRUSTS.

§ 3d. Charitable Trusts.

It is sufficient if charitable trust designates a class of beneficiaries with power to the trustees to select members thereof. *Bennett v. Attorney-General*, 312.

§ 4. Resulting Trusts.

Where one party pays the consideration for lands but title is conveyed to another, a resulting trust arises by operation of law when it is made to appear

from all the attendant facts and circumstances that at the time of the transfer the parties so intended, and as a general rule such intent will be assumed, in the absence of evidence to the contrary, when the person furnishing the consideration is under no legal obligation to the party to whom the conveyance is made. *Waddell v. Carson*, 669.

Where the husband furnishes consideration for a conveyance of land to the wife, there is a rebuttable presumption of fact that the deed is a gift, and no resulting trust can arise unless this presumption is rebutted by clear, strong, cogent and convincing proof. *Ibid.*

Evidence in this case that the husband furnished the entire consideration for lands conveyed to his wife, that both husband and wife signed the purchase money mortgage and deed of trust, that the grantor prepared and had registered the deed and the deed of trust, that the husband did not know that the conveyance had been made to his wife alone, rather than to himself and wife, until some years later, and that then the wife attempted to convey the premises to him, *is held* sufficient to be submitted to the jury in his action to establish a resulting trust as against the wife's heir. *Ibid.*

In the husband's action to establish a resulting trust in lands paid for by him but conveyed to his wife, no statute of limitations is applicable when the evidence discloses that he has been in continuous possession of the property. *Ibid.*

In the husband's action to establish a resulting trust in lands on the ground that he furnished the entire consideration therefor and did not know that the conveyance had been made to his wife alone until shortly before the institution of the action, the failure of the court to charge on the rebuttable presumption of fact that the law presumed, nothing else appearing, that the conveyance was a gift, will not be held for prejudicial error in the absence of a request for such instructions when the court repeatedly charges that the burden of proof to establish the trust was on the husband to satisfy the jury by evidence, strong, clear and convincing. *Ibid.*

USURY.

§ 2. Contracts and Transactions Usurious.

A provision in a deed of trust and notes requiring the borrower to pay a premium for the privilege of prepaying the notes before maturity, is valid. *Bakeries v. Ins. Co.*, 408.

UTILITIES COMMISSION.

§ 2. Jurisdiction.

Utilities Commission has exclusive original jurisdiction of dispute as to curtailment of services by intra-city bus carrier. *Winston-Salem v. Coach Lines*, 179.

The Utilities Commission has the jurisdiction and the duty to pass upon a contract between a power company and a municipality which maintains its own electric generating and distributing system, under which the city proposes to purchase the power company's facilities for electric service to an area annexed by the city. *Utilities Com. v. Casey*, 297.

§ 5. Appeal and Review.

By provision of statute, an order of the Utilities Commission is *prima facie* just and reasonable. *Utilities Com. v. Casey*, 297.

VENDOR AND PURCHASER.

§ 18. Tender of Purchase Price.

A contract to convey was predicated upon the purchaser's payment of one-fifth the encumbrances on the land and one-fifth of the medical, hospital and funeral expenses of the vendors' grantors, who had reserved a life estate in themselves. Evidence of the contract and its due execution and that the purchaser, prior to the male grantor's death, requested information as to the amount due and was met by threat of assault, that less than a year after the male grantor's death, he requested statement of the amount due and received no response, and that thereafter the vendors sold to a stranger, is sufficient to repel nonsuit, since the evidence discloses that tender may have been useless, in which event it is not required by law. *Tyndall v. Tyndall*, 94.

WAIVER.

§ 2. Acts Constituting Waiver.

There can be no waiver unless intended by the one party and so understood by the other. *Miller v. Casualty Co.*, 526.

§ 4. Pleading and Proof.

Waiver, or the facts constituting the basis thereof, must be pleaded. *Miller v. Casualty Co.*, 526.

WILLS.

§ 15a. Probate of Wills.

While the Superior Court has no initial probate jurisdiction, this being in the exclusive original jurisdiction of the clerk of the Superior Court, G.S. 2-16, G.S. 28-1, G.S. 31-12, *et seq.*, when the issue of *devisavit vel non* is raised and the matter is transferred to the civil issue docket, the Superior Court in term has jurisdiction of the question of probate as well as the issue of *devisavit vel non*. *Morris v. Morris*, 30.

