NORTH CAROLINA REPORTS

Vol. 258

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1962
SPRING TERM, 1963

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1963

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OF THE

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FALL TERM, 1962.
SPRING TERM, 1963

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J. ALLIE HAYES	Seventeenth	North Wilkesboro.
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CHARLES M. NEAVES	Twenty-first	Elkin.

SUPERIOR COURTS, SPRING TERM, 1963.

FIRST DIVISION

First District—Judge Paul.

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. 18*(2); Mar. 18†; May 6†(2); June 3*; June 10†.
Perquimans—Jan. 28†; Mar. 11†; Apr. 15.

Second District—Judge Bundy.

Beaufort—Jan. 21*; Jan. 28; 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—Apr. 22.
Washington—Jan. 14*; Feb. 11†; Apr. 1†; Apr. 29*.

Third District—Judge Hubbard.

Carteret—Mar. 11†; Mar. 18†(a); Apr. 1; Apr. 29†; May 6†(a); June 10(2).
Craven—Jan. 7(2); Feb. 4†(3); Mar. 11(a); Apr. 8; May 6†(2); May 27(2).
Pamlico—Jan. 21(a) (2).
Pitt—Jan. 21†; Jan. 28; Feb. 25†(2); Mar. 18(2); Apr. 15†; Apr. 22; May 20; May 27†(a); June 24.

Fourth District—Judge Mintz.

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 Parker.

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 Fountain.

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 Cowper.

Edgecombe—Jan. 21*; Feb. 25*(2); Mar. 25†(a) (2); Apr. 22*; May 13†(a); June 3.
Nash—Jan. 7*(a); Jan. 28†; Feb. 4*; 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).

Eight District—Judge Morris.

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 Bickett.

Franklin—Feb. 4*; Feb. 18†(2); Apr. 22†(2); May 13*.
Granville—Jan. 21; Jan. 28†(a); Apr. 8 (2).
Person—Feb. 11; Mar. 25†(2); May 20; 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 Williams.

Wake—Jan. 7†(2); Jan. 7*(a); Jan. 14†(a) (2); Jan. 21*(2); Jan. 28†#(a); Feb. 4*; Feb. 4†(2); Feb. 11†(a) (2); Feb. 18*(2); Feb. 25†#(a); Mar. 4†(2); Mar. 18*(2); Mar. 25†#(a); Apr. 1†(a); Apr. 1†(2); Apr. 15*(a) (2); Apr. 15†(2); Apr. 29†#; May 6*(a) (2); May 6†(2); May 20†(2); May 27†#(a); June 3†(a) (2); June 3*(2); June 17†(2); June 24*(a).

Eleventh District—Judge Braswell.

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

Twelfth District—Judge Mallard.

Cumberland—Jan. 7*(2); Jan. 21†(2); Feb. 4†(a) (2); Feb. 4*(2); Feb. 18*(a); Feb. 18†(2); Mar. 4†(a); Mar 11*; Mar. 25*; Apr. 1*(a); April 1†(2); Apr. 15*(2); Apr. 29†(a); May 6†(2); May 20*(2); June 3†(2); June 17*(2).
Hoke—Jan. 7(a); Mar. 4†; Apr. 29.

Thirteenth District—Judge Hall.

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 Carr.

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 McKinnon.

Alamance—Jan. 7†(2); Jan. 28*(a); Feb. 4†(2); Mar. 4*(2); Apr. 1†; Apr. 15†(2); May 6*; May 20†(2); June 10*(2).
Chatham—Jan. 28†; Feb. 25(a); Mar. 18†; May 13; June 3†.
Orange—Jan. 21†; Feb. 25*; Mar. 25†; Apr. 29*; June 24†.

Sixteenth District—Judge Hobgood.

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*(2).
Scotland—Feb. 4†; Mar. 18; Apr. 29†; June 24.

THIRD DIVISION

Seventeenth District—Judge Shaw.

Caswell—Feb. 25†; Mar. 25*(a).

Rockingham—Jan. 21*(2); Mar. 4†(2); Mar. 18*; Apr. 15†(2); May 13†; June 10*(2).

Stokes—Feb. 4*; April 1*; Apr. 8†; June 24.

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

Eighteenth District—

Schedule A—Judge Crissman.

Guilford Gr.—Jan. 7†(2); Jan. 14†#(a); Jan. 21†(2); Feb. 4*(2); Feb. 18†#(a); Feb. 25†(2); Mar. 25†#(a); Apr. 15†(2); Apr. 29†#(a); May 13*(2); June 3†#; June 10†(2).

Guilford H.P.—Feb. 11*(a); Feb. 18†; Mar. 11*; Mar. 18†(2); Apr. 1*; Apr. 29†; May 6*; May 27*.

Schedule B—Judge Armstrong.

Guilford 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).

Guilford H.P.—Jan. 7†(a); Jan. 21; Jan. 28†; May 20†; June 24†.

Nineteenth District—Judge McConnell.

Cabarrus—Jan. 7*; Jan. 14†; Mar. 4†(2); Apr. 22(2); June 10†(2).

Montgomery—Jan. 21*; May 20†(2).

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

Rowan—Jan. 28†(a) (2); Feb. 18*(2); Mar. 18†(2); May 6(2); May 20†(a); June 3*(a).

Twentieth District—Judge Johnston.

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 McLaughlin.

Forsyth—Jan. 7†#(a); Jan. 7(2); Jan. 21†(3); Feb. 4(a) (2); Feb. 11†#; Feb. 18†(2); Mar. 4†#(a) (2); Mar. 4(2); Mar. 18†(3); Apr. 8†(a); Apr. 8(2); Apr. 15†#(a); Apr. 22†(3); May 13†(a) (2); May 13(2); May 27†(2); June 10(2); June 17†(a) (2).

Twenty-Second District—Judge Gambill.

Alexander—Mar. 11; Apr. 15.

Davidson—Jan. 21†(a); Jan. 28; Feb. 18†(2); Mar. 18(a); 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 Gwyn.

Alleghany—Jan. 28; Apr. 22.

Ashe—Apr. 1*; May 27†.

Wilkes—Jan. 14†(2); Jan. 28(a); 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 Farthing.

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—Mar.4(2).

Twenty-Fifth District—Judge Campbell.

Burke—Feb. 18; Mar. 11(2); June 3(2).

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

Catawba—Jan. 7†(2); Feb. 4(2); Apr. 8 (2); Apr. 22†(2); June 17†(2).

Twenty-Sixth District—

Schedule A—Judge Clarkson.

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 Froneberger.

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).

Twenty-Seventh District—Judge McLean.

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

Gaston—Jan. 7*; Jan. 7†#(a); Jan. 14†(a) (2); Feb. 4*(a); Feb. 4†(2); Feb. 25*(2); Mar. 11†(2); Apr. 1†#(a); Apr. 8*(2); Apr. 8†(a) (2); Apr. 22†; May 13†(a) (2); May 20*(a); June 17*(2).

Lincoln—Jan. 14(2); May 13(2).

Twenty-Eighth District—Judge Pless.

Buncombe—Jan. 7*(2); Jan. 21†(3); Feb. 11*(2); Feb. 25†(3); Mar. 18*(a) (2); Mar. 18†(a); Mar. 25†(3); Apr. 15*(2); Apr. 29†(3); May 13*(a) (2); May 20†(2); June 3†(3); June 10*(a).

Twenty-Ninth District—Judge Patton.

Henderson—Feb. 11(2); Mar. 18†(2); May6*; May 27†(2).

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

Polk—Jan. 28; Feb. 4†(a) (2); June 24.

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

Transylvania—Jan. 28†(a); Feb. 4*; Apr. 1½.

Thirtieth District—Judge Huskins.

Cherokee—Apr. 1(2); June 24†.

Clay—Apr. 29.

Graham—Mar. 18; June 3†(2).

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

Jackson—Feb. 18(2); May 20.

Macon—Apr. 15(2).

Swain—Mar. 4(2).

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* Indicates criminal term.
† Indicates civil term.
# Indicates non jury term.
No designation indicates mixed term.

(a) Indicates judges to be assigned.
Number in parenthesis indicates number of weeks of term; no number indicates one week term.

UNITED STATES COURTS FOR NORTH CAROLINA

EASTERN DISTRICT

Judges

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

U. S. Attorney

ROBERT H. COWEN, RALEIGH, N. C.

Assistant U. S. Attorneys

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

U. S. Marshal

HUGH SALTER, RALEIGH, N. C.

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MRS. ELSIE LEE HARRIS, RALEIGH, N. C.
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MISS NORMA GREY BLACKMON, RALEIGH, N. C.
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MRS. JEANETTE H. ATTMORE, WASHINGTON, N. C.
R. EDMON LEWIS, WILMINGTON, N. C.
L. THOMAS GALLOP, ELIZABETH CITY, N. C.

MIDDLE DISTRICT

Judges

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

Senior Judge

JOHNSON J. HAYES, WILKESBORO, N. C.

U. S. Attorney

WILLIAM H. MURDOCK, GREENSBORO, N. C.

Assistant U. S. Attorneys

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

U. S. Marshal

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MISS GLORIA RIZOTI, GREENSBORO, N. C.

WESTERN DISTRICT

Judges

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

U. S. Attorney

WILLIAM MEDFORD, ASHEVILLE, N. C.

U. S. Marshal

PAUL D. SOSSAMON, ASHEVILLE, N. C.

Clerk U. S. District Court

THOMAS E. RHODES, ASHEVILLE, N. C.

Deputy Clerks

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

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1962

LOUISE YURT SKILLMAN v.
PHOENIX MUTUAL LIFE INSURANCE COMPANY, A CORPORATION
AND
LOUISE YURT SKILLMAN v.
ACACIA MUTUAL LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 31 October 1962.)

1. Insurance § 34—

In order to be entitled to recover under the usual double indemnity clause in a policy of insurance, claimant must show that death of insured resulted directly and independently of all other causes from bodily injury inflicted solely through external and accidental means, and if an existing disease or illness cooperated or contributed to the accident resulting in death, insurer is not liable under the double indemnity clause.

2. Same—

There is a distinct difference between "accidental death" and "death by external, accidental means"; the first describes a death which is unexpected, unusual, and unforeseen, and therefore fortuitous, the second describes a death in which the causal factor is accidental.

3. Same—

The evidence tended to show that insured was suffering from hypertension and that while driving his car along a straight highway he ran off the road and into the waters of a river. There was expert testimony that insured died from a coronary occlusion and not from drowning. *Held:* It was not error for the court to instruct the jury to the effect

that if the disease was the cause or a contributing cause of the accident, insurer would not be liable under a clause of the policy providing double indemnity for death resulting solely through external, violent, and accidental means, not contributed to directly or indirectly by physical or mental infirmity or disease.

4. Insurance § 3—

While ambiguity in a policy of insurance must be construed against insurer, if the terms of a policy are plain and unambiguous the court must give effect to such language and may not by interpretation enlarge the meaning of its terms.

APPEAL by plaintiff in each case from *McLean, J.*, 7 May 1962 Civil "A" Term of Mecklenburg.

These actions were instituted to recover under Accidental Benefit Agreements (supplementary to ordinary life insurance policies) providing for the payment of additional amounts equal to the face amounts of the policies.

These cases were consolidated and tried together by consent, since the plaintiff in each case is the widow and primary beneficiary under the three life insurance policies issued to the deceased, William V. Skillman. The Acacia Mutual Life Insurance Company issued one of these policies in the face amount of $5,000, with the double indemnity provision in the event of accidental death. The other two policies were issued by the defendant Phoenix Mutual Life Insurance Company and were in the face amounts of $2,000 and $1,000 respectively, with the double indemnity provision in the event of accidental death.

The defendant in each of these cases has paid the plaintiff the face amounts of the policies involved without prejudice to the rights of any of the parties with respect to the claims for accidental death benefits.

The pertinent conditions of the two Phoenix agreements were that it would pay such additional amounts "* * * only if the Company shall receive satisfactory proofs * * * (2) that such death resulted, directly and independently of all other causes, from bodily injury effected solely through external, violent, and accidental means * * *.

"This double indemnity benefit shall not be payable if the death of the insured resulted directly or indirectly from, or was contributed to by, any of the following: Physical or mental infirmity or disease * * *."

The pertinent conditions of the Acacia supplementary agreement were that it would pay such additional amount subject to the condition "That upon receipt by the Company * * * of due proof that the death of the insured resulted, directly and independently of

all other causes, from bodily injury sustained solely through external, violent and accidental means * * *.

"This accidental death benefit shall not be payable if the insured's death results directly or indirectly from: * * *

"2. Illness or disease of any kind or physical or mental infirmity."

On 4 April 1959, about 3:30 p.m., the insured, William V. Skillman, a man 50 years of age, was driving his 1958 Ford automobile in a westerly direction on North Carolina Highway No. 27, and as he approached a bridge where the highway crosses the Pee Dee River, at a point approximately 14 miles west of Troy, North Carolina, his automobile went off the right shoulder of the road, down the embankment of the fill, and into the waters of the river which are at this point also a part of the backwaters of Tillery Lake. After the car entered the water, it floated for a period of a few minutes, drifting away from the shore, and sank about 50 or 60 feet from the shore. The highway east of the bridge was straight for a distance of approximately 900 feet.

Kathleen Culp Almond, who saw the Skillman car leave the highway, run down the bank and into the water, testified: "The first thing that I saw that attracted my attention to the car was I was just looking out of the window (of my home) and the car just went down the road, and when it started down the bank, it just left the road, going down the bank. * * * From this window I could see the road for a short distance back from the bridge toward Mt. Gilead. When I first saw the car it was on the road and was proceeding in the direction of the bridge and on toward Albemarle. During the period of time that I was able to see the car, in my opinion it was running at a moderate speed. There was nothing unusual that attracted my attention to the car except that it just ran down the bank, that is all. As to whether I observed anything that might have caused it to run down the bank, such as any other car or anything unusual happening, no, it was the only car on the road right there at the time. The road is straight for some distance back toward Mt. Gilead from there on to the bridge."

Mr. and Mrs. Oliver McIntyre were in a boat on the lake and came under the highway bridge about the time the car entered the water but they did not see the car enter the water. When they saw the car, Mr. McIntyre turned his boat and went up beside the righthand side of the car. Mr. McIntyre testified: "I told him to run his glass down. The water was probably half way from the bottom of the door up to the glass. At that time the man in the car slid over just about center of the seat when I asked him to run the glass down. He ran the glass down a little bit and turned and sort of smiled at me and sat there and stared at me until he went out of sight. * * * When I first called to him and

told him to open the door, he didn't give any indication that he heard me at that time. Then I called to him the second time and told him to roll down the window and I would take him out through the window and that is when he moved for the first time. Then he sort of slid over or moved over towards the right-hand window and got hold of the handle of the window and gave it one turn and then dropped his hands in his lap and sat back. That is all the moves he made until the car sank. Never at any time did he speak to me or answer me. Yes, at that time he was fairly red in the face."

The evidence tends to show that it was approximately five minutes before the body was removed from the car after it sank. He was taken to the shore in the boat of Mr. and Mrs. McIntyre where he was given artificial respiration by several persons, including the Stanly County Rescue Squad. Considerable water came out of his mouth and nose while he was being given artificial respiration.

When the car was removed from the lake it was still in gear and the ignition switch was on.

It is undisputed that the insured had been suffering from atherosclerosis and hypertension for about three years before his death. He had been treated by numerous physicians and the treatment had included restriction to a low salt diet, medication and instructions to reduce and maintain his weight in the low 160's instead of over 180, as it usually was on such examinations except when he had been following the instructions of his doctors.

The record discloses that on 23 April 1956 the insured was involved in a collision with another car while driving through the intersection of Queens and Ardsley Roads in the City of Charlotte, of which he subsequently had no knowledge or recollection whatever; that following his admission to a hospital he was found to have a temporary paralysis of one leg and developed coma for which he was examined and treated by Dr. R. T. Bellows, an expert neurological surgeon; that Dr. Bellows found the paralysis and coma were caused by a cerebral occlusion which in his opinion had occurred and caused loss of consciousness immediately preceding the collision and that the cerebral occlusion had been caused by hypertension.

Following an autopsy by Dr. W. M. Summerville, a Charlotte pathologist with more than twenty years' experience, which autopsy was performed on 5 April 1959, the day following the insured's death, at the request of the plaintiff and with the permission of the coroner of Montgomery County in which the death occurred, Dr. Summerville made a preliminary report on 7 April 1959 (erroneously dated 7 March 1959), in which he said: "From the gross autopsy, it appeared that the deceased did not die from drowning. There was considerable heart

disease demonstrated at the autopsy table. There was a minor lesion demonstrated in the right frontal lobe of the brain. The final interpretation of the cause of death will depend upon microscopic studies. This report will be forwarded to you as soon as completed."

After Dr. Summerville completed his microscopic studies in connection with the autopsy performed on 5 April 1959, he made a final report in which he set out his findings in detail and gave his conclusion as follows: "It is my opinion that the deceased came to his death as a result of the coronary occlusion. There is nothing in the gross and microscopic findings to indicate that the deceased came to his death from drowning or traumatic injuries."

Dr. Summerville in the trial below testified: "As to what I mean by lumen, the heart takes all the blood from the body and pumps it out. It has to be its own blood supply. * * * As to giving the jury some idea as to the diameter or size of the interior of this coronary vessel, lumen, as I found it on that examination, ordinarily the opening of the vessel or vessels which supply the heart are approximately the size of a wood stemmed match. In the arteries which I found in the deceased the arteries were closed down to about pin point size. * * *

"I examined his liver which was markedly enlarged. It was enlarged approximately * * * two and a half inches, below the ribs where it was supposed to be. * * * The spleen which sits underneath the diaphragm was enlarged approximately three times its nomal size. The kidneys were slightly enlarged * * *. I found no water in the stomach. * * *

"On examining the head there was no evidence of fractures of the bony structure of the skull. * * * As I opened the brain I found an irregular cystic area in the front part of the right portion of the brain, measuring approximately 15 by 7 mms. That is approximately one inch by one half inch. There were no other significant findings."

The case was submitted to the jury and the jury answered the following issue in the negative: "Was the death of William V. Skillman caused by accidental means, as alleged in the complaint?"

Judgment was entered on the verdict and the plaintiff appeals, assigning error.

Carswell and Justice for plaintiff.
Cansler and Lockhart for defendants.

DENNY, C.J. The plaintiff is entitled to recover under the terms of the policies involved if the insured came to his death, directly and independently of all other causes, from bodily injury sustained solely through external, violent, and accidental means.

On the other hand, the plaintiff is not entitled to recover if at the time of the accident there was an existing disease or illness which co-operated with or contributed to the accident which resulted in his death. Such an accident cannot be considered as the sole cause or as the cause independent of all other causes.

The appellant assigns as error the following portions of the Court's charge to the jury:

"Now, the court instructs you, members of the jury, that there is a difference between accidental death and death by external, accidental means. Accidental means that which happens by chance or fortuitously without intent or design and which is unexpected, unusual, and unforeseen. Accidental means refers to the occurrence or happening which produces the result and not to the result. That is, accidental is descriptive of the term *Means*. The motivating, creating and causal factor must be accidental in the sense that it is unusual, unforeseen, and unexpected. The emphasis is upon the accidental character or causation, not upon the accidental nature of the element sequence of the chain of causation. The insurance provided in these policies is not against an accidental result. To create liability it must be made to appear that the unforeseen and unexpected result was produced by accidental means. The stipulated payment is to be made only if the death, though unforeseen and unexpected, was effected by means which are external, violent, and accidental." (EXCEPTION NO. 19)

"The court further instructs you, members of the jury, that if you should find that on this occasion in question the deceased was operating his automobile along highway 27 and that as a result of hypertension or heart attack or an arterial occlusion that he lost control of his car and it went out into the water and sank down and he was drowned, that the plaintiff could not recover and it would be your duty to answer this issue 'No.'" (EXCEPTION NO. 20)

"Now, the court instructs you, members of the jury, that our courts have laid down two rules to follow in the case such as this which the court will now give you. One, when at the time of the accident the insured was suffering from some disease but the disease had no causal connection with the accident, the accident is to be considered the sole cause. Second, when at the time of the accident there was an existing disease which cooperating with the accident resulted in the injury or death, the accident cannot be considered the sole cause or as the cause independent of all other means. In other words, if the injury or death was caused by the sum of two causes, namely accident and disease, then the plaintiff cannot recover." (EXCEPTION No. 22)

The appellant further assigns as error that portion of the following

excerpt of the charge within parentheses:

" * * * (T)he court instructs you that if you should find from this evidence and by its greater weight that on this 4th day of April, 1959, that the deceased was operating his automobile along the highway and that while doing so (his automobile left the highway accidentally, as that accidental means has been defined to you, and not as a result of any disease or heart attack or physical or mental infirmity), if you should find those facts by the greater weight of the evidence and you go further and find that the movement of the car went out into the lake and that he was there drowned, the court instructs you that it would be your duty to answer the issue Yes. If you do not so find, you will answer No * * *." (EXCEPTION NO. 23)

This Court has consistently held that there is a distinct difference in the meaning of the terms "accidental death" and "death by external accidental means." In *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687, Barnhill, J., later C.J., said: " 'Accidental' means that which happens by chance or fortuitously, without intent or design and which is unexpected, unusual and unforeseen. 29 Am. Jur., 706-7, sec. 931. 'Accidental means' refers to the occurrence or happening which produces the result and not to the result. That is, 'accidental' is descriptive of the term 'means.' The motivating, operative and causal factor must be accidental in the sense that is unusual, unforeseen and unexpected. Under the majority view the emphasis is upon the accidental character of the causation — not upon the accidental nature of the ultimate sequence of the chain of causation." See also *Slaughter v. Ins. Co.*, 250 N.C. 265, 108 S.E. 2d 438, and cf. *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173.

In our opinion, when the evidence disclosed on this record is considered, the challenged instructions are without prejudicial error and these exceptive assignments are overruled.

The appellant also assigns as error additional portions of the charge but these additional assignments would seem to involve no question of law not presented in those portions of the charge set out hereinabove.

In *Russell v. Glens Falls Indemnity Co.*, 134 Neb. 631, 279 N.W. 287, in considering a policy of insurance similar to that before us, the Court said: "It seems reasonably clear that a policy with the phrase 'resulting directly, independently and exclusively' refers to the efficient, substantial and proximate cause of the disability at the time it occurred. On the other hand, a policy which also has the phrase 'wholly or partly, directly or indirectly, from disease or mental or bodily infirmity' refers to another contributory cause, whether proximate or remote. To illustrate: A person might be standing near a stone

wall and become dizzy and fall and receive a serious injury. Clearly there is an accident. But if the dizziness was caused by an existing illness or disease of the insured, the illness or disease would be the remote or indirect cause of the injury. It would at least in part cause the injury. It would be a contributing and cooperating cause. But, whether a proximate or remote cause, if a contributing cause, there can be no recovery where such a cause is excluded by the policy. If the results of the acident, added to the diseased condition of an insured, produced the ultimate total result, under policy having the phrase 'wholly or in part, directly or indirectly,' there could be no recovery."

In *Knowlton v. John Hancock Mut. Life Ins. Co.*, 146 Me. 220, 79 A 2d 581, the policy excluded injuries, directly or indirectly caused by disease. The insured, an alcoholic, suffered a fall which was due to his alcoholism. The fall produced skull fracture and brain hemorrhages which resulted in death. The Court said: "It is well settled that if a fall produces injuries which in turn cause death, and such fall is caused by disease, the death results at least indirectly from the disease which causes the fall. In such case, the beneficiary cannot recover the additional benefit provided for in the policy, if the policy contains, as here, a provision that the additional benefit will not be payable 'if death results, directly or indirectly, or wholly or partially, or otherwise, from (1) any bodily or mental disease or infirmity.' "

In *Independent Life and Accident Ins. Co. v. Causby,* 94 Ga. App. 305, 94 S.E. 2d 388, the plaintiff affirmatively alleged that chronic rheumatoid arthritis contributed to the death of the insured but was not the disease or condition directly causing the insured's death. The death certificate gave the cause of death, " * * * Disease or condition directly leading to death (a) Cerebral hemorrhage injury to head caused, due to (b), by fall." Under the provisions of the policy, if the physical impairment of the deceased contributed to the fall in whole or in part, directly or indirectly, then there could be no recovery. The Court said: "The only inference this court can draw from the above quoted portion of the death certificate is that chronic rheumatoid arthritis is what caused the insured to fall and that the fall in turn caused a cerebral hemorrhage which resulted in his death. Rheumatoid arthritis being a physical infirmity which contributed directly to the fall which resulted in the insured's death, there could be no recovery under the double-indemnity clause of the policy issued him."

To the same effect are the following decisions: *Franklin v. Mutual Life Ins. Co. of New York,* 216 La. 1062, 45 So. 2d 624; *McGarity v. New York Life Ins. Co.*, 359 Pa. 308, 59 A 2d 47; *Prudential Ins. Co.*

v. Van Wey, 223 Ind. 198, 59 N.E. 2d 721; *Lederer v. Metropolitan Life Ins. Co.,* 135 Pa. Super. 61, 4 A 2d 608; *Puszkarewicz v. Prudential Life Ins. Co. of America,* 161 Pa. Super. 500, 55 A 2d 431; *New England Mut. Life Ins. Co. v. Fleming,* 102 F 2d 143.

In *Penn v. Insurance Co.,* 158 N.C. 29, 73 S.E. 99, this Court, in quoting from cases in other jurisdictions, said in effect that where the insured's policies are ambiguous in their terms they are to be construed liberally in favor of the insured, but that " * * * plain, explicit language cannot be disregarded, nor an interpretation given the policy at variance with the clearly disclosed intent of the parties." In this case there was a provision excluding coverage for injury arising directly or indirectly from bodily disease. The Court quoted from *White v. Insurance Co.,* 95 Minn. 77, 103 N.W. 735, saying, " '* * * (I)f the injury be the proximate cause of death, the company is liable, but if an injury and an existing bodily disease or infirmity concur and cooperate to that end, no liability exists. * * * The rule of proximate cause, as applied to actions of negligence, cannot be applied in its full scope to contracts of this nature.' "

The *Penn* case was here on a petition to rehear in 160 N.C. 399, 76 S.E. 262, and the Court laid down the following rules:

"1. When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death.

"2. When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause.

"3. When at the time of the accident there was an existing disease, which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes."

We hold that the evidence in this case brings it within Rule 3 as laid down in the *Penn* case. Other assignments of error, in our opinion, present no prejudicial error and are overruled.

In the trial below, we find

No error.

RIDIE WARD HARGETT v.
JEFFERSON STANDARD LIFE INSURANCE COMPANY.
AND
RIDIE WARD HARGETT v. THE PHOENIX MUTUAL
LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.
AND
RIDIE WARD HARGETT v.
THE FIDELITY MUTUAL LIFE INSURANCE COMPANY.

(Filed 31 October 1962.)

1. Evidence § 30—

A declaration is competent as an exception to the hearsay rule when the declaration is relevant, is not a narrative of past occurrences but is so spontaneous in character as to safeguard its trustworthiness and preclude the likelihood of fabrication, and made contemporaneously with the occurrence or so closely connected therewith as to be practically inseparable therefrom, and whether a declaration is a part of the *res gestae* and competent is a preliminary question to be determined by the trial court upon the facts of each particular case.

2. Same—

The requirement that a declaration be contemporaneous with the occurrence in question in order to be competent as a part of the *res gestae* relates to the spontaneity of the utterance, and imports that the declaration be made under the influence of the occurrence and not be so remote as to permit declarant to reflect and fabricate his statement.

3. Same—

In this action on a double indemnity clause in a life policy, a declaration of insured that he had been stung by a wasp *held* competent as part of the *res gestae* upon evidence disclosing that insured voluntarily made the statement some two minutes after the occurrence as soon as he had walked the fifty to one hundred yards to where the witnesses were sitting in a car along the highway, and that at the time insured was suffering severe pain, the explanation being consonant with the other facts in evidence and there being nothing to indicate that declarant thought he was going to die or had insurance benefits in mind.

4. Evidence § 44—

It is competent for a medical expert to testify upon proper hypothetical question based on the facts in evidence as to decedent's prior good health, his conduct at the time of the occurrence, the condition of his finger, his suffering, his lapse into unconsciousness, and his death shortly thereafter, coupled with relevant physiological facts established by the expert, that in the witness' opinion death resulted from the sting of an insect.

5. Insurance § 34—

The evidence in this case tending to show that insured died as a result of the sting of an insect, *held* sufficient to be submitted to the jury in this action on a clause of a policy providing double indemnity if insured died as the result of bodily injuries effected solely through external, violent, and accidental means.

HARGETT *v.* INSURANCE CO.

APPEAL by plaintiff from *Bone, J.*, May 1962 Term of JONES.

Three civil actions were consolidated for trial. Plaintiff seeks to recover double indemnity benefits under the provisions of certain life insurance policies by reason of the alleged accidental death of the insured.

Plaintiff is named beneficiary in the policies. Her husband, Guy Hargett, was the insured. The policies provide that the insurance companies will pay the beneficiary additional amounts equal to the face amounts of the policies if the death of the insured results from bodily injuries effected directly and independently of all other causes through external, violent and accidental means, where there is a visible contusion or wound on the exterior of the body.

Plaintiff alleges facts and circumstances sufficient, if established, to entitle her to the double indemnity benefits. Defendants deny that the death was accidental within the terms of the policy.

It was stipulated that insured died on 8 June 1953 at age 57, and the policies were in force at the time of death. Due proof of death was furnished. Demand was made and defendants refused payment.

Plaintiff's evidence is summarized as follows:

On the morning of 8 June 1953 Guy Hargett, the insured, talked for a few minutes with D. J. Baysden at the intersection of highways 41 and 258, Hargett's Cross Roads. Insured appeared to be in good health and did not complain of any illness or injury. They parted, and Hargett walked along highway 41 toward his home. When he had gone about 100 yards from the Cross Roads, he reached down, broke a bush and beat with it (witness illustrated) a time or two. He then turned and, interrupted only by a passing car, proceeded 50 to 100 yards diagonally across the highway to a point where George Turner was sitting in a vehicle in front of Whaley's Store. Hargett was wringing his hands. He stated to Turner and Jesse Jones, who was also present, that a wasp had stung him and he had never hurt so bad in all his life. (Upon objection by defendants, Hargett's statement to Turner and Jones that a wasp had stung him was excluded. Plaintiff excepted.) Hargett had a purple place under his finger nail. It was about two minutes from the time Hargett was beating with the bush until he made the statement to Turner and Jones. Immediately after making the statement Hargett walked directly to his home, a distance of about 350 yards. There it was observed that he had a discoloration at the end of his finger — "a pierce in what seemed to be the middle of a circle." Merthiolate was applied. He was in intense pain. Within a few minutes he became unconscious. He died about 40 minutes later without having regained consciousness. Dr. Mease had been called and arrived about 20 minutes before Hargett died. Hargett

was in good health prior to the occurrence and had never complained of any heart disorder. Dr. R. L. McMillan, a heart specialist and a member of the Staff of Bowman-Gray School of Medicine, was called as a witness by plaintiff. He had not attended deceased. He testified that he had studied, examined and treated the effects on humans of bites and stings by such insects as bees, hornets, wasps and yellow jackets. He discussed the systemic reactions, ranging from slight to extremely serious. He explained two serious reactions, stating that in some cases the stings resulted in a congestive heart failure or acute type of dropsy, and in other cases the brain and spinal cord were affected, and that in the latter class of cases one of the symptoms is loss of consciousness. He stated that a sting at the end of the finger is very painful because the tissue structure is such that the finger cannot swell. He testified that the external evidence of such sting "is frequently a puncture wound in the center of . . . a weal or welt, and there is commonly a purplish or reddish discoloration that comes on 20 to 30 minutes, or maybe sooner, after the sting." He testified without objection, in answer to a hypothetical question, that in his opinion insured died as a result of being stung by an insect.

At the close of plaintiff's evidence, the court, on motion of defendants, entered a judgment of involuntary nonsuit.

Plaintiff appeals.

Jones, Reed & Griffin and George R. Hughes for plaintiff.

Wharton, Ivey & Wharton, Charles E. Dameron, III, and Whitaker & Jeffress for defendants.

MOORE, J. We first consider whether the trial judge erred in excluding the statement of deceased to Turner and Jones that he had been stung by a wasp. An answer to this question is not necessary for a decision on this appeal, but the question will arise upon the retrial of the case and for that reason we discuss it here.

When, in an action upon an accident insurance policy, the beneficiary seeks to introduce in evidence declarations of deceased insured relative to the occurrence allegedly causing death, the inquiry is whether the declarations are part of the *res gestae* or are merely hearsay. 29A Am. Jur., Insurance, s. 1888, p. 947. To take such declaration out of the hearsay rule and render it competent as a part of the *res gestae*, it must be relevant, it must be so spontaneous in character as to safeguard its trustworthiness, preclude the likelihood of reflection and fabrication, and render it instinctive rather than narrative, and it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable

therefrom. *Little v. Brake Co.*, 255 N.C. 451, 455, 121 S.E. 2d 889; *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757. This general statement of the rule is difficult of application in particular circumstances. It has been said that "there is no single *res gestae* rule, and the expression does not mean exactly the same thing when used in different connections." Stansbury: North Carolina Evidence, s. 158, p. 329. Because of the incidence of various other rules of law in the different types of cases in which the *res gestae* rule arises, there seems to be inconsistencies in its application by our Court, particularly as to the effect of the time element. In many cases there is insistence upon strict contemporaneousness, and declarations made after the occurrence, however brief the interval of time, are excluded as "narrative." *Holmes v. Wharton*, 194 N.C. 470, 140 S.E. 93; *State v. Butler*, 185 N.C. 625, 115 S.E. 889; *Hill v. Insurance Co.*, 150 N.C. 1, 63 S.E. 124. Other cases emphasize spontaneity and admit utterances made after the occurence but before there has been opportunity to fabricate. *State v. Smith*, 225 N.C. 78, 33 S.E. 2d 472; *Young v. Stewart*, 191 N.C. 297, 131 S.E. 735; *State v. Spivey*, 151 N.C. 676, 65 S.E. 995. The effect of the time element in a particular case depends largely upon the particular circumstances involved.

The decision of the Supreme Court of the United States in *Travelers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437 (1869) established a more liberal trend in dealing with the time element in accident cases. There, the insured got out of bed about midnight, and shortly thereafter his son found him downstairs in a reclining position and asked him what was wrong, and insured said he had fallen downstairs and was badly hurt. He went back upstairs and told his wife he had fallen down the back stairs and almost killed himself, that he had hit the back of his head in falling. Insured died a few days later. The wife, beneficiary, sued for accident benefits of a life insurance policy. The Court ruled that the declarations of insured to his son and wife were admissible.

The opinion in the *Mosley* case exerted a powerful influence in expanding the concept of *res gestae* in accident cases and is now followed in a majority of jurisdictions. Some typical cases are: *Miser v. Iowa State Traveling Men's Asso.*, 273 N.W. 155 (Iowa 1937); *National Life & Accident Ins. Co. v. Hedges*, 27 S.W. 2d 422 (Ky. 1930); *Standard Acc. Ins. Co. v. Baker*, 291 P. 962 (Okla. 1930); *Bulkeley v. Brotherhood Acc. Co.*, 101 A. 92 (Conn. 1917); *Meyer v. Travelers' Ins. Co.*, 153 N.W. 523 (Minn. 1915); *Starr v. Aetna L. Ins. Co.*, 83 P. 113 (Wash. 1905); *Puls v. Grand Lodge, A.O.U.W.*, 102 N.W. 165 (N.D. 1904). The *Mosley* case was at first criticized in some quarters as being a bootstrap operation, that is, that the

court admitted in evidence a narrative to prove the accident itself, when the admissibility of the narrative was conditional upon the accident having happened. 163 A.L.R. 203. This criticism is not valid, for by this reasoning contemporaneous statements, otherwise competent, would in many instances be inadmissible. For example, consider the circumstances in *State v. Smith, supra,* and *Means v. R.R.,* 124 N.C. 574, 32 S.E. 960.

The generally accepted rule now is that "If the utterance tends to elucidate the occurrence, if it appears in its nature, manner and circumstances to have been so responsive to the mental impact of the accident as to be but an unconsidered reproduction of what the speaker has seen or experienced, and if it is made so soon after the accident as to render it improbable that perverting motive or false memory has intervened, it is admissible in evidence." 163 A.L.R. 92.

The admissibility of an utterance is, of course, a preliminary matter for the judge. If admitted, its weight and credit are for the jury. The ruling of the trial judge on admissibility is subject to review, but in doubtful cases should be given much weight. 163 A.L.R. 92, 93. See also *Swinson v. Nance,* 219 N.C. 772, 777, 15 S.E. 2d 284. The utterance should be regarded as presumably inadmissible. In determining whether the presumption has been overcome and whether the utterance is admissible the court should consider the time, place and content of the utterance, whether it was voluntarily made, motive for fabrication, condition of declarant, and corroborating circumstances. The time should not be so remote as to permit the declarant to reflect and fabricate and his statement to lose the quality of spontaneity. The utterance should be made under the influence of the accident. "What the law altogether distrusts is not after-speech but afterthought." *Travelers' Ins. Co. v. Sheppard,* 12 S.E. 18, 26 (Ga. 1890.) Ordinarily a response to a question is less trustworthy than a voluntary statement. A declaration made at the place of the occurrence is more likely to be influenced thereby than one made at a place substantially removed therefrom. Consideration should be given to those circumstances which motivate the utterance. It is important to consider whether declarant was under stress, emotion or pain brought on by the occurrence, or whether the declaration was made in a state of repose. An important consideration is whether the utterance is the narrative of an uncorroborated chain of events, or whether it is explanative of events otherwise in evidence. See 130 A.L.R. 302-310; *Meyer v. Travelers' Ins. Co., supra.*

Tested by the foregoing factors, it is our opinion that the statement of Hargett was competent and admissible. He made the declaration about two minutes following the occurrence, at or in close proximity

to the place the event occurred. It was made voluntarily and not in response to questioning. Declarant was suffering severe pain, and the statement was made under the stress and in explanation of the pain. There was no apparent motive to fabricate. There was nothing to indicate that Hargett thought he was going to die or considered that insurance benefits were involved. It was not a narrative of a chain of events, but was a voluntary statement of a single fact in explanation of a perfectly obvious set of circumstances capable of proof by other evidence. The declaration was such as would be accepted by others without question in the ordinary affairs and experiences of mankind.

Defendants contend, with some plausibility, that the doctrine of the *Mosley* case has been rejected by this Court. We have twice cited *Mosley* with approval in inapplicable cases. *Merrell v. Dudley,* 139 N.C. 57, 51 S.E. 777; *State v. Whitt,* 113 N.C. 716, 18 S.E. 715. In *Bumgardner v. Ry. Co.,* 132 N.C. 438, 441, 43 S.E. 948, the Court, discussing the opinion in the *Mosley* case, said: "But however inclined we may be to adopt these views if the question was new, we think the numerous decisions of our Court on the subject would prevent us." This was pure dictum. The declaration by the by-stander in the *Bumgardner* case, made after the occurrence, would not have been competent in any event. It was a narrative of events antecedent to the main occurrence and was in part a statement of opinion.

Defendants insist that *Hill v. Insurance Co., supra,* is indistinguishable from the instant case. Accident insurance was involved. Witness, just as a passenger train passed, saw deceased struggling and falling along beside the train, "ran there as quickly as he could, rolled the man over on his face and commenced to talk to him." The injured man stated the circumstances leading up to and causing his injury. The Court refused to permit the witness, who had been called by defendant, to relate deceased's statement, and held that it "was not exclamatory but narrative, and therefore hearsay and incompetent." The facts are similar to those in the *Mosley* case, but there are important differences. Mosley's statement related the main fact, the injury and its immediate cause as an explanation of his suffering; in *Hill* the immediate cause of the injury was obvious to the witness without any explanation, deceased's statement narrated his antecedent conduct and the events leading up to the main fact. The instant case is also significantly different. Hargett's statement related only to the main fact which explained his suffering, not to antecedent matters. It is not a narrative of a chain of events; it was explanatory of events already known and undisputed. Furthermore, the statement was voluntary and instinctive and not in response to questioning. We do not overrule the *Hill* case. In this jurisdiction cases are to be decided according to the circumstances involved.

Defendants concede that, if Hargett's death was caused by insect bite or sting, his death resulted from bodily injuries through external, violent and accidental means, and accident benefits are payable to beneficiary.

Even if insured's statement to Turner and Jones is excluded, there is competent evidence that death was caused by insect sting. In answer to a hypothetical question Dr. McMillan stated: "My opinion is that death resulted from an insect sting."

But defendants maintain that the answer of Dr. McMillan is insufficient and violates the rule (20 Am. Jur., Evidence, s. 787, p. 661) that "An opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support that conclusion." Defendants contend that the doctor's opinion supplies the immediate cause of the injury which is a fact necessary to support his conclusion. We do not agree that the rule was violated. The facts in evidence, including defendant's prior good health, his conduct at the time of the occurrence, the condition of his finger, his suffering, the lapse into unconsciousness, and his death shortly thereafter, coupled with the professionally established facts testified to by the doctor expert, were sufficient predicate for the conclusion reached by the witness. The hypothetical question was in proper form, included only such facts as were in evidence, and the facts were a sufficient hypothesis for the answer given. Stansbury: North Carolina Evidence, s. 137, pp. 270, 271; *State v. Smoak,* 213 N.C. 79, 195 S.E. 72; *Bailey v. Winston,* 157 N.C. 252,: 72 S.E. 966.

The court erred in allowing the motion for nonsuit.

The judgment below is

Reversed.

GRAEM YATES, DOING BUSINESS AS GRAEM YATES ADVERTISING v. W. F. MICKEY BODY COMPANY, INC.

(Filed 31 October 1962.)

1. Contracts §§ 21, 27; Quasi-Contracts § 2—

Where defendant's own evidence discloses that he used 1000 of the 5000 catalogs printed by plaintiff, defendant is not entitled to nonsuit in plaintiff's action to recover the contract price, even though defendant denies the alleged contract, since defendant, having accepted and used a portion

of the catalogs, would be liable for the portion used upon *quantum meruit* even in the absence of an express contract.

2. Contracts § 21; Quasi-Contracts § 2—

If the printer delivers printed catalogs according to the final proof approved by the purchaser, the printer is entitled to recover the contract price, or, if there were no contract, the reasonable value of the catalogs furnished in accordance with the purchaser's specifications, regardless of whether the purchaser liked the catalogs and irrespective of whether the catalogs were useful or not; if the printing of the catalogs was not in accordance with the specifications, the purchaser is entitled to reject them, but if the purchaser uses any number of them he is liable for the reasonable value of the portion used.

3. Contracts § 25; Quasi-Contracts § 2—

While a cause of action on an express contract and on an implied contract should be separately stated, recovery may be had upon *quantum meruit* upon a complaint alleging an express contract and the delivery of goods thereunder of a stipulated reasonable value.

4. Same—

Where the allegations and evidence are sufficient to support recovery upon an express contract and upon an implied contract, the court should submit separate issues directed to the two theories of liability.

5. Trial § 40—

If the pleading and evidence raise several issues, the submission of the single issue as to the amount, if any, plaintiff is entitled to recover, is not good practice.

6. Contracts § 25—

Where defendant in an action on a contract relies upon breach of the contract by plaintiff, defendant should deny plaintiff's allegations of due performance and allege the facts constituting the breach, and tender an issue relating thereto.

7. Contracts § 23—

If the catalogs purchased by defendant were not printed in accordance with the specifications, the fact that the purchaser uses a portion of the catalogs in an emergency does not preclude the purchaser from rejecting the remainder of the catalogs.

8. Trial § 33—

It is error for the court to fail to apply the law to the various aspects of the case presented by the evidence.

APPEAL by defendant from *Sink, E. J.* at April 23, 1962 Special "A" Civil Term of MECKLENBURG.

This is a civil action to recover damages for breach of contract. Plaintiff is the proprietor of an advertising agency; the defendant corporation manufactures truck bodies for delivering beverages.

Plaintiff alleges that on or about March 22, 1961, he and defendant entered into a contract "under the terms and in the full performance of which plaintiff caused to be printed and delivered to the defendant 5,000 catalogs created, designed, written, and prepared by plaintiff, . . . and duly approved by defendant"; that "pursuant to the contract" on or about March 28, 1961, plaintiff submitted an invoice to the defendant in the amount of $4,461.43 which defendant has refused to pay. Plaintiff prays judgment for this amount with interest from March 28, 1961.

Answering, the defendant admitted the receipt of a portion of the catalogs immediately prior to the departure of its sales force to a convention in Miami where the catalogs were to be distributed. However, defendant alleged that "the catalogs were incomplete and inaccurate for the purposes for which the defendant had intended using the catalogs"; that defendant immediately advised plaintiff of the omissions and told him to stop the printing but, notwithstanding, plaintiff printed the remaining 4,000 catalogs. Defendant denied that the parties ever reached a definite and final agreement with reference to the price of the catalogs. It alleged that plaintiff was entitled to recover nothing.

On the trial, plaintiff offered evidence which tended to show the following facts:

As a result of negotiations which began in the summer of 1960, and after the preparation of two "working dummies", plaintiff submitted the final proof of a sales catalog to defendant about March 20, 1961. Carl Mickey, president of the defendant, made a few minor corrections and told the plaintiff that defendant would need a partial shipment of catalogs by April 5, 1961, for use at a convention in Miami. Between March 22, 1961, and April 1, 1961, more changes had to be made in the proof. These were reviewed with Mr. Mickey and final instructions were given the printer on March 23, 1961. Thereafter on March 28, 1961, plaintiff submitted to the defendant an invoice in the amount of $4,461.43. On October 27, 1960, plaintiff had given defendant an estimate of the total cost for 5,000 catalogs containing both twelve pages and sixteen pages. The final billing in March was increased by the addition of color, plates, and by typography changes made on the instructions of Mr. Mickey. On April 5, 1961, according to its instructions, 1,000 catalogs were delivered to the defendant in High Point. On the same day Mr. Mickey telephoned plaintiff that page numbers had been omitted. He requested that plaintiff call the printer to determine whether all of the catalogs had been printed. At that time he made no other complaint. He told plaintiff he had decided to take the delivered catalogs with him to Miami and, upon

his return, would discuss with him the disposition of the other 4,000 catalogs.

At the time Mr. Mickey called plaintiff, the printer had already folded and stitched the remaining 4,000 catalogs. To have numbered the pages would have increased the cost $1,337.00 Hearing nothing further from the defendant, plaintiff had the remaining 4,000 catalogs delivered and requested payment. Defendant's president advised that the catalogs were not satisfactory because the pages were not numbered.

The delivered catalog contained twelve pages in addition to the cover pages — sixteen pages, counting front and back as two pages each. Page three purported to be an index page. On it were seven questions and the information that the answers could be found on various pages from four to fourteen. Since they were not numbered, in order to find the answers to the questions, it was necessary to count the pages. Plaintiff testified, "The entire catalog is based upon a very unusual index which was one of the teasing points that we were putting in the catalog. . . The working dummy did not have particular pages numbered . . . . Mr. Mickey personally reviewed each working dummy and each proof and all changes he requested were made."

The defendant's evidence tended to show that at a conference between plaintiff, Mr. Mickey, and the defendant's sales manager about the working dummy, it was agreed that the pages should be numbered, and the sales manager penciled the numbers on the onion skin overlay of the second working dummy at the place where the page numbers were to go. On the trial, defendant also contended that certain color with which defendant had promised to brighten the page advertising a roll-up door had been omitted.

Defendant's salesmen took the 1,000 catalogs to Miami but made no use of the remaining 4,000. Mickey testified that the price plaintiff quoted in October was acceptable; that he had requested him to send the invoice so that defendant could have it for March billing. He testified, "(T)he amount of the invoice was more than we had discussed originally. I didn't particularly like it, don't misunderstand, but I knew it was justified."

One issue, "What amount, if any is the plaintiff entitled to recover of the defendant?" was submitted to the jury without objection by the defendant. It was answered "$4,461.43 plus interest at 6% from March 28, 1961." From judgment entered on the verdict the defendant appealed assigning as error the action of the court in overruling its motion for nonsuit and omissions and commissions in the charge.

Robert L. Scott for plaintiff appellee.
Warren C. Stack for defendant appellant.

SHARP, J. Neither the pleadings nor the evidence clearly delineates this controversy. The submission of but one issue further blurred the picture and made the charge to the jury an extremely hazardous judicial operation.

The plaintiff's complaint, we believe, was intended to allege an express contract by defendant to pay $4,461.43 for the 5,000 catalogs in question. In its answer, defendant denied the contract as alleged in the complaint as well as plaintiff's performance of it. Defendant denied any agreement to pay a specific amount for the catalogs but alleged that it was ready, willing, and able to pay a reasonable sum for "proper and satisfactory catalogs." However, the most direct evidence of an express contract came from the defendant's president when he testified that the amount of the March invoice, sent at his request before the catalogs were delivered, "was justified." While alleging that "serious omissions and difficulties" in the catalogs caused it to reject 4,000 of them, defendant's evidence establishes that it did use 1,000 of the catalogs. Notwithstanding, defendant denied that plaintiff was entitled to recover any amount and excepted to the failure of the court to nonsuit plaintiff's entire claim.

Certainly the defendant was not entitled to receive the 1,000 catalogs as a gift from the plaintiff. The motion for nonsuit was correctly overruled.

The plaintiff contends that the defendant ordered 5,000 catalogs; that they were printed according to specifications or "a dummy" approved by defendant's president; and that he is entitled to recover for the 5,000. If plaintiff proves this by the greater weight of the evidence, plaintiff would be entitled to recover the stipulated price if there were one; the reasonable value, if there were none. If the catalogs were not printed according to the proof, plaintiff would not be entitled to recover for the 4,000 rejected. It is implicit in the dealings between these parties that the plaintiff was to furnish catalogs according to the final proof approved by the defendant. If that proof contained page numbers and color which did not appear in the printed catalog then plaintiff did not perform his contract. If the catalogs were printed according to the approved dummy, then defendant is obligated to pay for 5,000 of them whether its president liked the finished product or not, and irrespective of whether the catalog promoted sales at the convention or elsewhere. *Gills Lithographic & Liberty Printing Co. v. Chase et al.*, 149 Mass. 459, 21 N.E. 765, 4 L.R.A. 480; *Harris v. Sharples*, 202 Pa. 243, 51 A 965, 58 L.R.A. 214. In any event, the plaintiff would be entitled to recover the reasonable value of the 1,000 catalogs which the defendant used at the Miami Convention. *Thormer v. Mail Order Co.*, 241 N.C. 249, 85 S.E. 2d 140.