A holographic will must be probated upon the testimony of at least three witnesses that they believe the will to be written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will, is in the handwriting of the person whose will it purports to be, and a probate which shows on its face that the handwriting of the deceased was proven by only two witnesses renders the paper writing ineffectual to pass title. *Ibid.*

§ 16. Effect of Probate and Collateral Attack.

A will is wholly ineffectual as an instrument of title unless the will is probated and made a matter of record in accordance with the applicable statutes. *Morris v. Morris*, 30.

While an order of probate in common form is conclusive until set aside in a direct proceeding and may not be collaterally attacked, when the record of probate of a holographic will shows on its face that the handwriting of the deceased was proven by only two witnesses, this rule does not apply, since G.S. 31-19 is applicable only to a decree of probate regular on its face. *Ibid.*

In an action under the Declaratory Judgment Act the court is without jurisdiction to nullify a duly probated will or any part thereof. *Bennett v. Attorney-General*, 312.

WILLS—*Continued.*

§ 31. General Rules of Construction.

The intent of testatrix is her will and must be carried out unless some rule of law forbids it. *Barton v. Campbell*, 395.

A will must be construed as a whole to ascertain the intent of testator, and effect must be given to each clause, phrase and word if this is possible by any reasonable construction, and conflicting provisions must be reconciled if possible. *Trust Co. v. Wolfe*, 535.

In undertaking to reconcile apparently conflicting provisions of a will, apparently inconsistent subordinate provisions must be given effect in accordance with the general prevailing purpose of testator. *Ibid.*

§ 33c. Vested and Contingent Interests and Defeasible Fees.

Where testator dies without children and his will devises lands to his brothers and sister for life, and then to their children, the remaindermen must be ascertained upon the falling in of the particular estate, but upon the happening of the contingency, the remaindermen as then ascertained take from the testator and not as heirs of the life tenants, so that upon the death of a life tenant without children his share would go by operation of the will to the heirs of testator living at the death of the life tenant. *Barnes v. Dortch*, 369.

A bequest of personalty to a named person with provision that should the legatee have no bodily heirs at his death, the property should go back to testator's estate, is valid, and if the legatee should die without bodily heirs, the limitation over becomes effective and his estate must account for the *corpus* of the fund, an executory limitation over in personalty not being in violation of any rule of law in this State. *Barton v. Campbell*, 395.

§ 33d. Estates in Trust.

It is sufficient if charitable trust designates a class of beneficiaries with power to the trustees to select members thereof. *Bennett v. Attorney-General*, 312.

§ 33l. Estates in Common or in Severalty.

Where the will devises 100 acres on the west of a described tract of land to one devisee and the balance of the tract on the east to another devisee, the devisees take in severalty and not as tenants in common, since a surveyor can take the will and locate the respective tracts without other aid. *Lockleair v. Martin*, 378.

§ 34b. Designation of Legatees and Devisees.

A bequest of a designated sum to all persons who had been employed by testator's newspaper for a specified number of years, *is held* to include part-time employees regularly reporting for work each Saturday to perform a recurring job necessary in the issuance of the Sunday paper, even though they also had other employment. The distinction between "casual employees" and regular part-time employees, pointed out. *Shoup v. Trust Co.*, 682.

§ 34c. Designation of Devisees and Legatees—"Heirs."

While adoption creates the legal relationship of parent and child as between the parties, an adoption does not make the child a lawfully begotten heir of the adoptive parent, and therefore where there is bequest of personalty with provision that if the legatee should die without bodily heirs the property should

go back to the estate, the adoption of a child by the legatee does not satisfy the limitation in the will. *Barton v. Campbell*, 395.

§ 34e. Designation of Amount or Share.

The rule of *ejusdem generis* does not arbitrarily control in the construction of a will but is to be used as an aid in ascertaining the intent of testator as gathered from the will as a whole. *Trust Co. v. Wolfe*, 535.

Testatrix, after bequests of specified sums to designated charities, left her sister "my furniture, household effects and personal property" and then left "the balance of my estate" to the National Red Cross. At the time of executing the will and at the time of her death testatrix had no realty. It further appeared that testatrix had made provision for her sister in certain insurance policies and savings bonds. *Held:* Construing the will as a whole, the bequest to testatrix' sister was only of tangible articles of household and personal use, since otherwise the residuary bequest to the National Red Cross would be meaningless, and this construction is strengthened by the evidence of the circumstances attendant when the will was made. *Ibid.*

§ 39. Actions to Construe Wills.

In an action to obtain construction of a will, the admissibility of evidence as to circumstances attendant when the will was made, to enlighten the court in ascertaining the intent of testator as expressed in the instrument, is to be determined by the court. Therefore, the court should be free to make decision as to the competency of such evidence when offered, unimpeded by any prior rulings striking allegations relating to the circumstances attendant. *Collier v. Mills*, 200.

The ascertainment of the intent of testatrix from the language of the instrument is a question of law. *Trust Co. v. Wolfe*, 535.

The intent of testator must be ascertained from the language of the instrument, and while evidence of the circumstances attendant the execution of the will is competent when tending to shed light upon testator's intent as expressed in the language used, parol evidence of declarations made by testator is incompetent as an aid in construction. *Ibid.*

While ordinarily extrinsic evidence is admissible to identify persons embraced within a class to whom a devise or bequest has been made, such evidence is not competent when the language of the will is not ambiguous. *Shoup v. Trust Co.*, 682.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-69. Person claiming interest in property adverse to plaintiff may be joined as defendant. *Bright v. Williams*, 648.

1-99.2; 1-152. Upon setting aside service for failure of clerk to send copy of notice of service to defendant, court may order that service be completed. *Harmon v. Harmon*, 83.

1-123(1). All the causes must affect all the parties in order for joinder of several causes arising out of same transaction. *N.A.A.C.P. v. Eure*, 331.

1-127. Defendant may demur when it appears on face of complaint that two or more causes of action have been improperly joined. *N.A.A.C.P. v. Eure*, 331.

1-134.1. Want of proper service is waived by general appearance. *Bright v. Williams*, 648.

1-141. Sufficiency of further answer and cross-action may be tested by demurrer. *Bumgardner v. Groover*, 17.

1-151. Pleading will be liberally construed upon demurrer. *Hedrick v. Graham*, 249.

1-153. Does not apply to a motion to strike allegations from a pleading which relate solely to questions of fact addressed to the court. *Collier v. Mills*, 200.

1-180. It is duty of court to apply law to all substantial features of case arising on the evidence. *Ammons v. Insurance Co.*, 655.

1-183. Nonsuit is proper procedure to test sufficiency of evidence in action under Federal Employers' Liability Act. *Bennett v. R. R.*, 261. Where motion to nonsuit is renewed at close of all evidence, only second motion is to be considered on appeal. *Murray v. Wyatt*, 123.

1-189(5). Court may order compulsory reference in action to establish trust. *Solon Lodge v. Ionic Lodge*, 281.

1-212; 1-240. After final judgment against one tort-feasor, he is not entitled to bring in other joint tort-feasors as against plaintiff. *Denny v. Coleman*, 90.

1-220. Finding that movants had failed to show meritorious defense supports order denying motion to set aside default judgment. *Supply Co. v. Roberson*, 588.

1-257. Court has discretionary power, upon its finding that decision based on one of the causes alleged would not settle controversy, to dismiss that cause. *N.A.A.C.P. v. Eure*, 331.

1-282. Assignments of error may not be filed initially in Supreme Court. *Lowie & Co. v. Atkins*, 98.

2-16; 28-1; 31-12; 1-276. Where issue of *devisavit vel non* is raised and matter is transferred to civil issue docket, Superior Court has jurisdiction to determine question of probate as well as issue of *devisavit*. *Morris v. Morris*, 30.

5-8; 50-16. Consent judgment for support cannot be made basis for contempt. *Holden v. Holden*, 1.

6-19. Costs for surveyor's fees may be included in taxing costs against unsuccessful plaintiff in action to recover real property. *Ipock v. Miller*, 585.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

8-6. Certified copy of State grant with certificate of county surveyor and his description and map, are competent. *Meekins v. Miller*, 567.