The plaintiff's complaint is broad enough to support a recovery either on an express contract or on the *quantum meruit*. The following statement from McIntosh, North Carolina Practice and Procedure, Second Edition, Section 1133, is applicable to the instant case:

> "Under the code the complaint may allege an express contract or the allegations may be so general as, under the liberal construction rule, to allow a recovery upon either the express or implied contract. 'This, however, is a slovenly mode of pleading, tolerated, but not approved, as the cases cited will show.' The orderly method of pleading would be to state the express contract and the implied contract separately, or to state the express contract as an inducement or explanation of the implied contract and that defendant received the benefits."

Before the question of damages is reached in this case it is necessary to determine whether the catalogs which the plaintiff produced conformed to the proof approved by the defendant's president. If they did, the next question is: Had plaintiff and defendant agreed upon the price? If no agreement as to price had been reached, then what was a reasonable price? If the catalogs did not conform to the printer's proof, what was the reasonable value of the 1,000 delivered?

The disputed questions of fact in this case could not have been brought into sharp focus by the one issue, "What amount, if any, is the plaintiff entitled to recover of the defendant?" Before the jury can decide the amount of plaintiff's recovery, it must resolve the issues of fact upon which that question depends. In cases where the evidence requires a charge on both express and implied contract, separate issues should be submitted. *Hatcher v. Dabbs*, 133 N.C. 239, 45 S.E. 562. "It is error to submit the single issue, 'How much, if anything, is the plaintiff entitled to recover?' if other issues are raised, since this leaves out the controverted facts upon which the right to recover is based." McIntosh, North Carolina Practice and Procedure, Second Edition, Section 1353. The defendant should have tendered issues applicable to its defense and noted an exception had the judge then refused to submit them. *Greene v. Greene*, 217 N.C. 649, 9 S.E. 2d 413.

His Honor correctly charged the jury that plaintiff contended he was entitled to recover the amount of the invoice for which he sued, but he did not tell them what facts it would be necessary to find in order to return such a verdict. Likewise, he never told the jury what findings would require them to answer the one issue *NOTHING*, but he told them the defendant contended that *NOTHING* should be their verdict. Having accepted and used 1,000 of the catalogs, the defendant was not entitled to this contention.

We have been unable to rationalize the theory upon which this case was presented to the jury. It may be that the court was misled by the failure of the defendant to tender issues which embraced its defense. Furthermore, the judge may have concluded that the general allegation of "serious omissions and difficulties" in the catalog was insufficient to raise an issue as to whether the printed catalog conformed to the proof. "The defendant relying on a breach by plaintiff as a defense must allege it as well as the facts constituting it, and he must deny plaintiff's allegations of due performance." 17 C.J.S., Contracts, Section 552. *Bank v. Fidelity Co.*, 126 N.C. 320, 35 S.E. 588. However, plaintiff makes no point that the answer was insufficient to admit defendant's evidence that the finished catalog did not conform to the proof.

The defendant assigns as error that portion of the charge in which his Honor instructed the jury as follows: "The law does not provide and does not allow this defendant to take 25% of the product and decline the other where it is shown that that rejected is the same quality as that accepted."

This was error requiring a new trial. The plaintiff knew that defendant required a certain number of catalogs in time for the Miami Convention. A thousand catalogs were printed and delivered for that specific purpose. The defendant, within thirty minutes after they were delivered, informed plaintiff that the page numbers had been omitted and asked him to stop the printing of the others. Under these circumstances, the fact that defendant in an emergency used the 1,000 catalogs would not waive his right to reject the others. Of course, the plaintiff contends that the proof which defendant had approved did not contain page numbers. This was one of the issues of fact for the jury to resolve under proper instruction from the court.

By assignments of error 20, 21, and 22, the defendant contends that the trial judge failed to apply the law to the evidence as required by G.S. 1-180, in that he failed to instruct the jury in substance as follows:

(a) "(I)f the advertising matter was in accordance with their agreement, in the absence of stipulation as to price, the defendant was obligated to pay the reasonable value thereof; . . . ."

(b) "'(P)laintiff's right to recover for materials and services rendered, not in accordance with contract, is restricted to such materials and services as were accepted and appropriated by defendant. As to these and these alone, defendant must pay, on the basis of *quantum meruit*; and the basis of liability therefore is quasi-contract, i.e., unjust enrichment, ...'"

(c) "'(W)here plaintiff sues to recover for services rendered to defendant, failure to prove the alleged special contract to pay therefor precludes recovery thereon; but, where services so rendered are accepted by the defendant, plaintiff may recover therefor upon *quantum meruit*. The measure of such recovery, predicated on implied assumpsit, is the reasonable value of the services so rendered by plaintiff and accepted by defendant,'. . . ."

The duty to give these instructions arose on the evidence in this case. *Thormer v. Mail Order Co., supra.* They were not given.

For the reasons stated there must be a

New trial.

TOWN OF DAVIDSON, A MUNICIPAL CORPORATION, PETITIONER v. ALICE STOUGH, RESPONDENT.

(Filed 31 October 1962.)

1. Appeal and Error § 15.1; Courts § 6; Eminent Domain § 9—

A motion by petitioner for leave to withdraw its appeal from an order of the clerk confirming the report of the commissioners in comdemnation proceedings is addressed to the discretion of the Superior Court, and the denial of the motion will not be disturbed in the absence of a showing of abuse.

2. Eminent Domain § 4—

Municipal corporations have been given authority to comdemn rights-of-way for water lines if unable to acquire the needed property rights through negotiation. G.S. 160-204, G.S. 160-205, G.S. 160-255 *et seq.*

3. Eminent Domain §§ 5, 12— Extent of easement for municipal water lines.

The condemnation by a municipality of a 25 foot right-of-way for a water line with right to enter upon the land to construct, maintain, and repair underground pipe and the right to keep buildings and other structures from being located within said right-of-way, together with an easement of 20 feet on each side of the 25 foot right-of-way to excavate and refill ditches and remove trees and undergrowth during periods of construction or repair, vests the right in the city to use the twenty foot strips occasionally for periods of short duration when necessary to repair or reconstruct the lines, and an instruction permitting the jury to assess compensation on the basis that the municipality acquired the continuous and exclusive right to use the entire 65 foot right-of-way must be held for prejudicial error.

APPEAL by petitioner from *McLean, J.*, June 11, 1962 Scheduled "A" Civil Term of MECKLENBURG.

Petitioner supplies its inhabitants with water. To bring water to the filter plant, it was necessary to lay a water pipe line or lines across respondent's property. Unable to agree with respondent on compensation for the easement necessary to perform this public service, petitioner instituted this condemnation proceeding. Commissioners, appointed to determine the amount due respondent, filed their report with the clerk. In due time petitioner filed exceptions which were overruled. The report was confirmed, and petitioner appealed to the Superior Court.

Respondent also filed exceptions to the report of the commissioners, but these were not filed within twenty days of the filing of the commissioners' report. The record does not disclose what order, if any, the clerk made with respect to the exceptions filed by respondent.

An issue to determine the amount of compensation due respondent was submitted to and answered by the jury. Judgment was entered declaring petitioner owned the easements as described in the petition and in favor of respondent for the sum fixed by the jury as compensation. Petitioner excepted and appealed to this Court.

Howard B. Arbuckle, Jr. for petitioner appellant.

Bradley, Gebhardt, DeLaney and Millette, by Ernest S. DeLaney, Jr., for respondent appellee.

RODMAN, J. After the parties had offered evidence to support their respective contentions, but before all the evidence had been offered, petitioner asked leave to withdraw its appeal. The court denied the motion, and petitioner assigns this ruling as error.

When an appeal has been perfected, appellant cannot withdraw it without first obtaining the consent of the appellate court. That court may allow or deny the motion in the exercise of its sound discretion. Cf. *Ramsey v. R.R.*, 253 N.C. 230, 116 S.E. 2d 490, and *McDowell v. Kure Beach*, 251 N.C. 818, 112 S.E. 2d 390; *S v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1. Here there is no suggestion the court abused its discretion. Hence its ruling is not reviewable on appeal. *Adler v. Curle*, 254 N.C. 502, 119 S.E. 2d 393.

The sovereign has the power to acquire by condemnation such property as may be necessary for public purposes. It may acquire the property in fee or it may acquire a less estate. *Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 112 S.E. 2d 111. It may delegate this power to municipal corporations. The grant may be coextensive with the State's right, or it may limit the right granted. *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E. 2d 525.

The Legislature has specifically authorized municipal corporations to own and maintain water systems. G.S. 160-255. They are authorized to purchase such "land, right of way, water right, privilege, or easement" as may be necessary for that purpose. G.S. 160-204. If unable to acquire the needed property rights by private negotiation, they may acquire by condemnation. G.S. 160-205.

The petition describes the rights and estates which petitioner seeks in this language: "A permanent easement and right of way 25 feet wide for a water pipe line or pipe lines and mains. . .together with the right to enter upon the real property described in this paragraph at any time, to construct, maintain, and repair underground pipe lines for water and/or mains for the purpose of conveying water over, across, through or under the lands hereinafter described; the right to excavate and refill ditches and/or trenches for the location of said water pipe lines and/or mains; the right to remove trees, bushes, undergrowth and other obstructions interfering with the location, construction and maintenance of said water lines and/or mains; and the right to keep buildings and all structures from being located within said right of way; also, temporary easements of 20 feet on each side of the said permanent right of way and the right to excavate and refill ditches and to remove trees, bushes, and undergrowth only during the period of construction, reconstruction, or repair work on the water pipe line or lines."

It is apparent that petitioner seeks two easements, one called permanent, the other called temporary. The one designated as permanent is limited to an area 25 feet in width. It is the area to be used in transporting water across respondent's land. As to that area, petitioner indicates a clear intent to prevent respondent from making any use of the surface which would in any manner impede petitioner's use and occupancy of the 25-foot strip. Pipes can be laid above or below the surface to the full width of the 25 feet.

The so-called temporary easement is limited to areas 20 feet in width on each side of the 25-foot strip. As to these 20-foot strips, petitioner does not seek to exclude respondent from utilizing the surface rights when not needed to repair the water lines in the 25-foot strip.

The words "permanent" and "temporary" do not, as we interpret the petition, aptly describe the rights sought to be acquired. Both easements, for all practical purposes, are permanent, meaning thereby that termination of the easements and right of reverter are too insignificant to have appreciable value. *Highway Comm. v. Black*, 239 N.C. 198, 79 S.E. 2d 778. The word "permanent," as used in the petition, was intended to denote continuous and exclusive use of the easement. The word "temporary" was intended to indicate that the

right to use was not exclusive; the right would be exercised only occasionally, for periods of short duration when necessary to repair or reconstruct the lines. The rights of the dominant and servient estates with respect to the extent of easements sought by petitioner has been recognized by this Court. *Highway Comm. v. Young,* 200 N.C. 603, 158 S.E. 91, illustrates the rights of the parties with respect to the 25-foot "permanent" easement. *R.R. v. Bunting,* 168 N.C. 579, 84 S.E. 1009, illustrates the parties' rights as to the two 20-foot easements, which the petition designates as "temporary."

The court, in its charge, told the jury respondent "says and contends that while they presently have a pipeline running under the ground, at any time they can construct one over the ground, under the ground, on any portion or any part of this 65 feet and that they can come on it any day they want to. They can dig it up and that even though that she might be able to use it for grazing purposes or something like that, that, and while the title remains in her name, that she has a right to sell it and can sell it, but that it is subject at all times to this easement and that no one can construct any buidings over this easement at any time regardless of whether she retains it or whether she sells it, and she says and contends that that diminishes the fair market value of the property. . ."

Having given the jury the benefit of respondent's contentions with respect to the property taken, it became the duty of the court to inform the jury exactly what property petitioner would acquire. The court undertook to perform this duty by charging: "They (meaning petitioner) are asking that they at any time be allowed to go upon this right of way and dig ditches and that they be allowed to put place pipes under the ground or over the ground or at any place they want to along this property and that they remove the undergrowth and the trees and the bushes along this property and that at any time they want to use this particular right of way for any of the purposes for which they have set forth in this Petition, that is for the maintenance, construction, repair and additions and they have a right to use the entire 65 feet for any purpose they want to consistent with their Petition to condemn. That is, for the use of constructing water lines. So the Court instructs you, members of the jury, that upon your answer to this question the Court will then sign a judgment giving the Town of Davidson that right."

"But the easement confers upon the Town of Davidson complete authority to occupy and use the entire right of way for the purposes of constructing, repairing, or building or making additions to its water line when it deems such action conducive to the interest of the citizens of the Town of Davidson."

Petitioner assigns as error the two last-quoted portions of the charge. The assignments are well taken. They tell the jury that respondent's contentions with respect to the rights which petitioner sought are correct. A casual reading of the petition and the judgment will demonstrate petitioner will be required to pay for greater rights than it seeks or has been awarded. It cannot lay pipes outside the 25-foot easement. It cannot exclude respondent from using the 20-foot easements except when needed by petitioner in repairing or reconstructing the pipe lines on the 25-foot easement. Petitioner must pay fair compensation for the rights which it takes, but it cannot be made to pay for something it has not taken and does not want.

New trial.

DORIS BAKER SUTTON AND HUSBAND, LEON SUTTON v. J. R. DAVENPORT AND HIS WIFE, SYBIL S. DAVENPORT AND F. E. WALLACE, SR., TRUSTEE FOR THE UNIVERSITY OF NORTH CAROLINA

AND

DORIS BAKER SUTTON AND HUSBAND, LEON SUTTON v. J. KEITH WILLIAMS AND HIS WIFE, LOUISE L. WILLIAMS AND F. E. WALLACE, SR., TRUSTEE FOR THE UNIVERSITY OF NORTH CAROLINA.

(Filed 31 October 1962.)

1. Judgments § 38—

A motion to dismiss on the ground of the bar of a prior judgment, which motion alleges the facts constituting the basis of the estoppel, may be treated as an answer, which is the proper procedure to raise such plea, and the parties may consent that the judge find the facts upon the plea prior to trial on the merits.

2. Constitutional Law § 24; Judgments § 1—

No valid judgment can be entered disposing of one's property unless he has been given notice of the action seeking to accomplish that purpose and has been afforded an opportunity to assert his defense. Art. I, § 17, Constitution of North Carolina.

3. Process § 9—

Service by publication upon "any and all unknown heirs" of a deceased widow and all other persons having any interest in her estate, *held* insufficient to give the court jurisdiction of persons claiming as heirs of the deceased husband of the widow.

APPEAL by petitioners from *Bundy, J.*, February 1962 Civil Term of LENOIR.

Doris Baker Sutton and husband instituted two special proceedings. The petition in each proceeding alleges: Feme petitioner is the owner

of an undivided 1/42nd interest in the land there described; the defendants Davenport, as to the land described in the petition in that proceeding, and the defendants Williams, as to the lands described in that proceeding, are the owners of the remaining 41/42nds; the interest of each defendant cotenant is subject to a deed of trust to defendant Wallace securing an indebtedness to the University of North Carolina. Petitioner and her cotenants trace their respective titles to John Baker. Actual partition is sought.

Defendants, relying on G.S. 1-108, filed motions to dismiss. To support their motions they alleged facts which are, in substance, pleas of estoppel resulting from a judgment rendered by the Superior Court of Lenoir County in an action by *Theresa Baker Drake et al. v. University of North Carolina et al.*

The special proceedings were by consent consolidated. The clerk heard evidence in support of the motions. He made findings on which he concluded he was "without jurisdiction to hear and determine the claims of the petitioners, if any they have, in the lands involved in the respective petitions for partition." He dismissed the proceedings. Petitioners appealed to the judge in term.

Judge Bundy affirmed the clerk's findings of fact and legal conclusions. He remanded the proceedings to the clerk with directions to dismiss the proceedings at petitioners' cost.

Petitioners appealed to this court.

Fred W. Harrison for petitioner appellants.

LaRoque & Allen, Wallace & Wallace, and Geo. B. Greene for defendant appellees.

RODMAN, J. The proper way to present the question of estoppel is by answer setting out the facts, not by motion to dismiss for want of jurisdiction. *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125. When, as here, facts are pleaded to estop a party from asserting a right, the sufficiency of the plea cannot be determined before the evidence supporting the plea is offered. *Reid v. Holden, supra; Ransom v. Robinson,* 249 N.C. 634, 107 S.E. 2d 87.

Here the parties apparently treated the "motion to dismiss" as an answer and at least tacitly consented to a determination of the effect of that plea prior to a trial on the merits. That procedure was permissible. *Gillikin v. Gillikin,* 248 N.C. 710, 104 S.E. 2d 861; *Jones v. Mathis,* 254 N.C. 421, 119 S.E. 2d 200.

The question for decision then is: Are the facts alleged and found sufficient to sustain the plea of *res judicata*? Defendants attach to their motion copies of the pleadings, affidavits to obtain orders directing service of process by publication and appointment of a guardian

ad litem, order directing publication, copy of the published notice of summons, consent judgment which directs a sale for partition, and decree confirming the sales. All these papers are captioned as follows: *"THERESA BAKER DRAKE, Fannie T. Baker Smith, Lennie Doris Baker Hutchinson, and Ruth Baker Harris v. THE UNIVERSITY OF NORTH CAROLINA (a body politic and corporate), and John S. Davis, Clerk of Superior Court of Lenoir County, and Elijah J. Baker; and any and all unknown heirs of Annie T. Baker, deceased, whether in being or not in being or under disabilities, and all other persons who might in any contingency be or become interested in the lands and estate of the said Annie T. Baker, deceased."* (Emphasis supplied.)

In the action pleaded as an estoppel plaintiffs alleged they had, with the other heirs of John D. Baker, executed a deed to his widow, Annie; the deed was void as to them because they were married and their husbands had not consented to the conveyance; the widow died leaving no heirs; her property escheated to the University; plaintiffs sought to be adjudged cotenants with the University and adjudged the owners of an undivided 4/36ths interest in the lands conveyed to Annie T. Baker.

By consent a jury trial was waived. The court, based on the pleadings and the admissions of the parties, found: The heirs of John D. Baker were four named living brothers, a sister, and six named children of James Baker, a deceased brother. The named six did not include plaintiffs' ancestor, James Baker, Jr. No reference is made to him.

The court thereupon by consent adjudged plaintiffs owned 3/36ths interest in the property in controversy. The University owned the remainder. It directed a sale for partition. This judgment was consented to by the plaintiffs in person, by their counsel, by counsel for the University, by the defendant Elijah J. Baker, by his attorneys, and by the guardian *ad litem*. No one purported to speak for the petitioner, Doris Baker Sutton, unless she was included in the class for whom the guardian *ad litem* had authority to speak. His authority was limited to those bound by the decree as declared by the court, namely: "any and all unknown heirs of Annie T. Baker, deceased, whether in being or not in being or under disabilities, and all other persons who might in any contingency be or become interested in the lands and estate of the said Annie T. Baker, deceased, have been properly made parties to this action and duly served with process in the manner by law provided. . ."

Pursuant to the consent judgment the lands were sold and the sales confirmed. Specific parts were conveyed to the defendants Davenport and to the defendants Williams.

Every notice, pleading, and order referred only to those who might claim as heirs at law of Annie T. Baker. This reference does not apply to petitioner. She does not assert any right derived from Annie T. Baker. Annie T. Baker asserted her title by virtue of a deed from some of the heirs of John D. Baker. Petitioner asserts her title as another heir of John D. Baker. If there was any conflict of interest between petitioner and Annie T. Baker, it was only because Annie claimed more than she purchased. Nowhere in that record is there any suggestion that the parties intended to litigate a conflict of interest between Annie T. Baker's estate and the petitioner, Doris B. Sutton.

No valid judgment can be entered disposing of one's property unless he has been given notice of the action seeking to accomplish that purpose and has been afforded an opportunity to assert his defense. *Bank v. Jordan,* 252 N.C. 419, 114 S.E. 2d 82; *Barnes v. Dortch,* 245 N.C. 369, 95 S.E. 2d 872; *Peel v. Moore,* 244 N.C. 512, 94 S.E. 2d 491; *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138; *Comrs. of Roxboro v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144; *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717; *Ferguson v. Price,* 206 N.C. 37, 173 S.E. 1; *S. v. Collins,* 169 N.C. 323, 84 S.E. 1049.

The notice must be such as is reasonably calculated to apprise an interested party that his rights may be adversely affected. Mr. Justice Jackson, writing in *Mullane v. Central Hanover B. & T. Co.,* 339 U.S. 306, 94 L. ed. 865, said: "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." HIGGINS, J., expressed the same thought in this language: "The purpose of giving notice by publication is not only to alert the individuals named, but also their friends and acquaintances who may see the publication and give them actual notice." *Bank v. Jordan, supra.*

G.S. 1-108, relied on by defendant, has no application to the factual situation here considered. By express language that section relates only to "the defendant against whom publication is ordered." To give the statute an interpretation contrary to its express language, binding on one not within the class named in the order of publication, would render it void as violative of our constitutional provision, Art. I, sec. 17, N. C. Constitution.

The sole defense presented is not sufficient to deprive petitioner of any property rights she may have. The judgment must be reversed, but defendants may apply to the court upon remand for permission to amend their pleadings so as to assert other defenses, if any they may have, to defeat the claim asserted by petitioners.

Reversed.

EARNESTINE GOFF HARDBARGER, ADMINISTRATRIX OF THE ESTATE OF DAVID MICHAEL GOFF, DECEASED v. HARLAN M. DEAL AND MRS. J. R. McNAIRY, T/A McNAIRY'S DRUG STORE; THE REXALL COMPANY; THE REXALL DRUG AND CHEMICAL COMPANY AND THE REXALL DRUG COMPANY.

(Filed 31 October 1962.)

1. Death § 4—

The two year statute of limitations applies to an action to recover for wrongful death. G.S. 1-53(4), G.S. 28-173.

2. Time—

In computing the time in which an act may or must be performed, the first day must be excluded and the last day included, and if the last day is a Sunday or a legal holiday the time is extended to the next secular day, G.S. 1-593, regardless of whether the limitation is expressed in months, years, or days.

3. Holidays—

Construing G.S. 103-4, G.S. 103-5, and G.S. 2-24 *in pari materia*, where the county commissioners have stipulated by resolution, that Easter Monday should be a holiday observed by the court house and county employees, Easter Monday is a legal holiday in such county, notwithstanding it is not designated a State-wide holiday by G.S. 103-4.

4. Statutes § 5—

As a general rule, statutes *in pari materia* are to be construed together and harmonize, if possible, so as to give effect to each as a part of a harmonious body of legislation.

5. Death § 4; Limitation of Actions § 4—

Where the date which is two years from the death of intestate is Easter Monday, which is a holiday for county employees in the county in which the action is instituted, the cause of the action is not barred if instituted on the day following Easter Monday.

APPEAL by plaintiff from *Froneberger, J.*, March-April 1962 Civil Term of CALDWELL.

The judgment entered below, after recitals, provides:

"And the case having been called for trial.

"And it appearing to the Court from stipulations of Counsel and from other evidence introduced that the following are the facts with reference to the question of the Statute of Limitations, and the Court finding the following to be the facts:

"(1) That this is an action for damages for alleged wrongful death which was instituted on April 4, 1961, with the filing of a Summons without Complaint in the Office of the Clerk of Superior Court for Caldwell County.

"(2) That the Complaint when later filed sought damages for al-

leged wrongful death of the plaintiff's intestate.

"(3) That the death of the plaintiff's intestate occurred on April 3, 1959.

"(4) That the two-year Statute of Limitations, G.S. 1-53, is the applicable Statute.

"(5) That Monday, April 3, 1961, was Easter Monday.

"(6) That on the 4th day of June, 1956, the County Commissioners of Caldwell County adopted a Resolution having to do with the holiday status of Easter Monday and the closing of the Courthouse in Caldwell County, which Resolution appears of record.

"(7) That the Office of the Clerk of Superior Court was closed on Monday, April 3, 1961; the Clerk and his deputies were not in their office that day but would have been willing, if called upon, to perform any of their legal duties, including the issuance of Summons. One of the deputies lives in Lenoir, and the Clerk lives 11 miles from town.

"(8) That all the defendants have been present within the State and subject to service of process at all times since April 3, 1959, the date of the death of the child.

"(9) That all of the defendants have duly pleaded that the action is barred by the two-year Statute of Limitations, G.S. 1-53.

"And the Court being of the opinion under these facts that the action is barred by the two-year Statute of Limitations;

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby dismissed, and that the plaintiff pay the costs to be taxed herein."

Plaintiff excepted and appealed.

Ted G. West and W. C. Palmer for plaintiff appellant.

Fate J. Beal for defendants Harlan M. Deal and Mrs. J. R. McNairy, t/a McNairy's Drug Store, appellees.

Townsend & Todd, Helms, Mulliss, McMillan & Johnston and E. Osborne Ayscue, Jr., for defendants Rexall, appellees.

BOBBITT, J. The sole question is whether, upon the facts set forth in the judgment, plaintiff's action is barred by the statute of limitations.

The two-year statute of limitations applies to plaintiff's alleged cause of action. G.S. (Vol. 1A) 1-53(4); G.S. (Vol. 2A) 28-173, as amended by Ch. 246, Session Laws of 1951; *McCrater v. Engineering Corp.*, 248 N.C. 707, 708, 104 S.E. 2d 858; *Stamey v. Membership Corp.*, 249 N.C. 90, 94, 105 S.E. 2d 282; *Hall v. Carroll*, 253 N.C. 220, 116 S.E. 2d 459.

"The time within which an act is to be done, as provided by law,

shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday or a legal holiday, it must be excluded." G.S. (Vol. 1A) 1-593, as amended by Ch. 141, Session Laws of 1957.

G.S. 1-593 has been applied in these cases: Where an appellant was required to serve case on appeal within thirty days from June 5th and July 5th was Sunday, this Court held that service on July 6th was sufficient compliance. *Lumber Co. v. Rowe,* 151 N.C. 130, 65 S.E. 750. Where it was required that a petition to rehear be filed "within twenty days after the commencement of the succeeding term," and the twentieth day was Sunday, this Court held the petition was filed within the time limit. *Barcroft v. Roberts,* 92 N.C. 249; *Bird v. Gilliam,* 123 N.C. 63, 31 S.E. 267; also, see *Guano Company v. Hicks,* 120 N.C. 29, 26 S.E. 650. No decision of this Court applying G.S. 1-593 to the computation of the time limited for the commencement of an action has come to our attention. Nor does it appear that this Court has considered whether G.S. 1-593 is applicable when the limitation is expressed in months or years rather than in days.

We are in accord with the views expressed and conclusion reached in *Johnston v. New Omaha Thomson-Houston E. L. Co.* (Neb.), 125 N.W. 153, namely, that it "was intended by the Legislature to put an end to all confusion and uncertainty by adopting a uniform rule for the computation of time, alike applicable to matters of mere practice and to the construction of statutes, and that it applies to the computation of time, whether the time to be taken into account is days, months, or years, and that where an act is to be done, or is permitted to be done, within a specified time, and the last day is Sunday, it shall be excluded, and the act may be done on the following day."

In accord with *Johnston,* the majority view, which we adopt, is that "if the last day of a period of limitation for commencing an action falls on a Sunday or on a legal holiday, the period is extended and the action may be commenced on the following secular or business day." 86 C.J.S., Time § 14(9), and cases cited; *Elmore v. Fanning* (Kan.), 117 P. 1019; *Rochester v. Tulp* (Wash.), 337 P. 2d 1062; *Poetz v. Mix* (N.J.), 81 A. 2d 741; *Brembry v. Armour & Company* (Iowa), 95 N.W. 2d 449; *Wooten v. State Compensation Commissioner* (W. Va.), 95 S.E. 2d 643; *Smith v. Pasqualetto* (U.S.C.A. 1st), 246 F. 2d 765; *Associated Transport v. Pusey* (Del.), 118 A. 2d 362. Decisions *contra* include *Geneva Cooperage Co. v. Brown* (Ky.), 98 S.W. 279, and *Fulghum v. Baxley* (Tex. Civ. App., Dallas), 219 S.W. 2d 1014, cited by defendants. See Annotation, "Inclusion or exclusion of first and last day for purposes of statute of limitations," 20 A.L.R. 2d 1249, 1258, where decisions bearing upon whether the last day of a

period of limitation should be extended to the following day where such last day falls upon either a Sunday or a holiday are collected and discussed.

Excluding April 3, 1959, the day plaintiff's intestate died, April 3, 1961, was the last day of the two-year period. Hence, plaintiff's action is barred unless the period of limitation was extended to Tuesday, April 4, 1961, because April 3, 1961, Easter Monday, had the status of "a legal holiday."

In addition to G.S. 1-53(4) and G.S. 1-593, the statutory provisions set forth below are pertinent.

In G.S. 103-4 certain specified days "are declared to be public holidays," and a proviso declares "that Easter Monday and the thirtieth day of May shall be holidays for all State and national banks only." This statutory provision relates to state-wide public holidays.

G.S. 103-5 provides: "Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or on a holiday the act may be done on the next succeeding secular or business day and where the courthouse in any county is closed on Saturday or any other day by order of the board of county commissioners of said county and the day or the last day required for filing an advance bid or the filing of any pleading or written instrument of any kind with any officer having an office in the courthouse, or the performance of any act required or permitted to be done in said courthouse falls on Saturday or other day during which said courthouse is closed as aforesaid, then said Saturday or other day during which said courthouse is closed as aforesaid shall be deemed a holiday; and said advance bid, pleading or other written instrument may be filed, and any act required or permitted to be done in the courthouse may be done on the next day during which the courthouse is open for business."

The proviso in G.S. 2-24 declares "that the clerk's office in the respective counties may observe such office hours and holidays as authorized and prescribed by the board of county commissioners for all county offices."

By resolution adopted June 4, 1956, referred to in the court's sixth finding of fact, the Board of County Commissioners of Caldwell County "voted to set the following Holidays to be observed by the Court House and County Employees. HOLIDAYS . . . 2. Easter Monday — When this falls on the first Monday, the Board will meet on Tuesday. . . ."

"The matter is one of statutory construction . . ." *Poetz v. Mix, supra.*

Easter Monday is not designated a state-wide public holiday in G.S. 103-4. The Board of Commissioners of Caldwell County by

resolution of June 4, 1956, designated Easter Monday of each year as a holiday "to be observed by the Court House and County Employees" and pursuant thereto the clerk's office was closed on Easter Monday, April 3, 1961. Where the courthouse is closed pursuant to the order of the board of county commissioners, G.S. 103-5 expressly provides that "any act required or permitted to be done in the courthouse may be done on the next day during which the courthouse is open for business." Certainly, the institution of a suit is an act "required or permitted to be done in the courthouse."

"Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonoize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible." *Blowing Rock v. Gregorie,* 243 N.C. 364, 371, 90 S.E. 2d 898; *Justice v. Scheidt, Commissioner of Motor Vehicles,* 252 N.C. 361, 363, 113 S.E. 2d 709; *Faizan v. Insurance Co.,* 254 N.C. 47, 53, 118 S.E. 2d 303; *Coach Lines v. Brotherhood,* 254 N.C. 60, 68, 118 S.E. 2d 37.

When the cited statutes are so considered and construed, it is our opinion, and we so decide, that, by reason of the closing of the clerk's office in Caldwell County on Easter Monday, April 3, 1961, pursuant to resolution adopted June 4, 1956, by the board of county commissioners, in which Easter Monday was designated a holiday, the plaintiff, if otherwise entitled to commence her action on Monday, April 3, was entitled to commence her action on the next day the courthouse was open for business, to wit, on April 4, 1961. As stated in *Rochester v. Tulp, supra*: "The statute of limitations, although not an unconscionable defense, is not such a meritorious defense that either the law or the facts should be strained in aid of it."

Here, as in the court below, the question considered and decided is whether, based solely on the facts set forth in the judgment, plaintiff's action is barred by the two-year statute of limitations. Being of opinion these facts are insufficient to constitute a bar to plaintiff's action, the judgment of the court below is deemed erroneous and is vacated. Whether, as suggested by defendants Rexall, plaintiff's action is barred on account of matters not covered by the findings on which the court's judgment was based, will be for consideration at the next hearing in the superior court.

Error and remanded.

SHOENTERPRISE CORPORATION v. J. E. WILLINGHAM

(Filed 31 October 1962.)

Bills and Notes § 15; Limitation of Actions § 4—

Where the holder of a note exercises the acceleration clause therein contained by instituting an action against two of the comakers on the note for the entire indebtedness after default in the payment of an installment, the exercise of the acceleration clause is effective as to a third comaker, even though he is not made a party to the action, and action on the note against the third comaker is barred after the elapse of more than three years from the exercise of the acceleration clause, the note not being under seal.

APPEAL by defendant from *Martin, Special Judge,* March Term 1962 of BUNCOMBE.

Civil action instituted December 7, 1960, in the General County Court of Buncombe County in which plaintiff, a corporation, seeks to recover the amount due and owing on a certain promissory note, to wit:

"$10,014.58 May 10, 1955

"For value received, I promise to pay to the order of SHOENTERPRISE CORPORATION Ten Thousand Fourteen and 58/100 Dollars in installments, in the amounts and at or before the times stated in the Schedule of Payments hereon, with interest on the sums remaining from time to time unpaid at the rate of 6% per cent per annum, payable semi-annually with said installments.

"Should any of the principal or interest not be paid when due, such default shall, at the option of the legal holder hereof, cause all sums then remaining unpaid to become immediately due and payable, without notice. The makers, endorsers and guarantors of this note agree to pay a reasonable collection or attorney's fee if suit is brought hereon, or said note is placed in a collector's hands, when in default; and hereby waive presentment for payment, notice of non-payment, protest and notice of protest, and diligence in bringing suit against any party thereto, and consent that time of payment may be extended without notice.

G. C. BUTLER
W. H. BUTLER
J. E. WILLINGHAM

No. _____
"SCHEDULE OF PAYMENTS:
$2,002.90 one year after date
2,002.90 two years " "
2,002.90 three years " "

2,002.90 four years " "
2,002.98 five years " " "

The only defense asserted by defendant is that plaintiff's action is barred by the three-year statute of limitations. Defendant alleged that plaintiff on or before June 20, 1957, exercising its option to do so, had declared the entire principal balance to be immediately due and payable.

The case was heard, without a jury, in said General County Court by his Honor, Burgin Pennell, the presiding judge. The judgment, which sets forth the court's findings of fact (based on stipulated facts) and conclusions of law, provides:

" . . . the Court finds the following facts:

"1. That on or about May 10, 1955 the defendant, J. E. WILLINGHAM, G. C. BUTLER and W. H. BUTLER, jointly and severally, and as comakers, executed and delivered to SHOENTERPRISE CORPORATION, the plaintiff in this action, their promissory note bearing said date, in the amount of $10,014.58, according to an exact copy of said note, which is attached to the complaint in this action.

"2. That plaintiff, SHOENTERPRISE CORPORATION, is now the owner and holder of said note.

"3. That on or about June 20, 1957, plaintiff in this action, SHOENTERPRISE CORPORATION, instituted suit against G. C. BUTLER and W. H. BUTLER in the Chancery Court at Nashville, Tenn. to recover the sum of $10,014.58, the principal amount of said note, together with interest thereon from May 10, 1956. J. E. WILLINGHAM was not named as a party-defendant in that action, was not served with process, and did not appear in the Tennessee action against G. C. BUTLER and W. H. BUTLER.

"4. That the action instituted by plaintiff, *SHOENTERPRISE CORPORATION v. G. C. BUTLER and W. H. BUTLER* in the Chancery Court in Nashville, Tennessee, terminated in the judgment for Shoenterprise Corporation against the said G. C. Butler and W. H. Butler in the amount of $10,014.58, together with interest, a reasonable attorney's fee and court costs.

"5. That no payments of interest or principal on said note have ever been made to plaintiff except for payment of interest on December 14, 1955 in the amount of $300.44, and a payment of interest on May 11, 1956 in the amount of $300.44.

"6. That said judgment rendered in the Chancery Court at Nashville, Tennessee, against G. C. Butler and W. H. Butler remains wholly unpaid; that the said G. C. Butler is insolvent and not possessed of assets over and above his legal exemptions, and the said

W. H. Butler discharged his obligation to pay said judgment by filing an Involuntary Bankruptcy Petition in the United States District Court in Nashville, Tennessee, wherein he obtained a discharge in bankruptcy relieving him of the payment of his debts including his obligation under the terms of said promissory note and the judgment rendered thereon which formed the basis of the above action in the Chancery Court at Nashville, Tennessee.

"7. That the action of *SHOENTERPRISE CORPORATION, plaintiff, v. J. E. WILLINGHAM, defendant,* was duly instituted in the General County Court of Buncombe County, N. C. on the 7th day of December 1960, and on or about said date copy of summons and complaint was served on said defendant.

"8. That defendant, J. E. WILLINGHAM, filed Answer to plaintiff's complaint on the 14th day of January 1961.

"9. That the General County Court of Buncombe County, N. C. has jurisdiction of the parties and the cause of action set forth in the complaint and answer.

"10. That the promissory note referred to in Finding of Fact #1 hereof is not under seal and is payable in installments, as follows:

$2,002.90 on May 10, 1956
2,002.90 on May 10, 1957
2,002.90 on May 10, 1958
2,002.90 on May 10, 1959
2,002.98 on May 10, 1960

"11. That prior to the institution of this action, plaintiff demanded of defendant the payment of the full amount of said promissory note with interest, at which time all of said annual installments were in default. That said demand was refused by the defendant.

"12. That the installments on said promissory note in the amount of $2,002.90 each, which became due on May 10, 1956, and May 10, 1957, respectively, are barred by the Statute of Limitations, to wit: N. C. General Statutes 1-52(1).

"Upon the foregoing Findings of Fact, the Court CONCLUDES AND ADJUDGES, as a matter of law, as follows:

"1. That the plaintiff was not required, in the Tennessee action specifically referred to in Finding of Fact #3, to sue all of the makers of the promissory note for that the holder of a promissory note may sue one or all persons who are severally liable.

"2. That the installments on said promissory note in the amount of $2,002.90 each, which became due on May 10, 1956, and May 10, 1957, are barred by the Statute of Limitations, to wit: N. C. General Statutes 1-52(1).

"3. That said Judgment obtained by plaintiff in the courts of the State of Tennessee not having been satisfied does not constitute an extinguishment as between plaintiff and defendant of said promissory note which is the subject matter of this action.

"4. That the plaintiff is entitled to recover of the defendant the three last maturing installments of said promissory note which are not barred by N. C. General Statutes 1-52(1), aggregating $6,008.78, with interest on the same at the rate of 6% per annum from May, 10, 1956 until paid, together with the costs of this action."

Defendant excepted to conclusions of law and to the signing of said judgment and appealed to the Superior Court of Buncombe County.

In the superior court, Judge Martin overruled each of defendant's assignments of error and affirmed the judgment of said general county court. Defendant excepted to Judge Martin's judgment and appeals therefrom.

Lee, Lee & Cogburn for plaintiff appellee.

Adams & Adams and William F. P. Coxe, Jr., for defendant appellant.

BOBBITT, J. Defendant's appeal relates solely to the last three installments which, according to the "Schedule of Payments," were to become due May 10, 1958, May 10, 1959, and May 10, 1960. Defendant contends plaintiff's action is also barred as to these three installments because plaintiff, by the exercise on June 20, 1957, of its acceleration option, caused the entire unpaid indebtedness evidenced by said note to become immediately due and payable.

". . . where there is an acceleration clause giving the creditor the right upon certain contingencies to declare the whole sum due, the statute begins to run, only with respect to each installment, at the time the installment becomes due, unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option." 34 Am. Jur., Limitation of Actions § 142; 54 C.J.S., Limitations of Actions § 150.

"It appears to be well settled that a provision in a bill or note accelerating the maturity thereof on nonpayment of interest or installments, or other default, at the option of the holder, requires some affirmative action on the part of the holder, evidencing his election to take advantage of the accelerating provision, and that until such action has been taken the provision has no operation. In other words, some positive action on the part of the holder is an essential condition for the exercise of his option and a mere mental intention to de-

clare the full amount due is not sufficient." Annotation, 5 A.L.R. 2d 968, 970. This rule requires objective evidence of an election to exercise the option.

"The institution of a suit for the whole debt is, of course, the most solemn form in which the holder can exercise his option." 5 A.L.R. 2d 968, 975; *Barbee v. Scoggins,* 121 N.C. 135, 28 S.E. 259. Unquestionably, the Tennessee action by plaintiff against G. C. Butler and W. H. Butler to recover the whole debt evidenced by said note constituted, as between plaintiff and the Butlers, an exercise by plaintiff of its option and caused "all sums then remaining unpaid to become immediately due and payable." Even so, plaintiff contends it exercised its option to accelerate only as to the Butlers and not as to defendant. The question presented appears to be one of first impression in this jurisdiction and elsewhere. No case involving an analogous factual situation has been discovered by our research or by that of counsel.

The note sued on herein evidenced a single debt. The three comakers, the Butlers and defendant, became jointly and severally obligated for the payment thereof. Daniel on Negotiable Instruments, Seventh Edition, Vol. 1, § 109; G.S. 25-23(7). The acceleration clause relates to the debt. Whatever the maturity date, it was the same for all comakers. The acceleration clause did not contemplate an exercise of the option by the legal holder as to two comakers but not as to all. Affirmative action constituting an election by the legal holder to accelerate the maturity as to two comakers accelerated the maturity in like manner as to all comakers.

We are of opinion, and so decide, that plaintiff exercised its acceleration option as to defendant as well as to the Butlers on June 20, 1957, by the institution of said Tennessee action against the Butlers. Thus, the entire indebtedness of defendant to plaintiff became due on June 20, 1957, more than three years prior to the date this action was commenced, and plaintiff's action in respect of the entire indebtedness evidenced by said note is barred by the three-year statute of limitations. For the error indicated, the judgment of the court below is vacated and the cause is remanded for judgment in accordance with the law as stated herein.

Error and remanded.

MARY RUTH NIXON v. LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 31 October 1962.)

1. Insurance § 61—

Where insurer has given notice to insured of cancellation of an assigned risk policy for nonpayment of premium, specifying the date such cancellation would be effective, the notice being in strict conformity with G.S. 20-310, a passenger injured in an accident while the vehicle was being operated by insured after the effective date of the cancellation may not hold insurer liable, notwithstanding that notice of the cancellation is not given to the Commissioner of Motor Vehicles until after the date of the accident causing the injury.

2. Same—

The fact that insurer, after notice to insured of the effective date of cancellation for nonpayment of premium, gives to the Commissioner of Motor Vehicles notice of cancellation effective as of a different date, does not constitute a waiver and does not estop insurer from asserting cancellation as a defense to an action on the policy.

APPEAL by plaintiff from *Pless, J.*, May 21, 1962, Regular "B" Civil Term of MECKLENBURG.

Action to recover benefits under the provisions of an automobile liability insurance policy.

The parties waived trial by jury and submitted the case for the court's determination upon an agreed statement and stipulation of facts.

The facts stipulated are summarized as follows:

On 16 January 1960 defendant insurance company issued to James Henry Johnson (insured) an automobile liability insurance policy covering a Chevrolet automobile owned by insured. The policy was issued to insured as a "non-certified assigned risk" (G.S. Ch. 20, Art. 13), and defendant delivered a Form FS-1 to the Commissioner of Motor Vehicles. At the time the policy was issued insured paid initial premium of $50.00, but paid no premium thereafter. On 6 April 1960 a premium of $29.65 was due and unpaid. On that date defendant, in strict compliance with the provisions of G.S. 20-310 (with reference to giving notice of cancellation *to insured*), mailed to insured a notice of cancellation of the policy for nonpayment of premium, fixing 26 April 1960 as the effective date of cancellation. On 14 May 1960 Mary Ruth Nixon, plaintiff herein, was injured while riding as a guest passenger in the automobile in question, and while it was being operated by insured. On 16 May 1960 insured delivered to defendant at its office in Charlotte a report of the accident in which plaintiff was injured; in less than an hour the report was refused and returned to

insured. On 16 May 1960 defendant mailed from its office in Atlanta, Georgia, to the Commissioner of Motor Vehicles Form FS-4 stating that the policy had been cancelled as of 4 May 1960. The insurance agent (not an agent of defendant) through whom the insurance policy had been procured advised insured by mail on 17 May 1960 that he had received a premium refund for insured, and asked insured to stop by and see him. In July 1960 the agent mailed to insured the refund of $28.18. On 24 May 1960 insured received by mail from the Commissioner of Motor Vehicles Form FS-5, notifying him that the insurance on his automobile had ended. On 2 June 1960 plaintiff instituted suit against insured to recover damages for personal injuries. Defendant was given notice of the suit but refused to defend. A consent judgment for $5,000 and costs was entered in plaintiff's action on 20 July 1960. Execution against insured was returned unsatisfied.

No part of the judgment has been paid. Plaintiff demanded payment of defendant, and defendant refused. Plaintiff then instituted the present action.

The court adjudged that "plaintiff is not entitled to the relief sought," and dismissed the action.

Plaintiff appeals.

Welling, Welling & Meek for plaintiff.

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

MOORE, J. This case was here previously. *Nixon v. Insurance Co.*, 255 N. C. 106, 120 S.E. 2d 430. On that appeal the question as to whether the policy was in force at the time of the accident was left open. The legal questions there involved do not arise on this appeal.

The record now before us contains the following stipulations: "The plaintiff concedes that if the cancellation of the . . . policy . . . was effective, she is not entitled to recover . . . ," and "The defendant concedes that if the cancellation . . . was not effective, it is liable to the plaintiff . . . ."

It was further stipulated that the policy was issued to James Henry Johnson as a "non-certified assigned risk," that is, his insurance was issued in conformity with the Vehicle Financial Responsibility Act of 1957 (G.S., Ch. 20, Art. 13). "Under the 1957 Act a person, though his driver's license has not been suspended, may, if he is unable to obtain liability insurance through regular channels, apply for and procure such insurance through the Assigned Risk Plan." *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303. See G.S. 20-279.34 and G.S. 20-314. In determining whether there was an effective cancel-

lation of the policy in the instant case, inquiry is whether there was compliance with the requirements of G.S. 20-310. The provisions of G.S. 20-310, pertinent to this appeal, are as follows:

> "No contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew by the insurer until at least fifteen (15) days after mailing a notice of termination to the named insured at the address shown on the policy. Time of the effective date and hour of termination stated in the notice shall become the end of the policy period. . . . Upon the termination of insurance by cancellation or failure to renew, notice of such cancellation or termination shall be mailed by the insurer to the Commissioner of Motor Vehicles not later than fifteen (15) days following the effective date of such cancellation or other termination."

The crux of plaintiff's contention is that the provision of G.S. 20-310 requiring notice of cancellation (Form FS-4) to be "mailed by the insurer to the Commissioner of Motor Vehicles not later than fifteen (15) days following the effective date of such cancellation" is a condition of effective cancellation, that this provision was not complied with and the policy was in force and effect on 14 May 1960, the date of the accident in question. We do not agree.

It was stipulated that the notice of cancellation *to insured* fully complied with the requirements of the statute, that notice was mailed to insured on 6 April 1960, fixing the effective date of cancellation as 26 April 1960. The statute states that "Time of the effective date and hour of termination stated in the notice (to insured) shall become the end of the policy period." This is crystal clear; the cancellation was effective on 26 April 1960 at the hour stated in the notice. Neither defective notice, nor failure to give notice, *to the Commissioner* affects the validity or binding effect of the cancellation; the notice to the Commissioner serves an entirely different purpose. The statute provides for notice to the Commissioner "upon the termination of insurance by cancellation." Hence, the policy is terminated before notice is sent to the Commissioner. Notice to the Commissioner *follows* cancellation. Notice of cancellation could not be mailed to the Commissioner if there had been no cancellation. The language of the statute relative to notice of cancellation to the Commissioner is in sharp contrast with the provision relating to notice to insured. The notice to Commissioner is for the purpose of alerting him to the fact that the motor vehicle owner no longer maintains financial responsibility, and that owner's registration and license plates are subject to recall. We said in the *Faizan* case: "It is true that the provisions for

notice of termination under the 1957 Act (G.S. 20-310) do create the possibility of a hiatus of fifteen days or more in insurance coverage . . . . We believe the Legislature was advertent to this possibility and accepted it as the lesser of two hardships." Cancellation of a policy is not conditioned upon the statutory notice to Commissioner.

In all material respects our 1957 Act was copied from the New York statute. And the provisions of the New York law relative to notices of cancellation are the same as in our statute, except for minor variations not material in this case. The decisions of the New York courts on the very question under consideration in this case are in accord with our opinion herein: *Kyer v. General Casualty Co. of America,* 218 N.Y.S. 2d 185 (1961); *Caristi v. Home Indemnity Co.,* 202 N.Y.S. 2d 340 (1960); *Allstate Ins. Co. v. Altman,* 191 N.Y.S. 2d 270 (1959). Decisions from the other jurisdictions are of little authoritative value because of the differences in the statutes involved. However, we find no cases which are even persuasively contrary to our views. The cases cited by plaintiff are either not in point or easily distinguishable.

Plaintiff pleads estoppel and waiver. She contends that defendant is estopped from asserting cancellation as of 26 April 1960 by its act of preparing and filing Form FS-4 with the Commissioner, showing a later termination. This contention is not sustained. The facts stipulated do not contain the essential elements of estoppel. *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824. Nor has defendant waived its right to insist that there was a cancellation. The requisites of a waiver do not appear. *Green v. Patriotic Order,* 242 N.C. 78, 87 S.E. 2d 14.

The Judgment below is

Affirmed.

STATE v. CHARLES LEE.

(Filed 31 October 1962.)