8-51. Testimony of witness as to what he himself did does not come within purview of statute. *Waddell v. Carson*, 669. Husband may testify as to whether signature was in deceased wife's handwriting. *Ibid.* Husband of donee may testify as to transactions between donor and donee. *Bank v. Atkinson*, 563.

10-140; 20-141. Motorist is required to operate vehicle with due care and to reduce speed when special hazards exist. *Brunson v. Gainey*, 152.

14-17. Court must instruct jury as to right to recommend, and effect of recommendation, of life imprisonment. *S. v. Cook*, 610.

14-33. Evidence of assault of female by show of violence causing her to leave place where she had right to be, *held* sufficient. *S. v. Allen*, 185.

14-39; 14-87. Evidence *held* sufficient for jury on charges of kidnapping and armed robbery. *S. v. Dorsett*, 47.

14-55. In a prosecution under the statute, the burden is on the State to prove that the possession of the implements specified was "without lawful excuse." *S. v. McCall*, 146.

14-90. Evidence that defendant was agent of employee in receiving payment *held* sufficient in this action for embezzlement. *S. v. Block*, 661.

14-355. Complaint *held* not demurrable for joinder of cause of action for wrongful discharge with cause for blacklisting, the complaint being insufficient to allege cause for wrongful discharge. *Scott v. Burlington Mills*, 100.

15-147. Indictment must charge subsequent offense; transcript of certified record and proof of identity of defendant is sufficient to be submitted to jury for purpose of imposing higher penalty for repeated offense. *S. v. Stone*, 42.

18-11; 18-50. Presumption from possession of more than one gallon of intoxicating liquor relates solely to charge of possession for purpose of sale. *S. v. Poe*, 402.

18-32(4). Possession of less than five gallons of beer raises no presumption of possession for purpose of sale. *S. v. Harrelson*, 604.

18-48. Instruction as to *prima facie* proof *held* erroneous. *S. v. Bryant*, 645.

18-48; 18-50. Possession of intoxicating liquor and possession for purpose of sale are two distinct offenses. *S. v. Poe*, 402.

18-60. Evidence *held* sufficient on charge of possession of alcoholic beverages upon which tax had not been paid. *S. v. Bryant*, 645.

20-71.1. Proof of ownership of truck, even though it was registered in name of another, takes issue of *respondeat superior* to jury. *Scott v. Lee*, 68. Where action is not instituted within one year of collision, this statute does not apply. *Floyd v. Dickey*, 589.

20-129. Motorist has right to assume that another will not drive on highway at nighttime without lights. *White v. Lacey*, 364.

20-140. Evidence *held* sufficient on question of driver's actionable negligence. *Tatem v. Tatem*, 587.

20-141(e). Charge on rule that inability to stop before hitting unlighted vehicle parked on road *held* without error. *Weavil v. Trading Post*, 106.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

20-148; 20-149. Instruction as to statutory duty in overtaking and passing vehicle traveling in same direction *held* prejudicial in action involving passing vehicle traveling in opposite direction. *Lookabill v. Regan*, 500.

20-149(a). Violation of this statute is negligence. *Clark v. Emerson*, 387.

20-150. Attempt to pass vehicle traveling in same direction in area of special hazard *held* not negligence *per se* under the circumstances. *Sloan v. Glenn*, 55.

20-153(a); 20-154. Whether negligence in turning left without passing beyond center of intersection was proximate cause of collision *held* for jury. *White v. Lacey*, 364.

20-154. Whether red flashing lights were turn-signal lights *held* for jury upon evidence in this case. *Weavil v. Trading Post*, 106.

20-155(a). Right of way at intersection not controlled by traffic lights. *Mallette v. Cleaners, Inc.*, 652; *Taylor v. Brake*, 553.

20-161; 20-161.1. Guest's contributory negligence *held* to bar recovery from driver for negligent parking of vehicle. *Basnight v. Wilson*, 548.

20-179. Plea of *nolo contendere* to charge of drunken driving may not be made the basis of higher penalty for repeated offense. *S. v. Stone*, 42.