1. Assault and Battery § 8—

The proprietor, or person in possession of a store, is not under duty to retreat in the face of a threat by another to take property from the store, and is justified in using such force in defense of the property as the violence of the attack warrants, but the necessity of using such force need not be actual, it being sufficient if the danger be such as to induce a reasonable man to believe that force is necessary, since the right to use force in defense of property obtains upon necessity either real or apparent.

2. Assault and Battery § 15—

Where defendant's evidence is to the effect that while he was in his store waiting on customers a patron in an intoxicated condition entered and requested beer, and, after being told that it was after hours for the sale of beer, stated that he was going to have some beer anyway and started around the counter toward defendant, when defendant hit him with a stick, an instruction to the effect that defendant's plea as to defense of property had to rest upon real necessity, rather than necessity, real or apparent, must be held for prejudicial error.

3. Assault and Battery § 11—

A warrant charging defendant with assault with a deadly weapon, to wit, a blackjack or some blunt instrument, is disapproved, since the nature of the weapon is charged disjunctively.

APPEAL by defendant from *Bundy, J.*, 17 June 1962 Term of LENOIR.

Criminal prosecution upon a warrant charging defendant on 21 April 1962 with unlawfully and wilfully assaulting Theodore Sutton "with a deadly weapon, to-wit, a blackjack or some blunt instrument," and inflicting upon him serious bodily injury on the left side of his head, heard *de novo* on appeal by defendant from the Municipal County Court of Lenoir County.

Plea: Not Guilty. Verdict: Guilty of a Simple Assault.

From a judgment of imprisonment for thirty days, execution of sentence of imprisonment suspended on condition that defendant pay to Theodore Sutton for his benefit $54.00, and the costs, he appeals.

J. Harvey Turner for defendant appellant.

Attorney General T. W. Bruton and Assistant Attorney General G. Andrew Jones, Jr., for the State.

PARKER, J. The State's evidence is to this effect:

About eleven o'clock p.m. on 21 April 1962 Theodore Sutton went into the defendant's store on the Greenville Highway to buy some ice cream. While a man was dipping up ice cream for him, the defendant came out of the back where drinks were kept, and struck Sutton on the back of his head with something that looked like a sawed-off pool stick handle, saying, "I told you to stay out of here." Sutton whirled around, and went out of the store. Sutton had had nothing to drink. Defendant had never told him to stay out of his store. Sutton's head was swollen as a result of the blow, and he had X-ray pictures taken of it. After Sutton left the store, defendant came out of his store whirling a pistol around in his hand.

Defendant's evidence is to this effect: Theodore Sutton came into his store about midnight, and wanted to buy some beer. He appeared

to be drinking. He told Sutton it was after hours, and he couldn't sell him any beer. He was waiting on someone else, and Sutton came back and said, "I want some beer." He told Sutton again it was after beer hours, and he couldn't sell him any. Sutton replied, "I am going to have some beer," and he was coming around the counter, and defendant hit him with a stick about 18 inches long and not larger than a finger. He hit Sutton one time. "He acted as if he was coming around the counter toward me when I hit him." Defendant on direct examination testified: "The reason I hit him is because I wouldn't sell him beer, and I thought he was coming on me, and I did it to protect myself. This was my store, and I was standing behind the cash register at the end of the counter. He was standing facing me on the other side of the cash register." Defendant testified on cross-examination: "He insisted that I sell him beer, and he was coming around the counter. I had never seen him before.* * *The only thing he said was that he was going to take some beer."

Christine Washington, a witness for defendant, testified: "This fellow [Sutton] came in. He told Charles Lee he wanted some beer. Charles Lee told him he couldn't sell him no beer because it was after hours. He told Charles he wanted some beer. The boy was going around the corner toward Mr. Lee and then he hit him with a stick."

Wesley Creech, a witness for defendant, testified: "He [defendant] told him [Sutton] he couldn't sell him any that it was after beer hours, and he turned to go around the counter where Mr. Lee was and Mr. Lee hit him with a short stick."

Thomas Whitley, a witness for defendant, testified: "It was about 12 o'clock. This fellow came in and wanted beer. Mr. Lee told him it was too late to buy beer. We were busy waiting on people and he came up again and said he wanted some beer—said it wasn't too late. He told him he couldn't get it that it was too late, it was after beer hours. He told him he was going to have some beer anyway and he turned. He was standing here and he came up behind coming back of the counter where Mr. Lee was standing and Mr. Lee picked that stick up and hit him."

As an incident to the indubitable right to acquire and own property, recognized by the Constitution of North Carolina and the Constitution of the United States, a person in possession of property, either as owner, or as the agent or servant of the owner, has the legal right to defend and protect it from threatened and impending injury or destruction at the hands of an aggressor, or if it is personal property, to prevent it from being unlawfully taken, or injured, or destroyed by another, and in doing so he may use such force as is reasonably necessary, and no more than is reasonably necessary, to accomplish this

end, subject to the qualification that, in the absence of a felonious use of force on the part of the aggressor, human life must not be endangered or great bodily harm inflicted. *Bailey v. Ferguson,* 209 N.C. 264, 183 S.E. 275; *Curlee v. Scales,* 200 N.C. 612, 158 S.E. 89; *S. v. Scott,* 142 N.C. 582, 55 S.E. 69; *S. v. Yancey,* 74 N.C. 244; *S. v. Morgan,* 25 N.C. 186, 38 Am. Dec. 714; *Com. v. Donahue,* 148 Mass. 529, 20 N.E. 171, 2 L.R.A. 623, 12 Am. St. Rep. 591 (opinion by Holmes, J.); *S. v. Shilling,* Mo. App., 212 S.W. 2d 96; *Ryerson v. Carter,* 92 N.J. Law 363, 105 A. 723, affirmed 93 N.J. Law 477, 108 A. 927; 6 C.J.S., Assault and Battery, secs. 20 and 94; 4 Am. Jur., Assault and Battery, secs. 61-73; Wharton's Criminal Law and Practice, Anderson Ed., secs. 353 and 354; Annotations: 25 A.L.R. 508, 537-564, 32 A.L.R. 1541, 34 A.L.R. 1488. "To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned." *Com. v. Donahue, supra.*

Blackstone says: "In defense of my goods or possession, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away.* * *And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit,* for this purpose." 3 Bl. Com. 121.

Ordinarily, whether the force used in the defense of property is greater than the circumstances of the case justify or the violence of the attack warrants is for the jury to determine. *Curlee v. Scales, supra; S. v. Goode,* 130 N.C. 651, 41 S.E. 3; *S. v. Taylor,* 82 N.C. 554; Annotation: 25 A.L.R. 548.

"To justify a resort to force in defense of property, the danger should be such as to induce one exercising reasonable and proper judgment to interfere to prevent the consummation of the injury; the mere suspicion or fear of encroachment is not justification for the use of force. The necessity, however, need not be real; it need be only reasonably apparent and the resistance offered be in good faith." 6 C.J.S., Assault and Battery, sec. 94, p. 951.

The first and essential element of the establishment of a perfect self-defense is the necessity, actual or apparent, for the exercise of the right. *S. v. Francis,* 252 N.C. 57, 112 S.E. 2d 756; *S. v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892; *S. v. Goode,* 249 N.C. 632, 107 S.E. 2d 70; *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427.

No duty to retreat devolves upon a person who is assailed, without any fault of his own, in his home or place of business or on his premises.

S. v. Francis, supra; S. v. Frizzelle, 243 N.C. 49, 89 S.E. 2d 725; *S. v. Walker,* 236 N.C. 742, 73 S.E. 2d 868.

Defendant's evidence would permit a jury to find that about midnight on 21 April 1962 Theodore Sutton, who had been drinking, went into defendant's store, and said he wanted some beer. After defendant told him twice he couldn't sell him beer, because it was after beer hours, Sutton said "he was going to take some beer," and was going around the counter where defendant was standing behind the cash register, when defendant hit him with a short stick not larger than a finger. Defendant's evidence was sufficient to entitle him to have his plea of self-defense of his property and person passed upon by a jury under proper instructions by the court. *S. v. Miller,* 221 N.C. 356, 20 S.E. 2d 274.

Defendant assigns as error this part of the charge: "I charge you that a person has a right in his own business or store to protect himself, or his place of business from the attack of another, or to prevent an unlawful act being committed. So, if you find from the evidence and beyond a reasonable doubt that the defendant at the time and place in question assaulted Theodore Sutton with a deadly weapon, and that it was not done in self-defense, or in defense of his business, then you would return a verdict of 'Guilty.'"

The assignment of error is valid. The judge's charge was to the effect that the defendant's plea of self-defense must rest upon real necessity, and not upon necessity, real or apparent. The law in this State is thoroughly settled that the plea of self-defense rests upon necessity, real or apparent. *S. v. Francis, supra; S. v. Fowler, supra; S. v Goode,* (249 N.C. 632, 107 S.E. 2d 756); *S. v. Terrell, supra; S. v. Marshall, supra.*

The Attorney General with his usual candor admits that "the adequacy of his Honor's charge on the issue of self-defense is admittedly subject to question."

The allegation in the warrant, "with a deadly weapon, to-wit, a blackjack or some blunt instrument," is bad pleading and disapproved, because the description of the deadly weapon is charged disjunctively. *S. v. Helms,* 247 N.C. 740, 102 S.E. 2d 241; *S. v. Jones,* 242 N.C. 563, 89 S.E. 2d 129; *S. v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81; 42 C.J.S., Indictments and Informations, sec. 101.

For error in the charge defendant is entitled to a new trial, and it is so ordered.

New trial.

MYRTLE APARTMENTS, INC. v.
LUMBERMEN'S MUTUAL CASUALTY COMPANY.

(Filed 31 October 1962.)

1. Pleadings § 2—

Plaintiff has the burden of stating the facts constituting his cause of action, which he may do either upon actual knowledge or upon information and belief, but plaintiff may not allege that he does not have sufficient information to form a belief concerning certain facts, and then allege such facts upon information and belief, since the averments nullify each other, G.S. 1-145.

2. Same—

Plaintiff must allege the facts constituting the basis of his cause of action, and allegations amounting to mere conclusions must be ignored.

3. Fraud § 3—

Fraud must be based upon a false representation of fact with knowledge of its falsity, or reckless indifference as to its truth or falsity, with intent to deceive, and cannot be based upon a mere recommendation or opinion.

4. Fraud § 8—

Allegations that defendant insurer stated certain facts with respect to the condition of plaintiff insured's boiler and recommended upon such facts that the boiler be replaced, together with allegations that plaintiff did not have sufficient knowledge to form a belief as to the facts relating to the condition of the boiler, are insufficient to state a cause of action for fraud, plaintiff's conclusion that it was induced to install a new boiler by the false representations of defendant not being supported by allegation of the predicate facts.

5. Negligence § 20—

Allegations that defendant's engineer inspected plaintiff's boiler "in a negligent and careless manner" *held* a mere conclusion and insufficient to raise the issue of negligence.

6. Pleadings § 19—

Upon sustaining a demurrer for failure of the complaint to allege sufficient facts to constitute a cause of action, the action should not be dismissed since plaintiff must be given opportunity to amend.

APPEAL by plaintiff from *McConnell, S. J.*, June 1, 1962, Special "B" Civil Term, MECKLENBURG Superior Court.

In this civil action the plaintiff seeks to recover the sum of $10,493.99, the cost of a new boiler which the plaintiff alleged it was induced to install in its apartment building by the false representation of the defendant that the old boiler was defective and needed replacing. The plaintiff further alleged the inspection of the old boiler was negligently made and that in fact it was, "in all respects, sound

and in proper working condition." The plaintiff held the defendant's policy of insurance against damages resulting from the accidental explosion of the boiler.

After preliminary orders, on demurrer and motions to make more definite, the plaintiff filed its second amended complaint, to which it attached by order of the court the engineer's inspection report. The report, here quoted in full, is the foundation upon which the plaintiff seeks to base its right to recover:

"8XL 61 34 — Myrtle Apts., 1121 Myrtle Avenue
Charlotte, Mecklenburg County, North Carolina
"Aart Van Malssen December 10, 1959
"NC 4301 Fitzgibbon Fire Box Type Steam Heating Boiler
"Difficulty had been reported in regards to the above boiler. Our engineer made an inspection to determine the cause of leakage, which from information received, started about two weeks ago.
"This leakage was found to be at the left rear side of the boiler; it was noted that a crack had developed in the weld between the mudring and waterleg. The crack was properly repaired by the Queen City Engineering Company, a local concern, and a subsequent watertest proved the repair to be sound and tight.
"This investigation also revealed the metal of the mudring and waterleg to be rather thin. Therefore, the possibility exists that pinholes or other cracks may develop in the not too distant future. In order to prevent a possible shut-down at this time of the year, due to pinholes, we suggest that the boiler be 'doped,' this of course does not strengthen the boiler, but the 'dope' will fill in any small pinholes or cracks and will probably enable you to finish out this cold season without shut-down and inconvenience to the tenants.
"This boiler is 21 years old, and has outlived its normal life expectancy. The tubes as previously reported, are in rather poor condition. In the past, plates have been bulged, the staybolts have pulled through. The general condition of the boiler is poor. It is, therefore, recommended that this boiler be replaced with a new or better one of standard construction as soon as this heating season is over.
"Your cooperation will be appreciated.
Lumbermen's Mutual Casualty Co.
By: N. C. Horton, Jr., Supervising Engineer, Boiler & Machinery Departments."

The defendant demurred upon the ground the second amended complaint fails to state a cause of action. From a judgment sustaining the demurrer and dismissing the action, the plaintiff appealed.

Dockery, Ruff, Perry, Bond & Cobb by William H. McNair, for plaintiff, appellant.

Carpenter, Webb & Golding, by William B. Webb, for defendant, appellee.

HIGGINS, J. In testing the sufficiency of a complaint, the court ignores the conclusions and looks to the facts. Here, the plaintiff alleged: "The boiler was in all respects sound and in proper working condition"; and that the defendant, through its engineer, represented that, "The general condition of the boiler is poor. It is, therefore, recommended that this boiler be replaced with a new or better one of standard construction as soon as this heating season is over."

With respect to the further representations in the letter, the plaintiff alleged: "And as to the remaining representations and contents of said letter, plaintiff does not have sufficient information to form a belief concerning the same and therefore, on information and belief, the plaintiff alleges that each and every statement contained in said letter was untrue and false." The allegation that every other statement in the letter is untrue and false is cancelled out by the prior statement that the plaintiff does not have sufficient information to form a belief with respect to them.

In stating his cause of action a plaintiff has the laboring oar. He may allege facts based on actual knowledge, or upon information and belief. A defendant's position is defensive. He may deny generally, i.e., upon actual knowledge, or upon information and belief, or that he has sufficient knowledge or information to form a belief. A denial in either form puts the plaintiff to his proof. But when a plaintiff alleges he does not have sufficient knowledge or information to form a belief as to particulars, he disqualifies himself to allege them as facts. McIntosh on Pleadings, 2d Ed., Vol. 1, § 983; *Linker v. Linker,* 167 N.C. 651, 83 S.E. 736; G.S. 1-121; G.S. 1-145.

The plaintiff owned and operated the boiler. The defendant insured it against accidental explosion. Both parties were interested in eliminating this danger. The right of the insurer to inspect is not challenged. The duty to report the results of the inspection and to recommend corrective measures, if needed, follows as a matter of course. Was the boiler 21 years old? Had a leak developed in the weld between the mudring and waterleg? Had it outlived its normal life expectancy? Had the poor condition of the tubes been reported? All of these findings by the engineer were, or should have been, known to the plaintiff,

who voluntarily carried out the recommendation. What would have been the result otherwise, no one knows.

The defendant was not interested in the sale of a new boiler. Its only interest was to reduce the risk. This interest the plaintiff shared. The engineer's report shows it to be a recommendation for a new boiler upon the basis of what the examination revealed, all of which was set forth. "The general rule is that the mere expression of an opinion or belief, or more precisely a representation which is nothing more than the statement of an opinion, cannot constitute fraud. 37 C.J.S., 226, citing cases from the Federal courts and from the appellate courts of 26 of the States, including the case of *American Laundry Machinery Co. v. Skinner*, 225 N.C. 285, 34 S.E. 2d 190." *Lester v. McLean*, 242 N.C. 390, 87 S.E. 2d 886. To constitute fraud, there must be false representation, known to be false, or made with reckless indifference as to its truth, and it must be made with intent to deceive. *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202; *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5. The plaintiff's factual allegations do not raise an issue of fraud.

The plaintiff alleged the engineer inspected the boiler "in a negligent and careless manner." This is a conclusion and not an allegation of facts. The allegation is insufficient to raise an issue of negligence. *Etheridge v. Power & Light Co.*, 249 N.C. 367, 106 S.E. 2d 560; *Shives v. Sample*, 238 N.C. 724, 79 S.E. 2d 193; *Citizens Bank v. Gahagan*, 210 N.C. 464, 187 S.E. 580.

The second amended complaint fails to state a cause of action. The demurrer was properly sustained. However, by filing a third amended complaint, the plaintiff may be able to state some cause of action. *Davis v. Rhodes*, 231 N.C. 71, 56 S.E. 2d 43. At least the contrary does not appear as a matter of law. The judgment will be modified by striking that part which dismisses the action. The plaintiff will be permitted to amend.

Modified and affirmed.

STATE v. VERNON KEZIAH.

(Filed 31 October 1962.)

1. Criminal Law § 102—

A fatal variance between the indictment and proof is properly raised by motion for judgment as of nonsuit.

2. Perjury § 5—

Where the indictment charges defendant with having falsely sworn that he did not buy whiskey from named persons, but the State's evidence is to the effect that defendant testified at that trial that he did not buy whiskey in a specified house, there is a fatal variance between the indictment and proof and nonsuit should be allowed, notwithstanding evidence of defendant's false swearing in other particulars not set forth in the indictment.

APPEAL by defendant from *Froneberger, J.*, July 9, 1962, Regular Schedule "A" Criminal Term of MECKLENBURG.

Criminal prosecution on indictment charging that defendant, on June 8, 1962, "did feloniously, wilfully and unlawfully commit perjury upon the trial of an action in the City of Charlotte, Mecklenburg County, North Carolina, Recorder's Court wherein Johnny Johnson and Charles Erwin were defendants and the State of North Carolina was plaintiff by falsely asserting on oath or solemn affirmation that he did not purchase liquor from said Johnny Johnson and Charles Erwin, the said matter so testified to as aforesaid being material to said issue being tried in said action, knowing said statement or statements to be false or being ignorant whether or not said statements were true," against the form of the statute, etc.

Evidence offered by the State (the only evidence) tends to show: On June 8, 1962, in the Recorder's Court of Charlotte, two cases, one against Johnny Johnson and the other against Charles Erwin, were called and consolidated for trial. The warrants on which Johnson and Erwin were tried are not in evidence. There is testimony that each was charged with "violating the liquor law" and other testimony that each was being tried for "sale of illegal whiskey." Keziah, the present defendant, was called as a State's witness and was duly sworn. Verdicts of not guilty were entered as to Johnson and Erwin.

The evidence tends to show that Keziah testified at said trial in said Recorder's Court substantially as follows: That on the date (night) referred to in the warrants he went to a house at 237 North Cedar Street, Charlotte, to see friends and there talked with Johnson and Erwin; that before going to said house he had had no conversation with Lieutenant Shuler of the Charlotte Police Department; that Shuler did not give him a marked (exhibited) $5.00 bill with which to go to a house on Cedar Street and purchase a pint of whiskey from Johnson and Erwin; that he did not go into a house on Cedar Street and purchase a pint of whiskey; that "he had not taken any money from Lieutenant Shuler and . . . did not go and buy any whiskey in that house"; and (referring to a pint bottle of whiskey about three-fourths full exhibited to him) that "he had not bought that liquor in

that house" and "had not turned that over to Lieutenant Shuler."

There was no evidence, direct or circumstantial, that Keziah purchased "liquor" from Erwin. There was no direct evidence that Keziah purchased "liquor" from Johnson. There was circumstantial evidence sufficient to support a finding that Keziah, with a $5.00 bill given to him by Shuler, had purchased from Johnson the (exhibited) bottle of whiskey.

Upon the jury's verdict, "guilty as charged," the court pronounced judgment imposing a prison sentence. Defendant appealed and assigns as error the denial of his motion for judgment as of nonsuit.

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

Ledford & Ledford for defendant appellant.

BOBBITT, J. Defendant contends *inter alia* that, with reference to what Keziah testified in the Recorder's Court, there is a fatal variance between the indictment and the proof. This question is properly presented by defendant's motion for judgment as of nonsuit. *S. v. Hicks,* 233 N.C. 31, 62 S.E. 2d 497, and cases cited; *S. v. Law,* 227 N.C. 103, 40 S.E. 2d 699, and cases cited.

". . . a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, and cases cited. "The evidence must correspond with the charge and sustain it, at least in substance, before there can be a conviction." *S. v. Forte,* 222 N.C. 537, 23 S.E. 2d 842.

"In a prosecution for perjury or false swearing, the matter sworn to must be proved substantially as alleged, and a material variance in this respect is fatal." 70 C.J.S., Perjury § 50(g); 41 Am. Jur., Perjury § 55; *S. v. Bradley,* 2 N.C. 403, and s.c., 2 N.C. 463; *S. v. Groves,* 44 N.C. 402; *S. v. Davis,* 69 N.C. 383.

The State was required to establish *inter alia* that Keziah testified in the Recorder's Court of Charlotte as charged in the bill of indictment. *S. v. Lucas,* 247 N.C. 208, 212, 100 S.E. 2d 366. The indictment charges that defendant testified "he did not purchase liquor from said Johnny Johnson and Charles Erwin." Defendant contends the State offered no evidence that Keziah so testified and that in this respect the proof does not fit and support the allegation. *S. v. Gibson,* 169 N.C. 318, 85 S.E. 7. We are of opinion, and so decide, defendant's said contention is sound and that his motion for judgment as of nonsuit should have been allowed for fatal variance between the indictment and the proof.

There is ample evidence that Keziah's testimony in certain respects

was false, particularly his testimony that he did not receive from Shuler the marked $5.00 bill and his testimony that he did not deliver the pint bottle of whiskey to Shuler. But we find no evidence that Keziah testified he did not purchase liquor from Johnson and Erwin or from either of them. Keziah's testimony that he did not buy any whiskey "in that house" does not fit and support the crucial allegation in the perjury indictment, namely, that he falsely asserted on oath "that he did not purchase liquor from said Johnny Johnson and Charles Erwin." The applicable rule is well stated in the *per curiam* opinion in *S. v. Bradley*, 2 N.C. 463, decided in 1797, as follows:". . . where the sense and meaning of the words set down in the indictment is precisely the same with those proven in the evidence, though not the very same words, such evidence will support the indictment; but then the meaning must be evidently and clearly the same, without the help of any implication or anything extrinsic." Here, as in *S. v. Bradley, supra,* "(t)he words contained in the evidence are not necessarily of the same sense and meaning with those laid."

We need not consider other contentions advanced by defendant as additional grounds for judgment as of nonsuit.

Reversed.

WILLIAM K. SPARKS v.
JAMES R. PURSER AND WIFE, LOTTIE R. PURSER.

(Filed 31 October 1962.)

Brokers and Factors § 6—

Plaintiff broker's evidence to the effect that he was given a nonexclusive listing of defendant's property, that he contacted a prospective buyer but was never able to get an unqualified offer from the prospect for the price stipulated, that the seller thereafter gave the exclusive listing to another broker, and that the prospect thereafter purchased through such other broker, to whom the seller paid the full commission, *is held* insufficient to be submitted to the jury in plaintiff's action to recover commissions.

APPEAL by plaintiff and by defendant James R. Purser from *Riddle, S. J.*, April 9, 1962 Special "B" Term, MECKLENBURG Superior Court.

The plaintiff, a real estate broker, instituted this civil action to recover $1,825.00 commission on the sale of a house and lot on Queen's Road, West, in Charlotte. The defendants, by answer, denied the plaintiff had any exclusive listing of the Queen's Road house and lot,

or that he produced a purchaser, ready, able and willing to buy at the price fixed by the owners.

The evidence, in short summary, disclosed the following: At the time the defendants listed the house and lot with the plaintiff, they informed him that other realtors also had the listing. In addition, they reserved the right to make a sale themselves. Prior to the nonexclusive listing, the defendants had been in touch with the subsequent purchasers, Lawrence V. Senn and wife, although the negotiations had been suspended. As a result of the plaintiff's ad in the paper, the Senns began and carried on with the plaintiff negotiations for the purchase of the Queen's Road property. These negotiations also included a sale of the Senn's home. The plaintiff, however, was not able to close a contract with the Senns. The defendants thereafter, without notifying the plaintiff, gave an exclusive listing to the Withrow Agency which displayed a "for sale" sign on the lot. The Senns saw this sign and thereafter through the Withrow Agency, they closed a contract and purchased the Queen's Road house and lot at the price fixed by the defendants. The plaintiff was never able to secure an unqualified offer of $36,500 from the Senns or anyone else. The defendants paid the Withrow Agency the full commission of $1,825.00.

At the conclusion of the evidence the court dismissed the action against Lottie R. Purser, then submitted issues which the jury answered as here indicated:

"1. Did the defendant, James R. Purser, list the property at 1446 Queens Road West with the plaintiff for sale, as alleged in the complaint, and authorized him to sell it at a price of $36,500?

Answer: Yes.

"2. If so, did the defendant wrongfully breach said contract with the plaintiff?

Answer: Yes.

"3. If so, what amount is plaintiff entitled to recover of the defendant?

Answer: $912.50."

From the judgment on the verdict that the plaintiff recover of the defendant James R. Purser the sum of $912.50, both parties appealed.

Welling, Welling & Meek for plaintiff.

Ray Rankin, Henry E. Fisher for defendant.

HIGGINS, J. Both the plaintiff and the defendant James R. Purser appealed. The defendant assigns as error the refusal of the court to grant his motion for nonsuit at the close of all the evidence. The plain-

tiff assigns as error the refusal of the court to set aside the verdict on the third issue for that the jury having found the parties entered into a contract which the defendant breached, the court as a matter of law should have answered the third issue $1,825.00.

The evidence disclosed that originally the defendants and the Senns had some negotiations looking toward the sale of the Queen's Road property. The negotiations were dropped. The Senns saw the plaintiff's advertisement and undertook to purchase the defendant's house and lot. However, the negotiations also involved a sale of the Senn's home. Before any final and binding offer was obtained by the plaintiff, the defendant apparently gave an exclusive listing to the Withrow Agency. The Senns saw Withrow's sign displayed on the lot and thereafter they negotiated with Withrow and closed the sale at the seller's price of $36,500.00 The plaintiff, never, at any time, was able to obtain an unqualified offer from the Senns or anyone else to pay the price fixed.

The plaintiff admitted he did not have an exclusive listing. He did not introduce evidence that he obtained an unqualified offer from a purchaser, ready, able and willing to pay $36,500.00. "It is the established law in this jurisdiction that a real estate broker is not entitled to commissions or compensation unless he has found a prospect, ready, able and willing to purchase in accordance with the conditions imposed in the broker's contract . . ." *Ins. Co. v. Disher,* 225 N.C. 345, 34 S.E. 2d 200. ". . . commissions are based upon the contract of sale." *Trust Co. v. Adams,* 145 N.C. 161, 58 S.E. 1008; *White v. Pleasants,* 225 N.C. 760, 36 S.E. 2d 227; *Banks v. Nowell,* 238 N.C. 737, 78 S.E. 2d 761; *McCoy v. Trust Co.,* 204 N.C. 721, 169 S.E. 644.

This is not a case in which the owner went behind the broker's back to take advantage of his efforts, then closed the sale himself in order to escape a broker's commission justly earned, as in *Cromartie v. Colby,* 250 N.C. 224, 108 S.E. 2d 228. The sale was negotiated by Withrow, to whom the defendant paid full commission. The evidence did not make out a case for the jury. Compulsory nonsuit should have been entered at the close of the evidence. This disposition makes it unnecessary to discuss plaintiff's appeal. The judgment of the superior court is

Reversed.

THOMAS JEFFERSON JENKINS v.
ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 31 October 1962.)

1. Appeal and Error § 51—

Judgment of nonsuit entered in a negligence action must be sustained if the evidence fails to show defendant's negligence or affirmatively shows plaintiff's contributory negligence as a matter of law.

2. Railroads § 5—

Plaintiff's evidence tending to show that he drove his tandem, 10-wheel truck into the side of defendant's diesel engine at a railroad crossing, without stopping before entering upon the track, *is held* to disclose contributory negligence barring recovery as a matter of law, notwithstanding evidence of defendant's negligence in failing to give warning of the train's approach by bell or whistle, since plaintiff was not justified under the circumstances in relying solely upon the absence of signal by bell or whistle.

APPEAL by plaintiff from *Bundy, J.*, April 23, 1962 Term, LENOIR Superior Court.

The plaintiff, by this civil action, sought to recover damages for the personal injury he received when he drove a 46,000-pound tandem, 10-wheel truck loaded with gravel into the side of the defendant's diesel engine pulling a freight train north. The collision occurred about ten o'clock on the morning of September 13, 1958, as the plaintiff, driving east on Eighth Street, attempted to cross the defendant's track.

The plaintiff alleged the Atlantic Coast Line Railroad Company was negligent (1) by operating its train at an excessive speed, (2) by failing to give warning of the train's approach, and (3) by permitting weeds and vines to obstruct his view to the south.

The defendant denied negligence in any of the particulars alleged and, as a bar to recovery, alleged that the plaintiff's injuries were caused exclusively, or at least were contributed to, by his own negligence in attempting to drive the truck across the track without first ascertaining whether a train approached.

The plaintiff offered negative evidence that a witness a block from the Eighth Street crossing did not hear any whistle or bell; that weeds and vines and buildings obstructed the view of the train's approach from the south except at a point very close to the track. All the evidence indicated the train was running 20-25 miles per hour; that stop signals were in place on Eighth Street; that the plaintiff was thoroughly familiar with the crossing, had actually driven over it on the morning of the collision as he had done on five or six daily trips for a considerable time prior to September 13. All the evidence tended to show the

plaintiff did not stop his truck but proceeded, or attempted to proceed, across the track and actually ran into the side of the moving engine, striking it at the rear steps after the front of the engine had cleared the crossing. Plaintiff was unable to remember anything about the accident.

The defendant's evidence was in sharp conflict with respect to any obstruction to the view of a train's approach from the south. The plaintiff introduced ample evidence of his injury.

At the close of all the evidence the court entered judgment of compulsory nonsuit, from which the plaintiff brings this appeal.

R. S. Langley, Robert D. Wheeler, for plaintiff, appellant.

Bland & Freeman, by W. Powell Bland, Wallace & Wallace, by F. E. Wallace, Jr., for defendant appellee.

HIGGINS, J. The record does not disclose the legal ground upon which the trial judge based the nonsuit. The judgment must be sustained, however, if the evidence fails to show the defendant's negligence or does affirmatively show the plaintiff's contributory negligence as a matter of law. *Carter v. R.R.*, 256 N.C. 545, 124 S.E. 2d 561. In passing on the sufficiency of the evidence to survive the motion for nonsuit, we must resolve all conflicts in the testimony in the plaintiff's favor. Assuming the trial court concluded, therefore, the evidence presented a jury question on the issue of the defendant's negligence, nevertheless the plaintiff's own evidence shows his contributory negligence as a matter of law. If, as his own witness testified, the view south along the track was obstructed, he knew about the obstruction. Reason is not suggested why he did not proceed one block further north along the highway which paralleled the railroad track and cross at the Seventh Street crossing as his witness Dickerson did on this same occasion. Dickerson was also hauling gravel from the same dump to the same delivery point for the same employer.

The evidence does not even suggest the plaintiff stopped to look or listen, but apparently trusted to blind luck and ran into the train. The noise of an engine pulling a 10-wheel truck, weighing 23 tons, should be enough to put the driver on guard not to rely solely on a whistle or a bell, especially at train time. The driver failed to use any sort of reasonable precaution for his own safety. His negligence appears as a matter of law. "It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them." *Godwin v. R.R.*, 220 N.C., 281, 17 S.E. 2d 137. See also, *Carter v.*

R.R., supra; Arvin v. McClintock, 253 N.C. 679, 118 S.E. 2d 129; *Irby v. R.R.,* 246 N.C. 384, 98 S.E. 2d 349.

For the reasons assigned, the judgment entered in the court below is Affirmed.

ZENO RATCLIFF, SR., v. EDWARD N. RODMAN, CHAIRMAN, BEAUFORT COUNTY BOARD OF ELECTIONS, THE BEAUFORT COUNTY BOARD OF ELECTIONS, THE INDIVIDUAL MEMBERS OF THE BEAUFORT COUNTY BOARD OF ELECTIONS, EDWARD N. RODMAN, ZENO RATCLIFF, JR., AND ALTON MILLS.

(Filed 31 October 1962.)

Appeal and Error § 6—

Plaintiff was denied the right to file as a candidate of his political party for nomination to a public office because of plaintiff's refusal to subscribe to the pledge as prescribed by G.S. 163-119. Plaintiff asserted that the requirement of the statute that he pledge himself to support all candidates of his party in the next general election was unconstitutional, and sought mandamus against the election officials to require them to place his name on the ballot. *Held:* The primary election having been held at the time of the hearing of the appeal, the appeal must be dismissed as academic.

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

APPEAL by plaintiff from *Paul, J.,* at Chambers in the City of Washton, County of BEAUFORT.

Petition for writ of mandamus.

The allegations of the complaint are summarized as follows:

Plaintiff is a resident and elector of Beaufort County, a member of the Republican Party in good standing, and is registered as a Republican. On 10 April 1962 plaintiff presented himself to the Chairman of the Board of Elections of Beaufort County and requested that he be permitted to file as a candidate, for nomination of the Republican Party for Beaufort County's Representative in the Lower House of the General Assembly of North Carolina, in the Primary Election of 26 May 1962. Plaintiff tendered the filing fee required by law, but was told that he could not lawfully file as a candidate unless he took and subscribed the pledge required by G.S. 163-119, as follows:

> "I hereby file my notice as a candidate for the nomination as Representative of Beaufort County in the General Assembly in the Primary Election to be held on the 26th day of May, 1962.

> I affiliate with the Republican Party, and I hereby pledge myself to abide by the results of said Primary and to support in the next General Election all candidates nominated by the Republican Party."

Plaintiff offered to sign the pledge if permitted to delete the words, ". . . and to support in the next General Election all candidates nominated by the Republican Party." The Chairman of the County Board refused to accept the altered pledge and refused to permit plaintiff to file unless he signed the pledge as required by the statute. Plaintiff protested that the pledge prevented the free exercise of the ballot by him and violated rights guaranteed to him by Article I, section 10, of the Constitution of North Carolina, and by the Fourteenth Amendment to the Constitution of the United States. Nevertheless, he was not permitted to file without signing the pledge. Plaintiff filed a petition with the State Board of Elections suggesting the unconstitutionality of the pledge requirement and insisting that it was his right to file without subscribing to the objectionable portion of the pledge. The State Board denied the petition. Plaintiff is without an adequate remedy to enforce his fundamental rights. Plaintiff prays for writ of mandamus "requiring the defendants (Beaufort County Board of Elections, including the Chairman) to permit the filing of the plaintiff" as candidate for said office "without the necessity of taking that portion of the pledge hereinbefore set out which undertakes to control his vote in the next General Election."

Defendants answered and admitted the material factual allegations of the complaint, but denied that plaintiff was entitled to the relief sought.

The court entered judgment on 11 August 1962, refusing to issue the writ and denying the relief prayed for.

Plaintiff appeals.

John A. Wilkinson for plaintiff.

L. H. Ross for appellees.

Attorney General Bruton and Assistant Attorney General Bullock, Amicus Curiae.

MOORE, J. The question plaintiff seeks to present on this appeal is academic. The sole relief sought by plaintiff is the issuance of a writ of mandamus requiring the Beaufort County Board of Elections "to permit the filing of plaintiff for the nomination of the Republican Party as Representative of Beaufort County in the Lower House of the General Assembly of the State of North Carolina without the necessity of taking" the pledge as provided for in G.S. 163-119. In

short, he desires to be a candidate in the Primary Election of 26 May 1962. That Election has been held. *Saunders v. Bulla,* 232 N.C. 578, 61 S.E. 2d 607; *Nance v. Winston-Salem,* 229 N.C. 732, 51 S.E. 2d 185; *Penland v. Gowan,* 229 N.C. 449, 50 S.E. 2d 182; *Rousseau v. Bullis,* 201 N.C. 12, 158 S.E. 553. Any attempt to grant relief at this juncture would avail him nothing. Should there be a determination on the merits favorable to plaintiff's contention, he could not be certified as the nominee of his Party. Who can say, had he been permitted to file, that one or more persons unfavorable to his candidacy would not also have filed? It is too late for him to become an official nominee of his Party.

Where the question presented to this Court for decision is academic, the prevailing practice is to dismiss the appeal. *Eller v. Wall,* 229 N.C. 359, 49 S.E. 2d 758; *Efird v. Comrs. for Forsyth,* 217 N.C. 691, 9 S.E. 2d 466.

Appeal dismissed.

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

WENDELL J. WALKER, MINOR, BY HIS NEXT FRIEND, JUANITA CAUDLE WALKER v. JAMES EDWARD BYRD

AND

SHELIA ANN WALKER, MINOR, BY HER NEXT FRIEND, JUANITA CAUDLE WALKER v. JAMES EDWARD BYRD.

(Filed 31 October 1962.)

Automobiles § 41m— Evidence of negligence in striking children running into street held sufficient to overrule nonsuit.

Evidence tending to show that defendant saw children standing at the side of the street apparently waiting for a vehicle to pass before crossing the street, that plaintiff assumed that the children would also wait for his car, traveling in the opposite direction, to pass, that plaintiff did not slacken speed or blow his horn, and that the children ran into the street from behind the other car into the path of defendant's car, one of them running into the side of defendant's car and the other being struck by defendant's left headlight, *is held* sufficient to be submitted to the jury on the issue of negligence, since defendant was not entitled to assume that the children would also wait the passing of his car but should have foreseen that they might run into the street in obedience to childish impulse.

WALKER *v.* BYRD.

APPEAL by defendant from *Gwyn, J.*, May 28, 1962 Civil Term of FORSYTH.

These two civil actions, brought in behalf of minor plaintiffs, were consolidated for trial. Defendant's motions for nonsuit, timely made, were overruled. Both plaintiffs recovered damages. Defendant's only assignment of error is to the failure of the court to nonsuit the actions.

The evidence taken in the light most favorable to the plaintiffs, is sufficient to establish the following facts:

The Piedmont Park section of Winston-Salem is a residential area on the north side of Twenty-eighth Street. It contains apartment houses where many children live. There is a play ground on the south side of Twenty-eighth Street. About 12:55 P.M. on August 27, 1960, the plaintiff, Wendell J. Walker, aged nine; his sister, the plaintiff Shelia Ann Walker, aged three; their older brother, Gary, aged twelve; and two other children, aged eight and two respectively, were on the north side of Twenty-eighth Street, a paved road twenty-four feet wide. The children were enroute to a store on Woodland Avenue which intersects Twenty-eighth Street from the south but does not cross it. The defendant, driving his automobile east on Twenty-eighth Street, approached the intersection at a speed of thirty miles per hour. At the same time, another car was approaching from the east.

Gary crossed to the south side of the street leaving the smaller children still on the north side. At that time they were fifteen or twenty feet north of the pavement and from seventy-five to one hundred feet east of Woodland Avenue if it had been extended. They prepared to follow Gary across the street. Nine-year-old Wendell had three-year-old Shelia by the hand. He testified that he first looked to the west and saw no car coming; that he then looked to the east and saw the car traveling west. As soon as that car passed, they "trotted" out into the street. Gary, who had observed the defendant when he was west of Woodland Avenue, "hollered for them to go back", but they did not hear him.

The left headlight of defendant's car hit Wendell, and Shelia ran into the side of the car. The impact occurred about seventy-five feet from the east line of Woodland Avenue and four feet north of the south line of Twenty-eighth Street. Splotches of blood marked this spot. Shelia was knocked up in the air and came down about where she struck the car. She suffered serious injuries; Wendell was not permanently injured.

Defendant told a motorist, who stopped at the scene to render assistance, that he saw the children wait on the other car and thought they would wait on him. He did not blow his horn or slow down. There were forty-five feet of skid marks west of the blood spots on the street.

From these spots the view to and from the west was unobstructed for one hundred to two hundred yards.

On the trial, defendant testified that he met a car going west; that as the car passed him, the children ran from behind it into the path of his vehicle; and that he had not seen them before.

Leake & Phillips, and W. Z. Wood for plaintiff appellee.
Deal, Hutchins and Minor for defendant appellant.

PER CURIAM. The duty which a motorist in this jurisdiction owes to children whom he sees, or in the exercise of proper care should see, on or near the highway, has been too often stated to need further elaboration here. For the purpose of this appeal we must, of course, accept the plaintiff's evidence as true. *High v. R.R.*, 248 N.C. 414, 103 S.E. 2d 498. Therefore, when the defendant saw the children apparently intending to cross the street but waiting on the car going west to pass, he could not assume that they would also wait on him. It becomes his duty "to use proper care with respect to speed and control of his vehicle, the maintenance of vigilant lookout and the giving of timely warning, to avoid injury, recognizing the likelihood of the child's running across the street in obedience to childish impulses and without circumspection." *Sparks v. Willis*, 228 N.C. 25, 44 S.E. 2d 343. He failed to perform these duties.

The ruling of the court below is

Affirmed.

STATE v. JAMES HOWARD TEDDER.

(Filed 31 October 1962.)

1. Parent and Child § 1—

A child born in wedlock is presumed legitimate regardless of the length of time between the date of the marriage and the date of the child's birth, which presumption can be rebutted only by proof that it was impossible that the husband could have been the child's father, and a witness is not competent to testify as to nonaccess when under the circumstances access could well have existed without knowledge of the witness.

2. Evidence § 15—

A witness is not competent to testify as to the nonexistence of a fact when his situation with respect to the matter is such that the fact might well have existed without the witness being aware of it.

STATE *v.* TEDDER.

APPEAL by defendant from *Gwyn, J.*, 5 March 1962 Term of FORSYTH.

This is a criminal action tried upon a warrant charging the defendant with the wilful failure to provide support for his minor child begotten upon the body of his lawful wife, Essie Tedder.

The State's evidence tends to show that the defendant James Howard Tedder married Essie Montgomery Tedder on 27 August 1960 and that a child was born on 27 January 1961; that defendant lived with his wife and child until April 1961 when the wife left defendant because he was "running around" with one Doris King and would not support her or the child.

The evidence further tends to show that Mrs. Tedder was between four and five months pregnant at the time she was married; that she informed the defendant prior to their marriage that she was pregnant; that he didn't say anything when she first told him she was pregnant. She testified that thereafter "he came over one day and wanted to know if I didn't think we ought to get married. * * * I told him, 'If you don't intend to make a home for me and the baby, I don't want to marry you,' * * *. He said he wanted to make a home for me and the baby, and he promised me if I would marry him that is what we would have."

The defendant undertook to introduce evidence of nonaccess which, in the opinion of the court, under the facts and circumstances, was inadmissible. The jury returned a verdict of guilty as charged. Judgment was entered on the verdict and the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General James F. Bullock for the State.

Harold R. Wilson for defendant.

PER CURIAM. "A child born in wedlock is presumed to be legitimate, and, as stated by Ruffin, C.J., in *S. v. Herman*, 35 N.C. 502, quoting from Coke on Littleton, this presumption exists, 'if the issue be born within a month or a day after marriage.' " *West v. Redmond*, 171 N.C. 742, 88 S.E. 341.

In the case of *Ewell v. Ewell*, 163 N.C. 233, 79 S.E. 509, this Court said: "Nothing is allowed to impugn the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been its father." *S. v. Green*, 210 N.C. 162, 185 S.E. 670.

The proffered testimony of the defendant's witnesses was properly excluded by the court below. It was not positive proof of the fact of nonaccess. In fact, it had no logical tendency to prove nonaccess.

"* * * (E)vidence must have some logical tendency to prove a fact

in issue in order to be competent. And a witness is not competent to testify as to the nonexistence of a fact when his situation with respect to the matter is such that the fact might well have existed without the witness being aware of it. * * *" Strong, North Carolina Index, Vol. II, Evidence, section 15, page 259; *Johnson v. R.R.*, 214 N.C. 484, 199 S.E. 704; *Ballard v. Ballard*, 230 N.C. 629, 55 S.E. 2d 316.

A careful examination of the record in the trial below leads us to the conclusion that no prejudicial error has been shown that would justify a new trial.

No error.

JUNIOR B. SETZER v. PYRAMID LIFE INSURANCE COMPANY.

(Filed 31 October 1962.)

1. Insurance § 3—

Where the language of a policy is clear and unambiguous, the courts must give the language used its plain, natural, and obvious meaning.

2. Insurance § 48b—

A policy providing indemnity for injury by accident while riding in or on a vehicle, and excluding liability if injury results while insured is repairing or working on a vehicle unless such injury results from collision with another vehicle, *held* not to cover an injury sustained by insured when he lost his balance and fell into a harvester after he had stopped the tractor drawing the harvester and had climbed on the harvester to dislodge silage from its head, even though insured lost his balance when the tractor and harvester rolled forward when insured stepped on the wheel of the tractor.

APPEAL by plaintiff from *Froneberger, J.*, April 1962 Regular Term of CATAWBA.

Action to recover hospital and dismemberment indemnity under the provisions of a travel accident insurance policy.

Plaintiff's evidence is summarized as follows:

Plaintiff is a dairy farmer. On 21 October 1960 he was engaged in cutting corn and cane silage with a forage harvester attached to and drawn by a tractor. Silage was carried by chains into the head of the harvester. ". . .(T)he tops of the corn were breaking down over the head and the machine stopped. . . ." Plaintiff stopped the tractor for the purpose of dislodging the corn from the head of the machine. He left the tractor motor running. The harvester is operated by the tractor motor through a "power take off." Plaintiff stepped on the seat

of the tractor with his left foot and on the right wheel of the tractor with his right foot, and started to reach forward to dislodge the corn in the harvester. The tractor and harvester both rolled forward, plaintiff lost his balance and fell into the harvester. The rollers caught his right hand and pulled his arm into the cutters. He lost his entire right arm.

The insurance policy was in full force at the time of the accident. Plaintiff filed proof of loss and demanded payment of indemnity. Defendant refused on the ground that the accident was not within the coverage of the policy.

The policy insures against loss from bodily injuries caused through accidental means and sustained by insured only in the manner described in the policy. For the most part the policy covers travel accidents. It does not cover accidents, injury, disability or loss caused "while adjusting, repairing or working on an automobile or other vehicle, unless injury is the result of an accident caused by an automobile or other vehicle other than that which Insured is adjusting, repairing or working on." There is a "Farm Accident Rider" which provides coverage "(a) While riding in or on a motor-driven or animal drawn farm machine (including farm tractor) or farm implement of a type designed to be ridden upon while in use, and while such machine or implement is being used on or about the farm or public highway; or (b) By being struck, knocked down or run over by a moving motor-drawn or animal drawn farm machine (including farm tractor) or farm implement of a type designed to be ridden upon while in use; . . ."

At the close of plaintiff's evidence the court entered judgment of involuntary nonsuit.

Plaintiff appeals.

Richard A. Williams and Martin C. Pannell for plaintiff.
Cansler & Lockhart for defendant.

PER CURIAM. The pertinent provisions of the policy are clear and unambiguous. We give the language used its plain, natural, ordinary and obvious meaning. *Marshall v. Insurance Co.*, 246 N.C. 447, 98 S.E. 2d 345. Plaintiff's evidence compels the conclusion that his tragic injury is not within the coverage of the policy. At the time of the accident plaintiff was not "riding in or on" the tractor. He was not "struck, knocked down or run over" by a moving vehicle, machine or implement. He was in the process of "adjusting" the harvester, the head of which had become jammed by the silage and was temporarily inoperative, and he was injured by the harvester.

The judgment below is

Affirmed.

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

LILLIAN C. WHALEY v.
LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 31 October 1962.)

Insurance § 25—

The plain and unambiguous terms of the supplemental agreement for additional insurance in this case *held* to provide a lump sum which should be the maximum amount to be paid under the entire contract, with schedule of decrease in the amount for each year insured should live after the execution of the supplement agreement, and not to provide for payments of the maximum amounts stipulated in the supplement in addition to the face amount of the original policy.

APPEAL by plaintiff from *Bundy, J.*, May 1962 Civil Term of WAYNE.

On 1 February 1954 defendant issued its policy of insurance on the life of plaintiff's husband. She is the named beneficiary. The face amount of the policy is $2,025. By supplemental agreement defendant agreed to pay an additional sum if death occurred within fifteen years. The amount payable, decreasing each year, is fixed by Schedule A. He died in June 1959. Plaintiff demanded $9,255.53 in settlement of defendant's obligation. It tendered $6,810.12. Plaintiff rejected the tender and brought suit for the amount claimed.

The parties waived jury trial. Judge Bundy found the facts, which are not controverted, and rendered judgment for the sum tendered. Plaintiff appealed.

Scott B. Berkeley for plaintiff appellant.

Taylor, Allen & Warren and John H. Kerr III, by W. F. Taylor for defendant appellee.

PER CURIAM. The amount owing plaintiff is determined by the provisions of the policy. Plaintiff asserts the contract insured for a fixed sum of $2,025 plus an additional $9,000, and Schedule A applies only to the additional insurance.

Defendant says the maximum amount payable under the policy was $9,000, and this sum decreased as insured's age increased, as set out in Schedule A. If this is the proper construction of the policy, the judgment is correct.

The supplemental contract which provided the additional insurance also designates "THE METHOD OF SETTLEMENT OF THE FACE AMOUNT OF THIS POLICY AND OF THE BENEFITS HEREIN PROVIDED." The supplement further provides:

"2. This Supplemental Contract, during the period it is in force provides additional life insurance for the term of years stated herein and also sets out the method of settlement of the face amount of this Policy as well as the additional insurance benefits herein provided. The payments hereinafter stated include both the face amount of this Policy and the additional life insurance provided by this Supplemental Contract.

"3. . . .[I]f the death of the insured should occur within fifteen years from the Date of Issue of this Supplemental Contract. . .the Company will pay the face amount of this Policy and the additional insurance benefits provided by this Supplemental Contract in the following manner:

"A. A lump sum of Nine Thousand Dollars decreasing according to Schedule A immediately upon receipt of due proof of the death of the Insured."

The language selected to fix the amount to be paid on insured's death is too plain to require construction; $9000 is the maximum. Using this sum, the amount tendered is admittedly correct.

Affirmed.

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

IOWA MUTUAL INSURANCE COMPANY, A CORPORATION V. FRED M. SIMMONS, INC., NORMAN L. HARRIS AND HERBERT H. HARRIS, TRADING AND DOING BUSINESS AS NORMAN HARRIS AND SON.

(Filed 7 November 1962.)

1. Declaratory Judgment Act § 1—

Where there is an actual and existing controversy between insured and insurer as to whether the insurance contract covered a loss which had been sustained, the dispute is justiciable under the Declaratory Judgment Act, and defendant's contention to the contrary on the ground that the question involved could not be made the subject of a civil action at the time the proceeding was instituted, is untenable. G.S. 1, Art. 26.

2. Insurance § 93—

Under the terms of a policy of insurance indemnifying insured for sums insured might be obligated to pay for injury to or destruction of

property caused by accident, the word "accident", when not defined in the policy, must be given its usual, ordinary, or popular meaning, and imports an unforeseen, unexpected, and undesigned occurrence, and does not exclude an occurrence resulting from negligence.

3. Pleadings § 30—

Judgment on the pleadings is proper only when the pleading of the opposite party is so fatally deficient as to present no material issue of fact.

4. Insurance § 94— Pleadings held to raise issue of fact as to whether damage to property resulted from an accident.

The facts disclosed by the pleadings were to the effect that insured, pursuant to his contract to re-roof a building, had removed a part of the old roof when rain began to fall, that insured immediately covered the uncovered roof with a water-proof polyethylene covering, held in place by cement blocks and other heavy material placed around the edges, and that notwithstanding such precautions, water seeped in around the edges of the covering and ran into the building, causing damage. Insured and insurer drew opposite inferences from the admitted facts as to whether the damage resulted from an "accident" within the meaning of the policy sued on. *Held:* Judgment on the pleadings in favor of insurer is error, since the pleadings raise the issue of fact as to whether the damage to the building resulted from an accident.

5. Declaratory Judgment Act § 2—

Where the pleadings in an action under the Declaratory Judgment Act raise an issue of fact, such issue may be determined by a jury. G.S. 1-261.

6. Trial § 18—

Issues of law may be tried by the judge, but issues of fact must be tried by a jury unless trial by jury is waived. G.S. 1-172.

APPEAL by defendant, Norman L. Harris, trading and doing business as Norman Harris and Son, from *Pless, J.*, July 1962 Mixed Term of CLEVELAND.

Proceeding for declaratory judgment to determine rights of parties under policy of liability insurance.

The complaint alleges in substance: On 1 July 1960 plaintiff issued to defendant, Norman L. Harris, doing business as Norman Harris and Son, a policy of liability insurance. The policy contains the following provisions:

> "Coverage C—Property Damage Liability—Except Automobile. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

"II. Defense, Settlement, Supplementary Payments. With respect to such insurance as is afforded by this policy, the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."

Defendants Norman L. Harris and Herbert H. Harris are engaged in the roofing, insulating, and siding business. About two weeks prior to 27 September 1960 defendant, Fred M. Simmons, Inc., entered into a contract with the defendants Harris to re-roof its office building. To do the work it was necessary to remove the old roof and then put on the new roof. Defendants Harris began the work on 27 September 1960, and on the afternoon of that day after a part of the old roof had been removed and before a new roof had replaced it, a shower of rain fell. The following morning there was a shower of rain. Both were "ordinary and usual showers of rain." Defendant Fred M. Simmons, Inc., contends water from these showers of rain leaked through the roof into the building and damaged its property therein in the sum of $10,256.25.

On 28 July 1961 defendant Fred M. Simmons, Inc., instituted suit against the defendants Harris in the superior court of Cleveland County to recover the sum of $10,256.25 for water damage allegedly caused by the failure of defendants Harris to cover the portion of the roof partially removed, thereby permitting rain water from the aforesaid showers to leak through into the building. This suit is now pending for trial.

Defendants Harris have demanded that plaintiff defend the suit brought against them, and pay any recovery against them within the policy limits.

Plaintiff has no obligation under its policy to defend the suit or pay any part of the recovery therein, if a recovery is had, because if rain did fall on 27 and 28 September 1960 and leak through the removed roof and damage the property of Fred M. Simmons, Inc., it does not constitute an "accident" as set forth in Coverage C of its policy.

This is a summary of the relevant parts of the answer of "defendants Norman L. Harris and Herbert H. Harris d/b/a Norman Harris and Son":

It admits all the allegations of the complaint, except it denies Herbert H. Harris is a partner, it denies that plaintiff is under no obligation under its policy to defend the suit against them brought by Fred M. Simmons, Inc., and to pay a recovery therein against them

within its policy limits, and it denies that plaintiff is entitled to a declaratory judgment. The answer alleges as further defenses: One. Defendant Norman L. Harris, pursuant to his contract with Fred M. Simmons, Inc., on 27 September 1960 removed the roof from its building, and while the roof was off rain began to fall. He immediately covered the uncovered roof with a water-proof polyethylene covering, and placed cement blocks and other heavy material around the edges of the covering to hold it in place. In despite of these precautions, some rain did, as he is informed, accidentally seep in around the edges of the covering and into the building causing damage. The resulting damage thus caused was an "accident" within the language and meaning of his policy of insurance issued to him by plaintiff. Second. When Fred M. Simmons, Inc., instituted a suit against him for damages he immediately forwarded the summons and complaint served on him to plaintiff, who filed a motion to make the complaint more definite and successfully argued its motion, prepared and filed an answer for him, conferred with various parties, and has prepared to appear and defend the suit. By such acts and conduct plaintiff is estopped to deny coverage under its policy. Three. Plaintiff's complaint raises only the point whether the falling of rain constitutes an "accident" within the meaning of its policy of insurance, and does not allege the true facts. Until the court shall determine he is liable in the action instituted against him by Fred M. Simmons, Inc., no real controversy exists between plaintiff and himself.

Plaintiff filed a reply in which in respect to the first defense it admits that when rain began to fall Harris immediately covered the uncovered roof with a water-proof polyethylene covering anchored with cement blocks and took precautions to prevent rain from entering the building, but rain did enter. It denied the other allegations of the first defense. In respect to the second defense it alleged that all actions taken by it in connection with the Simmons suit were taken pursuant to the terms of a non-waiver agreement entered into with the defendants Harris, which expressly provides, "no action heretofore or hereafter taken by the company shall be construed as a waiver of the right of the company, if in fact it has such right, to deny liability and withdraw from the case* * *." In respect to the third defense it denies its allegations, except it admits allegations quoting certain policy provisions as to action against the company.

On 26 March 1962 Judge George B. Patton presiding over a term of Cleveland County superior court allowed plaintiff to amend its complaint. This amendment alleges that the suit of Fred M. Simmons, Inc., against Norman L. Harris and Herbert H. Harris, doing business as Norman Harris and Son, has been tried, and resulted in a final

judgment in favor of plaintiff against the defendants in the sum of $1,900.00, plus the costs. No appeal was taken. Appellant's rejoinder admits this allegation.

When the trial of the instant case came on for hearing before Judge Pless, and after the jury was impaneled and the pleadings were read, plaintiff moved for a judgment on the pleadings. Judge Pless, being of opinion that the motion should be granted, adjudged and decreed as follows:

One. The policy of liability insurance issued by plaintiff to defendant Norman L. Harris, doing business as Norman Harris and Son, did not cover the loss which Fred M. Simmons, Inc., suffered by rain coming into its building while it was being re-roofed.

Two. Plaintiff was not obligated by its policy to defend the suit brought by Fred M. Simmons, Inc., against Norman L. Harris, doing business as Norman Harris and Son.

Three. "Plaintiff is not estopped to defend this action and has not waived any of its rights."

Four. Plaintiff is not obligated to pay the said judgment in the amount of $1,900.00, or any part thereof.

Five. Defendant shall pay the costs.

From the judgment on the pleadings, defendant Norman L. Harris, doing business as Norman Harris and Son, appeals.

L. Lyndon Hobbs for defendant appellant.

Hamrick & Jones by Fred D. Hamrick, Jr., and Falls, Falls & Hamrick by B. T. Falls, Jr., for plaintiff appellee.

PARKER, J. Appellant challenges the propriety of plaintiff invoking the provisions of our Declaratory Judgments Act, G.S., Chapter I, Article 26, under the circumstances alleged in the complaint. Congress and most of the States, including North Carolina, have authorized declaratory relief, but only in cases involving an actual controversy appropriate for judicial examination. Annotation: 49 A.L.R. 2d 700. Generally, questions involving the liability of insurance companies under their policies are proper subjects for declaratory relief. *Assurance Co. v. Gold, Com'r of Insurance,* 248 N.C. 288, 103 S.E. 2d 344; *Cross v. Zurich General Accident & Liability Ins. Co.,* 7th Cir., 184 F. 2d 609, rehearing denied 8 November 1950; *Trinity Universal Ins. Co., v. Willrich,* 13 Wash. 2d 263, 124 P. 2d 950, 142 A.L.R. 1; Annotation: 142 A.L.R. 13, where many cases are cited supporting the rule; 29A Am. Jur., Insurance, sec. 1451. See *Insurance Co. v. Wells,* 225 N.C. 547, 35 S.E. 2d 631. Appellant's challenge here has no validity, because the complaint alleges an actual or real existing, genuine

controversy between the parties relative to the construction of the policy of liability insurance in order to determine the rights of the parties thereunder.

Appellant is a roofing, insulating, and siding contractor, and plaintiff an insurance company, which in its policy of liability insurance issued to appellant, contracted, "except automobile," to pay on behalf of appellant all sums which insured "shall become legally obligated to pay as damages because of injury to or destruction of property* * * *caused by accident.*" (Emphasis supplied.)

The term "accident" is not defined in the policy, and the term must, therefore, be interpreted in its usual, ordinary, and popular sense. *M. Schnoll and Son, Inc. v. Standard Accident Ins. Co.*, 190 Pa. Super. 360, 154 A. 2d 431; *O'Rourke v. New Amsterdam Casualty Co.*, 68 N. M. 409, 362 P. 2d 790, rehearing denied 7 June 1961.

In *Arthur A. Johnson Corp. v. Indemnity Ins. Co. of No. Am.*, 7 N.Y. 2d 222, 164 N.E. 2d 704, 706, the Court, in construing the word "accident" as used in a contractor's liability policy, said: "Phrased differently, we are not construing a statute, but the words of an insurance policy, and in so doing we must construe the word 'accident' as would the ordinary man on the street or ordinary person when he purchases and pays for insurance."

In *Tayloe v. Indemnity Co.*, 257 N.C. 626, 127 S.E. 2d 238 in *Kirkley v. Insurance Co.*, 232 N.C. 292, 59 S.E. 2d 629, in *Luttrell v. Hardin*, 193 N.C. 266, 136 S.E. 726, and in *Thomas v. Lawrence*, 189 N.C. 521, 127 S.E. 585, we have cited with approval the definition of the word "accident," as set forth in Black's Law Dictionary, Third Edition, and an earlier edition, as follows: "an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty." See the very elaborate definition of the term "accident" in its most commonly accepted meaning or in its ordinary or popular sense in Black's Law Dictionary, Fourth Edition, and in 1 C.J.S., Accident, p. 427 *et seq.*

In *Lacey v. Washburn & Williams Co.*, 309 Pa. 574, 164 A. 724, 725, the Court wrote: "Webster has defined it [accident] as 'an event that takes place without one's foresight or expectation; and undesigned, sudden, and unexpected event; chance; contingency.' Many courts have quoted this definition, and some have added to or embellished it, but in reality few have improved upon it."

In *Standard Oil Co. of New Jersey v. United States*, 264 F. 66, 69, the Court said: "The word 'accident' does not, in its generally understood meaning, entirely exclude negligence. The Supreme Court has

approved the definition of accidental as: 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected.' *Mutual Accident Association v. Barry,* 131 U.S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60. This does not exclude the idea of negligence." See 1 C.J.S., Accident, p. 439, to the same effect where many cases are cited in support of the text.

In our workmen's compensation cases we have in effect held, under the language of our Act, that in its more general sense the word "accident" does not necessarily exclude human fault called negligence, but is recognized as an occurrence that may arise from the carelessness of men, and the fact that the negligence of the person injured contributed to produce the result did not make it any less an accident. *Allred v. Allred-Gardner, Inc.,* 253 N.C. 554, 117 S.E. 2d 476; *Poindexter v. Johnson Motor Lines,* 235 N.C. 286, 69 S.E. 2d 495; *Archie v. Lumber Co.,* 222 N.C. 477, 23 S.E. 2d 834.

Stacy, C.J., said in *Slade v. Hosiery Mills,* 209 N.C. 823, 184 S.E. 844: "It was said in *Johnson v. Southern Dairies,* 207 N.C. 544, 177 S.E. 632, that an injury resulting from the employer's negligence may be tantamount to an injury by accident."

In *Aetna Life Ins. Co. v. Little,* 146 Ark. 70, 225 S.W. 298, it is said: "It is probably true that the element of carelessness or negligence enters into most accidents."

This is apparently a case of first impression in this State. Neither our research nor that of counsel has discovered any North Carolina case directly in point.

Rex Roofing Co. v. Lumber Mut. Cas. Ins. Co., 280 App. Div. 665, 116 N.Y.S. 2d 876, motion for leave to appeal denied, 305 N.Y. 932, 112 N.E. 2d 288, is a case where a controversy between insured, a roofing company, and insurer involving liability on an insurance contract insuring plaintiff against liability imposed upon it by law for damages because of injury to property "caused by accident" was submitted on an agreed statement of facts. On 18 January 1949 plaintiff was engaged in re-surfacing the roof of an apartment house. Next day the work was suspended due to inclement weather. Work was resumed on the 20th and progressed on the 21st to a point where the entire roof was covered with felts, nailed down and sealed on all sides with flashing cement, and nearly half of the roof was covered with an outer layer of felts mopped in with hot asphalt, when it began to snow heavily preventing completion of the work. Later in the day the snow turned to rain. Because the roof was a flat surface and snow-covered, the water was unable to drain off and collected on the roof and backed up under the felts, leaking down into the interior of the building. Actions were brought against plaintiff by the owner of the building

and five tenants for the damage caused by entry of the water. In all of these actions it was claimed that the damage was caused by the negligence of plaintiff in performing the work on the roof. Defendant refused to defend the actions, disclaiming liability under the policy upon the grounds that the "occurrence was due to faulty workmanship" on the part of plaintiff and was not "caused by accident." The Court said:

> "Defendant does not go so far as to suggest that negligence on the part of plaintiff absolves the defendant of liability or that the term 'accident' should be so narrowly construed as to rule out an occurrence caused by negligence. Indeed, negligence would be the predicate of any likely liability insured against and defendant concedes that in construing a contract of this kind words should not be given a technical meaning but should be taken as they would be understood by an average man. We have no doubt that the average man would consider the occurrence in question as an 'accident' in the common conception of that word.
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> * * * * * * * * * *
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> "To our mind it is so clear, however, on the agreed facts, that the occurrence falls within the definition of an 'accident', within the terms of the policy, that no finding to the contrary could be allowed to stand."

In *Employers Ins. Co. of Ala. v. Alabama Roofing & Sid. Co.*, 271 Ala. 394, 124 So. 2d 261, the question was one of an insurance company's liability to its insured under an insurance policy with coverage in the identical words as in the policy of insurance in the instant case. On 20 October 1957 insured, a roofing contractor, commenced putting a new roof on a building. During that afternoon about one-half of the roof was removed, and work on the new roof progressed to the extent that rosin paper was applied to the decking and two layers of felt were applied. The joints had been cemented on the layers of felt, which had been cemented to the parapet wall which surrounded the slightly tilted but otherwise flat roof at the time the work ended on the afternoon of 20 October 1957. The work that afternoon was done in a workmanlike manner. An additional layer of felt and a coating of asphalt and slag was yet to be placed. After work that day was stopped, a rainstorm occurred and rain accumulated on the flat roof to a point where it seeped through the flashing which insured had applied to the parapet, and caused damage to the ceiling and walls of the building and the goods therein. From a judgment in favor of the insured, the insurer appealed. The Supreme Court of Alabama

stated that it had held in *Employers Ins. Co. of Ala. v. Rives,* 264 Ala. 310, 87 So. 2d 653, 654, in effect that the term "accident" did not necessarily exclude human fault called negligence, and that the New York Court in *Rex Roofing Co., Inc. v. Lumber Mut. Cas. Ins. Co. of N. Y.,* 280 App. Div. 665, 116 N.Y.S. 2d 876, which New York case we have discussed above, on facts very similar to those in the instant case, took practically the same view as the Court did in the *Rives* case. In consequence, the Court said: "We are persuaded that in view of our holding in *Employers Ins. Co. of Alabama v. Rives, supra,* the trial court correctly rendered a judgment in favor of the plaintiff, the roofing contractor, against the insurance company."

O'Rourke v. New Amsterdam Casualty Co., supra, was an action by a roofing company against its liability insurer to recover amount of judgment against company. The coverage was identical with the coverage in the instant case. The Supreme Court of New Mexico held that a sudden, unpredicted rain in Albuquerque, New Mexico, in October, a normally dry month, was an "accident," within the roofing company's liability policy, and insurer was liable for rain damage to the house, the roof of which had not been completed.

In *Cross v. Zurich General Accident & Liability Ins. Co., supra,* plaintiffs brought suit for a declaratory judgment holding defendant liable to defend against or settle claims against plaintiffs for damage to glass in windows of a building by hydrofluoric acid in a solution used by plaintiffs in cleaning the outside walls of the building, by reason of a public liability insurance policy issued to them by defendant with coverage similar to the coverage in the instant case. The district judge held that the damage to the windows was not "caused by accident." There was before the trial court evidence that the use of steam with hydrofluoric solution for cleaning the walls of buildings was customary in the industry and that the wetting of windows was the customary protection against acid damage. The Circuit Court said: "The basis for the decision of the trial court was that plaintiffs intentionally used hydrofluoric acid in the solution and failed to take the precaution of covering the windows with grease or heavy paper. But failure to take a proper or effective precaution does not prove intent to damage. Plaintiffs may have been negligent in not keeping sufficient water on the windows, but the very fact that water was applied to each window negatives any idea that plaintiff intended to damage same. And lacking such intent, the damage was accidental, even though caused by negligence." The Circuit Court reversed the trial court holding that the claims for damages against plaintiffs are covered by the insurance policy, and defendant is under a duty to defend against the claims.

Plaintiff cites and relies upon *Midland Const. Co. v. United States Cas. Co.*, 10th Cir., 214 F. 2d 665. In that case it is held that an ordinary afternoon shower of rain in August in Wichita, Kansas, was not an "accident" within policy covering contractor's liability for loss from accident, and insurer was not liable for damage to merchandise occasioned when rain fell through hole in roof made by contractor under agreement which did not require contractor to close hole. However, this language used in the *Midland* case is pertinent: "It may be that an unprecedented, torrential downpour of rain may under certain conditions be considered an accident, but afternoon showers—and this seems to have been an ordinary rain—are not unusual or unexpected." In *Christ v. Progressive Fire Ins. Co.*, Fla. App., 101 So. 2d 821, rehearing denied 23 April 1958, not cited in plaintiff's brief, the Court held that it is common knowledge that a shower of rain is likely to occur in July, the rainy season in Florida, and that where a roofing contractor left repair job unfinished over week end in July without proper precautions against rain or showers, occurrence of heavy rain and leakage of rain water into store rooms was not an "accident" within coverage of contractor's property damage liability policy. In the *O'Rourke* case the New Mexico Supreme Court stated the *Midland* case and the *Christ* case are distinguishable from the case before it, because in both of those cases the rain was in the summertime or the rainy season, and in the case before it the rain was in October, a normally dry month in Albuquerque. In *Employers Ins. Co. of Ala.*, the Supreme Court of Alabama said that they understood the *Midland* case and the *Christ* case to hold, in effect, that a finding that damage was the result of negligence necessarily excludes a finding that the damage resulted from accident, and they did not subscribe to that view. The *Midland* case and the *Christ* case are factually distinguishable from the case at bar, because appellant in its first defense in its further answer does not allege that the rain was an accident causing damage in the building, but that water seeping into the building under the covering he had placed over the exposed opening of the roof was an accident causing damage. Further, we do not subscribe to the view that the term "accident," used in the liability policy here, considered in its usual, ordinary, and popular sense necessarily excludes human fault called negligence, because negligence would most probably be the predicate of any likely liability against appellant. To adopt the narrow view that the term "accident" in liability policies of insurance, as in the policy here, necessarily excludes negligence would mean that in most, if not all, cases the insurer would be free of coverage and the policy would be rendered meaningless.

Thomason v. United States Fidelity & Guaranty Co., 5th Cir., 248 F. 2d 417; *Kuckenberg v. Hartford Accident & Indemnity Co.*, 9th Cir., 226 F. 2d 225; and *C. Y. Thomason Co. v. Lumbermens Mutual Casualty Co.*, 4th Cir., 183 F. 2d 729, cited in plaintiff's brief, and relied on by it, are clearly distinguishable: none involve rain or water from rain. In the *C. Y. Thomason* case, which was a suit for a declaratory judgment in respect to an accident policy, the Court said: "We do not mean to say that there may not be an accident as the result of negligence, but there was no such result in this case and it cannot be held that negligence is synonymous with accident."

A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact. *Fisher v. Motor Co.*, 249 N.C. 617, 107 S.E. 2d 94; *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384; *Dunn v. Tew*, 219 N.C. 286, 13 S.E. 2d 536.

The further answer of appellant alleges in substance that water seeped into the building under the weighted-down, waterproof covering which he placed over the uncovered roof after the rain began, causing damage therein, and draws the inferences that, even if he was negligent, such seeping in of the water into the building resulting in damage was an unforeseen event, occurring without the will or design of appellant whose mere act caused it, or an undesigned, sudden, and unexpected event, a chance, and consequently the damage to the property of Fred M. Simmons, Inc., was "caused by accident" within the intent and meaning of the term "accident" as used in the coverage provision of his policy of liability insurance. Plaintiff's reply, while admitting in part the facts alleged in the answer, draws the inference that the seeping in of the water resulting in damage was not an "accident" within the intent and meaning of that term in its policy. Plaintiff's pleadings and appellant's pleading draw opposing inferences from admitted facts, and in that way indirectly raise issues of fact. *Erickson v. Starling, supra; Alston v. Hill*, 165 N.C. 255, 81 S.E. 291. We think this is such an issue of fact as should be determined by a jury under proper instructions of the court. We also are of opinion that the pleadings are not so clear in respect to whether plaintiff is or is not estopped to deny coverage under its policy, and as to whether or not plaintiff has waived any of its rights as to render it determinable without the aid of definite findings of fact by a jury. The learned and experienced trial judge erred in rendering a judgment on the pleadings in favor of plaintiff, and it is ordered that his judgment be vacated.

Our Declaratory Judgments Act provides in G.S. 1-261 that where a proceeding under the Act involves the determination of an issue of fact, such issue may be determined by a jury trial.

Issues of law must be tried by the judge; but issues of fact must be tried by a jury, unless trial by jury is waived. G.S. 1-172; *Sparks v. Sparks*, 232 N.C. 492, 61 S.E. 2d 356. In the very nature of things, it is impossible for a court to render a valid judgment declaring the rights of parties to litigation until the facts on which those rights depend have been determined in a manner sanctioned by law.

Error and remanded.

E. SCOTT BOWERS v. NORMAN E. MITCHELL.

(Filed 7 November 1962.)

1. Trespass to Try Title § 2—

Defendant's denial of plaintiff's allegations of title and trespass places the burden on plaintiff to establish each of these allegations.

2. Adverse Possession § 6—

Where plaintiff offers no evidence of actual possession by his predecessors in title, deed to such predecessors is without significance in determining plaintiff's claim of title by adverse possession under color.

3. Adverse Possession § 16—

Where plaintiff claims under separate deeds to separate tracts of land, even though the tracts are contiguous and comprise collectively the *locus in quo*, plaintiff's possession of a single tract is not constructively extended to the entire area.

4. Trespass to Try Title § 4—

In plaintiff's action for trespass to try title, nonsuit cannot be allowed if plaintiff's evidence is sufficient to establish *prima facie* his title and defendant's trespass as to any part of the land claimed, but nonsuit is proper if plaintiff fails to establish title to any portion of the tract.

5. Same; Adverse Possession § 6—

Where plaintiff's claim of title to two tracts of land by adverse possession under color is based upon deeds executed to him by his brother and his sister, conveying land formerly owned by his father, the deeds being executed less than seven years prior to the institution of the action, and plaintiff's evidence shows that his father died testate, presumably disposing of all his property, but plaintiff fails to introduce his father's will in evidence, there is a *hiatus* in plaintiff's chain of title, and plaintiff's evidence fails to show possession under color for the requisite time.

6. Adverse Possession § 2—

In order to be adverse, possession must be continuous, open, and notorious so as to put the true owner on notice of the adverse claim, and

therefore must be sufficient to subject the occupant to an action in ejectment as distinguished from a mere trespass *quare clausum fregit.*

7. Adverse Possession § 23—

The introduction in evidence by plaintiff of deeds executed more than seven years prior to the institution of the action, conveying the land to him, with testimony that plaintiff had had the land surveyed and given to others an unexercised permission to hunt, and had executed timber deeds granting the right to cut timber therefrom for a period not exceeding three years, but without evidence that plaintiff or his predecessors in title had been in the actual, hostile, exclusive and continuous possession of the land for a period of seven years, *is held* insufficient to overrule nonsuit.

8. Adverse Possession § 2—

The giving of permission to hunt on the land, which authority is not exercised, is evidence of an adverse claim but does not amount to adverse possession.

9. Adverse Possession § 20—

The provision of G.S. 1-42 does not declare that one who claims title, relying merely on a paper writing more than thirty years old, thereby acquires title to land described in that instrument, nor does it establish title *prima facie.*

APPEAL by plaintiff from *Morris, J.,* April 1962 Term of NORTHAMPTON.

Plaintiff seeks to recover $13,500, double the alleged value of timber cut and removed by defendant from an area described by course and distance as "containing 64.9 acres. . . and being lots 13, 19, 20, 21, 22, 23, 24, and 25 in the division of that tract of land known as the 'Woodruff Tract,' made in that special Proceeding entitled '*William Clarke, Walter Clarke, John Davis, et al., v. James Williams, Thomas Williams, Thomas Johnson, et al.*" Plaintiff alleges he is the owner and in possession of the 64.9 acres described by course and distance in the complaint.

Defendant denied plaintiff's allegations of ownership, possession, and trespass. At the conclusion of plaintiff's evidence, defendant's motion for nonsuit was allowed. Plaintiff appealed.

J. A. Pritchett and Eric Norfleet for plaintiff appellant.
Gay, Midyette & Turner by Buxton Midyette for defendant appellee.

RODMAN, J. The denial of plaintiff's allegations of title and trespass placed the burden on plaintiff of establishing each of these allegations. *Cothran v. Motor Lines,* 257 N.C. 782; *Shingleton v. Wildlife Comm.,* 248 N.C. 89, 102 S.E. 2d 402; *Carson v. Mills & Burnett,* 18 N.C. 546.

Plaintiff made no attempt to trace title to the sovereign or to show that defendant was estopped to deny plaintiff's title.

Plaintiff contends he acquired title to the 64.9 acres by his adverse possession under color of title for the statutory period or by deeds vesting him with his father's title acquired by adverse possession. To support his contention plaintiff offered: (1) A deed from his mother to him dated 31 December 1953. This deed purports to convey lots 13, 21, 22, 23, 24, and 25 shown on a map of the Woodruff Division. (2) A deed from his sister to him dated 18 September 1957 purporting to convey all her right, title, and interest in lots 19 and 20 of that division. (3) A deed from F. J. Bowers and wife to plaintiff dated 26 January 1962 purporting to convey all of grantors' right, title, and interest to lots 19 and 20 of the Woodruff Division. (4) A partition proceeding known as the Woodruff Division, made in 1902, and various deeds to plaintiff's father for lots 13, 19, 20, 21, 22, 23, 24, and 25 in that division.

The map and testimony of a surveyor suffice to show the location of these several lots. They are contiguous. The area described in the complaint is a composite of the areas of the eight separate tracts.

Plaintiff has no deed or other conveyance for a single tract as described in the complaint. Hence he does not have color of title for the land so described. What he has is color of title for eight separate and distinct pieces of land. *Burns v. Crump*, 245 N.C. 360, 95 S.E. 2d 906.

Plaintiff put in evidence a deed from W. F. Kell and wife to George Foreman and others dated 26 November 1896. That deed purports to convey a tract containing 166 acres. Plaintiff offered no evidence to show the grantees in that conveyance ever had possession of the land there described. Because of the failure to offer evidence of possession by the grantees in that deed, it has no significance in disposing of this appeal. All the conveyances subsequent to 1896 were for small specific parts, i.e., for areas described in the partition proceeding.

Subject to the qualification noted in the third headnote to *Boomer v. Gibbs*, 114 N.C. 76, the possession of one claiming under color is constructively extended to the entire area described in the instrument under which he asserts title. But possession of a single tract is not constructively extended to a separate and distinct tract even though both tracts are described in the same conveyance. *Carson v. Mills & Burnett, supra; Loftin v. Cobb*, 46 N.C. 406; *Lumber Co. v. Cedar Works*, 168 N.C. 344, 84 S.E. 523; 3 Am. Jur. 2d 111, 112; 2 C.J.S. 783.

Plaintiff was not required to show title to all of the land described in the complaint. The court should have overruled the motion to nonsuit and submitted the controversy to the jury as to those portions, if any, on which plaintiff had made a *prima facie* showing of title and trespass.

Hence we must examine the evidence to see if there is any showing of possession and trespass on any of the lots.

Plaintiff asserts title to lots 19 and 20 by virtue of deeds from his brother and sister. Their deeds were dated 1957 and 1962. This action was begun in July 1961. There is no suggestion that the brother or sister had color of title. Their father claimed these lots. But plaintiff's evidence shows the father died testate, leaving lots 13, 21, 22, 23, and 24 to plaintiff's mother. The will is not copied in the record. It is neither stated nor implied the father devised these lots to the plaintiff or to his brother or sister. Presumably the father disposed of all of his property by his will, leaving nothing for his children to inherit. *Trust Co. v. Waddell*, 234 N.C. 454, 67 S.E. 2d 651. There is no evidence to support a finding that plaintiff is the owner of lots 19 and 20.

Has plaintiff made a *prima facie* showing of title to lots 13, 21, 22, 23, 24, and 25 conveyed to him by his mother in 1953? Her deed is color of title and of sufficient age to permit plaintiff to acquire title by possession. He testified he had been in possession of the area "a number of years." He does not say how many years—two, three, four, or what. He does not in any way describe "possession" except to say he had it surveyed and gave permission to hunt. The authorization so given, but not exercised, is evidence of an adverse claim but can scarcely be described as possession. It is like payment of taxes. *Chisholm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726; *Ruffin v. Overby*, 88 N.C. 369. To convert the shadow of color of title into perfect title, possession must be continuous, open, notorious, as well as adverse. It must be of such character as to put the true owner on notice of the adverse claim. It must suffice to subject the occupant to an action in ejectment as distinguished from a mere trespass *quare clausum fregit*. *Lindsay v. Carswell*, 240 N.C. 45, 81 S.E. 2d 168, and cases cited; *Bland v. Beasley*, 145 N.C. 168.

The evidence is insufficient to establish *prima facie* plaintiff's possession under color for the requisite time to mature title. There is no evidence to show that the mother, in the four years that she had color, was ever in possession of the property. There is no evidence of any possession by the grantors of plaintiff's father. Unless the father had possession for sufficient time to mature title under color, plaintiff must fail. Plaintiff testified with respect to his father's possession as follows: "During my lifetime I know that they sold the timber when I was in high school. My father used to give permission to hunt there. . . . There has been no cleared land on it since I have known it. . . . The land is not located in such position that one would gather pine-straw from it. It is situate along a swamp approximately three miles long. It is not the sort of land you would gather pine-straw or build

a hunting lodge." This evidence, standing alone, clearly would not suffice to show seven years' continuous, open, notorious, and adverse possession of any particular lot, nor of all the lots. To supplement this testimony, plaintiff offered in evidence two timber deeds: One, a deed to Camp Manufacturing Co. dated 31 July 1914, authorizing Camp to cut timber eight inches and over in diameter on lots 19, 21, and 23. The right to cut expired 15 May 1916. The other was a timber deed to L. H. Taylor dated in 1931. It authorized Taylor to cut and remove the timber from lots 19, 20, 21, 22, 23, and 24. The period in which grantee could cut and remove was limited to three years. Neither of these deeds purports to authorize the cutting of timber from lot 25. If plaintiff's testimony that timber was cut when he was in high school referred to cutting by Taylor, it does not show how long the grantee took to cut the timber from any of the lots nor does it show on which lot timber was cut. It affirmatively appears that the authorized time to cut was less than seven years. Plaintiff's evidence fails to establish possession of the kind and for the period requisite to ripen the color of title into true title.

Appellant does not suggest the proviso added to G.S. 1-42 by c. 469, S.L. 1959, made a *prima facie* case of title requiring the court to submit his claim to the jury. We refer to the statute because defendant, appellee, makes reference to it in his brief, insisting that it has no application to the facts of this case. Suffice it to say, the statute does not declare that one who claims title, relying merely on a paper writing more than thirty years old, thereby acquires title to the land described in the instrument, nor does it establish title *prima facie*.

The judgment is

Affirmed.

HERBERT C. PICKENS, PLAINTIFF v.
MARGARET LEONARD PICKENS, DEFENDANT.

(Filed 7 November 1962.)

1. Divorce and Alimony § 13—

In the husband's action for divorce on the ground that he and his wife had lived separate and apart continuously for a period of two years next preceding the institution of the action, the husband is not required to establish as a constituent element of his cause of action that he is the injured party, G.S. 50-6, and the sole defense to the husband's right to divorce on such ground is that the separation was caused by the husband's misconduct amounting to his wilful abandonment of her, which

defense the wife must allege and prove, and in the absence of such allegations by her such defense is not presented.

2. Appeal and Error § 40—

Where the rights of the parties are determined by the jury's answer to certain of the issues, any error relating to another issue which was submitted but was not raised by the pleadings, cannot be held prejudicial.

3. Appeal and Error § 43—

Where the court's remarks during the interrogation of a witness, when considered in context and in light of the evidence, could not have affected the result, any error in the statement cannot be held prejudicial.

4. Appeal and Error § 42—

An exception to an excerpt from the charge is not ground for a new trial when it is apparent that the misstatement contained therein, when considered in connection with the pleadings, evidence, issues and the entire charge, could not have misled or confused the jury.

APPEAL by defendant from *Patton, J.*, May Term 1962 of LINCOLN.

Civil action for absolute divorce on the ground plaintiff (husband) and defendant (wife) had lived separate and apart for two years, in which the court submitted and the jury answered these issues:

"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 continuously 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. Was the separation brought about by the fault of the plaintiff as alleged in the Answer: ANSWER: No."

The court, on said verdict, entered a judgment of absolute divorce. Defendant excepted, appealed, and sets forth six assignments of error.

W. H. Childs, Jr., for plaintiff appellee.

John R. Friday and C. E. Leatherman for defendant appellant.

BOBBITT, J. Plaintiff alleged, as ground for absolute divorce under G.S. 50-6, that he and defendant separated May 8, 1959, and thereafter lived continuously separate and apart from each other.

Answering, defendant denied plaintiff's said allegation and alleged, by way of further answer, defense and plea in bar, the following:

1. That plaintiff, in full recognition of his marital status and in discharge of his marital obligation to support his wife and children,

has continued to support defendant and his two children and, during the past three years, has raised the amount of such support. These allegations bear upon whether there was a "separation" as defined in our decisions. *Williams v. Williams,* 224 N.C. 91, 29 S.E. 2d 39, and cases cited.

2. That, before and after the alleged date of separation, "which has never been with the consent of this defendant, either express or implied," plaintiff, without fault or provocation on the part of defendant, has, in respects set forth, "offered such indignities to the person of this defendant and her two minor children as to render her and their lives intolerable and burdensome." These allegations bear upon whether plaintiff was guilty of such misconduct as would entitle defendant to a divorce from bed and board under G.S. 50-7 or to alimony without divorce under G.S. 50-16. (Evidence offered in support of these allegations refers to plaintiff's conduct at various times when he was residing in the same household with his wife and children.)

Defendant did not seek, by cross action, a judgment for alimony without divorce. G.S. 50-16. Her prayer was that plaintiff's action be dismissed.

G.S. 50-6 creates "an independent cause of divorce." *Byers v. Byers,* 222 N.C. 298, 303, 22 S.E. 2d 902, and *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466, where the history of this statute is set forth.

"Where the husband sues the wife for an absolute divorce upon the ground of two years' separation under G.S. 50-6, he is not required to establish as a constituent element of his cause of action that he is the injured party." *Johnson v. Johnson,* 237 N.C. 383, 385, 75 S.E. 2d 109, and cases cited. If the husband alleges and establishes that he and his wife have lived separate and apart continuously for two years or more next preceding the commencement of the action within the meaning of G.S. 50-6, the only defense recognized by our decisions is that the separation was caused by the act of the husband in wilfully abandoning her. To defeat the husband's case, the wife must allege and establish such wilful abandonment as an affirmative defense. *Johnson v. Johnson, supra,* and cases cited; *Pruett v. Pruett,* 247 N.C. 13, 25, 100 S.E. 2d 296, and cases cited; *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492; *McLean v. McLean,* 237 N.C. 122, 125, 74 S.E. 2d 320.

Here, defendant did not allege as an affirmative defense that the separation was caused by plaintiff's wilful abandonment of her. Nor did she allege the separation was caused by plaintiff's alleged misconduct at times when he resided in the same household with her and the children. She denied there had been "a separation."

As indicated, there was no basis in defendant's allegations for submission of the fourth issue. Hence, error, if any, with reference to the court's instructions bearing upon the fourth issue is not prejudicial to defendant; and Assignments of Error Nos. 4, 5 and 6 are overruled.

Assignment of Error No. 1 is formal.

The facts necessary to an understanding of Assignments of Error Nos. 2 and 3 are as follows:

Plaintiff and defendant were married June 6, 1946. Since July 26, 1948, plaintiff has been a member of the United States Coast Guard. Except for periods in 1955-1957, plaintiff has lived where stationed and defendant and the two children have lived in their home in Lincolnton. Plaintiff's evidence tends to show defendant refused to leave Lincolnton and live with him at the various places where he was stationed. Defendant's evidence tends to show that she was willing and wanted to live with him wherever he was stationed but plaintiff insisted that she live in Lincolnton.

All the evidence tends to show plaintiff and defendant lived "separate and apart physically," continuously from a date prior to May 8, 1959. See *Mallard v. Mallard,* 234 N.C. 654, 656, 68 S.E. 2d 247, and cases cited.

As to Assignment of Error No. 2: Plaintiff testified on (first) cross-examination that he had cut the allotment to his wife but was forced to raise it again by the Coast Guard accountant. On (third) cross-examination, plaintiff again testified he had cut his wife's allotment. The record shows: "Q. Then you later raised it, did you not? COURT: He raised it because he had to."

While an exception to the court's said statement appears in the case on appeal, nothing appears to indicate defendant suggested that the judge correct his statement so as to clarify the intended meaning thereof, namely, that *plaintiff had testified* that "(h)e raised it because he had to." Considered in context, we do not think the jury could have understood that the judge was stating as a fact that the Coast Guard had required plaintiff to increase the amount of the allotment to his wife. Moreover, it is noted: Plaintiff testified that on May 8, 1959, he advised defendant by telephone that he was not going to live with her thereafter. Defendant testified plaintiff did telephone her and tell her he was not going to live with her; that she asked him to come home and discuss the matter; and that plaintiff "said he had made up his mind and that's all that matters . . ." Defendant's said testimony would appear sufficient to establish that the physical separation of plaintiff and defendant after May 8, 1959, was "accompanied by at least an intention on the part of one of them to cease their matrimonial cohabitation." *Mallard v. Mallard, supra,* and cases cited.

In the circumstances, the court's statement, if phrased as appears in the record, does not constitute *prejudicial* error.

As to Assignment of Error No. 3: Defendant excepts to a portion of the court's charge with reference to the third issue, to wit: "On the issue of separation he (plaintiff) is only required to satisfy you by the greater weight of the evidence that there has been a separation as I have defined it to you, and that that separation has been continuous, that is without interruption *for more than a year or two* prior to the institution of the action." (Our italics) Obviously, the italicized portion of this excerpt from the charge is erroneous.

This action was instituted December 9, 1961. Plaintiff's allegation and evidence are that he and defendant separated May 8, 1959, and thereafter lived continuously separate and apart from each other. With reference to the third issue, the court instructed the jury: "What the law makes the ground for divorce, is the living separate and apart of the husband and wife continuously, that is without interruption, for more than two years prior to the institution of the action for absolute divorce." Time and again the court instructed the jury that plaintiff was required to establish that he and defendant had lived separate and apart for two years or more prior to the commencement of the action. The court's final instruction with reference to the third issue was as follows: "Now, on issue #3, if the plaintiff has satisfied you from the evidence and by its greater weight, that he and the defendant separated from each other as I have defined the term 'separation' to you, and as I have heretofore said, and you are further satisfied from the evidence and by its greater weight, that that separation continued and it was continuous, that is without interruption, for more than two years prior to December 9, 1961 at the time this action was begun, then, if you are so satisfied by the greater weight of the evidence, you would answer issue #3 'yes.'" Moreover, the very language of the third issue includes the phrase "for more than two years next preceding the institution of this action."

When the pleadings, evidence and entire charge are considered, we do not think the misstatement in the excerpt from the charge challenged by Assignment of Error No. 3 could have misled or confused the jury. Hence, Assignment of Error No. 3 is overruled.

No error.

STATE v. LEX JONES.

(Filed 7 November 1962.)

1. Assault and Battery § 5—

"Serious injury" as used in G.S. 14-32 prescribing the punishment for an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, means physical or bodily injury and is not synonymous with "serious damage done", and therefore an instruction that if the jury should find beyond a reasonable doubt that the assault was made with a gun under such circumstances as would tend to create a breach of the peace that would outrage the sensibilities of the community, the assault would be assault with a deadly weapon inflicting serious injury, must be held for prejudicial error.

2. Assault and Battery § 14—

Evidence that defendant shot his victim in the back with a shotgun and that the victim went to the hospital and had 17 shot removed from his body, *held* sufficient to be submitted to the jury on the question of serious injury in a prosecution under G.S. 14-32.

APPEAL by defendant from *Williams, J.*, July, 1962 Term, GRANVILLE Superior Court.

Criminal prosecution upon a bill of indictment charging that the defendant "did unlawfully, wilfully and feloniously assault Lawrence Wortham with a certain deadly weapon, to-wit: a shotgun with the felonious intent to kill . . . the said Lawrence Wortham, inflicting serious injuries, not resulting in death . . ."

The defendant entered a plea of not guilty. The State called and examined three witnesses. Lawrence Wortham testified the defendant came to the home of the witness at about five o'clock in the afternoon of April 21, 1962. "So when he (the defendant) comes to cursing, I asked him to leave. He left and about dusky dark that night . . . I came outdoors . . . to the automobile . . . as I started back in the door, the shotgun shot. . . . I was hit by the shotgun. I was at my own home. . . . I had my back to the west. I didn't see the man that shot me. It was dark. . . . I went to the hospital and received treatment. All of the shots are in my body (back and arm) but seventeen. Seventeen were taken out."

Sheriff Roy D. Jones testified he investigated the shooting. During the investigation the defendant stated: "He and Lawrence got in an argument. Lawrence slapped him down. He got a fellow . . . to take him up the road about a mile and a half to . . . his sister's . . . He found nobody at home so he went in and got the shotgun (a .410). . . . He took the gun and shells and came back down . . . the road . . . laid down out there in the rye patch. . . . about 10 steps from the back door of Wortham's home. He waited until Wortham started back in the

house; when he opened the screen door . . . he shot him in the back. . . He said he was lying in the rye waiting for Wortham to come back to the house."

H. T. Brame, deputy sheriff, testified to the admissions made by the defendant to the sheriff. The defendant did not offer evidence. From an adverse jury verdict and judgment thereon, the defendant appealed.

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

William T. Watkins, for defendant, appellant.

HIGGINS, J. The indictment was drawn under G.S. 14-32: "Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony . . ."

The defendant's Assignment of Error No. 4 challenges the trial court's charge defining serious injury: "I instruct you in this case if you find beyond a reasonable doubt the assault was made with a gun under such circumstances as calculated to create a breach of the peace that would outrage the sensibilities of the community, it would be an assault with a deadly weapon inflicting serious injury."

The idea and some of the language are traceable to Justice Merrimon's opinion in *State v. Huntley,* 91 N.C. 617. In that case the Court had before it for review a special verdict finding the defendant, with an ordinary switch not larger than a little finger, gave his wife not more than 20 licks, breaking the skin, raising welts, and drawing blood, but "the said Rachel was not so injured as to prevent her from going about and doing as usual." Prior to the indictment, a justice of the peace had attempted to take final jurisdiction and dispose of the case upon the ground that no deadly weapon was used and *no serious damage done.* (emphasis added) At the time *State v. Huntley, supra,* was tried, punishment in assault cases was fixed by the Code of North Carolina, § 987: "In all cases of assault, with or without intent to kill or injure, the person convicted shall be punished by a fine or imprisonment, or both, at the discretion of the court; Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays, shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape." In 1911, Chapter 193, Public Laws, also withdrew from the jurisdiction of the justices of the peace, "assault or assault and battery by any man or boy over 18 years old on any

female person." The section above quoted, now G.S. 14-33, deals with punishment for various types of assault — all common law offenses.

However, in 1919, Chapter 101, Public Laws, now G.S. 14-32, the General Assembly created a new criminal offense. Following passage of the Act, this Court, in defining the term "inflict serious injury not resulting in death," not infrequently reverted to the definition "of serious damage done" as if the two expressions were synonymous. *State v. Plemmons,* (230 N.C. 56, 52 S.E. 2d 10); *State v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *State v. Hefner,* 199 N.C. 778, 155 S.E. 879; *State v. Strickland,* 192 N.C. 253, 134 S.E. 850

"Serious damage done" in assault cases withdraws jurisdiction from a justice of the peace. The term embraces results other than those arising from the use of a deadly weapon. If such a weapon is used, jurisdiction is withdrawn. Likewise, if serious damage is done, jurisdiction is also withdrawn. Serious damage, of course, includes serious physical injury. But it may include damage other than bodily injury. An assailant may roll the victim in the mud, ruin his best Sunday suit, break his glasses, and destroy his watch. This "serious damage done" removes jurisdiction of the case from a justice of the peace. *State v. Huntley, supra.*

By the passing of G.S. 14-32, the Legislature intended to create a new offense of higher degree than the common law crime of assault with intent to kill. The common law offense carries a fine or imprisonment, or both, in the discretion of the court. This new statutory offense is punishable by imprisonment for not less than four months nor more than ten years.

The statutory offense embodies (1) assault, (2) with a deadly weapon, (3) the use of the weapon must be with intent to kill, (4) the result of the use must be the infliction of serious injury, and (5) which falls short of causing death. *State v. Plemmons, supra.* The term "serious damage done" necessary to take an assault case from a justice of the peace is not synonymous with the term "inflicts serious injury not resulting in death," as used in G.S. 14-32. The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case.

Whether the assault is calculated to create a breach of the peace that would outrage the sensibilities of the community does not adequately or correctly describe the infliction of serious injury contemplated by G.S. 14-32. A simple assault committed by a prizefighter

upon a cripple at a Legion convention may be calculated to create a breach of the peace that would outrage the sensibilities of the community. The instruction given by the court does not properly define the serious injury contemplated by the statute under which the indictment was drawn. The court did not give any other definition.

The prosecuting witness was shot in the back and arm with a .410 shotgun, loaded with bird shot. He went to the hospital where 17 shot were removed. Whether the shot were removed by a knife, tweezers, or the finger nails, is undisclosed. How deep the shot penetrated into the flesh after passing through the clothing; whether the witness remained in the hospital half an hour, overnight, or a week, are matters also undisclosed.

The evidence is sufficient to go to the jury on the question of serious injury, but the jury must make the finding under a correct charge. For the error assigned, there must be a

New trial.

OLIN ODELL OWENS v.
NORFOLK AND WESTERN RAILWAY COMPANY, INC.
AND
MARION JEAN OWENS v.
NORFOLK AND WESTERN RAILWAY COMPANY, INC.

(Filed 7 November 1962.)

Railroads §§ 5, 6—

Plaintiffs' evidence tending to show that a motorist, on a dark and rainy night, approached a grade crossing, with which he was familiar, at a speed of 25 miles per hour when he could see only 25 feet ahead, and ran into the side of a locomotive that had stopped so as to block only half of the street, and that the motorist kept looking ahead without watching for an approaching train and did not see the engine or decrease speed until he was within a car or a car and a half length therefrom, *held* to disclose that negligence of the motorist was the real, efficient, and sole proximate cause of the collision, barring as a matter of law any recovery by the motorist or by his passenger.

APPEAL by plaintiffs from *Gwyn, J.*, second week of 19 March 1962 Term of FORSYTH.

Two civil actions to recover damages, in Olin Odell Owens' case for medical bills, loss of wages, personal injuries, and property damage, and in the case of Marion Jean Owens, his wife, for personal injuries and medical bills, received in a grade-crossing accident in the city of

Winston-Salem, North Carolina, allegedly resulting from the negligence of defendant—consolidated by consent for the purpose of trial.