20-225. Requirement that statute be liberally construed cannot have effect of coverage beyond terms of policy. *Miller v. Casualty Co.*, 526.

20-227(2)(a). Under Act of 1947. Assigned risk policy specifying vehicle covered does not cover another vehicle owned by insured. *Miller v. Casualty Co.*, 526.

20-252(b). Registration of vehicle in violation of statute cannot have effect of enlarging coverage of assigned risk policy. *Miller v. Casualty Co.*, 526.

20-279.35. Act of 1953 has no application to rights arising out of collision occurring prior to 1 January 1954. *Miller v. Casualty Co.*, 526.

22-1. Memorandum containing no specific promise to answer for debt of another *held* insufficient under the Statute of Frauds. *Deaton v. Coble*, 190.

22-4. Premium for prepayment before maturity is not usurious. *Bakeries v. Insurance Co.*, 408.

31-19. Where record shows that holographic will was probated upon testimony of only two witnesses, probate is not conclusive. *Morris v. Morris*, 30.

39-23. Evidence *held* sufficient for jury on question of sale in bulk void under the statute. *Kramer Brothers v. McPherson*, 354.

40-17; 40-19. Where landowner has no notice of final meeting of appraisers, his exceptions filed without laches are timely. *Gatling v. Highway Commission*, 66.

41-11. All living persons who would take upon happening of contingency must be parties to proceeding to sell for reinvestment. *Barnes v. Dortch*, 369.

44-6, *et seq.* Evidence *held* sufficient to show timely filing of claim with owner's agent, or that notice was waived. *Goldston v. Tool Co.*, 226.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

47-18. Subsequently dated but prior recorded quitclaim deed supported by consideration takes precedence over prior dated but subsequently recorded fee simple deed. *Hayes v. Ricard*, 688.

47-26. Deed of gift registered within time required is valid. *Edwards v. Batts*, 693.

49-2; 49-4; 49-5, 7-103. Fact that affidavit charging defendant with willful failure to support illegitimate child is filed before offense could have been committed does not deprive Domestic Relations Court of jurisdiction to determine issue of paternity, and such finding within three years of child's birth precludes bar of statute. *S. v. Robinson*, 10.

50-13. Best interest of child is controlling in proceeding for award of custody. *Kovacs v. Brewer*, 630.

52-12. Deed from mother to daughter and daughter's husband does not come within purview of statute. *Edwards v. Batts*, 693.

55-38. Foreign publishing company shipping magazines into State to wholesalers is not doing business in this State for purpose of service of process on Secretary of State. *Putnam v. Publications*, 432.

55-38.1. Nonresident may be served by service on Secretary of State in action for tort committed in this State. *Painter v. Finance Co.*, 576.

55-38.1(a)(3). In regard to action for libel against publishing company shipping magazines into this State to wholesalers is unconstitutional, and G.S. 55-38.1(1) and (3) are inapplicable. *Putnam v. Publications*, 432.

55-81. Delivery by owner of certificates of stock duly endorsed to donee is sufficient delivery to constitute gift. *Bank v. Atkinson*, 563.

58-131. Burden is on petitioner to establish that proposed rate is fair and reasonable. *In re Rating Bureau*, 444.

58-131.2. Commissioner of Insurance has no right to consider rate not based on experience for five years. *In re Rating Bureau*, 444.

58-176. Provision in standard fire policy that suit must be brought within twelve months from inception of loss is valid conjunctive limitation. *Boyd v. Insurance Co.*, 503.

59-56. Interest of partner in partnership property is personalty even though part of partnership property is real estate. *Bright v. Williams*, 648.

59-62. Complaint *held* sufficient to state ground for dissolution of partnership and accounting. *Bright v. Williams*, 648.

62-27; 62-29; 62-96. Public utility may, with approval of Utilities Commission, sell to a municipality facilities for servicing territory annexed by the municipality. *Utilities Com. v. Casey*, 297.

62-121.47(h). Utilities Commission has exclusive original jurisdiction of dispute as to curtailment of services by intra-city bus carrier. *Winston-Salem v. Coach Lines*, 179.

87-Art. 3. *Held* unconstitutional as unwarranted interference with fundamental right to engage in ordinary occupation. *Roller v. Allen*, 516.