From a judgment of involuntary nonsuit at the close of plaintiffs' case, the male plaintiff appeals, and from a judgment of involuntary nonsuit at the close of all the evidence, the *feme* plaintiff appeals.

Oliver T. Denning and Richard C. Erwin, Sr. for plaintiff appellants.

Craige, Brawley, Lucas & Hendrix and Hamilton C. Horton, Jr., by Hamilton C. Horton, Jr., for defendant appellee.

PER CURIAM. Plaintiffs' sole assignments of error are the allowance of defendant's motions for judgment of involuntary nonsuit.

Plaintiffs' evidence tends to show the following facts: The actions arose out of an automobile-train collision, which occurred about 9:00 o'clock p.m. on Sunday, 11 September 1960 at a grade crossing on South Main Street, in the city of Winston-Salem. U.S. Highway #52 and State Highway #8 merge into South Main Street, and this is the main highway leading to places south. South Main Street is 42 feet wide, runs north and south, and is surfaced with black asphalt at and near the grade crossing, where a spur track of the defendant railway crosses the street at a long, slanting angle, and runs generally in a northwest-southeast direction. Traveling south along South Main Street toward the grade crossing the street is level. Immediately beyond the grade crossing South Main Street starts on an incline. To warn travelers on the street there is a crossarm on either side of the spur track about 20 feet from the tracks to indicate a grade crossing. There is a telephone pole in front of the crossarm on the side of the grade crossing plaintiffs were approaching.

The male plaintiff, with his wife sitting beside him, was driving his 1950 Ford sedan at a speed of 25 miles an hour in a southerly direction on South Main Street, and approaching this grade crossing about 9:00 o'clock p.m. in transit to his home in Lexington, North Carolina. The male plaintiff testified on direct examination: "I noticed my speedometer, and I was driving at that time 25 miles an hour." The *feme* plaintiff testified on cross-examination: "It seemed like to me he was going 10 to 15 miles an hour, but I didn't look at the speedometer; he just seemed to me like he was driving slow." The male plaintiff knew of the grade crossing on South Main Street, because he had crossed it many times—about twice a month. The male plaintiff testified on cross-examination: "I knew that the crossing was there in the daytime, because you can see it; but at night, if it's a very bad night, you wouldn't take your eyes off the highway to look for a railroad crossing." It was raining and kind of foggy. He had his lights

on dim, his windshield wipers were working, the windows of his automobile were rolled up tight, and his brakes were good. There were no lights along the street. No other automobile was in the vicinity. The male plaintiff testified on direct examination: "It was raining hard. I had my lights on dim, and that would mean that I couldn't see over 25 feet, if that far. * * *It was real dark and cloudy, and with the lights on bright you couldn't hardly see the road at all; it was a black road." D. E. Williard, a witness for plaintiffs and a policeman of the city of Winston-Salem, who arrived at the scene of the accident a few minutes after it occurred, testified on redirect examination: "I would say the visibility was in the neighborhood of 300 to 400 feet, depending on what you were looking for; if you were looking for a light specifically, you could probably have seen it 800 to 1000 feet." The male plaintiff was keeping his eyes straight ahead the whole time. As he approached near the crossing, he heard no whistle or signal from the train, saw no flagman in the street ahead waving a lantern, and no lights. When he was a car or a car and a half length from the grade crossing, he saw a train on the crossing. He applied his brakes, and that's all he knows. He does not know in what direction the train was traveling. He was right on the train before he saw it.

Plaintiffs' automobile ran into the left front side of the train's black engine. The outermost protrusion of the engine stopped on the grade crossing about 12 feet from the west curb line of South Main Street—sufficient room for an automobile to have crossed the street ahead of it in safety.

In the collision both plaintiffs were injured and the automobile damaged.

Defendant's evidence shows the following: Its train, consisting of a diesel engine, a yellow refrigerator car, and two boxcars, was approaching the grade crossing at a speed of about two or three miles an hour. The engine's headlight was burning brightly. A brakeman with an electric lantern went ahead of the train, and stood in the street to warn or signal oncoming traffic. The engine was blowing its whistle and ringing its bell. The brakeman in the street saw plaintiffs' automobile 250 to 300 feet away approaching the grade crossing. He kept waving his lantern, until the automobile was almost on him, when he made a pivot out of its way, and the automobile crashed into the left front of the train's engine. When the automobile hit the engine, the engine had come to a complete stop. When the operator of the engine saw the automobile coming he gave short and long blasts with his whistle, and when he saw the automobile still coming, he applied his emergency brakes, and came to a complete stop a few seconds before the automobile ran into the engine. The engine stopped in about

the middle of the street. It was agreed that the train was moving northwestwardly down a slight grade, and consequently it would seem that the approaching train was in some degree facing toward plaintiffs' automobile traveling southwardly.

Conceding that plaintiffs' evidence, when considered in the light most favorable to them, *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1, shows that defendant was negligent in operating its train at night and approaching the grade crossing without the headlight of its engine burning and without giving any signal of its approach, nevertheless, it is manifest that the negligence of the male plaintiff in operating his automobile on a rainy and kind of foggy night at a speed, as he says, of 25 miles an hour (his wife's testimony as to speed seems a pure guess not entitled to probative value), when he could see only 25 feet ahead, along a street with which he was thoroughly familiar, and well knew that there was a grade crossing ahead and a crossarm beside the street to indicate the grade crossing, and under such conditions to keep looking straight ahead and not to look for the crossarm which he knew was there, so as to see and know the grade crossing was immediately ahead, and not seeing the train and not decreasing speed until he was within a car or a car and a half length from it and running into the left side of the engine instead of crossing in safety in front of the stopped engine, as their evidence shows he could have done, was active negligence on the part of the driver of the automobile, the male plaintiff, operating subsequent to any negligence on the part of defendant, and such negligence of the male plaintiff was the real, efficient and sole proximate cause of the injuries to himself and damage to his automobile and of his wife's injuries.

Plaintiffs' evidence when tested by settled principles of law, explained and applied in *Johnson v. R.R.*, 214 N.C. 484, 199 S.E. 704; *Jeffries v. Powell*, 221 N.C. 415, 20 S.E. 2d 561; *Jones v. R.R.*, 235 N.C. 640, 70 S.E. 2d 669; *Faircloth v. R.R.*, 247 N.C. 190, 100 S.E. 2d 328, is insufficient to make out a case for the jury as to both plaintiffs. *Meacham v. R.R.*, 213 N.C. 609, 197 S.E. 189, strongly relied on by plaintiffs, is distinguishable in that Meacham stopped the truck he was driving about ten feet from the switch track, looked and listened and heard nothing; that he next stopped about ten feet of the first track, looked and listened, and did not see or hear anything; that he then started up again, traveled a distance of 40 or 50 feet in low gear at a speed of three or four miles an hour, and was struck by the tender of the shifting engine on the fourth track.

Both judgments of involuntary nonsuit below are

Affirmed.

MALLIE GLESON JENKS v. HERMAN LEE MORRISON.

(Filed 7 November 1962.)

1. Appeal and Error § 19—

An assignment of error should clearly present the error relied on without the necessity of going beyond the assignment itself to learn what the question is.

2. Automobiles § 46; Evidence § 15—

Where plaintiff pedestrian's evidence is to the effect that defendant's car skidded 45 feet before striking him, and that plaintiff did not see or hear defendant's automobile until about the time it struck him, the omission of the court to charge with reference to the failure of defendant to sound his horn, G.S. 20-174(e), will not be held for prejudicial error, there being no evidence as to whether plaintiff did or did not sound his horn except the negative testimony of plaintiff that he heard nothing, not even the sound of the tires skidding a distance of 45 feet.

APPEAL by plaintiff from *Mallard, J.*, May 1962 First Regular Civil Term of WAKE.

Action to recover for personal injuries suffered by plaintiff by reason of the alleged actionable negligence of defendant.

The incident in question occurred in the general vicinity of Apex, N.C., in the early afternoon of 22 August 1960. Plaintiff was struck by an automobile owned and operated by defendant, while plaintiff was walking eastwardly across Jenks Road (rural paved road no. 1601), about 100 yards north of the intersection of Jenks Road with U.S. Highway 64. Defendant was driving northwardly along Jenks Road, which is a blacktop road, 18 feet wide. From its intersection with 64 to the point of the accident Jenks Road is straight and level.

Plaintiffs' version of the occurrence: Plaintiff parked his tractor in the driveway to his home on the west side of Jenks Road. He walked to the west edge of the road and looked both to his right and left and saw no vehicles approaching. He started diagonally across the road toward his store, and did not see or hear anything until he turned to his right about 18 inches from the east edge of the hard-surface and saw defendant's car almost upon him. Before he could move he was struck. Just prior to the accident defendant's speed was 50 to 60 miles per hour. He skidded 45 feet before striking plaintiff. Plaintiff was 50 years old, had normal eyesight and hearing, but did not see or hear defendant's automobile until about the time it struck him. He was seriously injured.

Defendant's version: Defendant's speed was 35 miles per hour. He was in his proper lane of travel. When he was about 50 feet away plaintiff started running across the road. Defendant applied brakes

and attempted to avoid striking plaintiff. The car stopped within a few feet of the point of impact. As a result of the impact there was a dent about the center of the hood.

The judge submitted three issues (negligence, contributory negligence, damages) to the jury. The jury answered the negligence issue "No." Judgment was entered denying recovery and dismissing the action.

Plaintiff appeals.

Vaughan S. Winborne and Daniel R. Dixon for plaintiff.
Smith, Leach, Anderson & Dorsett for defendant.

PER CURIAM. Plaintiff's assignments of error relating to the exclusion and admission of evidence are not in accordance with the rules of this Court. Assignments of error "should clearly present the error relied on without the necessity of going beyond the assignment itself to learn what the question is." 1 Strong: N. C. Index, Appeal and Error, s. 19, Footnote 203; *Balint v. Grayson*, 256 N.C. 490, 124 S.E. 2d 364. However, we have examined these assignments and find them without merit. The remaining assignments of error (other than formal assignments) relate to the charge. In them we find no error sufficiently prejudicial to warrant a new trial. Plaintiff places emphasis upon the omission of the court to charge with reference to the failure of defendant to sound his horn. G.S. 20-174(e). There is no evidence as to whether he did or did not sound his horn except the negative testimony of plaintiff that he heard nothing — not even the sound of tires skidding a distance of 45 feet. Parenthetically, it would seem futile to order a new trial on this pretext since it appears that plaintiff was probably guilty of contributory negligence as a matter of law. *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589.

In the trial below we find

No error.

J. W. McCLELLAN v. JACK BRYON COX.

(Filed 7 November 1962.)

APPEAL by defendant from *Gambill, J.*, February Mixed Term 1962 of UNION.

This is a civil action that arose out of property damage sustained by the plaintiff in an automobile accident that occurred about 11:50

a.m. on 23 September 1960 on U. S. Highway No. 29 in Davidson County, about three miles south of Lexington, near Yarborough's Restaurant.

U. S. Highway No. 29 is a four-lane highway and runs generally in a northerly-southerly direction. The northbound lanes and the southbound lanes are separated by a grassed median. The collision occurred while both cars were being operated in a northerly direction. The highway was dry and was slightly downhill at that point; the speed limit was 60 miles per hour.

The plaintiff was the owner and operator of a 1955 Plymouth automobile and the defendant was the owner and operator of a 1957 Plymouth automobile. Defendant Cox was in front in the right-hand lane, traveling about 45 miles per hour. Plaintiff was in the left-hand or passing lane and had just passed a large truck, which truck was in the right-hand lane and behind defendant's automobile. When the plaintiff was approximately 80 or 90 feet of a cross-over between the north and southbound lanes, and defendant's automobile was about 40 feet in front of him, the defendant without giving any signal began slowing down and cut across to his left lane directly in front of plaintiff's car, apparently with the intention of going into the cross-over. Plaintiff immediately applied his brakes but could not stop before he ran into the rear of defendant's automobile.

The case was submitted to the jury on plaintiff's alleged cause of action for damages to his car and on the cross-action by defendant for personal injuries and damages to his car.

The jury returned a verdict in favor of plaintiff and judgment was accordingly entered.

The defendant appeals, assigning error.

Coble Funderburk for plaintiff appellee.
Smith & Griffin for defendant appellant.

PER CURIAM. We have carefully examined the defendant's assignments of error and in our opinion they present no prejudicial error that would justify granting a new trial.

On the evidence presented, the case of *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849, supports the result reached in the trial below.

No error.

JACK L. CAUDILL, PLAINTIFF-EMPLOYEE v. CHATHAM MANUFACTURING COMPANY, DEFENDANT-EMPLOYER, AND HARTFORD ACCIDENT & INDEMNITY COMPANY, DEFENDANT-CARRIER.

(Filed 21 November 1962.)

1. Torts § 7—

A release executed by the injured party for a valuable consideration is a complete defense to an action by the injured party to recover damages for the injury, and the burden is upon the injured party, if he seeks to set the release aside for fraud, mistake, or other vitiating element, to prove the matters in avoidance.

2. Compromise and Settlement—

A compromise is an adjustment and settlement of differences, and if there are no differences or uncertainties there is no reason for compromise.

3. Master and Servant § 67—

Compromise settlements of claims under the Workmen's Compensation Act are permitted provided they are submitted to and approved by the Industrial Commission. G.S. 97-17.

4. Torts § 7—

A release from liability for personal injury may be set aside for mutual mistake based upon error in diagnosis, since such mistake relates to mistake of existing fact as to the extent of a known injury, but a release may not be set aside for mistake in prognosis, since such mistake relates to error in judgment or opinion as to the future course or consequences of a known injury, and is not a mistake of existing fact.

5. Same; Compromise and Settlement; Master and Servant § 67— Compromise settlement of claim held to preclude additional recovery.

Claimant suffered a fracture of the verterbrae of his back at an existing spinal fusion. Claimant was paid for total temporary disability, and, after the apparent healing of the incision to correct the injury, claim for permanent partial disability was adjusted by a compromise settlement and release, executed by the parties and approved by the Industrial Commission, under which claimant accepted payment of a stipulated sum in settlement of all claims, past, present and future arising out of the accident in question, and waived his right to reopen his claim for change of condition. Thereafter an abscess developed in claimant's back at the site of the spinal fusion, and the medical expert testified that the abscess probably existed in a latent state at the time the settlement was executed but that such condition was undiagnosable, and that his prior opinion as to the percentage of permanent disability was erroneous. *Held:* The mistake related only to consequences of a known injury, and uncertainties in this regard were the subject matter of the compromise settlement, and therefore the mistake was not such as to warrant a court of equity in setting aside the release.

PARKER AND HIGGINS, JJ., dissent.

APPEAL by defendants from *McLean, J.*, March 26, 1962, Regular Civil "A" Term of MECKLENBURG.

This is a proceeding under the Workmen's Compensation Act (G.S., Ch. 97). The parties are subject to and bound by the provisions of the Act.

In 1957 plaintiff was 53 years of age and had been employed by defendant Chatham Manufacturing Company for 20 years. About 18 years prior to 1957 plaintiff received compensation for an injury to his lumbar spine, which injury arose out of and in the course of his employment. Surgery was performed, resulting in a spinal fusion. At that time he was given a rating of 25 per cent permanent partial disability of the back.

On 14 September 1957 plaintiff, in the course of his employment, stepped down from a platform and "felt something click in his back." Medical examination disclosed that he was injured in his back at the site of his former injury and the spinal fusion. Pursuant to an "Agreement for payment of compensation," approved by the Industrial Commission, plaintiff was paid compensation for temporary total disability in the total amount of $1295.00, for a period of 36 weeks ending 27 May 1958; and, in addition, medical expenses totaling $2369.36 were paid by the insurance carrier.

In the meantime plaintiff was admitted to the Charlotte Memorial Hospital on 25 September 1957, remained there for 28 days and received "conservative" treatment under the direction of Dr. Chalmers R. Carr, an orthopedic surgeon. Plaintiff returned to the hospital on 13 January 1958. Dr. Carr performed an operation to correct a fracture at the site of the old fusion. The incision became infected and this slowed recovery. Plaintiff remained in the hospital until 5 March 1958; the wound was draining at the time he left the hospital, but closed about two weeks later. Dr. Carr saw plaintiff in April and May following, and on both occasions X-Ray examinations were made. The incision had apparently healed. In May 1958 Dr. Carr, at the request of plaintiff's family physician and the insurance carrier, rated the injury as 40 per cent permanent partial disability of the back referable to the 1957 accident. In October 1958 plaintiff was "pressuring" his attorney to get a settlement. On 18 October 1958 the parties executed in writing an "Agreement for Final Compromise Settlement and Release." It was approved by the Industrial Commission on 10 November 1958. Pursuant to this agreement, defendants paid plaintiff $3000, and his attorney $150, in addition to payments theretofore made, and plaintiff accepted same in full, final and complete settlement of any and all claims, past, present and future, arising out of the accident in

question, and waived the right to reopen his claim because of changes of condition.

A few weeks after the compromise settlement a knot or abscess developed at the site of the operation. Dr. Hagaman, at the hospital in Boone, N. C., made an incision to drain the abscess. Plaintiff was again examined by Dr. Carr in July 1959. "He was found to have an abscess in his back at the site of the prior spinal fusion, which had been performed on January 15, 1958, said abscess connecting with the bone grafts which had been used at the time of the fusion, and being the development of an osteomylitis in the area of the spinal fusion. . . ." Plaintiff again underwent surgery and remained in the hospital about three months.

Plaintiff petitioned the Commission for a hearing, seeking to rescind the compromise agreement and release on the ground that it was induced by a mutual mistake of fact. At the hearing Dr. Carr testified in part as follows: "It is my opinion that it (the abscess and osteomylitis) probably did exist in October 1958 . . . it probably had been there in the latent state from the time of his original surgery in January 1958. . . . It is my opinion that as of July 26 of 1960, that he has to the best of my knowledge and judgment a disability of approximately 60 per cent as we normally rate things related to the back, by virtue of the condition of ankylosis and fibrosis and arthritis that exists in his back subsequent to his injuries, the surgical treatment and the complication. . . . I did not recognize in May of 1958 the condition which later proved to be present and in which, in retrospect, I now recognize as having been there but having been undiagnosable at that time. In the letter I wrote Dr. Hall, who was Mr. Caudill's family doctor and referring physician, I made mention of the fact that I thought it was too early to give a permanent rating, but to the best of my knowledge at that time the 40 per cent was certainly the minimum and a justifiable one. . . . I gave them a rating based on the facts I then saw, which I now feel professionally and in my opinion were in error."

The hearing Commissioner reviewed the facts, generally as hereinbefore set out, and concluded that the compromise agreement "was entered into and approved by the Commission under and as a result of a mutual mistake of fact to the claimant and the defendants and should be set aside under rules of the Commission for approval of agreements, Section XV, no. 2." The hearing Commissioner declared the compromise agreement null and void, ordered it set aside and the claim placed on the hearing docket to determine the amount of compensation, if any, due plaintiff.

Upon review, the full Commission affirmed the findings of fact, rulings and order of the hearing Commissioner. The Superior Court, on appeal, affirmed the opinion and award of the full Commission.

Defendants appeal.

Henderson & Henderson and Joe T. Millsaps for plaintiff.
Kennedy, Covington, Lobdell & Hickman and Edgar Love, III, for defendants.

MOORE, J. One of the questions posed by this appeal is whether the mutual mistake of fact upon which plaintiff relies is such as will permit a court exercising equity jurisdiction to annul the compromise agreement and release.

"A release executed by the injured party and based on a valuable consideration is a complete defense to an action for damages for the injuries and where the execution of such release is admitted or established by the evidence it is necessary for the plaintiff (releasor) to prove the matter in avoidance." *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5. We have held that a release from liability for personal injury may be set aside for mutual mistake of fact. *Cheek v. R.R.,* 214 N.C. 152, 198 S.E. 626. And it has been declared that "a mistake of fact takes place when some material fact, which really exists, is unknown, or some essential fact is supposed to exist which really does not exist." *Freeman v. Croom,* 172 N.C. 524, 90 S.E. 523.

The class of cases in which it is sought to rescind releases and compromise settlements for mutual mistake of fact as to the nature, extent and consequences of personal injuries is said to be *sui generis. Clancy v. Pacenti,* 145 N.E. 2d 802, 71 A.L.R. 2d 77 (Ill. 1957). We have no case in this jurisdiction sufficiently in point to be controlling on this appeal. There is no uniformity of opinion in other jurisdictions. Cases are legion, and opinions range from strict enforcement of releases according to their terms, in the absence of fraud, to the so-called "liberal view" in which releases are set aside almost without rule and according to the notion of the particular court. The cases are assembled and discussed in the following annotations. 71 A.L.R. 2d 82, Anno: Personal Injury — Release — Avoidance; 117 A.L.R. 1022, Anno. — Release — Personal Injuries — Avoidance; 48 A.L.R. 1462, Anno. — Release — Personal Injuries — Avoidance.

What seems to us to be the general principles followed by a majority of the courts are set out in 76 C.J.S., Release, s. 25a, pp. 645-647, as follows:

> "A release may be avoided where the releasor can show that it was executed by mutual mistake, as between himself and the releasee, of a past or present fact, material to the release or the agreement to release, as where there was a mutual mistake as to

the nature, extent or degree of gravity of the releasor's injury, unless it further appears that the parties intended that claims for all injuries, whether known or unknown at the time of the execution of the release, be relinquished. . . .

"The mistake must be as to a present, existing fact, or a past fact; a mistake in prophecy, or in opinion, or in belief relative to an uncertain future event, such as the probable developments from, quickness of recovery from, and the permanence of, a known injury, is not such a mutual mistake as will avoid the release; nor does conscious ignorance of a fact amount to a mistake.

"In determining whether a release was executed under a mutual mistake, all of the circumstances relating to the signing must be taken into consideration, including the sum paid for the release. A factor to be considered in cases of this kind is whether the question of liability was in dispute at the time of the settlement. The source or author of the mistake is of no consequence if the parties in good faith relied on it, or were misled by it, and the releasor was thereby induced to release a liability, which he would not otherwise have done."

The following are illustrative of the cases in which releases were rescinded on the ground of mutual mistake as to the nature and extent of the injuries to releasors: In *Clancy v. Pacenti, supra,* plaintiff was injured in an automobile accident. She executed a release for a consideration of $150 on the assumption she had no more than a muscle sprain, when in fact she had two herniated discs. The release was set aside and the court awarded damages in the amount of $22,500. *Crane Co. v. Newman,* 37 N.E. 2d 732 (Ind. 1941), was an action for damages for injury suffered by plaintiff in falling down an elevator shaft. He was assured by defendant's physician that his injuries were superficial, and for $140 he released defendant. Afterwards it was discovered that he had a broken back and was permanently injured. The release was set aside and a recovery of $10,000 allowed. *McKissick v. Penn. Brook Coal Co.,* 168 A. 691 (Pa. 1933), was a workmen's compensation case. A final receipt was signed on the assumption of both parties that claimant had suffered a slight concussion, when in fact he had a depressed fracture of the right frontal bone and a fracture at the base of the skull. The settlement was vacated and further compensation awarded. In *Poti v. New England Road Machinery Co.,* 140 A. 587 (N.H. 1928), plaintiff executed a release on the basis of a bruise on his leg and physician's opinion there would be a recovery within a few weeks. But in truth the muscles of the leg were so severely injured that they came away from the bone, a serious sore

developed and plaintiff was permanently injured. See also: *Serr v. Biwabik Concrete Aggregate Co.*, 278 N.W. 355 (Minn. 1938); *Shetina v. Pittsburgh Terminal Coal Corporation*, 179 A. 776 (Pa. 1935), a workmen's compensation case. It will be observed that in all of these cases the true nature and extent of the injuries, as they existed at the time of the execution of the releases, were unknown. It is the majority view that releases may be set aside for mutual mistake of fact when the nature and extent of injury, as it existed at the time the release was executed, were unknown, unless there is an overriding factor, as, for instance, questionable liability where releasee merely buys his peace.

Some courts have been reluctant to upset settlements and releases, in the absence of fraud, even where there were mutual mistakes as to the nature and extent of the injuries. *Reinhardt v. Wilbur*, 105 A. 2d 415 (N.J. 1954); *Caffey v. Aetna Casualty & Surety Co.*, 219 S.W. 2d 530 (Tex. 1949); *Grace v. Eisenhuth*, 150 S. 398 (La. 1933).

Many courts have refused to set aside releases where the mistake consisted of unforeseen consequences of known injuries, that is, where the nature and extent of the injuries were known at the time of the execution of the release, but later developments were more serious than had been anticipated by physician or the parties. The following are examples: In *Mendenhall v. Vandeventer*, 299 P. 2d 457 (N.M. 1956), plaintiff had undergone an operation for an elbow fracture, and on the opinion of the doctor that he would recover within four to six weeks, he made a compromise settlement and executed a release. Afterwards there were complications and further surgery was necessary. The court ruled that the parties had contracted with reference to future possibilities, foundation for rescission can be laid only by mistake of past or present fact material to the agreement, and such effect cannot be produced by a mistake in prophecy or in opinion — such not being *facts*. *Tewksbury v. Fellsway Laundry*, 65 N.E. 2d 918 (Mass. 1946), involved a release by plaintiff who had suffered abrasions of the face, injury to the right hip, laceration in the groin and fracture of the right femur. She afterwards developed osteomylitis. The court, refusing to set the release aside, said: ". . . (T)he mistake must relate to a past or present fact material to the contract and not an opinion respecting future conditions as a result of present facts." *Bee v. Chicopee Mfg. Corporation*, 55 A 2d 897 (N.H. 1947) is a workmen's compensation case. Claimant underwent surgery for removal of coccyx, and thereafter agreed to a settlement and signed a release. A permanent nerve involvement developed. The court decided it was not a case for rescission of release, and stated that claimant had contracted with reference to the uncertainties, and the fact that she was unable

to resume work within the period suggested by her attending physician amounted to a mistake in prognosis. *Reichner v. P. Blakiston's Son & Co.*, 175 A. 872 (Pa. 1934), is also a workman's compensation case. Claimant suffered an injury to his leg; he entered into a compromise agreement which was approved by the Compensation Board. He later petitioned to reopen the case on the ground that he had executed the agreement in ignorance of the fact that the infection from the injured leg did affect and would thereafter affect and aggrevate a weekened heart condition known as myocarditis. The case was not reopened. See also *Mack v. Albee Press, Inc.*, 32 N.Y.S. 2d 231 (1942), in which it is said that a miscalculation of consequences does not avoid a release.

It is generally recognized that there is a distinction between the extent of a known injury as an existing fact and its consequences as a matter of opinion, though the distinction in some instances is a narrow one. ". . . (I)t does not follow that an opinion as to the extent of an injury is part of the opinion as to the consequences merely because the latter is predicated upon the former. . . . (O)ne relates to facts of the past and present, and the other relates to inquiry into the future." *Poti v. New England Road Machinery Co., supra.* Some courts do not recognize that there is a distinction. In *Granger v. Chicao, M. & St. P. Ry. Co.*, 215 N.W. 576 (Wis. 1927), plaintiff signed a release six months after he was injured and after employer's physician had stated that plaintiff was "pretty well along toward being cured." Plaintiff's condition continued serious and the period of recovery greatly extended. The court declared: "The statement made by the doctor . . . is not a mere expression of opinion as to future events. It was a representation as to existing facts upon which both the plaintiff and the Company had the right to rely." *Denton v. Utley*, 86 N.W. 2d 537 (Mich. 1957), involved an injury suffered in an automobile accident. Not knowing that he had been injured in the accident, plaintiff executed a general release in settling property damage. It was later discovered that he had been seriously injured. He was probably entitled to rescission under the majority view, but the following is from the opinion delivered by Mr. Justice Smith: ". . . (W)e may well ask, as a practical matter (as distinguished from a verbal technique), is it possible to completely divorce diagnosis from prognosis? Is there not an interrelation, even if not an interdependence? Is not a doctor's opinion as to prospects of recovery a representation as to an existing factual situation upon which all parties should be entitled to rely?" The opinion in substance answers the first question in the negative and the second and third in the affirmative. It is noted that three Justices concurred, four concurred in the result, and one did not sit.

Among North Carolina cases the one most nearly analogous to the instant case is *Morgan v. Norwood,* 211 N.C. 600, 191 S.E. 345. Therein a compromise settlement was approved by the Industrial Commission. Claimant petitioned for a rehearing on the ground that his condition (hearing) had grown worse, he had become permanently disabled, and had been compelled to compromise his claim because of his extreme need. The Court held that the settlement was binding and final, and commented that there was no allegation or proof that it was obtained by fraud or mutual mistake. Both appellant and appellee, in the case at bar, appear to find comfort in this decision. But to us it is not sufficiently definitive to furnish guidance.

A compromise is essentially an adjustment and settlement of differences. If there are no differences or uncertainties there is no reason for compromise. The law permits compromise settlements between employers and employees who are bound by and subject to the Workmen's Compensation Act, provided they are submitted to and approved by the Industrial Commission. G.S. 97-17. The law thus undertakes to protect the rights of the employee in contracting with respect to his injuries. The presumption is that the Industrial Commission approves compromises only after a full investigation and a determination that the settlement is fair and just. In the instant case it is clear that the parties were contracting with reference to future uncertainties and were taking their chances as to future developments, relapses and complications, or lack thereof. If not, why the compromise and release? The nature and extent of the injury were known. These had been explored and discovered by surgery. Remedial action had been taken. The plaintiff was "pressuring" for a settlement. The doctor gave a rating of 40 per cent disability and advised that it was a minimum rating and it was too early to give a permanent rating. The doctor stated that the abscess and osteomylitis which developed later were undiagnosable at the time he made the rating. His opinion, given at the hearing, that he had made a mistake was, as he said, "in retrospect." He stated that the abscess and osteomylitis *probably* did exist in October 1958 and *probably* had been there in a latent state. They were only consequences of a known injury and developed after the release was executed. There is no competent evidence that they were "facts" at the time the compromise settlement was made and approved. The parties contracted with respect to such consequences. The mistake disclosed by this record is not such as will enable a court of equity to set aside a release.

We do not reach, and we make no decision with respect to, the question as to whether the Industrial Commission has inherent equitable jurisdiction to rescind and set aside settlements and compromise

settlements, approved by them, on the ground of mutual mistake of fact. The Legislatures of some States have conferred such jurisdiction by statute. We find no such provision in the North Carolina Workmen's Compensation Act. The General Assembly may desire to give the matter consideration. If the Industrial Commission presently has no such jurisdiction by implication, it cannot confer such jurisdicton upon itself in the exercise of its rule making authority. *Evans v. Times Co.*, 246 N.C. 669, 100 S.E. 2d 75.

This case is remanded to Superior Court with direction that it be returned to the Industrial Commission that an order may be entered in accordance with this opinion.

Error and remanded.

PARKER & HIGGINS, JJ., dissent.

STATE v. RAY HELSABECK.

(Filed 21 November 1962.)

1. Embezzlement § 6— Evidence held sufficient to overrule nonsuit in this prosecution for embezzlement.

The State's evidence tended to show that defendant, in negotiating for the sale of a house as broker, entered into a verbal contract with the purchaser under which the purchaser was to pay him the monthly payments on the mortgage assumed by the purchaser and the broker was to turn over the sums monthly to the mortgagee until such time as the mortgagee should accept the assumption of the debt by the purchaser, and that the purchaser made seven such monthly payments to the broker but that the broker made only four monthly payments to the mortgagee, and converted to his own use the proceeds of the other three payments. *Held:* The evidence is sufficient to be submitted to the jury in a prosecution for embezzlement, since it tends to show that the broker, as agent and while acting in a fiduciary capacity, fraudulenly embezzled and converted to his own use monies which the purchaser entrusted to him to pay to the mortgagee. G.S. 14-90.

2. Same—

Fraudulent intent, constituting a necessary element of embezzlement, may be shown by direct evidence or by evidence of facts and circumstances from which it may be reasonably inferred.

APPEAL by defendant from *Fountain, S.J.*, 28 May 1962 Criminal Term of FORSYTH.

Criminal prosecution upon an indictment charging that defendant, Ray Helsabeck, being "the agent, bailee, consignee, clerk, employee

and servant of one Thomas D. Kempton" did feloniously embezzle $269.70 in money entrusted to him by Thomas D. Kempton. G.S. 14-90.

Plea: Not Guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, suspended by the court with defendant's consent on condition that he make restitution and on other conditions, defendant appeals.

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

Emanuel & Emanuel by J. L. Emanuel for defendant appellant.

PARKER, J. Defendant's sole assignment of error carried forward and discussed in his brief is to the denial of his motion for judgment of nonsuit made at the close of all the evidence: the State and the defendant introduced evidence.

This is a summary of the State's evidence:

Thomas D. Kempton, an associate engineer with Western Electric Company in the city of Winston-Salem and a married man of very little business experience, who had never owned any real estate, was desirous in the fall of 1960 of purchasing a home in the city. Ray Helsabeck is a licensed real estate broker in Winston-Salem. On 20 December 1960 Kempton entered into negotiations with defendant to purchase a house situate at 1237 Peachtree Street in the city of Winston-Salem owned by Mrs. Elizabeth H. Willard, a daughter of defendant, who at that time was a resident of Ohio. This Willard house at the time was burdened with a deed of trust securing an indebtedness in the sum of $10,062.00 in favor of the Prudential Insurance Company, payable in monthly installments of $89.90. The negotiations terminated in a verbal contract of purchase and sale as follows: Kempton was to pay defendant a down payment of $900.00 in cash and give him a $1,200.00 promissory note, for Mrs. Willard's equity of redemption in the property, and he was to receive a deed for the property, and he and his wife were to assume the payment of the secured debt to the Insurance Company. That until the Insurance Company agreed that he and his wife could assume its secured debt, he was to make out monthly cheques for $89.90 payable to defendant, and defendant would use the proceeds of the cheques to pay to the Insurance Company the monthly installments due. In December 1960 Kempton borrowed $900.00, and gave it to defendant, and also a promissory note for $1,289.47. On 30 December 1960 defendant gave Kempton his promissory note reading: "Three years after date I promise to pay to the order of Thomas D. Kempton nine hundred and 00/100 dollars at $29.59 per month, Wachovia Bank & Trust Company." Thereafter, Kempton and his wife moved into the Willard house, and lived in it about seven months.

On 5 January 1960 (it seems this is a manifest error and should be 1961), on 1 February 1961, on 7 March 1961, on 5 April 1961, on 12 May 1961, on 13 June 1961, and on 10 July 1961 Kempton delivered to defendant his cheques payable to the order of Ray Helsabeck in the sum of $89.90 each, and drawn on Wachovia Bank & Trust Company, Winston-Salem, North Carolina, except that the February cheque has as payees Ray Helsabeck, Carolina Realty Company. The May, June, and July cheques have on their face: "For: House payment to Prudential Ins. Co." The January, February, March, April and June cheques were endorsed "Ray Helsabeck—Carolina Realty Co.", and the May and July cheques were endorsed "Ray Helsabeck." All these cheques were paid upon presentation by the payee bank.

In May 1961 defendant came to Kempton's home, and delivered a deed from Mrs. Elizabeth H. Willard, and husband, to Thomas D. Kempton, and wife, for the property at 1237 Peachtree Street. At that time defendant told Kempton and his wife: "If you record this, then this deal with the notes will have to go through as written, otherwise, at the end of the year, if we want to, we can renege, but if you put it on record, it is final." This deed executed by Mrs. Elizabeth H. Willard, and her husband, bears the date of 6 January 1961, was acknowledged by them before a notary public in Ohio on 30 January 1961, and was filed for registration in Winston-Salem on 26 September 1961. This deed is in the usual form, recites a consideration of $100.00, and other considerations, refers to no notes, and covenants that the property conveyed is free from encumbrances.

On 25 July 1961 Charles D. Ficken, a mortgage loan agent for Prudential Insurance Company, came to 1237 Peachtree Street looking for Mrs. Elizabeth H. Willard. Kempton told him he had purchased the house. Ficken told him the monthly installments on the secured debt were three months delinquent.

Helsabeck made four payments of $89.90 to Prudential Insurance Company from the proceeds of Kempton's seven cheques for $89.90 each, but did not make payments of $89.90 to the Insurance Company from the proceeds of three of Kempton's cheques in the sum of $89.90 each.

As a result of the information received in July 1961 by Thomas Kempton from Ficken that the monthly installments on the debt to Prudential Insurance Company were three months in arrears, he went the same month to George B. Kempton for advice. They were not kin. Thomas Kempton knew George B. Kempton, who has been in the real estate business in Winston-Salem for 23 years, by reason of the fact that George B. Kempton had done some building for Western Electric Company. Thomas Kempton went over his transaction with defendant

with George B. Kempton. George B. Kempton testified "the thing was very confused," and he called defendant for a conference. At this time George B. Kempton did not know Thomas Kempton had received a deed for the house. George B. Kempton testified:

> "I had a conference with Mr. Kempton and defendant and Tom's wife in my office approximately in July. During that conference defendant said he had used the money from these checks; he said he would make the money good during that week.* * *I suggested to defendant that I had never seen a real estate transaction handled in this way, the man couldn't get his deed, and they had notes swapped back and forth, and I suggested to him: 'You are certainly on mighty thin ice, as far as I can see, and I think you would be wise to get this settled,' and he said, 'I agree with you thoroughly, I don't want any trouble about it and if he will just turn the papers back to me I will meet him at Wachovia Bank and pay off this $900.00 note balance that is due, and we will wash it out.' * * *so on the Thursday morning that I called the Wachovia Bank and told them they would be up there and pay this off and get the note out and to send it to the branch bank Thursday morning. Defendant never showed up. I continued trying to help Mr. Kempton, charging him nothing. I suggested defendant come out there again and he said he couldn't raise the money, that he couldn't get it and he didn't know what he was going to do. He said he would do it on Thursday, and the following Tuesday he didn't get it. * * *during the course of all this defendant told me that he had taken these checks. I said, 'Why would you take money for Prudential Insurance Company,' he said, 'I do a great deal of business with them. I will handle it and send it in.' I said, 'You haven't, though.' He said, 'No, but I am going to,' and that was the way I became involved in it, and those were the things he told me."

Charles D. Ficken testified in substance: His understanding is defendant ran Carolina Realty Company at that time. When he told Thomas Kempton the loan was in arrears, Kempton told him he had made monthly payments, but Ficken is not sure whether Kempton said he had made the payments to Carolina Realty Company or defendant. The Insurance Company foreclosed its deed of trust on 1 November 1961.

In August 1961 the North Carolina National Bank carried an account in the name of defendant or Carolina Realty Company. On 7 August 1961 there was presented to this bank a cheque for $273.26 signed by defendant for Carolina Realty Company payable to Pru-

dential Insurance Company, which was not paid by the bank by reason of insufficient funds on deposit in the bank by the drawer.

In the last of September 1961 the Kemptons moved out of the house. Defendant has never paid him back any of the cash down payment of $900.00 or any of the $89.90 monthly payments on the deed of trust debt.

This is a summary of defendant's evidence, except when quoted: As agent for his daughter Mrs. Willard, he ran an advertisement for the sale or rental of her house situate at 1237 Peachtree Street. As a consequence, he was contacted by Thomas Kempton who said he would like to buy it. He told Kempton it would take $1,287.53, which was the difference between what they owed Prudential Insurance Company and $11,900.00, and he would sell it for that amount. Or he would rent it for a year at $89.90 a month, which "was our costs per month of the payments, until he could raise this amount." Kempton gave him a cheque for $89.90 for rent of the property for January 1961, and moved into the house. Kempton said he would like to buy the property as soon as he could get the down payment. Kempton gave defendant a note for $1,287.53, saying, "I will give you a note for that amount until I can raise it, I have some money coming." He told Kempton he would transfer the property when he, Kempton, paid off the note. A few days later Kempton gave him $900.00 saying he couldn't get any more. He told Kempton he would accept that until he got the $387.53. Kempton said that if he was going to have to pay 6% interest on his note until he paid it off, he would like to have 6% interest on the $900.00 in cash he gave defendant. Defendant said he thought that was fair; he would hold the $900.00 as a down payment and pay him 6% interest. Thereafter, he went to Ohio and procured a deed for the property to Kempton, and wife, from his daughter to be delivered when he got the remainder of his money.

On 7 February 1961 Kempton told him he had $100.00, and he could pay his $89.90 monthly payment, but if he did, he wouldn't be able to make a payment on the bank note for the $900.00 he had borrowed. Whereupon, Kempton gave him a cheque for $89.90, and he refunded him the amount he had to pay on his bank note. In March, April, May and June, Kempton could only pay $60.00 a month. He told Kempton in June this had gone on long enough, instead of his getting a full month's rent of $89.90, he was only getting $60.00 a month. In July Kempton told him he wanted to see the deed, and when Kempton received it, he walked out of the office over his protest carrying the deed.

A few days later George B. Kempton called him for a conference. At the conference George B. Kempton threatened him with the loss

of his real estate license if he didn't get the payments with Prudential Insurance Company up to date. He told them if Thomas Kempton was not satisfied with the transaction, and if he would leave the house on August first, he would give him every dime he put in it, "and the $89.90 that he had paid me for rent would be considered as rent for the time that he was in it. This he agreed to do, and on the strength of that verbal agreement I mailed to Prudential a check for $273.00 and some cents, to get the property up to date." The property at that time had not been foreclosed, but the payment of the secured debt was delinquent. Kempton did not move out on August first, and he stopped payment on the cheque.

Defendant testified on cross-examination:

> "This check for $273.26 was returned for insufficient funds. And Prudential wrote me a letter that it had been returned for insufficient funds and unless it was paid promptly they would have to foreclose; that was under date of August 14, 1961. They did foreclose, and I didn't pay it.
>
> "* * *From the time Kempton was in the picture, I paid Prudential the January, February, March and April payments, being the same amount Mr. Kempton was paying me for rent, the same as the man before him paid me for rent.
>
> "There were three payments of rent that he paid to me that were never sent to Prudential. He was to pay me $89.90 in rent. He was coming up $30.00 short of this money every month.* * *
>
> "I signed a note promising to pay Thomas D. Kempton $900.00 three years after its date, of December 30, 1960, at 6%. The words '$29.59 per month of Wachovia Bank and Trust Company' were written in the note after February 7th, after I signed it—that is not my writing. * * *
>
> "* * *I have a check dated February 1st for $29.59—that was the first payment I made to him, and the first month he paid me the full rent—$89.90."

Thomas Kempton, recalled as a witness after the defendant rested, testified as follows:

> "I never did have a rental agreement for the property at $89.90. I had no other contract with defendant other than one of purchase. The purchase contract was not to take place when I paid $1,200; it was to take place when we exchanged the $900.00 and the promissory notes (sic)."

It is very apparent from all the evidence that Thomas D. Kempton has had very little business experience. It is also very apparent from

the evidence, whether one considers Thomas D. Kempton's version of the real estate transaction or that of defendant, that it was a strange and unusual transaction.

However that may be, considering the State's evidence in the light most favorable to it, and giving to it the benefit of all legitimate inferences to be drawn therefrom, as we are required to do in passing on defendant's motion for judgment of nonsuit, *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686, this seems clear: Thomas D. Kempton and defendant as agent for his daughter, Mrs. Elizabeth H. Willard, entered into a contract of purchase and sale of the house situate at 1237 Peachtree Street in Winston-Salem, that this house was burdened with a deed of trust securing an indebtedness in the sum of $10,062.00 in favor of Prudential Insurance Company, payable in monthly installments of $89.90, that Kempton was to assume the payment of the secured debt to the Insurance Company, and that until the Insurance Company agreed that Kempton and his wife could assume the payment of its secured debt, Kempton was to make out monthly cheques for $89.90 payable to defendant, and defendant would use the proceeds of these cheques to pay to the Insurance Company the monthly installments due. That Kempton in January, February, March, April, May, June, and July 1961 gave defendant cheques for $89.90 each, which were paid by the bank upon which they were drawn to defendant, and that defendant used the proceeds from four of these cheques to pay the monthly installments to the Insurance Company, and used the proceeds from the last three cheques for his own purposes. George B. Kempton testified that defendant at the conference in his office said "he had used the money from these checks; he said he would make the money good during that week." Defendant never did. Later Prudential Insurance Company foreclosed its deed of trust because the monthly installments due were in arrears.

The State's evidence would permit and support a jury's finding of these four distinct propositions of fact: One. Defendant was the agent of Thomas D. Kempton, and charged with the duty of receiving from his principal in his fiduciary capacity, and paying over to Prudential Insurance Company, on the secured debt owned by it on the house defendant sold Kempton and his wife, seven monthly installment payments of $89.90 each. Two. That he did in fact receive such money amounting to $629.30. Three. That he received this money in the course of his employment and by virtue of his fiduciary relationship with Thomas D. Kempton. And Four. Defendant knowing this money was not his own fraudulently embezzled and converted the last three of these payments of $89.90 each, amounting to $269.70, entrusted to him in his fiduciary relationship by Kempton, to his own use.

The establishment by the State of these four elements is sufficient to constitute the felony of embezzlement under the statute and decisions of this State. G.S. 14-90; *S. v. Blackley,* 138 N.C. 620, 50 S.E. 310; *S. v. Eubanks,* 194 N.C. 319, 139 S.E. 451; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *S. v. Block,* 245 N.C. 661, 97 S.E. 2d 243.

The fraudulent intent within the meaning of G.S. 14-90 "may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred." *S. v. McLean,* 209 N.C. 38, 182 S.E. 700.

Defendant's motion for judgment of nonsuit made at the close of all the evidence was properly overruled.

Affirmed.

ERNEST RAY PUNCH, BY AND THROUGH THURMAN R. PUNCH, NEXT FRIEND FOR ERNEST RAY PUNCH, INFANT v. T. E. LANDIS AND C. E. LANDIS, TRADING AS LANDIS MOTORS; HENRY CLICK TRUITT; P & G CHAIR COMPANY, INC.; GRADY CARROLL, JR.; EDNA WRENN SCARLETT; WILLIAM LAFAYETTE ABERNETHY; HOUSTON DONNELL HAVNAER; ABERNETHY'S, INC; AND EDNA WRENN SCARLETT, ADMINISTRATRIX OF THE ESTATE OF RUSSELL WAYNE SCARLETT, DECEASED.

(Filed 21 November 1962.)

1. Automobiles § 11—

The operator of a wrecker towing another vehicle at night is responsible for having the lights required by statute on the back of the towed vehicle.

2. Same—

By the terms of G.S. 20-129(g) the requirement of a stop lamp on the back of vehicles does not apply to vehicles manufactured prior to 31 December 1955.

3. Automobiles § 9—

The stopping of a vehicle on a highway after an accident is not negligence, since a motorist is required by statute to stop after an accident. G.S. 20-166(b).

4. Automobiles § 41e—

Evidence tending to show that the driver of a wrecker towing another vehicle had burning on the back of the towed vehicle lights sufficient to warn following motorists, that upon suddenly encountering fog, which covered the road for only a few hundred feet, he slowed to 10 or 15 miles per hour, that upon feeling a slight impact from a car hitting the rear of the towed vehicle, he came to a stop, and, that as he came to a

stop another car hit the rear of the first car with tremendous impact, the second impact occurring some 5 to 10 seconds after the first, *is held* insufficient to be submitted to the jury on the issue of negligence on the part of the driver of the wrecker.

5. Automobiles § 41a—

Negligence must be the proximate cause of damage or injury in order to be actionable.

6. Same—

Where the direct testimony and the physical facts at the scene disclose that plaintiff passenger received no injury when the car in which he was riding collided with the rear of another vehicle in a fog, and that within 10 seconds of this slight impact another car collided with the rear of the car in which plaintiff was riding with a tremendous impact which caused extensive damage to the vehicles and was the sole cause of plaintiff's injury, motion to nonsuit made by the administratrix of the driver of the car in which plaintiff was riding should be allowed.

7. Automobiles § 39—

The physical facts at the scene of the accident may be such as to indicate excessive speed unquestionably.

8. Automobiles § 41f—

Evidence tending to show that an automobile struck the rear of a van which was being towed by a wrecker, that the impact occurred shortly after the vehicles had entered a fog and were being driven at a very slow speed, the impact being very slight, and that within ten seconds after the impact the driver of another car hit the rear of the automobile, with such force as to drive it under the van, shearing off the top more than half way back, and driving the heavy van upon the rear of the wrecker, *is held* sufficient to be submitted to the jury on the issue of negligence of the driver of the second car, since the physical evidence discloses that the second car was being driven at excessive speed.

APPEAL by all defendants except P & G Chair Company and Grady Carroll, Jr., from *Froneberger, J.*, January, 1962 Regular Term, CATAWBA Superior Court.

This civil action was instituted on behalf of Elmer Ray Punch to recover damages for personal injuries sustained in a collision involving three motor vehicles. Judgment of nonsuit was entered as to P & G Chair Company and Grady Carroll, Jr. The circumstances under which the collisions occurred are stated by this Court in the cases of *Lawing v. Landis* and *Houser v. Landis, reported in* 256 N.C. 677, 124 S.E. 2d 877.

The parties stipulated the ownership of the vehicles involved and the agency of the drivers as disclosed in the former opinion of this Court. Additional evidence was offered by all parties except Edna Wrenn Scarlett, individually, and as administratrix of her son.

A summary of the additional evidence is here given: Highway 64-70 is a four-lane, hard surface road, 52 feet wide. The two north lanes are for west-bound traffic and the two south lanes are for east-bound traffic. The rear-end collisions occurred in the outside, or north, lane as the three vehicles were traveling west. The wrecker towing the chair company van was in front, followed by the Chevrolet in which the plaintiff was a guest passenger. The Ford station wagon followed the Chevrolet. The evidence indicated the collisions occurred about 100 to 160 yards after the vehicles entered the fog bank. The first impact occurred when the Chevrolet struck the rear of the van. The sequence of events is disclosed by the adverse examination of Henry Click Truitt:

"I was traveling at 10 to 15 miles per hour and felt this impact. . . . So far as I could tell, the first impact did not have any effect upon the operation of the truck. By this I mean it still rolled free. I stopped as quick as I could, but so far as I could tell, I couldn't tell any difference with the truck rolling. So far as I could tell, the first impact did not cause the furniture van to come up against the wrecker. It did not cause it to swing on my wrecker. . . . Thereafter, I had a second impact from the rear; it was five or ten seconds after the first impact that I felt or heard or experienced the second impact; I don't think it was over that. I was in the wrecker when I felt the second impact. I was in the seat under the wheel. The second impact seemed to be much more severe and a lot noisier than the first impact; it sounded real loud. . . . I examined my vehicle and the vehicle I was towing after I got traffic under control. I could not move it.

"I did not receive any injuries in the first impact. . . . After the first impact and before the second, I can testify positively whether or not the truck was on my wrecker. I am positive the truck was not on the wrecker after the first impact. I know this because it wasn't hit that hard. . . . Also, I had looked out the back glass. While I was looking out the back glass the second impact occurred so hard that it knocked my hat off. . . . I observed the position of the Chevrolet under the truck; the radiator of the Chevrolet was jammed up against the housing of the truck at the back axle. The center of the Chevrolet was approximately at the center of the axle."

After the first impact the driver of the wrecker began to slow down and stopped in five to ten seconds — just as the second impact occurred. Grady Carroll, Jr., who was riding with Truitt in the cab of the wrecker, testified: "After we got into the fog a little we had an impact at the rear of the P & G truck. . . . In my opinion Mr. Truitt was driving approximately 15 miles per hour. . . . After the first impact occurred I opened the wrecker door and jumped out. . . .

I don't know what made me realize there was going to be another impact . . . I turned to my left. . . . I was half way up the bank when the second impact occurred. A piece of flying metal or something struck me in the head. The second impact was loud like something had been torn up. . . . Over half of the Chevrolet automobile was under the truck after the second impact."

Henry Click Truitt testified to the following damage to the wrecker: "As a result of these collisions, the boom assembly on my wrecker was broken; this is the boom that elevates back and has cables on it that picks up vehicles. The right rear drum assembly was broke on the crane. The cable assemblies were broken. The boom drum that the cable wraps around was broken. The boom lock assembly, the propeller shaft, the gear, the drive sprocket, the cable guides, the boom cables, the universal joints, the jack shaft, the clutch comb and the shaft assembly were broken. The crane assembly was bent forward and broke from the truck frame. The frame assembly on the wrecker was bent. All the bolts in the rear housing, that holds the rear housing to the springs, were broken. Two 5-foot long log chains were broken. Four 7/16" cables and one 3½" tow bar were broken."

The evidence showed extensive damage to the Chair Company's van. "The complete undercarriage of the truck (van), that is, the dual wheels, axle, bell housing group, and other parts was knocked forward from the U-bolts. Most of the damage was on the left side."

The Chevrolet was extensively damaged front and rear. The most severe rear-end damage was on the left side. The wrecker, the van, and the Chevrolet were on the extreme right side of the north lane for west-bound traffic. The Ford station wagon was stopped a few feet to the rear of the Chevrolet and slightly left. The heaviest damage to the station wagon was to the right front. Before the accident the van was attached to the wrecker with the front elevated 15 to 18 inches above the road surface. After the vehicles came to rest, the front of the van had been driven upon the rear of the wrecker's towing assembly and was elevated 4½ to 5 feet above the road surface. The empty van weighed 22,000 pounds.

Photographs of the different vehicles were introduced in evidence for the purpose of enabling the witnesses to illustrate their testimony. They were not offered and not admitted as substantive evidence.

All defendants remaining in the case, except Edna Wrenn Scarlett, individually, and as administratrix, offered evidence, at the close of which all defendants made motions for judgment of nonsuit, and excepted to the court's refusal to allow them. The jury answered issues of negligence in favor of the plaintiff and against all defendants remaining in the case, and assessed plaintiff's damages at $10,000. From a judgment on the verdict, the defendants appealed.

Sigmon & Sigmon, by Jesse Sigmon, Jr., for plaintiff, appellee.

Patrick, Harper & Dixon by Charles D. Dixon, Bailey Patrick, for T. E. Landis and C. E. Landis, Trading as Landis Motors, and Henry Click Truitt, defendants, appellants.

Patton & Ervin, by Frank C. Patton, for defendant Scarlett, appellant.

James C. Smathers, Emmett C. Willis, for defendants William Lafayette Abernethy, Houston Donnell Havnaer, and Abernethy's Inc., appellants.

HIGGINS, J. The evidence indicated that Thomas Wesley Weaver, Douglass E. Houser, Russell Wayne Scarlett, Larry Nelson Scarlett, and the plaintiff were riding in the Chevrolet at the time of the collisions. All were killed except the plaintiff. He was a guest passenger riding in the back seat.

The personal representatives of Weaver and Houser instituted separate civil actions against all the defendants for damages under the wrongful death statute. The cases were consolidated and tried together. The jury absolved all defendants from liability. On appeal, this Court held the record of the trial failed to disclose error. (256 N.C. 677) This plaintiff was not a party to the former actions and hence not bound by the jury's findings.

In this case the jury found the defendants were guilty of actionable negligence which caused the plaintiff's injury. From the judgment on the verdict, they appealed.

The defendants T. E. Landis and C. E. Landis, trading as Landis Motors, contended the evidence was insufficient to present a jury question as to their actionable negligence and that the court committed error in denying their motion to dismiss. In passing on their motion they must be charged with any negligent failure to have the rear of the Chair Company's van properly lighted. Their agent attached it to their wrecker and undertook the towing operation. In order to protect himself from the glare of the van's driving lights, he turned them off. This also cut off the tail lamp. However, the evidence disclosed that seven marginal lights in good working order — one at each of the four corners and three along the lower margin of the van — were burning on the van during the towing operation. In addition, three red reflector lights were installed on each mud guard over the rear wheels. The plaintiff alleged failure to have a stop lamp as required by G.S. 20-129(g). However, the plaintiff's complaint in Article 14, alleged the van was a 1952 model. Hence it was not affected by the stop lamp section which applied only to vehicles manufactured since December 31, 1955. The lights displayed on the

rear of the van would seem to be sufficient to warn following motorists. The ribbon of fog over the stream was extremely dense. But it was very narrow and covered the road for only a few hundred feet. Neither the speed — 10-15 miles per hour — nor the act of stopping after the first impact can be held as actionable negligence. The driver of a vehicle involved in an accident is required to stop. G.S. 20-166 (b). The evidence of negligence on the part of T. E. Landis and C. E. Landis, trading as Landis Motors, was insufficient to be submitted to the jury. The trial court committed error in overruling their motion for nonsuit.

The defendant Mrs. Scarlett, both individually and as administratrix, insists the court committed error in overruling her motion to nonsuit at the close of all the evidence. In following the wrecker and the towed vehicle, the driver of the Chevrolet at all times was in the proper lane. The speed in the dense fog could not have been great. The contact with the rear of the van was relatively light and not enough to interfere with Truitt's operation. The position of the towed vehicle was not changed. Truitt testified: "I was traveling 10-15 miles per hour when I felt the impact. I just knew the furniture van had been hit. So far as I could tell the first impact did not have any effect upon the operation of the truck. By this I mean it still rolled free. . . . After the second impact . . . I could not move it."

The evidence fails to show the plaintiff sustained any injury as a result of the first impact. We must conclude from the continued movement of the wrecker and the van the Chevrolet was not under the van while Truitt was slowing down.

All the evidence disclosed that the "dug out" place in the concrete was under the Chevrolet after the second impact. There was debris both in front of the Chevrolet, under it, and to the rear after the second impact. The evidence of Truitt was explicit that the damage to the wrecker was caused by the second impact which drove the front of the van into his wrecker with such terrific force that it caused the extensive damage which he describes.

The extensive damage to the undercarriage of the van was caused by the second impact. This second impact after the slowing down operation, consuming five to ten seconds, apparently drove the Chevrolet under the van with such force that the top was pushed back, the hood driven into the occupants, causing the death of the four and injury to the plaintiff. Evidence is lacking that any injury to the plaintiff resulted from the first impact.

To make out a case the evidence must show negligence and resulting damage or injury. *Benthall v. Hog Market,* 257 N.C. 748; *Wilson v. Geigy,* 236 N.C. 566, 73 S.E. 2d 487. The motion for nonsuit

by Mrs. Scarlett, individually, and as administratrix, should have been allowed. *Gatlin v. Parsons,* 257 N.C. 469, 126 S.E. 2d 51; *Riddle v. Artis,* 246 N.C. 629, 99 S.E. 2d 857.

The evidence permits the inference that Abernethy's Ford station wagon crashed into the rear of the Chevrolet, drove it under the van, shearing off the top more than half way back, injuring the plaintiff who was a guest passenger in the back seat, and killing the four other occupants. The impact of the Chevrolet upon the rear of the van was relatively light. The front of the van was not raised on the wrecker. The movement of the wrecker was free and easy and continued for five to ten seconds during which Truitt brought it to a stop. At that instant the Ford station wagon crashed into the rear. The van, weighing 22,000 pounds, was driven upon the bed of the wrecker, making a shambles of the heavy towing equipment and lifting the front of the van from its former position — 15-18 inches in the towing position — to an elevation of 4½ to 5 feet above the road surface. This impact caused a piece of steel from the wreckage to strike Carroll who was climbing the bank several feet from the road. The Chevrolet was driven under the van so that the wrecker and the attached van could not be moved. The extent of this wreckage unquestionably indicates excessive speed. Increase in speed multiplies the destructive force generated by a moving automobile. Such is nothing more than the application of the law of physics.

The evidence of actionable negligence on the part of William Lafayette Abernethy, Houston Donnell Havnaer, and Abernethy's, Inc., was sufficient to go to the jury and to sustain the finding of negligence as to them. Their objections to the court's charge are not sustained by the record. Error insofar as these defendants are concerned is not disclosed.

On the appeal of T. E. Landis and C. E. Landis, trading as Landis Motors, and Henry Click Truitt, the judgment is

Reversed.

On the appeal of Edna Wrenn Scarlett, individually and as administratrix of Russell Wayne Scarlett, the judgment is

Reversed.

On the appeal of William Lafayette Abernethy, Houston Donnell Havnaer, and Abernethy's, Inc., we find

No error.

VIRGINIA McCURDY HARRIS v. RICHARD FOSTER HARRIS, JR.

(Filed 21 November 1962.)

1. Divorce and Alimony § 16—

A final order for alimony without divorce ordinarily terminates an order for subsistence *pendente lite* and renders the findings supporting the temporary order inapposite, nevertheless, the court may order that the payments previously allowed as subsistence *pendente lite* should be continued as permanent alimony when the final order is based on independent findings supported by evidence at the final hearing.

2. Same—

In determining the amount of permanent alimony, the court properly disregards the fact that the husband is financially irresponsible and had spent money in excess of his earnings for a number of years, and properly bases his order upon the husband's actual earnings or earning capacity, and the needs of the wife and children of the marriage.

3. Same—

In awarding alimony without divorce under G.S. 50-16 the court is not limited to a one-third part of the husband's net annual income, and the amount allowed by the trial court will not be disturbed in the absence of error of law or abuse of discretion.

APPEAL by defendant from *Walker, Special Judge,* 5 March Special "B" Term 1962 of MECKLENBURG.

This is a civil action for alimony without divorce on the ground of abandonment and failure to provide adequate support for the plaintiff and the children born of the marriage between the plaintiff and the defendant under the provisions of G.S. 50-16.

The defendant is an insurance salesman with Pilot Life Insurance Company. He is also a broker for other insurance companies.

Plaintiff alleges that she and the defendant were secretly married in South Carolina on 29 June 1936 and thereafter they had a church wedding in Atlanta, Georgia, on 21 August 1937; that they lived together as man and wife until 17 November 1960 at which time the defendant unlawfully abandoned the plaintiff; that since that time they have lived separate and apart and have not resumed the marital relationship.

The defendant has lived in Houston, Texas, for a little over a year. Prior to moving to Texas he lived in Charlotte, North Carolina.

The plaintiff has earned approximately $5,000 from selling real estate since May 1961.

The plaintiff's motion for alimony *pendente lite* was heard before his Honor, Francis O. Clarkson, on 3 January 1961. Judge Clarkson awarded the plaintiff possession of the home in Charlotte, owned by the

plaintiff and the defendant as tenants by the entirety, and ordered the defendant to pay to and in behalf of the plaintiff the following: Direct to the plaintiff the sum of $700.00 per month; the regular monthly mortgage payment of $126.53 on the home; city and county taxes on said residence; and premiums on insurance for fire and extended coverage on the residence and its contents.

Subsequently, the defendant was cited by plaintiff to show cause why he should not be held in contempt for the violation of Judge Clarkson's order. Defendant filed a motion to discontinue or reduce the payments under Judge Clarkson's order. Both motions were heard before his Honor, J. B. Craven, Jr., on 4 April 1961. The plaintiff's motion that the defendant be held in contempt was overruled and the previous order of Judge Clarkson was modified and an order entered requiring the defendant to pay direct to the plaintiff the sum of $400.00 per month; the first mortgage payment of $126.53 per month and the second mortgage payment of $156.00 per month; city and county taxes and the insurance premiums for fire and extended coverage on said residence. Judge Craven's order also secured to the plaintiff the residence owned jointly by the parties for the use and occupancy of the plaintiff and her minor children.

The defendant was later cited for contempt on 25 September 1961 and was adjudged by his Honor, George B. Patton, to be in contempt, and was committed. The defendant borrowed funds from his father to purge himself of contempt.

This cause came on for hearing on its merits at the above term of court and the parties waived trial by jury and the defendant agreed that the issues be answered against him, establishing the fact that the plaintiff and defendant were married as alleged in the complaint and that the defendant wilfully abandoned the plaintiff and failed to provide the plaintiff and the children born of the marriage with the necessary subsistence according to the defendant's means and condition in life.

Following the answering of the issues, the plaintiff through her attorney moved that the order theretofore entered by Judge Craven on 4 April 1961, be continued in full force and effect. The defendant without filing any petition or motion, made an oral request that the payments required by said order be reduced. The defendant was then allowed to testify in his own behalf and to call the plaintiff to be examined as an adverse party.

After hearing the evidence, the court made the following findings of fact:

"That the defendant is an able-bodied man who voluntarily left the jurisdiction of the State of North Carolina;

"That his gross income as reported by him the last year of his stay in North Carolina was in excess of $26,000;

"That the records disclose that he has a wife and two minor children, one now a sophomore at Duke University and the other a senior in high school in Charlotte, who anticipates going to some college next year;

"The court finds that the defendant is a man who, by his own admission, is a spendthrift and whose expenditures have exceeded his income every year for a number of years;

"The court further finds as a fact that the defendant is an excellent salesman, that he is a member of the Million Dollar Roundtable Club, an exclusive insurance organization, indicating his excellence as a salesman;

"The court further finds as a fact that the defendant has made a yearly gross income in excess of $21,000 while residing in the State of Texas, and that the defendant * * * stated in open court * * * that he anticipates or hopes to exceed his 1960 income this year or next year in Texas.

"The court further finds as a fact that by the testimony of the defendant, the reasonable costs of operating the household of the plaintiff and the two minor children is in the sum of at least $10,000 a year;

"The court finds that to reduce the amount of payments heretofore ordered by the Honorable J. B. Craven, Jr., would severely penalize the wife and minor children born of the plaintiff and defendant;

"The court further finds that the defendant voluntarily left the jurisdiction of this State; that he has been found in willful contempt of the courts in North Carolina for failing to comply with previous orders issued in these proceedings; that in order to purge himself of contempt he had to borow money from his father;

"The court further finds as a fact that the defendant has dissipated the life savings of his father.

"Based upon the foregoing findings of fact, the court concludes as a matter of law that the order of April 4, 1961, heretofore entered by Honorable J. B. Craven, Jr. shall be continued in full force and effect.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED in the sole discretion of the undersigned judge that the order heretofore entered on the 4th day of April, 1961, in this action by the Honorable J. B. Craven, Jr. be, and the same is hereby continued in full force and effect, pending further orders of the court."

The defendant appeals from the foregoing order, assigning error.

Warren C. Stack, James L. Cole for appellee.

W. Faison Barnes for appellant.

DENNY, C.J. Ordinarily, a final order for alimony without divorce terminates an order for subsistence *pendente lite*. *Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867. Likewise, when the facts are investigated and findings made as a guide to the court in making temporary allowances, they do not affect the ultimate rights of the parties at the final hearing. *Peele v. Peele*, 216 N.C. 298, 4 S.E. 2d 616.

On the other hand, when the court on the final hearing finds facts based on the defendant's admissions and his testimony given at the hearing, the court may determine that the relief sought by plaintiff and ordered at a previous hearing should be continued as permanent alimony, subject to the further orders of the court. We think from the facts found, which are supported by the evidence, that is what was done in the court below.

The defendant contends that the amounts which the order requires him to pay are excessive. However, he testified in the hearing below, "I do have an idea how much it costs to operate and run the house occupied by my wife and children per month. About $10,000 a year is what they have been living on. * * * (T)hat is a fair and reasonable amount."

The order of Craven, J., which the court below continued in effect, in our opinion, was tantamount to an order for permanent alimony in the amount set out therein, subject to the further orders of the court. This order requires payment by the defendant of $4,800.00 per year for the support of the plaintiff and the two minor children born of the marriage between the parties, both of whom are presumably in college; $126.53 per month principal and interest on the first mortgage on the home; $156.00 per month on a second mortgage on the home; plus taxes in the approximate sum of $500.00 a year; and premiums on fire and extended coverage insurance on the home, the amount of which is not given or estimated in the record. These amounts total less than $9,000.00, which is more than one thousand dollars less than the defendant testified was a fair and reasonable amount for the maintenance of the home and the support of his wife and children. Moreover, the defendant would not be relieved of the payment of the installments on the mortgages referred to herein or the taxes on the property if no order for alimony had been entered.

The case of *Sguros v. Sguros*, 252 N.C. 408, 114 S.E. 2d 79, was an action instituted for alimony without divorce pursuant to the provisions of G.S. 50-16. This Court, speaking through *Higgins, J.*, said: "After the trial judge has determined an allowance is justified, the amount is left to his sound judicial discretion, not subject to review except for abuse or error of law. We hold it was proper in this case to award exclusive possession of the home, the furnishings, and the

family automobile to the wife, and to require the defendant to make payments on the mortgage in order that the plaintiff and the children may have a place to live. *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555."

The defendant contends and insists that the court below committed error in not ascertaining the net current income of defendant and limiting any award to one-third thereof, citing G.S. 50-14. The defendant's evidence tends to show that for many years he has been one of the top salesmen for the Pilot Life Insurance Company, earning anywhere from $21,000.00 to $28,000.00 annually. But it also tends to show that he has never lived within his income in recent years. He testified that on 31 December 1961 his assets were $77,007.13 and his liabilities were $96,686.81. He further testified that his earnings in 1960 were $28,000.00 and in 1961 $21,230.78, and that in his operations in Texas he expects to reach his 1960 earnings "either this year or next." While the defendant testified that he earned $21,230.78 in 1961, he also testified that he spent $44,612.44 in that year. Therefore, if we accept his theory of the law, all that is required of him is to be financially irresponsible and to spend more than he makes and as a result thereof he should be relieved of the support and maintenance of his wife and children. Fortunately, the law does not so reward such moral and financial irresponsibility.

It seems clear that while this defendant has the ability and capacity to earn a large income, he has not shown any capacity or disposition to handle his earnings wisely.

It was said in *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912, "To base an award on capacity to earn rather than actual earnings there should be a finding based on evidence that the husband was failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife," citing *Davidson v. Davidson,* 189 N.C. 625, 127 S.E. 682. In the instant case, there is a finding both as to the capacity of the defendant to earn as well as to his actual earnings. Likewise, there is a finding "that the defendant is a man who, by his own admission, is a spendthrift and whose expenditures have exceeded his income every year for a number of years."

The amount of alimony to be allowed pursuant to the provisions of G.S. 50-16 is within the sound discretion of the trial court and its order will not be disturbed unless there has been an abuse of discretion. *Hall v. Hall,* 250 N.C. 275, 108 S.E. 2d 487; *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555.

In the last cited case it is said: "Except when the allowance is made following a decree of divorce *a mensa et thoro* the court, in making the

allowance, is not confined to a one-third part of the defendant's net annual income. *Anderson v. Anderson,* 183 N.C. 139, 110 S.E. 863."

On the record before us, in our opinion the order entered below should be upheld, and it is so ordered.

Affirmed.

BETTY CAUDLE KIGER v. JASPER THOMAS KIGER.

(Filed 21 November 1962.)

1. Husband and Wife § 10—

The right of a married woman to support and maintenance is a property right which she may release by contract executed in conformity with the statute, and therefore a separation agreement executed in accordance with statute which is fair, just, and reasonable to the wife with regard to the conditions and circumstances of the parties at the time the agreement is made, is valid, and the certificate of the officer made pursuant to G.S. 52-12(b) is conclusive of the facts therein stated and may be impeached only for fraud.

2. Divorce and Alimony § 16—

A valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside without the consent of the parties except as to the provisions for the custody and support of the minor children of the marriage, and therefore in an action for alimony without divorce after the execution of a valid separation agreement by the parties, the court is without power to award alimony or counsel fees to the wife in the absence of an attack on the validity of the separation agreement, or prayer that the payments therein stipulated should be sanctioned by order of the court.

APPEAL by defendant from *Johnston, J.,* at Chambers in Winston-Salem, North Carolina, on 2 June 1962. From FORSYTH.

This is an action for alimony *pendente lite,* permanent alimony, custody of the minor children born of the marriage between the plaintiff and defendant, and counsel fees, pursuant to the provisions of G.S. 50-16.

The plaintiff and the defendant were married on 21 December 1946 and there were two children born of the marriage, to wit, Charlie Thomas Kiger, age 12, and Martha Jane Kiger, age 10. These children reside with the plaintiff.

The plaintiff alleges adultery on the part of the defendant as grounds for her action. The defendant in his answer pleads a deed of separation dated 16 September 1961, signed by the plaintiff and defendant, as a

bar to the court's power to award permanent or temporary alimony. The deed of separation was duly executed before a justice of the peace as required by G.S. 52-12.

The deed of separation gives to each of the contracting parties the right to live separate and apart from the other, as if the respective parties were sole and unmarried. It further provides that the parties may carry on and engage in any employment, business, or profession, and that the same shall be for the use and benefit of the respective parties as if he or she were sole and unmarried.

The defendant, the party of the first part in the separation agreement, bound himself to do the following things for and on behalf of the plaintiff, the party of the second part, and the children born of the marriage: To deed or convey to her the house and lot on North Carolina Highway No. 8 in fee simple, together with all household and kitchen furniture in the same; one 1955 Ford automobile; to pay his wife, Betty Caudle Kiger, the sum of $10.00 per week for each of their children until said children become eighteen years of age; to pay all doctor bills for said children until they become eighteen years of age; to pay the 1961 county taxes on the home, and any encumbrances against said house and lot so that the wife will own the property free of debt.

The separation agreement contains this further provision: "The said wife agrees that in the event a suit for divorce should be instituted either by the wife or the husband, she will not pray the court, or otherwise ask for counsel fees, alimony *pendente lite,* or subsistence of any character for herself."

It was stipulated in the hearing below that the defendant paid $20.00 each week for the support of his children, beginning with 21 September 1961 through 28 October 1961; that beginning with 4 November 1961 and continuing each and every week through 1 June 1962, the defendant paid $30.00 each week for the support of his children.

It was also stipulated that the defendant has a net take-home pay from Hanes Hosiery Mills of $62.00 per week, or $268.67 per month.

It was further stipulated at the time of the hearing below that the defendant was obligated to make the following payments: $38.00 a month to the Hanes Hosiery Credit Union for balance due on the Ford automobile conveyed to plaintiff (this loan was paid in full in August 1962 if the defendant paid all installments when due); $37.64 a month to the First Federal Savings and Loan Association to liquidate the balance due on the encumbrance on the house and lot conveyed to plaintiff (the balance due on this loan will be liquidated in September 1963 if all installments are paid when due); $28.00 a month to the

Family Finance Corporation on a loan for furniture purchases made prior to the separation of the parties and conveyed to the plaintiff (the balance on this loan on the date the order was signed below was $196.00); $14.00 per month on a television purchased prior to the separation and conveyed to the plaintiff (the unpaid balance at the time the order was signed below was $216.00); and $3.50 per month on a hospital and surgical policy which the defendant is carrying on his children.

The court below, in light of the evidence and stipulations, found facts and entered an order awarding the plaintiff alimony as follows: "$30.00 per week beginning June 8, 1962 and on each Friday thereafter until the first Friday in August 1962; $35.00 per week beginning the first Friday in August 1962, and a like amount thereafter until the first Friday in September 1963; $45.00 per week beginning the first Friday in September 1963, and a like amount during the pendency of this action or until the further order of this court * * *."

The order further requires the defendant to pay counsel fees to plaintiff's counsel in the sum of $100.00; to maintain and make payments on the home and automobile each month as such payments become due. Custody of the minor children born of the marriage was awarded to plaintiff with reasonable visitation privileges for the defendant.

The defendant appeals, assigning error.

R. Kason Keiger for plaintiff appellee.

Deal, Hutchins & Minor, and Edwin T. Pullen for defendant appellant.

DENNY, C.J. Since the decision in *Archbell v. Archbell*, 158 N.C. 408, 74 S.E. 327, this Court has upheld separation agreements whenever a fair, just and reasonable provision has been made for the wife, having due regard to the condition and circumstances of the parties at the time the agreement was made, and when the agreement has been executed in the manner required by law.

The right of a married woman to support and maintenance is held in this jurisdiction to be a property right. *Archbell v. Archbell, supra; Walton v. Walton*, 178 N.C. 73, 100 S.E. 176; *Smith v. Smith*, 225 N.C. 189, 34 S.E. 2d 148, 160 A.L.R. 460; *Daughtry v Daughtry*, 225 N.C. 358, 34 S.E. 2d 435; *Bolin v. Bolin*, 246 N.C. 666, 99 S.E. 2d 920.

The right of support being a property right, the wife may release such right by contract in the manner set out in G.S. 52-12. In the acknowledgment and execution of such contracts, the certificate of the officer is made by statute conclusive of the facts therein stated but

may be impeached for fraud as other judgments may be. G.S. 52-12, subsection (b).

The provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Such agreements, including consent judgments based on such agreements with respect to marital rights, however, are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118. Otherwise, the parties to a valid separation agreement are remitted to the rights and liabilities under the agreement or the terms of the consent judgment entered thereon. *Lentz v. Lentz,* 193 N.C. 742, 138 S.E. 12; *Brown v. Brown,* 205 N.C. 64, 169 S.E. 818; *Turner v. Turner,* 205 N.C. 198, 170 S.E. 646; *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819; *Holden v. Holden, supra.*

The agreement involved herein has not been attacked by the plaintiff on the ground of fraud or coercion in its procurement or execution, consequently, so long as it stands unimpeached, the parties are bound thereby.

We do not concur in the plaintiff's contention that the case of *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745, supports the ruling of the court below in awarding the plaintiff alimony and counsel fees, notwithstanding the fact that a separation agreement had been entered into. In the *Butler* case the separation agreement contained the following provision: "Each party hereto reserves the right to appeal to the Resident Judge of the Second Judicial District of North Carolina for a revision in the amount to be paid to the said wife, either for the joint support and maintenance of the said wife and the said Robert Allen Butler, or solely for the support and maintenance of said wife." The *Butler* case is not controlling on the facts presented on this record.

Likewise, we do not concur in the view of plaintiff's counsel to the effect that the separation agreement executed by the parties to this action left the question of support open for the court to adjudicate.

We hold that it is implicit in the separation agreement that the wages earned by the respective parties after the separation, and any profits realized from any business or profession, were to be for the use and benefit of the party earning the wages or making the profits, "as if he (or she) were sole and unmarried." This language runs counter to the plaintiff's contention. Furthermore, the wife, the plaintiff herein, expressly agreed to the following statement in the separation agreement: "The said wife agrees that in the event a suit for divorce should be instituted either by the wife or the husband, she will not pray the court, *or otherwise ask for counsel fees, alimony pendente lite, or subsistence of any character for herself.*" (Emphasis added)

Therefore, we hold that the plaintiff is bound by the terms of the separation agreement dated 16 September 1961 and the court below was without power to award alimony and counsel fees to plaintiff in the absence of an attack on the validity of the separation agreement.

It may be that the defendant is infatuated with another woman, as alleged in the complaint, which is denied in the answer, even so, the evidence on this record tends to show that beginning with November 1961 and up to the time of the hearing below, the defendant, with a net income of $268.67 per month, has expended $251.14 each and every month for the support of his minor children or in making payments on indebtedness outstanding against the real and personal property conveyed to the plaintiff under the terms of the separation agreement, leaving only $17.53 a month from his net earnings for his own living expenses, which has made it necessary for the defendant to move in and live with his father and to depend on his father for room and board. Cf. *Davidson v. Davidson,* 189 N.C. 625, 127 S.E. 682.

The order entered below is set aside except as to custody, about which there is no controversy. The additional relief sought will be denied unless the plaintiff recasts her pleadings and raises questions not now raised by the present pleadings.

Error & remanded.

MARTHA C. WALSTON v.
THE ATLANTIC CHRISTIAN COLLEGE (INCORPORATED).

(Filed 21 November 1962.)

1. Husband and Wife § 14—

Where husband and wife convey lands held by the entireties to a trustee, who in turn reconveys to them as tenants in common, but the deed to the trustee is void because of failure to comply with the requirements of G.S. 52-12, the estate by entireties is not disturbed notwithstanding the misconception of the parties as to the nature of their title, and upon prior death of the husband, nothing else appearing, the wife becomes the sole owner as surviving tenant.

2. Wills § 7—

Where husband and wife own land by the entireties, but mistakenly believe that they own the land in question as tenants in common, and execute a joint will under which the husband devises a life estate in one-half of the land to the wife with remainder to a college, and the wife devises a life estate in one-half of the land to the husband with remainder to certain of her kin, and the husband thereafter dies, *held,*

the wife obtains title to the entire land as survivor and may revoke or change her devise of the property, since the reciprocal provisions with regard to a life estate do not amount to a contractual agreement precluding revocation.

3. Wills § 63—

Where husband and wife own land by the entireties and the husband bequeaths her certain personalty and devises one-half of the land to a named beneficiary after a life estate to the wife, and it is apparent that the devise was made under the mistaken belief that they owned the land as tenants in common, the wife is not put to her election, since in such instance there is no intention on his part to devise to another property which belonged to her, and thus put her to her election.

APPEAL by defendant from *Paul, J.*, June Civil Term 1962 of WILSON.

The plaintiff instituted this action on 6 April 1962 for the purpose of quieting title to real estate described in the complaint. The defendant alleges and contends that the plaintiff is estopped to deny the defendant's title by reason of a contract between the plaintiff and her late husband under the terms of which the defendant was a beneficiary.

Prior to November 1950, the plaintiff and Walter L. Walston owned the four parcels of land described in the complaint as tenants by the entireties. As husband and wife they executed a deed dated 24 November 1950 to Silas Lucas, Trustee, for the four parcels of land, with the understanding and agreement that he would reconvey the property to them as tenants in common. This deed to the Trustee was not executed as required by G.S. 52-12. The Trustee, on 24 November 1950, attempted to reconvey the property to plaintiff and her husband as tenants in common. These deeds were duly recorded in the office of the Register of Deeds of Wilson County.

On 10 March 1951, the plaintiff and her husband executed a joint will which is set out in the record. In this will, Walter L. Walston devised all his rights, title and interest in and to his real property, including the one half interest in the property described in the deed of Silas Lucas to Walter L. Walston and wife, Martha C. Walston, as tenants in common, dated 24 November 1950, to his wife for life, and the remainder upon termination of her life estate to the Trustees of The Atlantic Christian College Endowment Fund and their successors.

The testator bequeathed all his personal property subject to a bequest in Item III of the will to his wife. The wife, plaintiff herein, devised all her right, title and interest in and to her real property, including the one half interest conveyed to Walter L. Walston and wife, Martha C. Walston, as tenants in common, to her husband for life,

and the remainder upon termination of the life estate to her brothers and sisters, naming them. She bequeathed her personal property to the husband, but if she survived him she bequeathed her personal property to her brothers and sisters subject to the bequest contained in Item III of the will.

Walter L. Walston died 17 March 1951 and the will referred to herein was probated in the office of the Clerk of the Superior Court of Wilson County as the last will and testament of Walter L. Walston, deceased, on 20 March 1951.

The plaintiff and Branch Banking and Trust Company of Wilson qualified as coexecutors of the aforesaid will. The final account showed that Mrs. Wilson received the balance of the personal property in the estate of a value of $4,931.55. An inheritance tax return was filed by the executors showing the remainder interest of the College in said real estate as having a value of $5,606.17.

The plaintiff, called as an adverse witness, testified that she knew her husband's property was going to The Atlantic Christian College at the time she signed the will and that she and her husband agreed on all provisions in the will except the provisions under which the College would receive a remainder interest.

The appellant concedes that the deed to Silas Lucas, Trustee, was null and void.

The parties waived a trial by jury and agreed that the court might, from the stipulations made in open court and entered in the record, the admissions in the pleadings, and the evidence offered by the parties at the trial, make its findings and enter judgment accordingly.

Among other things, the court found as a fact that, "The plaintiff has made no contract as alleged in the defendant's answer. She has made no contract binding her to a joint will with her husband, Walter L. Walston, nor any affecting the title to the real estate described in the complaint."

The court further found as a fact that plaintiff was not required by the will of Walter L. Walston to make an election.

The court concluded as a matter of law that the plaintiff is the owner of the land described in the complaint, and that the defendant's claim to a reminder in fee to a one half undivided interest therein subject to a life estate in such interest in the plaintiff is invalid and is a cloud on the plaintiff's title.

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

Gardner, Connor & Lee for plaintiff appellee.
Lucas, Rand & Rose for defendant appellant.

DENNY, C.J. It is evident that at the time Walter L. Walston and his wife, Martha C. Walston, executed a joint will, both of them were under the impression that they owned the real property involved as tenants in common. It is further evident that the plaintiff was under that impression when the inheritance tax return was filed by the co-executors of Walter L. Walston's estate. Even so, this misconception with respect to the manner in which the plaintiff and her husband held title to the real property involved at the time the joint will was executed did not change in any respect the manner in which title was actually held by them. The deed from Walston and wife to Lucas, Trustee, not having been executed pursuant to the requirements of G.S. 52-12, was a nullity. It follows, therefore, that the deed from Lucas, Trustee, purporting to reconvey the property to Walston and wife as tenants in common was ineffective to convey title. *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598.

Since the deed from Walston and wife to Lucas, Trustee, was not executed and acknowledged as required by G.S. 52-12, the estate by the entireties was not destroyed, and upon the death of Walter L. Walston, his wife, Martha C. Walston, nothing else appearing, became the sole owner as surviving tenant, with no right, title or interest of any kind passing to his executors for the benefit of creditors or devisees under his will. *Honeycutt v. Bank, supra,* and cited cases.

1. Did the court commit error in finding as a fact that under the terms of the joint will in question there was no contractural intent on the part of the plaintiff that affected the title to the real estate described in the complaint? 2. Did the terms of his will impose the doctrine of election upon the plaintiff? The court below answered both questions in the negative, and we concur.

It is stated in Anno - Joint, Mutual, or Reciprocal Wills, 169 A.L.R., at page 22, "The general rule is that a will jointly executed by two persons, being in effect the separate will of each of them, is revocable at any time by either one of them, at least where there is no contract that the joint will shall remain in effect * * *," citing *Ginn v. Edmundson,* 173 N.C. 85, 91 S.E. 696.

In *Ginn v. Edmundson, supra,* where a husband and wife made a joint will disposing of property held as tenants by the entireties, it was held that the survivor could revoke the will at pleasure and take the property free of the will. The Court said: "A joint or conjoint will is a testamentary instrument executed by two or more persons, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons, and a mutual or reciprocal will is one in which two or more

persons make mutual or reciprocal provisions in favor of each other. " * * * (I)n the absence of contract based upon consideration, such wills may be revoked at pleasure. * * *

"The will before us belongs to the class of joint or conjoint wills, as it is a disposition of the property owned by the husband and wife by the entireties to third persons, and there is no reason why the wife could not, after the death of her husband, revoke the will and dispose of the property as if it had not been signed by her."

In *Clements v. Jones,* 166 Ga. 738, 144 S.E. 319, the Court said: "The general rule is * * * that if two persons execute wills at the same time, either by one or two instruments, making reciprocal dispositions in favor of each other, the mere execution of such wills does not impose such a legal obligation as will prevent revocation. * * * (T)o enable one to invoke the intervention of equity, it is not sufficient that there are wills simultaneously made, and similar in their reciprocal provisions; but the existence of a clear and definite contract must be alleged and proved, either by proof of an express agreement, or by unequivocal circumstances."

It is said in 97 CJS., Wills, section 1367, page 301: " * * * (T)he agreement, in order to make the wills mutual, and to be enforceable, must be more than a mere agreement to make wills, or to make the wills which in fact are made: it must involve the assumption of an obligation to dispose of the property as therein provided, or not to revoke such wills, which are to remain in force at the death of the testators."

We hold that the provision in the respective wills of Walter L. Walston and his wife, Martha C. Walston, devising a life estate to the survivor, is not a provision that adversely affected the plaintiff's title to the real estate involved in this appeal. The joint will of Walston and wife is tantamount to separate wills although contained in a single instrument. Moreover, these wills do not purport to be reciprocal or mutual with respect to the disposition of the remainder interest in the real estate involved .

In the case of *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584, this Court said: " * * * The inference of election arises only from the assumption that the devise related to the land of the wife. The intention to put the donee to an election cannot be imputed to a testator who, as one of the supposedly alternate gifts, attempts to devise property which he mistakenly believes to be his own, and so describes it, whereas, in reality, it is the property of another. * * * Its significance here cannot be ignored. It is strong evidence of the fact that the testator really supposed the land to be his own, or that he had a disposable interest in it, and was not conscious * * * of an attempt to devise the land of his wife."

Likewise, in *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29, this Court said: " * * * The intent to put the beneficiary to an election must clearly appear from the will. *Rich v. Morisey,* 149 N.C. 37, 62 S.E. 762; *Bank v. Misenheimer,* 211 N.C. 519, 191 S.E. 14; Page on Wills, Vol. 4, p. 1347. The propriety of this rule especially appears where, in derogation of a property right, the will purports to dispose of property belonging to the beneficiary and, inferentially, to bequeath or devise other property in lieu of it.

"Our train of reasoning is not complete without adding that if, upon a fair and reasonable construction of the will, the testator, in a purported disposal of the beneficiary's property, has mistaken it to be his own, the law will not imply the necessity of election." *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162; *Benton v. Alexander, supra; Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45.

In our opinion, there is nothing in the will of Walter L. Walston from which it can be inferred that he intended to devise or bequeath anything to his wife in said will in lieu of her legal interest as a tenant by the entireties in the land involved. Therefore, we hold that she is the absolute owner of the land involved, irrespective of whether or not she revokes or affirms the joint will signed by her and her husband.

In light of the facts in this case and the authorities cited herein and the conclusion reached, the judgment of the court below is

Affirmed.

ATHLYN B. LANGFORD v. MIDGIE L. SHU.

(Filed 21 November 1962.)

1. Negligence § 1; Torts § 1—

Where a person perpetrates a practical joke on another with the intention of subjecting the victim to fright, and the circumstances are such that injurious consequences are reasonably foreseeable to the victim in his natural attempt to flee, the person perpetrating the joke may be held liable for such injuries notwithstanding that injury was not intended and notwithstanding the absence of hostility.

2. Negligence § 24a—

The evidence disclosed that two small boys possessed a box labeled, "Danger, African Mongoose, Live Snake Eater," which box was so contrived that a fox tail would be released by a spring when the lid was opened, and that when plaintiff, a neighbor, came to visit, the boys induced her near the box and suddenly released the fox tail therefrom, causing plaintiff, in attempting to escape what she thought was a live animal, to

stumble against a brick wall, resulting in personal injury. *Held:* Whether injury to plaintiff was reasonably foreseeable under the circumstances is a question for the jury.

3. Parent and Child § 7—

A parent is not liable for the torts of the child solely by reason of the relationship, but where the parent participates with the child in the commission of the tort or fails to exercise control over the child under circumstances from which it is reasonably foreseeable that the child will likely inflict injury, the parent may be liable.

4. Same— Evidence of parent's participation in tort committed by her children held sufficient for jury on question of parent's liability.

Defendant's small sons were in possession of a box labeled "Danger, African Mongoose, Live Snake Eater," inside of which was a fox tail released by a spring when the lid of the box was opened. The evidence further tended to show that defendant knew of the practical joke, and that when plaintiff, a neighbor, came to visit, helped set the stage for the perpetration of the joke on plaintiff by her answers to plaintiff's questions concerning the box, and stood by while the boys induced plaintiff near the box and sprang the joke, resulting in personal injury to plaintiff in her attempt to flee. *Held:* The evidence permits a finding by the jury that defendant participated in the perpetration of the joke with her boys and knew or should have known that, in the absence of positive action on her part, her children would perpetrate the joke on plaintiff, and therefore defendant's motion to nonsuit should have been overruled.

5. Negligence § 33—

Where a visitor is injured as a result of a practical joke, liability for such injury is predicated upon the positive acts of defendant in perpetrating the joke, irrespective of the locale, and therefore the law relating to the condition and use of premises and liability to a licensee or invitee is inapposite.

APPEAL by plaintiff from *Pless, J.*, June 4, 1962 Regular Civil "B" Term of MECKLENBURG.

This civil action to recover damages for personal injuries was dismissed by judgment of nonsuit at the close of the plaintiff's evidence. That ruling presents the only question on appeal.

Plaintiff and defendant are next door neighbors. On the afternoon of March 11, 1961, Mrs. Langford, the plaintiff, came to visit Mrs. Shu, the defendant. As was her custom, she came by way of the backyard. Mrs. Shu was busy in the kitchen and plaintiff entered the house through the screened back porch. As she entered, to her left on the porch was a picnic table with two benches, a chair and a lounge; on her right was a wicker couch. Beside the couch was a doorway into the kitchen. The furniture arrangement did not leave much "walking space" on the porch. When plaintiff entered the porch she saw on the picnic table a wooden box which was labeled "Danger, African Mon-

goose, Live Snake Eater." Plaintiff walked past the box into the kitchen and said to Mrs. Shu, "What in the world have you got on the back porch?" Defendant told her that it was a mongoose which a man had given to her husband for their children. Mrs. Langford then asked defendant what she was going to feed it and the reply was, "It eats snakes." Plaintiff and defendant had previously "discussed snakes, bugs, and so forth," and plaintiff had told defendant that she was afraid of them. Defendant told plaintiff to look at the box; that it would not hurt her.

The two Shu children, boys aged nine and eleven years respectively, were in the next room. Hearing this conversation between their mother and Mrs. Langford, and realizing that plaintiff had not seen "the box demonstrated," they came eagerly into the kitchen. The mongoose was in reality only a fox tail. Mrs. Shu, who was called as plaintiff's first witness, testified: "In order to show the box to someone, you have them standing at that end of the box, that is, the end of the box with the wire mesh over it. . . . (T)he lever is released with a spring, and it swings open and that is when it comes out."

The defendant's boys urged plaintiff to go out on the porch and look at the mongoose. Plaintiff declined to get near the box because she was afraid of snakes. When she started to go home she stopped in the kitchen door four to five feet from the box, still refusing "to get near that thing." Steve, the older boy, had been poking into the box with a stick which he then held in his hand. Plaintiff cautioned him not to hold that portion of the stick which had been in the box because "it was dirty down in the box where the animals and snakes were." About that time Steve released the spring on the box. With a whoosh and a screech, a furry object, which plaintiff believed to be an animal, sprang out at her. She jumped back and turned to run. There was so little room on the porch that she hit the lounge and stumbled back into a brick wall of the house, tearing a cartilage in her left knee. After extensive and painful treatments were ineffectual, an operation was required to repair the damage. Plaintiff spent sixty-three days in the hospital, endured much suffering and inconvenience, and incurred medical bills in the sum of $2,219.88.

According to the plaintiff, Mrs. Shu had stepped out on the porch at the time Steve released "the mongoose." According to Mrs. Shu, she was still in the kitchen, only a step from the porch, but she could hear the conversation between the children and Mrs. Langford. Defendant stepped out and saw "the mongoose" as it came out of the box in front of plaintiff.

McDougle, Ervin, Horack & Snepp and C. Eugene McCartha for

plaintiff, appellant.

Boyle, Alexander & Wade for defendant, appellee.

SHARP, J. This case involves a practical joke which caused unintended injury. However, the fact that it is a practical joke which is the cause of an injury does not excuse the perpetrator from liability for the injuries sustained. 52 Am. Jur., Torts, Sec. 90; 86 C.J.S., Torts, Sec. 20. Where voluntary conduct breaches a duty and causes damage it is tortious although without design to injury. 62 C.J., Torts, Sec. 22.

If an act is done with the intention of bringing about an apprehension of harmful or offensive conduct on the part of another person, it is immaterial that the actor is not inspired by any personal hostility or the desire to injure the other. See Annotation, Right of Victim of Practical Joke to Recover Against its Perpetrator, 9 A.L.R. 364.

In *Johnston v. Pittard et al,* 62 Ga. App. 550, 8 S.E. 2d 717, six defendants, as a practical joke, persuaded plaintiff to go with them to a house in the country to see "some wild women." When they arrived at their destination, a vacant farm house, a man yelled from within and two shots were fired in plaintiff's direction. He "ran in desperation and fear of his life and fell into a ditch as a result of which he sustained injuries." The Court of Appeals, in ordering a new trial after verdict for the defendants, held that the defendants would be liable if they should have foreseen that injurious consequences to the plaintiff were the natural and probable result of their conduct and that this was a question for the jury.

In *Lewis v. Woodland et al,* 101 Ohio App. 442, 140 N.E. 2d 322, plaintiff sought damages for a back injury which occurred while she was a guest in the automobile of the defendant Jones when she jumped with fright after defendant Woodland dropped a life-like rubber lizard in her lap. She alleged that the act of Woodland was the result of a preconceived plan of both defendants to frighten her and cause her to react suddenly and violently. The jury returned a verdict in favor of the plaintiff against both defendants. The court ruled that "the question of foreseeability of the consequences of the defendants' perpetration of a joke was properly for consideration by the jury. . . ." In the syllabus by the court it is said:

> "Where a person's conduct is such as to frighten or cause an emotional disturbance to another, which the former should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely from the internal operation of the fright does not protect the former from liability.

"Once it is shown that a person charged with frightening another should have anticipated that some injury would likely result from his conduct, . . . responsibility attaches for all consequences naturally resulting from the former's conduct . . . although it might not have been specifically contemplated or anticipated."

The defendant in the instant case owed to the plaintiff the duty not to subject her to a fright which, in the exercise of due care or reasonable foresight, she should have known was likely to result in some injury to her. *Kirby v. Stores Corp.*, 210 N.C. 808, 188 S.E. 625. Restatement of Torts, 1177, Sec. 436; *Lewis v. Woodland, supra.* The purpose of the box labeled "Danger, African Mongoose, Live Snake Eater" was to produce sudden fright and to cause the affrighted person to recoil violently. The degree of fright generated would depend upon the fortitude of the individual victim.

Had the defendant herself demonstrated the box and sprung the trap which released the fake mongoose, there is no doubt that it would be for the jury to say whether or not she should have reasonably foreseen that some injury might result to the plaintiff from the perpetration of her joke. The question now arises whether the defendant is liable for the act of her eleven-year-old boy who released the furry object which frightened plaintiff into precipitous flight and caused her injury.

North Carolina is in full accord with the common-law rule that the mere relation of parent and child imposes on the parent no liability for the torts of the child. The parent is not liable merely because the child lives at home with him and is under his care and control. Apart from the parent's own negligence, liability exists only where the tortious act is done by the child as the servant or agent of the parent, or where the act is consented to or ratified by the parent. A parent is liable for the act of his child if the parent's conduct was such as to render his own negligence a proximate cause of the injury complained of. In such a case the parent's liability is based on the ordinary rules of negligence and not upon the relation of parent and child. 39 Am. Jur., Parent and Child, Sec. 55. Furthermore, "a parent may be liable for the consequences of failure to exercise the power of control which he has over his children, where he knows, or in the exercise of due care should have known, that injury to another is a probable consequence. . . . Failure to restrain the child, it is said, amounts to a sanction of or consent to his acts by the parent. . . . (A)s in all negligence cases, the issue in the last analysis is whether the parent exercised reasonable care under all the circumstances. . . ." 39 Am. Jur., Parent and Child, Sec. 58; See also 67 C.J.S., Parent and Child, Sec. 68.

In *Lane v. Chatham,* 251 N.C. 400, 111 S.E. 2d 598, this Court in an opinion by *Bobbitt, J.* fully considered the liability of parents for the torts of their child. In that case the parents had entrusted their nine-year-old son with an air rifle with which he injured the plaintiff. There was evidence that the mother knew the boy had shot at others before; there was no evidence that the father knew this. In sustaining a verdict against the mother, the Court said that a parent was negligent, and therefore liable, if under the circumstances he "could and should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof."

Defendant in this case set the stage for her children's prank; she aided and abetted it by her answers to the plaintiff's questions about the box. Defendant had seen the box demonstrated and she knew, as only the mother of boys aged nine and eleven could know, that unless she took positive steps to prevent it, they would not let such a wary and apprehensive prospect as Mrs. Langford escape without a demonstration. To reach any other conclusion would be to ignore the propensities of little boys who, since the memory of a man runneth not to the contrary, have delighted to stampede timorous ladies with snakes, bugs, lizards, mice and other rewarding small creatures which hold no terror for youngsters. It is implicit in this evidence that defendant expected to enjoy the joke on her neighbor as much as the children, and that she participated in the act with them. To say that she should not have expected one of the boys to spring "the mongoose" on plaintiff would strain credulity.