90-108. Evidence *held* insufficient for jury in prosecution under this statute. *S. v. Dunn*, 102.

90-242; 90-249. Finding that applicant had not engaged in practice as dispensing optician within purview of "grandfather clause" *held* supported by record and binding on Superior Court. *In re Berman*, 612.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

96-14(b); 96-4(m). Where employee is discharged for misconduct he is disqualified for unemployment benefits for nine consecutive weeks. *In re Stutts*, 405.

97-2. Compensation Act contemplates but single claim for disability. *Smith v. Red Cross*, 116.

97-2(f). Injury resulting from blood test required by G.S. 130-20 does not arise out of employment. *King v. Arthur*, 599.

97-10. Action against third person tort-feasor within six months of injury must show that it is prosecuted in name of injured employee by the employer or insurance carrier, the employee having accepted compensation. *Taylor v. Hunt*, 212.

97-17; 97-82. Settlement made under mistaken belief that Compensation Act did not apply is not "settlement" required to be approved by Industrial Commission. *McGill v. Freight*, 469.

97-19. Interstate carrier leasing truck in interstate commerce is liable as employer if owner-lessor has less than 5 employees and no compensation insurance coverage. *McGill v. Freight*, 469.

97-31(m), (t). Evidence that fingers of employee's hand were severed supports conclusion of percentage loss of use of hand. *Pridmore v. McCrary*, 544.

97-36. Contract of employment between resident employer and resident employee for services not exclusive outside State is subject to our Compensation Act. *McGill v. Freight*, 469.

97-47. Claim for additional compensation for change of condition, filed more than year from final payment, *held* barred. *Smith v. Red Cross*, 116.

97-50. Minor dependent who is without guardian is not barred during disability by failure to give notice of claim. *McGill v. Freight*, 469.

97-63. Employee not exposed to silica dust for as much as two years in ten years prior to claim may not claim compensation. *Hicks v. Granite Corp.*, 233.

105-2; 105-4; 105-15; 105-18; 105-20. Liability of devisees for inheritance tax is not affected by compromise settlement for distribution other than as directed in the will. *Pulliam v. Thrash*, 636.

105-306(7); 105-306(24); 105-272(30); 105-279(1). Structure and improvements and stoves and refrigerators placed by lessee on lands within military reservation leased from Federal Government are subject to taxation by the county. *Investment Co. v. Cumberland County*, 492.

114-2; 7-43. Attorney-General has no duty to initiate prosecutions, and has no authority to issue directives to solicitors. *N.A.A.C.P. v. Eure*, 331.

115-116(3); 115-120; 115-121; 115-118. Where proper petition is filed approval of county board of education is not necessary. *Jordan v. Comrs. of Durham*, 290.

120-Art. 10. Attorney-General has no specific enforcement duty in connection with this statute. *N.A.A.C.P. v. Eure*, 331.

128-9. Individual members of alcohol beverage control board *held* not liable to individual for failure to require enforcement officer to give bond. *Langley v. Taylor*, 59.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

130-36. State Board of Health does not have authority to exclude from a territory described in approved petition territory therein served by municipality. *Deal v. Sanitary District*, 74.

136-1; 136-18(b); 136-19. Highway Commission may condemn easements in order to make highway one of limited access. *Hedrick v. Graham*, 249.

136-18. Highway Commission has no power to acquire in condemnation building not within boundaries of right of way. *DeBruhl v. Highway Com.*, 140.

136-96. No lapse of time precludes city from accepting dedication of streets. *Roberts v. Cameron*, 373.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, secs. 1, 7, 17, 31. Act requiring licenses for tile contracting *held* unconstitutional as unwarranted interference with fundamental right to engage in ordinary occupation. *Roller v. Allen*, 516.

III, sec. 13; IV. sec. 23. Attorney-General has no duty to initiate prosecution and has no authority to issue directives to solicitors. *N.A.A.C.P. v. Eure*, 331.

IV, sec. 1. Decree of foreign jurisdiction awarding custody of child within this State is not entitled to full faith and credit. *Kovacs v. Brewer*, 630.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

14th Amendment. Validity of service of process on foreign corporation is essentially question of due process. *Putnam v. Publications*, 432.