Defendant contends that the plaintiff, when she came visiting, was a mere licensee, *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717, and that defendant owed plaintiff no duty to keep her premises in a safe and suitable condition for callers. Suffice it to say that plaintiff's injuries did not arise from any defect or condition of the premises. They were not due to passive negligence or acts of omission. *Pafford v. Construction Co.,* 217 N.C. 730, 9 S.E. 2d 408. Plaintiff's status as a licensee is immaterial to the decision of this case.

Taken in the light most favorable to the plaintiff the evidence would permit the jury to find that defendant approved and participated in the practical joke her children played on the plaintiff; that defendant knew plaintiff was afraid of snakes and of the contents of the box which defendant had told her contained a mongoose which ate live snakes; that in the exercise of due care defendant could have reasonably foreseen that if a furry object came hurtling from the box toward plaintiff she would become so frightened that she was likely to

do herself some bodily harm in headlong flight. In our opinion, and we so hold, the evidence makes out a case for the jury.

The judgment of the court below is reversed.

Reversed.

GRADY ENNIS, ADMINISTRATOR OF THE ESTATE OF CECIL MAC ENNIS, DECEASED v. TALLIE DUPREE AND WIFE, SARAH DUPREE.

(Filed 21 November 1962.)

1. Automobiles § 7—

A motorist is under duty to maintain a proper lookout in the direction of travel and is charged with the duty of seeing what he should see in the exercise of reasonable care in this respect.

2. Automobiles § 34—

A motorist is not an insurer of the safety of children along the highway and may not be held liable for striking a child whose presence in the motorist's line of travel could not have reasonably been foreseen, but a motorist may be held liable if his speed or failure to maintain a reasonable lookout prevents him from avoiding injury to a child suddenly running in his path of travel.

3. Automobiles § 41m—

Evidence that defendant motorist did not see the child on his bicycle until the child was immediately in front of her vehicle, and permitting the inference that had defendant been maintaining a reasonable lookout she could have seen the child riding along the highway in time to have avoided striking the child when the child suddenly rode in front of her vehicle, *is held* to warrant the submission of the issue of defendant's negligence to the jury.

4. Automobiles § 54f—

Where there is sufficient evidence of negligence of the operator of a motor vehicle to be submitted to the jury on that issue, evidence that the vehicle was registered in the name of the other defendant takes the issue of such other defendant's liability to the jury. G.S. 20-71.1(b).

5. Negligence §§ 16, 26—

Since an eight year old boy is rebuttably presumed incapable of contributory negligence, nonsuit may not be entered on the ground of such child's contributory negligence.

RODMAN AND SHARP, JJ. dissent.

APPEAL by plaintiff from *Clark (Edward B.), S.J.*, 4 June 1962 Civil Term of HARNETT.

ENNIS *v.* DUPREE.

Civil action to recover damages for the death of an eight-year-old boy in a bicycle-automobile collision, allegedly caused by the *feme* defendant's negligent operation of a 1958 Plymouth station wagon owned by and registered in the name of her husband, the male defendant.

From a judgment of involuntary nonsuit at the close of plaintiff's case, he appeals.

Taylor & Morgan and Everette L. Doffermyre by Everette L. Doffermyre for plaintiff appellant.

Dupree & Strickland by Franklin T. Dupree and Dupree, Weaver, Horton & Cockman by F. T. Dupree, Jr., for defendant appellees.

PARKER, J. Plaintiff alleged, *inter alia*, that the *feme* defendant was negligent in driving the 1958 Plymouth station wagon in that she failed to keep a proper lookout in the direction she was traveling.

Defendants filed a joint answer denying any negligence on the part of the *feme* defendant in the operation of the station wagon, and conditionally pleading as a bar to plaintiff's action contributory negligence of plaintiff's intestate.

Plaintiff examined *feme* defendant as an adverse witness, and offered other evidence. Plaintiff's evidence, when considered in the light most favorable to him, tends to show these facts:

About 3:40 o'clock p.m. on 16 February 1959 Mrs. Sarah Dupree, a school teacher, was driving a 1958 Plymouth station wagon on her right side of the road in a northerly direction on State Highway #55, traveling from the town of Coats to the town of Angier. The station wagon was owned by her husband, the male defendant, was registered in his name, and was maintained by him for his wife's pleasure and convenience. Mrs. Hilda Rose Lee, Frances Hockaday and Sheila Dupree, a daughter of defendants, were riding in the station wagon as passengers.

Highway #55, which has pavement 24 feet wide and dirt shoulders several feet wide on each side of the pavement, is straight for several hundred feet south of the place where the collision on the highway occurred. At or near the scene of the collision two dirt roads, one from the east and one from the west, intersect the highway. The road intersecting the highway from the east is slightly south of the road that intersects the highway from the west. William Ragsdale, a registered civil engineer and plaintiff's witness, testified in respect to the dirt road from the west: It "is a path that leads from a dwelling house which lies on the west side of the road.* * *On the west side of the road there is an embankment that projects up higher than the surface

on the road." The dirt road that intersects the highway from the east is about 12 feet wide, goes down into the highway at a fairly steep angle, and has no highway sign on it. There is an embankment on the east side of highway and south of the intersecting road on the east ten feet in height. According to measurements made by State Highway Patrolman Stuart Moore, the distance from the pavement to the embankment on the east side of the highway at or near the scene of the collision is 20 feet: it is 32 feet from the center line of the highway to the embankment.

At and near the scene of the collision *feme* defendant was traveling on the highway at a speed of 40 to 45 miles an hour. It was open country, and the speed limit was 55 miles an hour. No other motor cars were near. She was looking straight ahead. She testified: "The first time I saw the child was when he shot in front of me. I swerved to keep from hitting the child. I am not sure if the bicycle was in front of me when I swerved. I saw the child as it shot, it seemed to drop from the heavens or somewhere. I do not know where, and I swerved. I saw the child for the first time when the child was in front of me and I swerved my car. I never did see the child on the side of the road or riding across the road. You could not see up that pathway 10 feet embankment. I did not see the child up there. I did not see the child on the hard surface peddling in front of me." She also testified: "When I saw and struck the child it must have happened in a split second." She did not apply her brakes after hitting the child. Her station wagon swerved to the left of the highway, went down the highway on its west side about 120 feet, and turned over in the ditch on the left side of the highway.

Patrolman Moore arrived at the scene shortly after the collision. On the west side of the highway, about 18 inches from the center line, he saw a scooped-out place at a point across from the right-hand ditch of the dirt road intersecting the highway from the east. The station wagon was turned over in the ditch on the west side of the highway 122 feet from the scooped-out place. He testified: "I found the bicycle on the west side of the road and the body of the deceased child lying in the ditch beside the station wagon." He further testified: "She [*feme* defendant] advised that the child was in front of her. She saw it and in a flash she struck the child. She said the first time she saw the child, the child was in front of her, that she had not seen the child just a flash before she struck it."

Cecil Mac Ennis was riding a 26" bicycle. When killed, he was eight years, eleven months old, lacking three days. Defendants admit in their answer Cecil Mac Ennis died as a result of the injuries which he received in the collision.

The Court in *Dixon v. Lilly,* 257 N.C. 228,. 125 S.E. 2d 426, quotes from Blashfield, Cyclopedia of Automobile Law and Practice, Per. Ed., Vol. 2A, section 1498, as follows:

> "Drivers or owners of motor vehicles are not insurers against all accidents wherein children are injured. Accordingly, a driver proceeding along a street or highway in a lawful manner using ordinary and reasonable caution for the safety of others, including children, will not be held liable for striking a child whose presence in the street could not reasonably be foreseen. He is not required to anticipate the appearance of children in his pathway, under ordinary circumstances, from behind parked automobiles or other obstructions.
>
> "Thus, when a motor vehicle is proceeding upon a street at a lawful speed, and is obeying all the requirements of the law of the road and all the regulations for the operation of such machine, the driver is not generally liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid injuring him."

The fact that an automobile driver was driving at an unreasonable or dangerous speed in violation of a statute or ordinance, or was operating the automobile without keeping a proper lookout, may deprive him of all right to escape liability for striking a child which runs suddenly in front of his machine. There still remains the question whether the negligent driving of the automobile made it impossible for the driver of the car, under the circumstances then and there existing, to avoid the accident after seeing the child, or when in the exercise of proper care he could have seen the child, in time to avoid the injury. *Goss v. Williams,* 196 N.C. 213, 145 S.E. 169; *Moore v. Powell,* 205 N.C. 636, 172 S.E. 327; *Kelly v. Hunsucker,* 211 N.C. 153, 189 S.E. 664; *Butler v. Allen,* 233 N.C. 484, 64 S.E. 2d 561; *Brunson v. Gainey,* 245 N.C. 152, 95 S.E. 2d 514; *Cassetta v. Compton,* 256 N.C. 71, 123 S.E. 2d 222; Blashfield, *ibid,* sec. 1499; 60 C.J.S., Motor Vehicles, sec. 396, b, pp. 968-970; 5A Am. Jur., Automobiles and Highway Traffic (1956), sec. 472.

See also *S. v. Gash,* 177 N.C. 595, 99 S.E. 337, where the Court held the following part of the charge to be without error: "If the defendant was operating the car lawfully and at the rate of speed permitted by law, yet if by reason of a failure to keep a proper lookout he failed to see the deceased in time to avoid injuring him, and 'by reason of his carelessness and negligence in failing to keep this lookout' he caused the death of the child, he was guilty." See also *S. v. Gray,* 180 N.C. 697, 104 S.E. 647.

In *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330, the Court said: "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."

In *Tibbetts v. Harbach,* 135 Me. 397, 198 A. 610, the Supreme Judicial Court of Maine tersely and accurately said: "An automobile driver is bound to use his eyes, and to see seasonably that which is open and apparent and govern himself suitably."

Feme defendant in the daytime was traveling 40 to 45 miles an hour along a State highway with pavement 24 feet wide and dirt shoulders on each side, and straight in the direction she was traveling for several hundred feet before the place of the collision. The scooped-out place on the highway, 18 inches west of its center line, permits the reasonable inference that the child on his bicycle was struck at that point. There was nothing to obstruct her view as she traveled along the straight highway for several hundred feet before striking the child, and yet she did not see the child on his bicycle until "a split second" before she struck him, when, in her words, the child "shot in front of me* * * it seemed to drop from the heavens or somewhere." Although the evidence does not disclose the direction in which the child was riding his bicycle, or where he was a short time before he was struck, yet, in our opinion, the evidence permits the inference that her failure to see the child on his bicycle riding on the highway, when she was some appreciable distance away from him, was due to her negligence in failing to keep a proper and adequate lookout.

This is a borderline case, but considering the evidence in the light most favorable to plaintiff, it is our opinion that it would permit, but not compel, a jury finding that the *feme* defendant was negligent in operating the station wagon without keeping a proper lookout, that such negligence made it impossible for her to avoid the collision with the child, when by the exercise of due care she could and should have seen the child in time to avoid striking him, and that such negligence was the proximate cause of her striking the child, which caused injuries resulting in his death. The judgment of involuntary nonsuit of plaintiff's action against *feme* defendant was improvidently entered. Consequently, the court erred in nonsuiting plaintiff's case against the male defendant, the registered owner of the station wagon. G.S. 20-71.1 (b); *Hamilton v. McCash,* 257 N.C. 611, 127 S.E. 2d 214.

A compusory nonsuit on the ground that plaintiff's intestate, an eight-year-old boy, was guilty of legal contributory negligence is not permissible, because of the rebuttable presumption that the eight-year-old boy was incapable of contributory negligence. *Hamilton v. McCash, supra.*

We do not think defendants are entitled to have the nonsuit sustained on the ground of a fatal variance between *allegata et probata.* If plaintiff desires to amend his complaint to allege that the child was riding his bicycle in a westerly direction, he may make such a motion before the court below.

The judgment of compulsory nonsuit is

Reversed.

RODMAN AND SHARP, JJ., dissent.

WACHOVIA BANK & TRUST COMPANY AND MRS. RUBY M. WILSON, CO-EXECUTORS OF THE ESTATE OF BURKE E. WILSON v. SAVANNAH JONES MEDFORD.

(Filed 21 November 1962.)

1. Contracts § 12—

Ambiguity in a contract will be construed against the party who prepared the instrument.

2. Vendor and Purchaser § 2—

As a general rule time is of the essence of an option to purchase, and acceptance and tender must be made within the time fixed for the exercise of the right.

3. Same— Provision for extension of time for investigation of title held to apply only if purchaser within the life of the option obligated himself to buy.

The option in suit, prepared by the purchaser, obligated the vendor to convey upon demand within 30 days upon payment of the purchase price, with further provision that in the event of the exercise of the option the purchaser should have reasonable additional time for title examination. *Held:* The purchaser was required to bind himself to complete the transaction within the 30-day period in order to effect any extension of time for title examination, and his failure to do so during the term of the option amounted to a rejection and terminated his rights, and therefore the vendor's participation after the expiration of the 30-day period in negotiations with respect to clearing up the title will not extend the time or estop the vendor from refusing to accept tender thereafter made.

APPEAL by plaintiffs from *Gwyn, J.,* March 19, 1962 Term, FORSYTH Superior Court.

The plaintiffs, executors of Burke E. Wilson, instituted this civil action to recover $30,100.00 damages for an alleged breach of con-

tract to convey the Roediger Building and lot in Winston-Salem. The plaintiffs alleged the contract to convey arose in the following manner: On June 10, 1960, the defendant executed this option:

> "In consideration of the sum of ONE HUNDRED AND NO/100 DOLLARS ($100.00) to us in hand paid this day by Burke E. Wilson, the receipt of which is hereby acknowledged, we, Savannah Jone Medford (Mrs. Charles Jones) hereby irrevocably agree to convey to Burke E. Wilson, upon demand by him within 30 days from the date hereof, upon the terms and conditions hereinafter set out (a certain specifically described lot and building) . . .
>
> "We agree within the time specified, to execute and deliver to Burke E. Wilson, or assignee, upon demand by him, a good and sufficient deed for the above described premises upon payment by him to us of the sum of Fifteen thousand and no/100 Dollars ($15,000.00) under the following terms and conditions: Cash in full at the end of 30 days, and the above $100.00 option money is to be allowed as credit on price.
>
> "In the event of the exercise of this option by Burke E. Wilson, the payment of One hundred and no/100 Dollars ($100.00) this day made shall be credited on the purchase price, and the said Burke E. Wilson may have reasonable additional time for title examination.
>
> /s/ Savannah Jones Medford
> Mrs. C. H. Jones."

The plaintiffs alleged that Burke E. Wilson, on September 2, 1960, notified the defendant of his election to purchase, tendered the balance due, and demanded a deed.

The parties stipulated:

> "1. On or about June 15, 1960, Louis Baldwin, in behalf of Burke E. Wilson, Sr., employed Luther Ferrell, an attorney of Winston-Salem, North Carolina, to examine the title to the real estate owned by Savannah Jones Medford at the Northwest corner of Third and Church Sts. in the City of Winston-Salem, North Carolina, which is the subject of this litigation, and he did make such title examination.
>
> "2. During the time that Luther Ferrell was examining this title, he encountered matters which caused him to question the validity of the title.
>
> "3 As a consequence, Luther Ferrell called Savannah Jones Medford in Washington, D. C., the latter part of June, 1960, to

inquire about certain matters which he questioned in the title. During this conversation, Luther Ferrell explained to Savannah Jones Medford that he questioned the title because of what, in his opinion, was a faulty foreclosure of a deed of trust in the chain of title.

"4. At about the same time, Luther Ferrell turned the matter back over to Louis Baldwin advising him that in his opinion the title was defective and that he was turning it down."

Beginning about the 7th day of July, 1960, and continuing for some time thereafter, counsel for Mr. Wilson discussed with the defendant certain problems encountered in connection with her title. During the examination Mr. Ferrell, counsel for Mr. Wilson, notified the defendant that because of certain defects in the title he was turning it down. Thereafter Mr. Wilson employed another attorney who requested a renewal or extension of the option pending his further efforts to clear the title. Mrs. Medford refused to sign any further option, saying he already had time. All the negotiations with the attorney were carried on by Mrs. Medford in person. She was never represented by counsel.

On August 21, 1960, the building burned. Mrs. Medford was not in Winston-Salem and did not know of the fire until advised by Mr. Wilson's attorney. The building was insured for $45,000.00. After the fire Mr. Wilson's attorney notified Mrs. Medford that he had approved the title and requested her to appear at his office on August 29 to close the transaction. Mrs. Medford ignored the notice and refused to attend the proposed meeting. On September 2, 1960, Mr. Wilson tendered a certified check for $14,900.00 and demanded a deed. The demand was refused.

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

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Norwood Robinson, R. M. Stockton, Jr., for plaintiffs, appellants.

Blackwell, Blackwell, Canady & Eller by Winfield Blackwell, Jack F. Canady for defendant appellee.

HIGGINS, J. The plaintiffs make these contentions: (1) The limitation of 30 days was not controlling. (2) Mr. Wilson was entitled to reasonable time thereafter for title examination. (3) The tender of the purchase price and the demand for a deed on September 2, 1960, were within a reasonable time. (4) The defendant was estopped to plead failure to give notice and make tender by participating in an effort to clear up the title.

The defendant, on the other hand, contends: (1) The option specifically provided that a demand must be made within 30 days from June 10, 1960. (2) Cash in full, $15,000.00, (less $100.00 paid for the option) must be paid at the end of 30 days from June 10, 1960. (3) Within the 30-day period Mr. Wilson's counsel notified defendant he had found a defect in her title and was turning it down. (4) After the 30-day period had expired, plaintiffs' attorney requested a written extension or a new option. (5) Refusal of the request was sufficient notice to defeat any estoppel. (6) Mr. Wilson did not give notice or an unqualified election to purchase until after the building had burned and the owner became entitled to $45,000.00 insurance. At that time defendant's liability under the option had terminated.

The plaintiffs' action is not for specific performance, but for damages of $30,100.00, the exact amount of the insurance less the $14,900.00 which would have been due on the option price. Apparently the parties to the option were not too inclined to stand on strict legal rights until the building burned and the owner became the beneficiary of the insurance. After the expiration of 30 days the parties were still at liberty to negotiate further. Of course, the plaintiffs were anxious to pick up $30,000.00 on a $100.00 investment. The defendant was just as anxious to prevent the pick-up. Hence the dispute.

The Court is called upon to interpret the legal rights of the parties under their option. The document was written by Mr. Baldwin, representing Mr. Wilson, "at Mr. Wilson's direction." The defendant, without counsel, signed the option in Mr. Wilson's office. "Any ambiguity must be inclined against the party who prepared the contract." *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906. Mr. Wilson's option required him to make demand "within 30 days from the date hereof, upon the terms and conditions hereinafter set out, . . . cash in full at the end of 30 days, . . . In the event of the exercise of this option . . . the said Burke E. Wilson may have reasonable additional time for title examination." How was Mr. Wilson to exercise the right to purchase under the option? According to its plain and unambiguous terms, by the payment or tender of $14,900.00 and demand for a deed within 30 days from June 10, 1960. What is the modifying effect of the term "may have reasonable additional time for title examination?" The meaning seems to be this: Mr. Wilson, within 30 days from the date of the option, was required to bind himself to go through with and complete the transaction provided the defendant could convey a good title. His binding obligation (conditioned upon a good title) was required within the 30 days life of the option in order to effect any extension of time for title examination. Otherwise, Mrs. Medford would continue to be bound and Mr. Wilson would be free to forfeit

his $100.00 and refuse to be bound further. Suppose the building had been uninsured. The contemplation of such an event emphasizes the wisdom of the rule that time is of the essence of an option to purchase and acceptance and tender must be made within the time fixed for the exercise of the right. *Douglass v. Brooks,* 242 N.C. 178, 87 S.E. 2d 258; *Kaller v. Martin,* 241 U.S. 369; *Land Co. v. Smith,* 191 N.C. 619, 132 S.E. 593; *Davis v. Martin,* 146 N.C. 281, 59 S.E. 700; 55 Am. Jur., Vendor and Purchaser, p. 509, §§ 40-41. Failure to acept during the term of the option amounts to a rejection. 55 Am. Jur., Vendor and Purchaser, p. 508, § 39.

Mr. Wilson's attorney examined the title, found it defective and notified Mrs. Medford accordingly. Another attorney undertook to re-examine the title, requested Mrs. Medford to sign an extension or a new option. This request the defendant refused, stating he already had time. Reasons for the refusal are immaterial. If, beyond the 30 days Mr. Wilson sought to bind Mrs. Medford, he was required to bind himself. His failure so to do terminated his rights on July 10. The attempt to exercise them by the tender and demand for a deed on September 2, 1960, came too late. *Douglass v. Brooks, supra; Winders v. Kenan,* 161 N.C. 628, 77 S.E. 687; *Trogden v. Williams,* 144 N.C. 192, 56 S.E. 865.

In the light of the option, the stipulations, and the plaintiffs' evidence, Mr. Wilson's representative has failed to make out a case for the jury. The judgment of nonsuit entered by Judge Gwyn is

Affirmed.

HUBERT M. HOWELL, T/A HOWELL OIL COMPANY v. HERBERT SMITH, T/A ATLANTIC BLOCK COMPANY.

(Filed 21 November 1962.)

1. Contracts § 12—

A contract between parties is their mutual agreement as ascertained by the reasonable meaning of their words and acts; and the undisclosed intent on the part of one of them alone is immaterial in the absence of mistake, fraud, and the like.

2. Contracts § 14; Corporations § 12— Evidence held for jury on question whether individual defendant contracted for purchase of goods.

The evidence disclosed that plaintiff had been selling his products to a customer, that the person in charge of the customer's business ad-

vised plaintiff's agent that he was selling the business and introduced the agent to defendant as the person purchasing the business, that defendant stated he was changing the name of the business, but that he saw no reason why the purchase of plaintiff's products should not continue, and on the same day plaintiff's agent delivered products with invoice addressed to the new name of the business and that defendant signed same under the printed words "received goods," and that neither at that time nor in later negotiations in regard to the size of the unpaid balance did defendant disclose that he intended purchasing the products as agent of the corporate purchaser of the business. *Held:* In an action against defendant individually the evidence is sufficient to be submitted to the jury on the issue of whether the products were sold and delivered by plaintiff pursuant to an express contract between plaintiff and defendant.

3. Pleadings §§ 10, 28—

Plaintiff's recovery must be based on the cause of action alleged in the complaint unaffected by allegations of the reply, since a reply is solely a defensive pleading.

4. Contracts § 26; Evidence § 27—

The mutual agreement of the parties is the contract and the unexpressed intention of either in entering into the agreement is immaterial, and therefore evidence of the unexpressed intent of one party alone is properly excluded.

APPEAL by plaintiff from *Bundy, J.*, January 29, 1962, Term of WAYNE.

Plaintiff's action is to recover from Herbert Smith, individually, the sum of $2,054.13 (with interest), alleged to be the balance defendant owes plaintiff for various petroleum products sold and delivered by plaintiff to defendant "under an express contract."

Answering, defendant denied plaintiff's said allegations. For a further defense, defendant alleged that Atlantic Block Company was a corporation and plaintiff had knowledge of this fact; that defendant was an officer of the corporation but assumed no personal liability for its debts; and that plaintiff's sole remedy was against the corporation.

In addition to complaint and answer, plaintiff filed (1) a reply and (2) an amended reply, and defendant filed an answer to plaintiff's amended reply.

Evidence was offered by both plaintiff and defendant. At the close of all the evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Sasser & Duke and Joseph H. Davis for plaintiff appellant.
James N. Smith for defendant appellee.

BOBBITT, J. The record shows plaintiff offered in evidence "a verified statement of account with seven ledger sheets attached, there appearing at the top of each ledger sheet the name 'Atlantic Block Company' and the said ledger sheets showing numerous charges and credits and an alleged balance due of $2,054.13." The verified statement is not set forth in the record. It is noted: The complaint alleges merchandise was sold and delivered from August, 1957, through June, 1960. There was evidence the first sale and delivery was made April 5, 1957.

Evidence offered by plaintiff tends to show:

Prior to April 5, 1957, plaintiff, through B. G. Combs, its tank wagon salesman, had sold and delivered petroleum products to Atlantic Building Block Company. Mr. A. J. Marlow was in charge of the business conducted under the name of Atlantic Building Block Company.

On April 5, 1957, at the place where the business of Atlantic Building Block Company had been conducted, Mr. Marlow introduced Combs to defendant (Herbert Smith) and stated that "he (Marlow) was selling out the business to Mr. Smith." In a conversation with defendant, Combs told Smith he "would be glad to continue to furnish him with his petroleum products," and defendant replied that "he saw no reason why we couldn't continue on as we were." Defendant also stated that "he was changing the name of the business from 'Atlantic Building Block Company' to 'Atlantic Block Company.'"

On April 5, 1957, Combs delivered 160 gallons of gas to said place of business. The invoice therefor was addressed to "Atlantic Block Co." The signature of defendant, "Herbert H. Smith," appears thereon under the printed words, "Received Goods." Subsequent to April 5, 1957, Combs made numerous deliveries to said place of business on a "keep filled" basis. Defendant was present "upon a number of occasions." Defendant "had men helping him and was telling them what to do." In the absence of defendant, who resided in Duplin County, "Mr. Maready was manager at the plant for Mr. Smith so far as (Combs) knew." After April 5, 1957, defendant signed some delivery tickets and "his employees signed the rest of them." Payments on account were made by checks bearing the signature, "Herbert H. Smith" under the printed words "Atlantic Block Co.," or the signature of Mr. Maready.

Combs did not ask defendant whether "the business was incorporated." Nor did defendant state that "he was contracting for petroleum products in any capacity."

Herbert H. Howell, manager of Howell Oil Company, testified: "During the spring and summer of 1958, I saw Mr. Smith two or three

times. I mentioned to him that the account was getting quite large and was not being cut down. I suggested he give us notes to secure the account, and he said he would think about it. Later he told me he wouldn't give me the notes because he thought he was planning to sell the business. I asked him if he sold the business would he have enough to pay what he owed us. He said he did not know, and I got real worried and started this."

Nothing was stated by defendant to Combs or to Howell to the effect Atlantic Block Company was a corporation and that defendant was acting as an officer or agent thereof. Nor does the evidence, except as stated above, disclose any particulars as to dealings as between plaintiff and Atlantic Building Block Company prior to April 5, 1957.

Evidence favorable to defendant is not pertinent to decision on this appeal and hence is not set forth.

"A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." *Prince v. McRae,* 84 N.C. 674; *Overall Co. v. Holmes,* 186 N.C. 428, 119 S.E. 817, and cases cited; *Jackson v. Bobbitt,* 253 N.C. 670, 677, 117 S.E. 2d 806.

"The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them. The undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject, as mental assent to the promises in a contract is not essential." 17 C.J.S., Contracts § 32. "The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties—that is, from a consideration of their words and acts." 12 Am. Jur., Contracts § 19. ". . . the test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." Williston on Contracts, Third Edition, Vol. 1, § 94.

In the light of these legal principles, we are of opinion, and so decide, that the evidence, when considered in the light most favorable to plaintiff, was sufficient to require submission for jury determination

the issue as to whether petroleum products referred to in the complaint were sold and delivered by plaintiff to defendant pursuant to an express contract entered into between plaintiff and defendant on April 5, 1957.

With reference to the personal liability of a person who contracts as agent for an undisclosed principal, see *Walston v. Whitley & Co.*, 226 N.C. 537, 540, 39 S.E. 2d 375, and cases cited; *Rounsaville v. Insurance Co.*, 138 N.C. 191, 50 S.E. 619; 3 Am. Jur. 2d, Agency §§ 307-309; 3 C.J.S., Agency § 216.

It is noted that plaintiff's recovery, if any, must be on the cause of action alleged *in the complaint.* "A reply is a defensive pleading." *Nix v. English*, 254 N.C. 414, 420, 119 S.E. 2d 220, and cases cited.

While unnecessary to present decision, it seems appropriate that we consider the assignments of error directed to the court's exclusion of proffered testimony of Combs and of (Herbert H.) Howell to the effect that each *intended* to do business with Herbert H. Smith, individually, as owner of Atlantic Block Company. This evidence was properly excluded. As indicated above, the subjective (unexpressed) intention of either party to the alleged contract is immaterial. Cases cited by plaintiff, where the intention of a person is a material fact to be proved in the determination of issues raised by the pleadings have no bearing upon the present factual situation.

The judgment of involuntary nonsuit is reversed.

Reversed.

JAMES D. REDDING v. GEORGE W. BRADDY.

(Filed 21 November 1962.)

1. Evidence § 15—

In order to be relevant it is not required that evidence bear directly on the issue or that the inference sought to be established thereby be the sole possible inference, it being sufficient if there is a reasonable connection between the evidence and the fact sought to be proven and not merely one which is remote or conjectural.

2. Evidence § 56—

Plaintiff testified to the effect that the accident in suit caused injury to his neck and that a subsequent, unconnected accident caused injury only to his back. *Held:* Testimony of a settlement for injuries received in the second accident with evidence tending to show that the treatment for that injury related to injury to plaintiff's neck as well as his back, is competent as bearing upon the credibility of plaintiff's testimony to the

effect that the only injury he sustained in the second accident was a back injury.

3. Appeal and Error § 42—

Where incompetent evidence is admitted without objection, the fact that the court charges the jury upon the evidence so admitted will not be held for error, certainly when the instruction relating to such evidence could not have prejudiced appellant.

APPEAL by plaintiff from *Gambill, J.*, July 9, 1962, Term of FORSYTH.

Personal injury action instituted February 1, 1961, growing out of a collision that occurred February 25, 1958, about 11:25 a.m., in Winston-Salem, North Carolina.

Plaintiff operated a 1957 Plymouth, the property of the Police Department of Winston-Salem, west along Liberty Street and stopped (in obedience to a red traffic light) east of and near the intersection of Liberty Street and North Patterson Avenue. Defendant, operating his 1937 Pontiac, had been following the 1957 Plymouth. Defendant saw the 1957 Plymouth slow down and stop and there was ample space for defendant to slow down and stop. However, defendant was unable to bring his car to a complete stop. His clutch and brakes failed to respond. Under these circumstances, the front of the 1937 Pontiac, at slow speed, struck the right rear of the 1957 Plymouth.

Plaintiff alleged the said collision and the personal injuries he sustained were proximately caused by the negligence of defendant. Defendant, answering, denied said allegations. Defendant, among other things, alleged: ". . . if the plaintiff sustained any injuries as a result of said collision, same were minor in nature, and the defendant says and alleges that any injuries sustained by the plaintiff in 1958 were the result of some other accident and were not caused by the accident complained of in this case."

Evidence was offered by plaintiff and by defendant. At the conclusion of all the evidence, it was stipulated that the court answer the first issue, "Yes," thereby establishing that plaintiff was injured by the negligence of defendant as alleged in the complaint.

The second issue, relating to damages, was submitted to the jury, which found that plaintiff was entitled to recover of defendant the sum of $1,265.30. The court entered judgment which, after recitals, provides:

"NOW, THEREFORE, IT IS ORDERED, DECREED AND ADJUDGED that the plaintiff have and recover judgment against the defendant in the amount of $1265.30, which sum shall be paid by the Clerk of Superior Court of Forsyth County, North Caro-

lina, to the City of Winston-Salem upon its subrogation claim under the Workmen's Compensation Act of the State of North Carolina in that amount, less a fee of $300.00 hereby found to be reasonable to be paid from the proceeds of said judgments to Messrs. White and Crumpler in payment of their services rendered upon the trial of this action, all as provided by law, and the defendant is taxed with the costs."

Plaintiff excepted and appealed.

White & Crumpler, Leslie G. Frye and Harrell Powell, Jr., for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice and H. G. Barnhill, Jr., for defendant appellee.

BOBBITT, J. Prior to February 25, 1958, plaintiff, a police officer, had been involved in a series of automobile collisions from which he received some injury, including injury to his neck and back.

The damage to the police car (Plymouth) caused by the collision of February 25, 1958, was "very slight." The chief accounting officer of Winston-Salem testified the damage "was of such a minor nature that the vehicle was not repaired."

Plaintiff testified he felt "a sharp pain in (his) neck, just back of (his) head, just at the back of (his) neck," when defendant's Pontiac struck the Plymouth; that he "immediately called the police over the radio to come and investigate this collision"; that he got out of the police car, talked with defendant and tested the gear shift and brakes on defendant's car; and that, after remaining at the scene of the collision some twenty or thirty minutes, he went to the office of Dr. Transou, a chiropractor, where he was "given an adjustment to (his) neck."

From February 25, 1958, to October 28, 1958, plaintiff was given numerous adjustments by Dr. Transou. Plaintiff testified that, during this period, he suffered pain both "in (his) neck and right arm." From October 28, 1958, until February 9, 1959, plaintiff saw no doctor.

Plaintiff saw Dr. McDowell, a bone specialist, February 9, 1959. Under treatment by Dr. McDowell, plaintiff was in the hospital from February 24, 1959, to March 5, 1959. Plaintiff was absent from work from February 25, 1959, through August 21, 1959. (Note: Prior to February 25, 1959, plaintiff had lost no time from his work.) During this period, plaintiff received his full salary of $380.00 per month. (Note: Included in this amount was $35.00 per week paid by Winston-Salem as self-insurer under the Workmen's Compensation Act. Too, by

reason of the payment of full salary, plaintiff's accumulated sick leave was reduced a half day for each of the days he was absent from work.)

While all of plaintiff's assignments of error have been considered, only those referred to below merit particular discussion.

On May 22, 1958, some three months after the collision in which defendant was involved, a police car in which plaintiff and another officer were riding had stopped at a street intersection in Winston-Salem, North Carolina, in obedience to a red traffic light. Plaintiff testified: "While I was sitting there a car driven by a man by the name of Charlie Hartman White, Jr., of Mocksville, accelerated and ran into the rear of the car I was in." Again: "In that collision the muscles in my lower back were pulled; I did not have any injury to my neck in that collision."

Under cross-examination, plaintiff testified, over objection by his counsel, that he had received $1,025.00 on April 2, 1959, in settlement of his claim for injuries caused by said collision of May 22, 1958; and defendant, over plaintiff's objection, offered in evidence the check of Allstate Insurance Company, dated April 2, 1959, in the amount of $1,025.00, payable to James D. Redding. Plaintiff assigns as error the admission of this evidence, contending the fact there was a settlement of his claim for injuries sustained in said collision of May 22, 1958, for $1,025.00, was irrelevant and prejudicial.

"The standard of admissibility based on relevancy and materiality is of necessity so elastic, and the variety of possible fact situations so nearly infinite, that an exact rule cannot be formulated. In attempting to express the standard more precisely, the Court has emphasized the necessity of a *reasonable,* or *open and visible* connection, rather than one which is remote, latent, or conjectural, between the evidence presented and the fact to be proved by it, at the same time pointing out that the evidence need not bear *directly* on the issue and that the inference to be drawn need not be a *necessary* one." Stansbury, North Carolina Evidence, § 78.

Before and after May 22, 1958, plaintiff was receiving adjustments from Dr. Transou. In February-March, 1959, in the hospital, plaintiff "was placed in traction, with a head harness, with a bar running across the top of (his) head . . ." Plaintiff testified that while "wearing the traction it gave (him) some relief, and (his) neck and shoulders seemed to get a lot better," and "the grip in (his) hand started to coming back to some degree." Dr. McDowell, witness for plaintiff, testified that when he first examined plaintiff on February 9, 1959, plaintiff "was complaining of pain in his neck entirely, not in his lower back, even though he was still wearing a back support to his lower back." Again: "My examination was confined entirely to his complaint,

which was his neck." Dr. McDowell referred to the treatment given plaintiff in the hospital as "cervical traction." Dr. McDowell testified plaintiff told him about the collision in May, 1958, but "did not at any time say anything specifically about an accident involving the automobile driven by Mr. Braddy, on February 25, 1958."

While the *precise amount* of the settlement was not of particular significance, it may be inferred from the fact he received a substantial amount in settlement that plaintiff was then asserting he received substantial injury from said collision of May 22, 1958. Moreover, as indicated, Dr. McDowell's testimony was to the effect that he was treating plaintiff primarily for injuries to his neck, not for injuries to plaintiff's back, and that plaintiff did not advise him of any collision in which he was involved in 1958 except the collision of May 22, 1958. Under the circumstances, we think the testimony concerning plaintiff's settlement of April 2, 1959, was relevant and material as bearing upon the credibility of plaintiff's testimony to the effect the only injuries he sustained May 22, 1958, were back injuries.

Evidence was elicited, first by plaintiff's counsel and thereafter by counsel for plaintiff and counsel for defendant, with reference to the amount paid by Winston-Salem, a self-insurer under the Workmen's Compensation Act, to plaintiff, its employee, as (workmen's) compensation and for medical bills, a total of $1,265.30. As provided by G.S. 97-10.2(e), this evidence was inadmissible. *Penny v. Stone*, 228 N.C. 295, 45 S.E. 2d 362. Ordinarily, the admission of such evidence, over objection, would be error. However, no objection was interposed either by plaintiff or by defendant.

Plaintiff does not assign as error the admission of the evidence relating to payments made under the Workmen's Compensation Act. He assigns as error portions of the charge in which the court refers to this evidence. The gist of the court's instructions was that plaintiff, if entitled to recover from defendant, was entitled to recover all damages ordinarily recoverable in a personal injury action but that the amount recovered, up to $1,265.30, would be used to reimburse Winston-Salem for the payments it had made under the Workmen's Compensation Act. *Lovette v. Lloyd*, 236 N.C. 663, 668, 73 S.E. 2d 886, and cases cited. Thus, the jury was advised, in effect, that plaintiff could not benefit personally from the verdict unless the amount thereof exceeded $1,265.30.

In instructing the jury, the court was confronted by the fact that the evidence concerning the payments made by Winston-Salem under the Workmen's Compensation Act had been admitted and was before the jury. Whether counsel for plaintiff or defendant had based arguments to the jury on such evidence does not appear. We cannot say

that the court should have ignored the fact that this evidence had been admitted and was before the jury. Under the circumstances, we do not perceive that the instructions were prejudicial to plaintiff.

Plaintiff's other assignments do not disclose prejudicial error and discussion thereof is deemed unnecessary.

No error.

ALICE G. SCARLETTE v. EVERETTE GRINDSTAFF, CHARLES WHITNEY, AND KENNETH SCARLETTE.

(Filed 21 November 1962.)

1. Automobiles § 7—

A motorist is required to exercise reasonable care to avoid injury to persons or property, and when the failure to observe such care is the proximate cause of injury, liability attaches.

2. Automobiles § 23.1—

Where one automobile tows another on the highway, the operator of each vehicle is under duty to exercise more than ordinary alertness and caution.

3. Automobiles § 41u— Evidence of negligence of each driver involved in towing operation held for jury.

In an action by a passenger in a towed vehicle, evidence that one car towed the other by chain, leaving the cars some five feet apart when the chain was taut, that the respective operators of the vehicles agreed that the operator of the towing vehicle should give a specified signal before reducing speed, that the vehicles traveled some 75 miles without accident, the operator of the towing vehicle slowing down each time before entering upon a bridge, that thereafter, in approaching a bridge at the end of a curve to the left, the operator of the towing vehicle suddenly slowed down without giving the signal and the operator of the towed vehicle, to avoid collision, swerved to his right into the bridge abutment, *is held* sufficient to be submitted to the jury on the issue of negligence of the operator of the towing vehicle in failing to give the signal, and on the issue of the negligence of the operator of the towed vehicle in failing to keep a proper lookout and control his vehicle when he saw or should have seen the bridge and should have anticipated that the other driver would slow down before entering thereon.

4. Automobiles § 49—

The evidence tended to show that plaintiff with her three small children were riding in a car driven by plaintiff's husband on a long trip, that in returning home the car had motor trouble and the driver of another car undertook to tow the disabled car. *Held:* Whether plaintiff

was contributorily negligent in riding in the towed vehicle is a question for the jury to be determined in the light of plaintiff's situation, and plaintiff cannot be held contributorily negligent as a matter of law.

APPEALS by defendants Whitney and Scarlette from *Shaw, J.* February 1962 Civil Term of DAVIDSON.

Plaintiff, wife of defendant Scarlette and a passenger in his automobile, sought and was awarded compensation for injuries negligently inflicted when the car in which she was riding collided with the abutment on the bridge spanning Yadkin River on U.S. 64.

Plaintiff, her husband, their three infant children, and another had visited plaintiff's mother near Bakersville; defendant Whitney and his family had done likewise. The two families were returning to their homes in Thomasville when Scarlette had motor trouble just east of Marion. Whitney, driving a car owned by defendant Grindstaff and loaned for the trip, had been following Scarlette and offered to tow the Scarlette car to Thomasville. Scarlette furnished a chain about eight feet long, tied to the left rear bumper of the Whitney car and to the left front bumper of the Scarlette car. When the chain was taut, the two cars were about five or six feet apart.

Plaintiff alleged that Whitney failed to give signals as agreed; each driver neglected to keep a proper lookout; each failed to keep his automobile under adequate and proper control; her injuries were due to the joint and concurrent negligence of defendants Whitney and Scarlette; defendant Grindstaff was liable for the negligence of his agent, Whitney.

Defendants denied the asserted negligence, pleaded contributory negligence of plaintiff in riding in the Scarlette automobile with knowledge of the manner in which it was being towed and operated. Grindstaff denied that he was in any event liable.

At the conclusion of the evidence, Grindstaff's motion for nonsuit was allowed. The usual issues of negligence, contributory negligence, and damages were submitted to the jury. The jury answered the issues relating to the negligence of defendants Whitney and Scarlette in the affirmative. It answered the issue of contributory negligence in the negative. It fixed compensation due plaintiff. Judgment was entered on the verdict. Defendants Whitney and Scarlette appealed.

W. H. Steed for plaintiff appellee.

Jordan, Wright, Henson & Nichols by Charles E. Nichols and G. Marlin Evans, for defendant Whitney.

Walser & Brinkley by Walter F. Brinkley for defendant Scarlette.

RODMAN, J. Each defendant assigns a single error—the refusal to allow his motion to nonsuit. Each asserts the evidence is insufficient to establish his negligence. Each asserts the evidence establishes as a matter of law plaintiff's contributory negligence barring recovery.

The evidence would permit a jury to find these facts: The drivers agreed before the towing started that Whitney would warn Scarlette before Whitney reduced his speed. The agreed warning signal was the waving of a hand extended out of the window. Additionally Scarlette would be warned by the brake lights when pressure was applied to the brake pedal of the Whitney car. The towing operation had covered seventy-five miles or more before the accident occurred. The cars traveled at a maximum speed of 40 to 45 m.p.h. They passed over several bridges before reaching the Yadkin. Whitney always slowed down in approaching and crossing a bridge. Traveling eastwardly, as the cars were, there is a crest to a hill and then a decline to the bridge seventy-five to a hundred feet from the bridge there is a thirty-degree curve to the left. The paved portion of the highway is slightly wider than the bridge. As the cars approached the bridge, a truck, going west, was crossing the bridge. When within a few feet of the bridge, Whitney abruptly slowed his car without giving the agreed hand signal. Scarlette swerved his car and struck the side of the bridge. This collision caused plaintiff's injuries.

Every operator of a motor vehicle is required to exercise reasonable care to avoid injury to persons or property of another G.S. 20-140. A failure to so operate proximately resulting in injury to another gives rise to a cause of action. *Black v. Milling Co.*, 257 N.C. 730; *Funeral Service v. Coach Lines*, 248 N.C. 146, 102 S.E. 2d 816; *Tatem v. Tatem*, 245 N.C. 587, 96 S.E. 2d 725; *Cox v. Lee*, 230 N.C. 155, 52 S.E. 2d 355.

Undoubtedly the parties recognized towing the Scarlette vehicle in the manner described on much-traveled highways, U.S. 40 and 64, was not a normal operation. It called for more than ordinary alertness and caution on the part of each driver. 5A Am. Jur., Automobiles and Highway Traffic, s. 424. The Scarlette car was measurably under the control of the Whitney car. In recognition of that fact, the drivers agreed upon a system of signals to be given by Whitney which would permit Scarlette to conform his operation to the movement of the towing car. The evidence is sufficient to warrant a finding that Whitney failed to give the agreed signal, and this failure was one of the causes of the collision.

The agreement with respect to signals did not, however, relieve Scarlette of his duty of keeping a proper lookout and controlling the movement of his car as best he could to avoid hazards which he observ-

ed or should have observed. *Rhyne v. Bailey*, 254 N.C. 467, 119 S.E. 2d 385; *Currin v. Williams*, 248 N.C. 32, 102 S.E. 2d 455; *Clark v. Emerson*, 245 N.C. 387, 95 S.E. 2d 880.

Whitney had invariably reduced his speed in approaching and crossing bridges before reaching the Yadkin. Scarlette was aware of that fact. Scarlette knew, when they approached the Yadkin, he was not far from his home and knew the conditions existing at the river crossing. He saw or should have seen the sharp curve to the left with the descending road and trucks meeting them. Knowledge of these facts should have warned him Whitney would be compelled to suddenly apply his brakes because he could not safely enter the bridge at a speed of 40 to 45 m.p.h. Was he as alert as he should have been under the existing conditions? The jury could well find that he was not.

The court properly submitted separate issues with respect to the negligence of defendants Whitney and Scarlette.

Does the evidence compel the conclusion that plaintiff was negligent? The answer is no. Whether she acted with reasonable prudence in riding in the towed vehicle was a question for the jury. Plaintiff's situation was properly a matter for the jury to consider in arriving at the answer. She was on the highway with three children, the oldest only six years of age. It does not appear what experience, if any, she had in operating automobiles. What was there to compel her to conclude that the operation could not be made in safety if each driver was cautious? Two stops were made in the seventy-five miles that the Scarlette vehicle was towed. One of these stops was for lunch, the other for gas. The jury might, but the court could not as a matter of law, say that plaintiff negligently contributed to her injuries. *Smith v. Stepp*, 257 N.C. 422; *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543.

Affirmed.

STATE v. ALBERT RORIE.

(Filed 21 November 1962.)

1. Criminal Law § 154—

It is the duty of appellant to make timely exception to asserted error in order to present the matter for review, and to group his exceptions which relate to a particular question to avoid a dismissal of the appeal.

2. Criminal Law § 168—

In passing upon the sufficiency of the evidence to overrule nonsuit, the Supreme Court has no jurisdiction to weigh the evidence.

3. Indictment and Warrant § 14—

Objection that persons of defendant's race had been arbitrarily excluded from the grand jury returning the indictment must be timely made by plea in abatement or motion to quash, and defendant loses his right to present the question when he makes no objection until after the trial jury is sworn and impaneled. G.S. 9-26.

4. Jury § 4—

A defendant may challenge the array before pleading to the indictment or, after plea, may challenge individual jurors for cause or peremptorily, but after the jury has returned its verdict, he may not challenge the competency of the jury to determine the question of his guilt.

APPEAL by defendant from *Gwyn, J.*, November 2, 1961 Regular Criminal Term of UNION.

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

Conrad J. Lynn for defendant appellant.

RODMAN, J. Defendant was tried on a bill of indictment charging him with an assault with a deadly weapon with intent to kill J. W. Rushing, inflicting serious injuries not resulting in death. The jury returned a verdict of guilty as charged. Prison sentence within the limits fixed by G.S. 14-32 was imposed.

The trial judge, after he imposed sentence, said: "Let the record show that the defendant gives NOTICE OF APPEAL to the Supreme Court." Nowhere in the record is there an exception or assignment of error. The nearest approach to an exception occurred when the State rested. Counsel for defendant then said: "Motion to dismiss on ground State has failed to make out a *prima facie* case." The court said: "I think it is a matter for the Jury."

It is the duty of an appellant who asserts prejudicial error to point out the asserted error by exception. He must then classify his exceptions, putting in a separate group all exceptions which relate to each particular question. The failure to except leaves nothing to review, and the failure to group requires a dismissal of the appeal. *Hines v. Frink*, 257 N.C. 723; *Phillips v. Alston*, 257 N.C. 255; *Cratch v. Taylor*, 256 N.C. 462, 124 S.E. 2d 124; *Vance v. Hampton*, 256 N.C. 557, 124 S.E. 2d 527; *Logan v. Sprinkle*, 256 N.C. 41, 123 S.E. 2d 209; *Darden v. Bone*, 254 N.C. 599, 119 S.E. 2d 634; *Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912; *Abbitt v. Bartlett*, 252 N.C. 40, 112 S.E. 2d

751; *Workman v. Workman,* 242 N.C. 726, 89 S.E. 2d 390; *Worsley v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467; *Jones v. Jones,* 235 N.C. 390, 70 S.E. 2d 13.

The question of the sufficiency of the evidence to warrant a conviction is not before us because not properly presented by an exception Nonetheless, it may be noted that the State's witness Rushing testified that defendant shot him. The credibility of this testimony was for the jury. Our jurisdiction does not permit us to weigh the evidence.

The record shows defendant was tried during the first week in November 1961. He was represented by counsel who appears for him in this court. When notice of appeal was given, the statutory time to perfect the appeal was enlarged. Defendant was allowed thirty days for that purpose. Seemingly he never submitted his case on appeal to the solicitor as he should have done, and not until 30 April 1962 did he file a statement with the clerk for certification to this Court.

Defendant filed his brief in this Court on 11 September 1962. Then, for the first time, he challenged the validity of the trial on the unsupported statements made in his brief that Negroes had been arbitrarily excluded from jury service in Union County. This asserted exclusion, he contends, deprived the bill of indictment of any vitality. Hence the judgment is a nullity.

For more than three-quarters of a century our statute law has declared that a failure to assert disqualifications of grand jurors is waived if not taken before the petit jury is sworn and impaneled. G.S. 9-26; Code 1883, s. 1741.

Dillard, J., said in *S. v. Baldwin,* 80 N.C. 390, decided in 1879: "It is settled that the defendant, as indeed every person accused of a violation of the criminal law of the State, has the right not to be put to a public trial except on a bill of indictment preferred by a grand jury composed of persons qualified as by statute prescribed. If there be a defect in the accusing body, it is the right of the party indicted, by plea in abatement or by motion to quash, to avail himself of such defect; but it is required to be exercised at the earliest opportunity after bill found, which must be upon the arraignment when the party is first called upon to answer." The conclusion then reached has been consistently followed: *S. v. Blackburn,* 80 N.C. 474; *S. v. Martin,* 82 N.C. 672; *S. v. Haywood,* 94 N.C. 847; *S. v. Gardner,* 104 N.C. 739; *S. v. Barkley,* 198 N.C. 349, 151 S.E. 733; *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; *S. v. Tennant,* 222 N.C. 277, 22 S.E. 2d 552; *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623; *Miller v. S.,* 237 N.C. 29, 74 S.E. 2d 513; *S. v. Gales,* 240 N.C. 319, 82 S.E. 2d 80; *S. v. Ballenger,* 247 N.C. 216, 100 S.E. 2d 351; *S. v. Clyburn,* 247 N.C. 455, 101 S.E. 2d 295; *S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *S. v. Green,* 251 N.C. 40, 110 S.E. 2d 609.

Our procedure requiring the challenge to be made before pleading to the merits conformed with practice in the Federal courts prior to the adoption of the Federal Rules of Criminal Procedure. *U.S. v. Gale*, 109 U.S. 65, 27 L. ed. 857; *Wood v. Brush*, 140 U.S. 278, 35 L. ed. 505; *Crowley v. U.S.*, 194 U.S. 461, 48 L. ed. 1075. The Federal Rules of Criminal Procedure accord with this practice. See Rule 12. *Scales v. U.S.*, 367 U.S. 203, 81 S. Ct. 1469, 6 L. ed. 782.

In *King v. U.S.*, 165 F. 2d 408, cert. den. 324 U.S. 854, 89 L. ed. 1413, King challenged the validity of his conviction because of intentional and systematic exclusion of women from the grand jury which indicted him and from the petit jury which tried him. The court denied his motion to vacate the judgment of conviction and sentence imposed thereon. The court said: "[T]he right to not have women intentionally and systematically excluded from a jury panel is one that may be waived, and it will ordinarily be deemed to have been so waived where timely objection is not made in the proceedings and the question is sought to be raised for the first time by a motion to vacate the judgment."

A person charged with crime may, when called upon to plead to the bill of indictment, challenge the array; or he may, after his plea, challenge individual jurors for cause or peremptorily. G.S. 15-163. But he cannot wait until the jury has returned a verdict of guilty to challenge the competency of the jury to determine the question. *S. v. Banner*, 149 N.C. 519; *People v. McCrea*, 6 N.W. 2d 489 (514), cert. den. 318 U.S. 783, 87 L. ed. 1150; 50 C.J.S. Juries, sec. 263; 31 Am. Jur. Jury, sec. 114.

No sound reason is suggested for according defendant special privileges. He was represented at the trial by able counsel of his own selection, presumably well aware of our statutory provisions and the decisions of this Court. Notwithstanding his charge of discrimination, he says in his brief that members of his race were on the grand jury which returned the bill of indictment and the petit jury which found him guilty. It should be noted that the record says nothing with respect to who was on either the grand or petit jury; nor does it appear that defendant, in the exercise of his right, challenged peremptorily or for cause any juror called to pass on the question of guilt or innocence.

The appeal is

Dismissed.

ERVIN LETTERLOUGH, PLAINTIFF-EMPLOYEE, v.
JOHN HENRY ATKINS, NON-INSURER, DEFENDANT-EMPLOYER.

(Filed 21 November 1962.)

1. Master and Servant § 82—

The Industrial Commission is not a court of general jurisdiction but is an administrative board with quasi-judicial functions, and has only that jurisdiction conferred by statute, which jurisdiction may not be enlarged by waiver or extended by act or consent of the parties.

2. Same—

While the Industrial Commission may not institute a proceeding *ex mero motu*, if its jurisdiction is invoked by the filing of claim or the submission of a voluntary settlement for its approval, the Commission has authority and must, as the first order of business, determine the jurisdictional facts from the admissions of the parties, facts agreed, stipulations noted at the hearing, or evidence offered in open court after all parties have been given opportunity to be heard, and it may not find such facts from records, files, evidence, or data not thus presented.

3. Same—

The parties submitted to the Industrial Commission a voluntary settlement for the approval of the Commission, but the employer insisted at every stage of the proceeding that he did not have as many as five employees and was not subject to the Act. *Held:* An award of the Commission entered without a finding of the jurisdictional facts is void and must be set aside, but the proceeding should not be dismissed but should be remanded to the Industrial Commission for the finding of facts determinative of whether it had jurisdiction to proceed.

4. Same; Judgments § 19—

Challenge to the jurisdiction may be made at any time, since a judgment entered without jurisdiction is void and may be treated as a nullity.

APPEAL by plaintiff from *Olive, J.*, February 5, 1962, Term of RANDOLPH.

This is a proceeding pursuant to the Workmen's Compensation Act (G.S., Ch. 97).

Plaintiff, an employee of defendant, suffered a fracture of and injury to the right femur while using a power saw about the business of defendant. On 9 May 1961 the parties executed a compromise "Agreement and Release," reciting facts relative to the injury and the amount of medical expenses incurred, and stating defendant's contention that he is not "legally responsible . . . under the Workmen's Compensation Act." In the instrument defendant agrees to pay plaintiff the sum of $1500 and to pay the further sum of $623.55 on account of medical expenses incurred, and plaintiff releases defendant from all claims and

liabilities, past, present and future, on account of the alleged accident and the injury. It is provided that the settlement is "subject to the approval of the North Carolina Industrial Commission."

On 12 May 1961 Chairman Bean, of the Commission, entered an approval of the agreement and release, and made further comment and order, as follows:

> "It is directed to the attention of this employer that it is and has been operating its business for a considerable length of time without insuring its liability under the Workmen's Compensation Act, qualifying as a self-insurer or rejecting the provisions of the Workmen's Compensation Act.
>
> "IT IS THEREUPON ORDERED that unless the employer shall either provide compensation insurance or reject the provisions of the Act within thirty days from the date this order is filed, this case will be re-set for hearing before the Commission upon the next visit of a Hearing Commissioner to Greensboro, North Carolina, to determine what penalties, if any, the Commission should assess for employer's failure to provide insurance or reject the Act. G.S. 97-94(b)."

Defendant filed a motion and notice of appeal, in which he asserted that he has not had as many as five employees at any one time and has contended throughout the proceeding that he was not subject to the Act, and prayed, (1) that the *further order* of the Commission be vacated, or (2) that the settlement be disapproved and the proceeding be set for an original hearing before a hearing Commissioner, or (3) that the matter be reviewed by the full Commission.

Review was granted, and an award was entered declaring that there was ample evidence "in the file of the case and the agreement and release of the parties to support the findings of fact of Chairman Bean," that the contentions of defendant are without merit, and the former order should be affirmed. Upon affirmance by the full Commission defendant appealed to Superior Court.

The Superior Court adjudged that the "cause is remanded to the North Carolina Industrial Commission which is directed to enter an Order setting aside its approval of the agreement and its award for the payment of compensation and medical benefits and dismissing the proceeding on the ground of lack of jurisdiction."

Plaintiff appeals.

Ottway Burton and Linwood T. Peoples for plaintiff.

John Randolph Ingram for defendant.

MOORE, J. The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction created by statute and confined to its terms. Its jurisdiction may not be enlarged or extended by act or consent of parties, nor may jurisdiction be conferred by agreement or waiver. *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673; *Reaves v. Mill Co.,* 216 N.C. 462, 5 S.E. 2d 305. To sustain the jurisdiction of the Commission it must affirmatively appear that the employer, which it undertakes to bind by its award, had as many as five men in his or its employment. *Chadwick v. Department of Conservation and Development,* 219 N.C. 766, 14 S.E. 2d 842.

Defendant has insisted in the agreement and release signed by him and in every step and stage of this proceeding that he did not have as many as five men in his employment and was not subject to the provisions of the Workmen's Compensation Act. We find nothing in the record tending to show affirmatively that he had five or more employees and that the Commission had jurisdiction. The matter of jurisdiction has not been determined. A challenge to the jurisdiction may be made at any time, since a judgment entered without jurisdiction is a void judgment without legal effect and may be treated as a nullity. *Hart v. Motors, supra.* The court below properly directed the Industrial Commission to vacate and set aside its order and award *in toto.*

However, it is our opinion that the court erred in directing the Commission to dismiss the proceeding. Whether or not the Commission has jurisdiction has not been properly determined. "Where its jurisdiction depends on the existence of certain facts, the . . . Commission has the authority to determine whether such facts exist. . . ." 100 C.J.S., Workmen's Compensation, s. 425d, p. 272. It is not error for the Superior Court to remand a proceeding "in order that the facts with respect to the number of employees in the employment of the defendant at the time the . . . employee was injured might be ascertained by the Industrial Commission." *Thompson v. Funeral Home,* 208 N.C. 178, 179 S.E. 801. It is true that the Commission may not *ex mero motu* institute a proceeding. But the jurisdiction of the Commission is invoked either when a claim for compensation is filed or a voluntary settlement is submitted for approval. In approving settlements the Commission acts in its judicial capacity. *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777. In presenting the agreement and release to the Commission for approval, the parties instituted the present proceeding. In every proceeding before the Commission determination of jurisdiction is the first order of business. Determinative facts upon which rights of parties are made to rest must be found from

judicial admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. "Recourse may not be had to records, files, evidence, or data not thus presented to the court." *Biddix v. Rex Mills, supra.* The instant proceeding should be remanded for a proper hearing. Should it be determined therein that the Commission has no jurisdiction, the proceeding should be dismissed. If the Commission has jurisdiction, it should proceed according to law. From any and all orders and awards made pursuant to the hearing an appeal will lie.

The proceeding is remanded to Superior Court. It will remand to the Industrial Commission with directions that the order and award of the Commission appealed from be vacated and set aside, and proceedings be had in accordance with this opinion.

Error and remanded.

RANDALL INSURANCE, INC. v. CHARLES J. O'NEILL.

(Filed 21 November 1962.)

1. Appeal and Error § 44—

If the president of plaintiff corporation testifies voluntarily on cross-examination that plaintiff carried liability insurance, and the question asked the witness did not necessarily call for such information, plaintiff may not complain of the error it thus induced.

2. Automobiles § 54f—

Where the president of plaintiff corporation testifies that he was authorized to use plaintiff's vehicle in going to and from his home, plaintiff may not make a contrary contention that its president, in driving to his home on the occasion of the accident in suit was on a purely personal mission.

3. Same; Limitation of Actions § 3—

Even though at the time of the accident the one-year limitation of G.S. 20-71.1 is in effect, if, at the time of the trial, the limitation has been removed (Chapter 975, Session Laws of 1961), the presumption of the statute may be invoked even though at that time more than a year had elapsed since the accident, since statutes which change the rules of evidence relate to the remedy only and are at all times subject to modification and control by the Legislature.

APPEAL by plaintiff from *Mallard, J.*, March 12, 1962 Term, WAKE County Superior Court.

The plaintiff instituted this civil action to recover $1,235.78 damages to its new Renault Dauphine automobile allegedly caused by the actionable negligence of the defendant. The defendant answered, denying negligence, and setting up a counterclaim for $250.00 damages to his 1949 Chevrolet allegedly caused by the negligence of the plaintiff.

The collision occurred on Downtown Boulevard in Raleigh at about 5:45 p.m. on February 24, 1960, as Harry Randall, plaintiff's president, drove the Renault north in the middle of the three lanes for traffic in that direction. Randell attempted to cross to the right-hand lane in which the defendant was also driving north. Traffic was heavy. The plaintiff contended, and offered evidence tending to show, its driver had completed the crossover in safety and the defendant negligently ran into its vehicle from the rear. The defendant contended, and offered evidence tending to show, that the plaintiff's driver crossed over into the defendant's traffic lane without proper signal and when it was unsafe for him to make the movement. Each driver claimed the other's negligence was the sole proximate cause of the collision and property damage.

The answer setting up the counterclaim was filed subsequent to July 18, 1961. The exact date does not appear in the record. The plaintiff, by reply, challenged the right of the defendant to set up a counterclaim against the plaintiff upon the ground the evidence showed that Harry Randall was using the Renault not on plaintiff's business, but on a private mission of his own.

Harry Randall testified he kept and used the plaintiff's vehicle by company authority which included its use at any time after or before business hours; that by company authority he used it for transportation to and from his home, and for storage which was not available at the plaintiff's office.

On proper issues the jury determined Harry Randall was plaintiff's agent; that his negligence proximately caused the collision; that defendant was not negligent; that the defendant recover $200.00 on his counterclaim.

From the judgment on the verdict, the plaintiff appealed.

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

Teague, Johnson & Patterson by I. Edward Johnson, Robert M. Clay for defendant appellee.

HIGGINS, J. One of plaintiff's exceptions involved the admission of evidence with respect to the damage to the Renault. On cross-examination, Mr. Randall, president of the plaintiff, was asked if he sold the vehicle for salvage. He replied, no. He was then asked who did

sell it. He replied: "The adjuster for the insurance company that carried my company's fire, theft and collision insurance." When asked who sold the vehicle, he could have answered, giving the name of the seller or the auctioneer, or, if he did not know, he could have said so. Instead, he gave the reply above quoted, volunteering the information as to his company's fire, theft and collision insurance.

The court refused to strike the evidence upon the ground the plaintiff's president had himself volunteered the statement. The refusal to strike is the subject of plaintiff's assignment of error No. 1. The plaintiff cannot be heard to complain of an error it induced. *Brittain v. Blankenship*, 244 N.C. 518, 94 S.E. 2d 489. Other objections to evidence are inconsequential.

The plaintiff's assignment of error No. 8 challenges the court's charge that proof of ownership of a motor vehicle involved in an accident is *prima facie* evidence the vehicle at the time of the accident was being used with the owner's authority, and in connection with the owner's business. The president of the company testified the plaintiff authorized him to use the vehicle in going to and from his home so that he would have it handy for company business before and after office hours; and also as a means of providing storage not available at the company's office. To permit the company to defend now upon the ground that Mr. Randall was using the vehicle on a private mission would be blowing both hot and cold. The statute and the evidence were sufficient to support the affirmative answer to the issue of agency.

The charge of the court on the *prima facie* presumption which follows proof of ownership was in accordance with the law in effect at the date of the trial. The presumption relates to the rule of evidence and procedure rather than to substantive rights. "In *Tabor v. Ward*, 83 N.C. 291, the Court declares that laws which change the rules of evidence relate to the remedy only, and are at all times subject to modification and control by the Legislature, and that changes thus made may be made applicable to existing causes of action." *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598.

It is true, at the time of the accident the *prima facie* presumption arising from proof of ownership applied only to actions brought within one year. However, the General Assembly, by Chapter 975, Session Laws of 1961, struck out the one year limitation. Consequently at the time of the trial the limitation had been removed. Under *Spencer v. Motor Co., supra*, the defendant was entitled to the benefit of the presumption, although more than one year had elapsed between the date of the accident and the date he filed his counterclaim.

We have examined all assignments of error relied on by the plaintiff. They are without merit.

No error.

EDITH M. MONTGOMERY v. MONROE TELEPHONE COMPANY, INC.

(Filed 21 November 1962.)

1. Pleadings § 28—

Plaintiff must recover, if at all, in accordance with the allegations of the complaint, and plaintiff's proof must correspond substantially thereto.

2. Telephone Companies § 4—

Where plaintiff's allegations are to the effect that she was injured while talking on the telephone by electricity from a bolt of lightning traveling over telephone wires, and that the injury occurred because of defendant telephone company's negligence in improperly installing the telephone equipment, but plaintiff introduces no competent evidence of any electrical storm or any lightning anywhere or any lightning being inducted over the telephone wires, nonsuit is proper.

3. Appeal and Error § 41—

If judgment of nonsuit would have to be sutained even though certain of plaintiff's evidence had been admitted, the exclusion of such evidence, even if competent, cannot be prejudicial.

APPEAL by plaintiff from *McConnell, J.*, August 1962 "A" Civil Term of UNION.

Civil action to recover damages for personal injuries.

Plaintiff alleged in her complaint in substance: Defendant installed and furnished for its customary charges telephone service in the home where she was living with her husband. About 12:30 p.m. on 18 February 1960, while she was talking over the telephone with a friend, Mrs. Parks Williams, who lived about six or seven miles away, a thundercloud gathered near the home of the plaintiff and a bolt of lightning struck somewhere in the close proximity of the plaintiff's house and followed the wiring of the defendant's telephone system through the fuse and through the lead-in wire to the telephone the plaintiff had in her hand and was talking through, and the bolt of lightning was not shunted into the ground because defendant had installed a defective lightning arrester, or that a bolt of lightning struck the lines of the Union Electric Membership Corporation and followed them into plaintiff's house, where it was transmitted over the telephone line to the ear piece which plaintiff was using, because of defendant's negligence in the improper installation of the telephone equipment. "The bolt of lightning passed out of the ear piece into the plaintiff's right ear and on to the right side of the plaintiff's face with such force and power that it knocked her down and rendered her unconscious."

Defendant in its answer denies that it was negligent in the installation of its telephone in plaintiff's home, and denies that any

lightning occurred and was conveyed by its wires, or any wires, into the telephone in plaintiff's home thereby injuring her.

Plaintiff testified in substance: When she was talking to Mrs. Williams she noticed it got real dark outside. It was raining. She did not see or hear any thunder or lightning. When she was talking over the telephone, it seemed like a cloud was rolling in on her, and the next thing she remembers she was on the floor, and it was about 1:30 p.m. Her right ear drum was ruptured and her face was scorched.

When she recovered consciousness she left her home, and went through the rain across the road to the home of Mr. and Mrs. J. L. Broom. J. L. Broom testified she told them, "she was telephoning Mrs. Williams, I believe, and lightened (sic) or something, when the pop of lightning struck, it knocked her out for I guess forty minutes." When she reached the Broom home, the side of her face was reddish-blue like, and her hair looked like it was swinged some.

Plaintiff returned to her home about 3:00 p.m. At that time the telephone was dead, and the receiver was hanging to the floor. That afternoon a repairman from defendant came to the house. When he came in, he said: "Well, the fuse is not even blown; the fuse is not even burned out." He took the telephone apart, and the receiver and it was completely burned out. He replaced cords everywhere.

Mrs. Parks Williams testified in respect to her conversation with plaintiff: "I guess we talked for about a minute or maybe two minutes and it was raining at my house, but the clouds wasn't too bad and all of a sudden she says to me she says, 'There is a terrible noise over my house' says 'It sounds like a storm.' And so I thought she had hung up the receiver although it made a terrible noise in my ear which really did frighten me. The noise was just more or less a popping noise, just real loud popping noise."

Plaintiff offered voluminous evidence in respect to the wiring of the telephone equipment and the lightning arrester installed by defendant.

At the close of plaintiff's case, the court entered a judgment of compulsory nonsuit, from which plaintiff appeals.

Coble Funderburk for plaintiff appellant.

Carpenter, Webb & Golding by William B. Webb for defendant appellee.

PER CURIAM. The theory of plaintiff's action, as alleged in her complaint and as contended in the trial and here, is that lightning was conducted over defendant's telephone wire and into the receiver of the telephone while she was talking over it due to defendant's negligence, and this was the proximate cause of her injuries. And yet when

we examine the evidence, plaintiff has offered no evidence, either direct or circumstantial, of any electrical storm or lightning anywhere, or of any lightning being conducted over its wires into the telephone she was using in February, or that she was injured by lightning. She testified she heard no thunder and saw no lightning. The testimony of J. L. Broom that plaintiff told them "when the pop of lightning struck" seems the statement of an opinion or conclusion and not a fact, when considered in the light of plaintiff's positive testimony at the trial.

In *Lynch v. Telephone Co.*, 204 N.C. 252, 167 S.E. 847, relied on by plaintiff, there was evidence that an electrical storm was going on in June, and that a witness saw a bolt of lightning about 50 yards from the telephone pole, and saw it on the wire that came in the house probably about 50 yards from the house. In addition, defendant in its answer admitted plaintiff was struck by lightning.

Even conceding *arguendo* that an excessive current of electricity came into the receiver of the telephone plaintiff was using and injured her, because of defendant's negligence in the installation of the telephone equipment, plaintiff has offered no evidence the electricity was lightning or caused by lightning. If a plaintiff is to succeed at all, he must succeed on the case set forth in his complaint, and his proof must correspond substantially with his allegations. *Wilkins v. Finance Co.*, 237 N.C. 396, 75 S.E. 2d 118.

Plaintiff's assignment of error to the judge's exclusion of evidence to the effect that the telephone in plaintiff's home continually growled with static from the date of its installation in October 1958, and that when defendant in March 1962 installed new equipment, the static ceased, and when an electrical storm would appear, the telephone would go dead, and no harm would occur to persons in the house, is overruled, for even if it was competent, which it is not necessary for us to decide, it would not benefit plaintiff here by reason of her failure to show there was any lightning or electrical storm at the time of her injury and that her injury was caused by lightning, as she alleges in her complaint.

The judgment of involuntary nonsuit below is

Affirmed.

CHARLES JUNIOR COOPER v. BILLIE VERNON KISER
AND
ALLENE CULLER GILLESPIE v. BILLIE VERNON KISER.

(Filed 21 November 1962.)

Automobiles § 49—

A passenger may not be held contributorily negligent as a matter of law in voluntarily riding in an automobile driven by a person who had drunk some intoxicating beverage when divergent inferences may be drawn from the evidence as to the quantity of liquor drunk, and it does not appear from the evidence that any incapacity of the driver was obvious.

APPEALS by plaintiffs from *Clark (Edward B.), S.J.*, May 7, 1962 Term of RANDOLPH.

Plaintiffs, passengers in defendant's automobile, were injured when it collided with another car going in the opposite direction. The cases were consolidated for trial. Plaintiffs allege the collision was caused by the negligence of defendant in driving his car on his left side of the road at an excessive and unlawful rate of speed and in failing to keep a proper lookout.

Defendant denied the allegations of negligence. Additionally, he asserted contributory negligence on the part of plaintiffs. To support his plea of contributory negligence he alleged his car was being operated by one Cranford; that plaintiffs, defendant, and the driver of his car "were engaged in a drinking party" at the home of plaintiff Gillespie prior to the collision; that plaintiffs knew or should have known that defendant and the driver of his car were, because of the consumption of alcoholic beverages, in no condition to safely operate a motor vehicle; and with such knowledge plaintiffs voluntarily rode with defendant.

The court, being of the opinion the evidence established negligence of plaintiffs barring recovery, allowed defendant's motion to nonsuit. Plaintiffs appealed.

Ottway Burton for plaintiff appellants.
Coltrane and Gavin by T. Worth Coltrane for defendant appellee.

PER CURIAM. Plaintiffs were not denied recovery because of failure to establish the alleged negligence of defendant. On the contrary, they were denied relief on the theory that defendant's negligence was so palpable that plaintiffs, exercising that degree of caution which a prudent person would use for his own safety, would have refused to ride in defendant's automobile when operated either by Cranford or defendant.

Viewed in the light most favorable to plaintiffs, the evidence suffices to show: The collision occurred about 11:00 p.m. Plaintiffs were riding on the back seat. Cooper was asleep and had been asleep for some time when the collision occurred. When the journey started, Cranford was driving. Defendant was driving when the collision occurred. Gillespie and Cranford lived in the same building. Cooper came to see Gillespie about 8:00 a.m. on the morning of the collision. Defendant came to the Gillespie home in the forenoon. He left and returned shortly after noon. He brought with him a pint of gin. This was consumed during the afternoon and early evening by the four occupants of the automobile. Cooper testified on cross-examination: "I could tell what I had drunk. As far as being drunk, I wasn't drunk. Yes, I could feel it." Gillespie testified: "We drank a pint of gin. No, I was not able to feel any degree of intoxication from these three drinks of gin I took, couldn't feel it at all. No, three ounces of gin doesn't make any effect on me." The evidence is not specific as to the quantity of alcoholic beverage Cranford or defendant had consumed.

Divergent inferences may be drawn as to the quantity consumed by each of the four participants. Irrespective of the quantity consumed by Cranford or defendant, what effect had it had on them? Cooper testified he could feel the effect of his imbibing. Gillespie testified she could not. If the drinking sufficed to affect either Cranford or defendant so as to impair their ability to drive safely, did their actions indicate that fact? These were questions of fact that the jury could resolve; but, because of the diverse inferences which might be drawn, the court should have overruled the motions and submitted appropriate issues to the jury. *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543; *Maynor v. Pressley*, 256 N.C. 483, 124 S.E. 2d 162.

Reversed.

MRS RUBY O. WOLFE, ADMINISTRATRIX OF PHYLLIS M. WOLFE, DECEASED v. FARMERS COOPERATIVE EXCHANGE, INCORPORATED.

(Filed 21 November 1962.)

Automobiles § 41m—

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of negligence of the driver of a motor vehicle in striking a child upon a highway.

APPEAL by defendant from *Hall, J.*, May 1962 Term of JOHNSTON.

Civil action to recover damages for the wrongful death of a four-year-old child.

The jury found by its verdict that plaintiff's intestate was fatally injured by the negligence of defendant's agent, and awarded damages of $10,000.00.

From a judgment on the verdict, defendant appeals.

Robert A. Spence and George B. Mast for defendant appellant.
Levinson & Levinson by L. L. Levinson for plaintiff appellee.

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

Plaintiff's evidence, and defendant's evidence favorable to her, shows these facts:

About noon on 31 May 1960 Phyllis Wolfe, a four-year-old girl, followed her eleven-year-old sister, Patricia Wolfe, from their home across a rural paved road to a mailbox, where the mail carrier had stopped his automobile. At that point the paved road is 18 feet wide, with six-foot dirt shoulders on each side. The distance from the pavement to the mailbox is seven feet. At this point the road is flat and straight for a quarter of a mile on each side of the mailbox. When the mail carrier's automobile began pulling away in a direction from Smithfield, Patricia looked to the right and saw defendant's truck coming along the road toward Smithfield about the length of a football field away. Patricia then turned to the left, and saw Phyllis right behind her. She then turned to the right to see where defendant's truck was, and when she turned again to the left, she saw Phyllis with her head down and kicking a pebble, walking slowly across the road. Patricia noticed no change in the speed of defendant's truck from the first time she saw it: she heard no horn blow. When Phyllis had crossed the white line in the center of the road, the right side of the bumper of defendant's truck hit her, and in Patricia's words, "I just saw her flying in the air." Defendant's truck went 174 feet from where it struck the little girl before it stopped. When it stopped, Phyllis' body was about 27 feet from where she was struck and about two feet from the white center line of the road on defendant's side of the road. In the collision Phyllis sustained, among other injuries, a crushed head and a broken neck, which resulted in her immediate death. Defendant's truck at the time was being driven by its employee, O. F. Barbour, in the scope and course of his employment.

Defendant's evidence shows these facts: Its salesman, O. F. Barbour, was driving its truck 40 or 45 miles an hour on his right side of the

road. He saw no children anywhere. He saw the mail carrier's automobile stopped by the mailbox. Barbour testified: "Just as I started to pass the tail end of his (the mailman's) automobile, I glimpsed through my left side glass a view of a child and the cab part of my truck was done by by that time and I put on brakes just as short as I could. I then didn't see the child until I got stopped and got out of the truck. She was somewhere around 15 or 20 feet from the mailman's car. She was lying somewhere around two feet, or something like that, in my lane that I was traveling in. When I first saw the child, she won't over three feet from the truck, three or four feet at the very outside, and running. The child was running toward the house. She was running right into the side of my truck, the back part of the body." He did not see Patricia until after Phyllis had been killed, and he went back. He testified on cross-examination: "The child came to rest something about 15 feet from where she was struck.* * *As to explaining how she was thrown any such distance as that by running into the side of my truck rather than being hit by the front of it, as she contends, I say the wheel could have done it."

In our opinion, the court properly overruled defendant's motion for judgment of compulsory nonsuit. This is in accord with our decisions in *Goss v. Williams,* 196 N.C. 213, 145 S.E. 169; *Moore v. Powell,* 205 N.C. 636, 172 S.E. 327; *Kelly v. Hunsucker,* 211 N.C. 153, 189 S.E. 664; *Butler v. Allen,* 233 N.C. 484, 64 S.E. 2d 561; *Brunson v. Gainey,* 245 N.C. 152, 95 S.E. 2d 514; *Cassetta v. Compton,* 256 N.C. 71, 123 S.E. 2d 222; *Ennis v. Dupree,* ante 141, ... S.E. 2d .....

The two assignments of error to the admission of evidence are overruled, for the reason that no prejudicial error is made to appear sufficient to warrant a new trial. The assignment of error to the charge is broadside, and in addition it is not carried forward and discussed in the brief.

In the trial below we find

No error.

ORKIN EXTERMINATING COMPANY OF RALEIGH, INCORPORATED v. ALLEN J. GRIFFIN, AND ALLEN J. GRIFFIN AND BURRIS B. JONES T/A WAYNE EXTERMINATING COMPANY.

AND

ORKIN EXTERMINATING COMPANY OF RALEIGH, INCORPORATED v. BURRIS B. JONES AND BURRIS B. JONES AND ALLEN J. GRIFFIN, T/A WAYNE EXTERMINATING COMPANY.

(Filed 21 November 1962.)

1. Injunctions § 13—

Where, upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, there is no request for findings of fact and the court continues the temporary order without setting forth his findings, it will be presumed for the purpose of the order that the court found facts sufficient to support it.

2. Contracts § 7—

A contract not to engage in business in competition with the employer after termination of the employment is valid and enforceable if the contract is in writing and is entered into as part of the contract of employment, is based upon valuable consideration, is reasonable as to time and territory, is fair to the parties, and is not against public policy. G.S. 75-4.

3. Injunctions § 13—

Where plaintiff makes out a *prima facie* showing of right to the final injunctive relief demanded, a temporary order entered in the cause should ordinarily be continued to the hearing when reasonably necessary to protect plaintiff's rights and prevent irreparable injury.

APPEALS by defendants from *Paul, J.*, August 1962 Term of WAKE.

In these two actions plaintiff seeks to restrain defendants from competing with plaintiff in twenty-five towns in Eastern North Carolina in violation of their individual contracts of employment. The contract between the plaintiff and the defendant Griffin is dated May 10, 1960; the contract between plaintiff and the defendant Jones, July 25, 1960. Plaintiff further prays for damages allegedly resulting from defendants' breach of contract.

Plaintiff is engaged in the pest control, exterminating, fumigating, and termite control business. Each defendant at the time, and as a part of his contract of employment by plaintiff, agreed that for a period of two years immediately following the termination of his employment for whatever cause, he would not himself, or in conjunction with any other person, partnership, or corporation, engage in the pest control, exterminating, fumigating, or termite control business anywhere within the following territory: Kinston, Ayden, Beaufort, Cherry Point, Cove City, Faison, Calypso, Goldsboro, Havelock, Jacksonville, Ken-

ansville, La Grange, Maysville, Midway Park, Morehead, Mt. Olive, New Bern, Oriental, Pink Hill, Princeton, Richlands, Seven Springs, Snow Hill, Trenton and Warsaw.

The agreement specifically prohibited each defendant from calling upon or soliciting any customer whose account was serviced by him as an employee of plaintiff. The complaint in the *Griffin* case alleged that he had voluntarily and without provocation terminated his employment with plaintiff on May 16, 1962. The complaint in the *Jones* case alleged that he had similarly terminated his employment with plaintiff on January 5, 1961. Each complaint alleged that Jones and Griffin had thereafter formed a partnership under the name of Wayne Exterminating Company and were engaged in the exterminating, fumigating, and termite control business in competition with plaintiff in the prohibited territory in violation of their contract of employment; that in the course of his employment each defendant not only acquired a list of the plaintiff's customers but also confidential information as to plaintiff's secret methods and processes in the pest control business.

Upon the verified complaint his Honor W. H. S. Burgwyn on July 19, 1962, issued a temporary restraining order against the defendant in each case. On August 28, 1962, his Honor Malcolm C. Paul heard the two cases fully upon affidavits offered by each party. The defendants admitted the execution of the contracts which the plaintiff seeks to enforce. Each defendant alleged that his contract was a renewal and that there was no basic difference in this contract and previous contracts he had signed with plaintiff. Judge Paul continued the restraining orders pending trial on the merits or until the expiration of the two-year term contained in the covenant not to compete in the event the case should not be tried prior to the date it expired. Each defendant appealed.

Wallace & Wallace, Harvey W. Marcus and Irving K. Kaler for plaintiff, appellee.

Herbert B. Hulse for defendant, appellants.

PER CURIAM. Each defendant makes only one assignment of error. It raises the question whether the court below erred in continuing the temporary restraining order until the final determination of the action on its merits.

The judge was not requested to find the facts upon which he continued the temporary restraining order and he made none. However, it is presumed for the purpose of his order that he found facts sufficient to support it. *Hall v. Coach Co. et. al.*, 224 N.C. 781, 32 S.E. 2d 325;

Edmonds v. Hall, 236 N.C. 153, 72 S.E. 2d 221; Strong, N.C. Index, Injunctions, Sec. 13.

The affidavits disclose that defendants in the course of their employment had acquired knowledge which would give them an unfair advantage over plaintiff in a competitive business. Under such circumstances equity will enforce a covenant not to compete if it is: "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions (5) fair to the parties, and (6) not against public policy." *Asheville Associates v. Miller and Asheville Associates v. Berman,* 255 N.C. 400, 121 S.E. 2d 593. *Exterminating Co. v. Wilson,* 227 N.C. 96, 40 S.E. 2d 696; G.S. 75-4.

The plaintiff in this case made out a *prima facie* showing of right to the final injunctive relief it demanded. When this is done the court will ordinarily continue a temporary restraining order if, in its opinion, it is reasonably necessary to protect the plaintiff's rights until the controversy can be finally determined. On this record, we think the plaintiff was entitled to have the temporary restraining order continued as ordered by Judge Paul. *Studios v. Goldston,* 249 N.C. 117, 105 S.E. 2d 277.

The judgment of the court below is affirmed.

Affirmed.

EMORY C. MASSENGILL v. J. E. WOMBLE & SONS, INCORPORATED, AND BARTER WRIGHT MASON AND ROSA HAYES HORTON.

(Filed 21 November 1962.)

1. Automobiles § 41f—

Evidence that the additional defendant, driving a car along a four-lane highway, was proceeding in the left lane for travel in his direction, and slowed to turn left at a crossover in the median, and that plaintiff, driving a following car, also slowed his vehicle and was hit from the rear by a third vehicle driven by an original defendant, is insufficient to support a finding that the negligence of the additional defendant, if any, was a proximate cause of plaintiff's injuries, and such additional defendant's motion to nonsuit the cross action of the original defendants was properly allowed.

2. Automobiles § 44—

Evidence that plaintiff, driving along a four-lane highway in the left lane for traffic traveling in his direction, decreased speed when the pre-

ceding vehicle slowed down to make a left turn at a crossover in the median, and was struck from the rear by defendant's vehicle, *is held* insufficient to warrant the submission of the issue of contributory negligence to the jury.

APPEAL by original defendants from *Walker, Special Judge,* April 1962 Civil Term of WAKE.

On February 29, 1960, about 8:30 a.m., plaintiff was driving his 1960 Pontiac on Highway 401 toward Raleigh. He was proceeding in a line of traffic in the left of the two lanes for northbound traffic. A 1953 Pontiac operated by (additional) defendant Horton was in front of plaintiff and a 1957 Chevrolet truck owned by the corporate defendant and operated by its agent, defendant Mason, was behind plaintiff. Defendant Horton gradually reduced her speed as she approached a crossover in the median where she was to turn left. Plaintiff, observing her action, gradually reduced his speed. When defendant Horton reached the crossover and began her left turn, her car and plaintiff's car were proceeding very slowly. Under these circumstances, the truck operated by defendant Mason overtook plaintiff's car and struck the right rear thereof, causing plaintiff's car to strike the car of defendant Horton.

Plaintiff instituted this action against the corporate defendant and defendant Mason to recover damages for personal injuries and property damage allegedly caused by Mason's negligence. Answering, these (original) defendants denied negligence, pleaded contributory negligence, and alleged, conditionally, a cross action for contribution against defendant Horton. Defendant Horton was made a party on motion of original defendants and became a defendant only in respect of said cross action for contribution.

At the close of all the evidence, the motion of defendant Horton for judgment of nonsuit as to original defendants' cross action for contribution was allowed. Original defendants excepted.

Original defendants tendered, but the court refused to submit, an issue as to the alleged contributory negligence of plaintiff. Original defendants excepted.

Issues as to negligence and damages were submitted. The jury found that plaintiff was injured and damaged by the negligence of original defendants as alleged in the complaint and awarded damages in the amount of $3,500.00.

Judgment for plaintiff, in accordance with the verdict, was entered. Original defendants excepted and appealed.

Holding, Harris, Poe & Cheshire for plaintiff appellee.

Maupin, Broughton, Taylor & Ellis for defendants J. E. Womble & Sons, Inc., and Barter Wright Mason, appellants.

Smith, Leach, Anderson & Dorsett for additional defendant Horton, appellee.

PER CURIAM. We find no evidence sufficient to support a finding that the negligence of defendant Horton, if any, was a proximate cause of plaintiff's injuries and property damage. Nor do we find evidence sufficient to support a finding that plaintiff was contributorily negligent. Hence, there is no error in the rulings referred to in our preliminary statement.

Other assignments brought forward in appellants' brief relate to alleged errors in respect of the court's charge to the jury. However, none of these assignments discloses prejudicial error.

No error.

STATE v. BRUCE LANIER.

(Filed 21 November 1962.)

Forgery § 2—

Conflicting evidence as to whether the signature on the check in question was that of the maker or whether defendant signed the name of the purported maker, *held* to take the issue to the jury.

APPEAL by the defendant from *Olive, J.*, May 1962 Term of ROWAN.

Criminal prosecution upon two indictments which charge (1) that on January 7, 1961, defendant forged a check in the amount of $4,700.00 upon the account of Herbert Flora, Jr., and (2) that on the same day he uttered the forged check.

Plea: Not guilty. Verdict: Guilty.

From judgment imposed, defendant appealed.

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

Robert M. Davis for defendant appellant.

PER CURIAM. Upon the trial in the Superior Court the defendant testifying in his own behalf, admitted that he deposited the check in question in his account at the Scottish Bank in Salisbury. He denied, however, that he wrote the signature of Herbert Flora, Jr. on it. On

the contrary, he said that he saw Flora sign the check; that Flora then delivered it to him in payment of a $4,600.00 gambling debt and a $100.00 used car he had sold Flora. The teller and the bookkeeper of the Security Bank and Trust Company at Salisbury, which cashed the check, each testified that in his opinion the signature on the questioned check was that of Herbert Flora, Jr.

Flora himself swore that he did not sign the check and knew nothing about it until he received it in his bank statement at the end of the month. His testimony was that, after buying a used car from the defendant for his son, the defendant gave him two drinks in a shot glass: the first one at 5:00 p.m., the second one at 6:00 p.m.; that shortly after the second drink he knew nothing more until 10:00 p.m. when he came to himself on the floor of defendant's office. A special agent of the Federal Bureau of Investigation, an expert assigned to the full-time examination of questioned documents, after studying enlargements of the $4,700.00 check and a number of genuine Flora checks, testified that in his opinion the signature on the questioned check was not written by the writer of the genuine Flora signatures used for comparison.

The question of fact which arose upon this conflicting evidence was for the jury to answer. The charge of the court fairly presented the defendant's contentions to the jury and correctly stated the applicable principles of law. The jury answered the issue against the defendant in a trial in which we find no reversible error.

No error.

IN THE MATTER OF THE APPLICATION OF ROBERTS COMPANY FOR THE APPOINTMENT OF AN UMPIRE UNDER THE PROVISIONS OF FIRE INSURANCE POLICY NO. 675-002 ISSUED BY CENTRAL MUTUAL INSURANCE COMPANY.

(Filed 21 November 1962.)

Appeal and Error § 3—

The appointment of an umpire by a judge of the Superior Court upon application of a party to an insurance contract pursuant to the "appraisal" clause of the policy, G.S. 58-176, is a ministerial and not a judicial act, and no appeal will lie from the refusal of the judge to vacate the order, since the validity of the appointment may be adjudicated only when the question is raised in a properly instituted civil action.

APPEAL by movant, Central Mutual Insurance Company, from *Williams, J.*, at chambers in LEE County.

Smith, Leach, Anderson & Dorsett for appellant.

Jordan, Wright, Henson & Nichols; Pittman, Staton & Betts; and McDermott, Cameron & Harrington for appellee.

PER CURIAM. The Central Mutual Insurance Company (insurer) issued a policy of fire insurance to Roberts Company (insured) on 1 December 1959. The policy covers the contents of 13 separate plants situate in and outside the City of Sanford, North Carolina. It contains a co-insurance clause. In compliance with G.S. 58-176 it contains an "Appraisal" clause providing in pertinent part the following:

> "In case the insured and this Company shall fail to agree as to actual cash value . . . of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss."

On 9 October 1961 a fire occurred at one of the plants in Sanford. There were extended negotiations between insurer and insured respecting inspection and the quantity of property damaged and destroyed. On April 17, 1962, insured requested an appraisal pursuant to the "Appraisal" clause and appointed its appraiser. Insurer did not appoint an appraiser but requested an examination of insured under oath. The examination was begun. On 2 June 1962 insured applied to Honorable Clawson L. Williams, Resident Judge of the Eleventh Judicial District, for appointment of an umpire. The Judge appointed Robert L. Gavin, Esq. Upon receiving notice of the appointment, insurer filed a motion with the Judge to vacate the order. The emotion was heard on 20 June 1962. At the hearing insurer notified insured that it denied any and all liability under the policy. On 23 July 1962 Judge Williams entered an order denying the motion to vacate the appointment, and insurer excepted and appealed.

The appeal must be dismissed. There is no suit pending. No action has been commenced and instituted by issuance of summons (G.S. 1-

14), or as provided in G.S. 1-88. The appointment of the umpire is not the judgment of a court, it is a mere ministerial act pursuant to contract, albeit authorized by statute. The statute might very well have designated a postmaster, minister of the gospel, mayor, sheriff or other personage to make the appointment. The appointment is made at the request of either the insurer or insured and no notice to the other is required, no hearing is contemplated. There is no requirement that the appointment be made in term or at any particular time or place. The appointment itself may be challenged only by an action instituted for that purpose. The legal effect of the appointment and any acts done pursuant thereto may be challenged in any action in which they arise.

It follows that we make no decision upon the merits, that is, we do not adjudicate any of the rights of the parties with respect to an appraisal under the policy. We only decide that the appointment was not a judicial act.

Appeal dismissed.

STATE v. JOSEPHINE P. VOWELL.

(Filed 21 November 1962.)

APPEAL by defendant from *Mallard, J.*, April, 1962 Criminal Term, WAKE Superior Court.

Criminal prosecution upon a warrant issued by the City Court of Raleigh charging the defendant and a female companion with the offenses of false registration at a named hotel in Raleigh on March 14, 1962, and in engaging in prostitution. From a conviction and judgment in the city court, the defendants appealed to the Superior Court of Wake County.

A trial *de novo* in the superior court resulted in a verdict of guilty. From judgments thereon, the defendant Vowell alone appealed.

T. W. Bruton, Attorney General, James F. Bullock, Asst. Attorney General, for the State.

Earle R. Purser, for defendant, appellant.

PER CURIAM. At the trial in the superior court the State introduced evidence that appellant and her companion checked into the hotel about six o'clock on March 14, 1962. Due to some disturbances in

which they were involved, the police were called, the defendant and her companion were arrested, and warrants issued. The police officer in charge of the investigation testified as to the confession of the appellant. The appellant contends the confession was unsupported and, therefore, not sufficient to convict. However, the record does not bear out the appellant's contention. The evidence corroborating the confession was ample. The confession and the corroborating evidence made out a strong case.

No error.

RUTH COLTRANE ROBERTS v. JAMES GRAY ROBERTS.

(Filed 21 November 1962.)

APPEAL by defendant from *Walker, S.J.*, in Chambers, RANDOLPH Superior Court.

The plaintiff instituted this civil action against the defendant, her husband, for alimony without divorce. The defendant demurred upon the ground the complaint alleged conclusions and not ultimate facts sufficient to constitute a cause of action for divorce from bed and board. After notice, Judge Walker held a hearing upon the plaintiff's application for alimony *pendente lite* and counsel fees. At the hearing the court held as a matter of law the complaint stated a cause of action and entered a *pendente lite* order that the defendant pay the plaintiff $20.00 per week for her support pending a hearing on the merits. The court refused to allow counsel fees.

Deane F. Bell, for plaintiff appellee.
Ottway Burton, for defendant appellant.

PER CURIAM. The plaintiff's complaint, while not in full detail, yet contains sufficient factual averments to survive the demurrer. The evidence was sufficient to sustain the *pendente lite* allowance and the amount thereof. Apparently the court failed to provide for counsel fees upon the ground the evidence showed the plaintiff was amply able to pay her own attorney. The order from which this appeal is taken is

Affirmed.

STATE v. ORVILLE PEARSON.

(Filed 21 November 1962.)

1. Criminal Law § 82; Rape § 14—

Whether the solicitor should be permitted to ask leading questions, particularly of a prosecutrix of tender years in a trial of a defendant charged with rape, carnal abuse, and other cases involving inquiry into delicate subjects of a sexual nature, rests in the sound discretion of the trial court, and since the trial court, from his observation of the witness and knowledge of the circumstances of the particular case, is in a better position to decide the course of conduct necessary to establish the truth and yet safeguard the rights of defendant, the exercise of his discretion will not be disturbed in absence of manifest abuse.

2. Same—

In this prosecution of a twenty-year old defendant for carnally knowing and abusing a fourteen-year old girl, it appeared that the prosecutrix remained silent when interrogated in regard to the more intimate details necessary to make out the State's case and that the solicitor was then permitted by the court to ask leading questions in regard thereto. *Held:* The record discloses no abuse of discretion by the trial court in permitting the leading questions, the *corpus delicti* being established by other evidence.

3. Criminal Law § 90—

Where evidence competent for the purpose of corroboration is admitted over the general objection of defendant without request that its admission be restricted, exception to the admission of the evidence cannot be sustained. Rule of Practice in the Supreme Court No. 21.

4. Criminal Law § 154—

An assignment of error must disclose within itself the question sought to be presented without the necessity of going through the record to find the asserted error or ascertain the precise question involved. Rules of Practice in the Supreme Court Nos. 19(3) and 21.

5. Criminal Law § 159—

An assignment of error in support of which no reason or argument is stated and no authority cited in the brief will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Shaw, J.*, March 1962 Term of ALEXANDER.

Criminal prosecution on an indictment charging defendant, Orville Pearson, a male person over eighteen years of age, on 24 May 1961 with feloniously and carnally knowing and abusing Rosina Clontz, a female child over twelve and under sixteen years of age, who had never before had sexual intercourse with any person: a violation of G.S. 14-26.

Plea: Not Guilty. Verdict: Guilty as charged in the indictment.

From a sentence of imprisonment for not less than three years nor more than five years, defendant appeals.

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

Ray Jennings for defendant appellant.

PARKER, J. Rosina Clontz, a witness for the State, testified in substance as follows:

She is fourteen years old. On 24 May 1961 she got into an automobile with Orville Pearson, and went with him to the FCX store in Taylorsville, a short distance from where she lives. They got two Pepsi-Colas, and went from the FCX store down by a chicken house on "a teeny dirt road." There was nobody with her but Orville Pearson.

After Rosina had given this testimony the following appears in the record:

> "(Witness first testified that when they left the store they went back home, and that she did not go with him anywhere else that day. The trial Judge at this point permitted the Solicitor to ask leading questions on account of the 'tender years' of the witness).
>
> "The Solicitor asked her to tell what happend after they got to the chicken house and stopped. No answer was given. The Solicitor again asked her to go ahead and without him leading her to tell what happened. She said: 'Well, we were just sitting there talking — and he put his arms around me and kissed me.' The witness then stopped and the Court directed her to go ahead. The Solicitor then asked her the following question: 'Now, you told us about his stopping at the chicken house and you told us that he put his arms around you and kissed you. Did he put his hands on you?' To which the witness answered: 'Yes, Sir.' The Solicitor then asked: 'Did he take out his private parts?' Witness answered: 'Yes, Sir.' Solicitor asked: 'What did he do with them?' To which there was no answer. The Court instructed witness to answer his question. The Solicitor then asked witness if he put his private parts in hers, and the witness answered: 'Yes, Sir.' The Solicitor then asked what she did then, and she answered that she started crying. She testified that she did not know how long they were there; that after leaving they went down close to Edith Mitchell's and he let her out and went on. Upon being asked by the Solicitor if she had told her mother what happened, she said that she had. The Solicitor then asked her if she had ever had sexual intercourse with any person other than him, and she replied: 'No, Sir.'

"DEFENDANT'S EXCEPTION NO. 1."

Immediately thereafter in the record appears the testimony of Rosina on cross-examination, which is in substance:

She doesn't remember what time of the evening it was: it wasn't daylight. When she got home after dark her mother gave her a whipping, and then she told her mother that Orville had done something to her. She lives right close to where Orville lives. She has known him about two years, and she visits at his mother's home.

Defendant assigns as error "the action of the presiding judge in allowing the solicitor to ask leading questions of the prosecuting witness in regard to the alleged act of sexual intercourse with the defendant Orville Pearson."

Notwithstanding the general rule against asking one's own witness leading questions, the control of such is largely within the sound discretion of the trial judge. In this jurisdiction the law has been well settled for many years that it is within the sound discretion of the trial judge whether or not counsel shall be permitted to ask leading questions, and the exercise of such discretion, in the absence of an abuse thereof, will not be disturbed on appeal. *Bank v. Pinkers,* 83 N.C. 377; *Howell v. Solomon,* 167 N.C. 588, 83 S.E. 609; *S. v. Buck,* 191 N.C. 528, 132 S.E. 151; *In re Will of Williams,* 215 N.C. 259, 1 S.E. 2d 857; *S. v. Hargrove,* 216 N.C. 570, 5 S.E. 2d 852; *S. v. Harris,* 222 N.C. 157, 22 S.E. 2d 229; *S. v. Cranfield,* 238 N.C. 110, 76 S.E. 2d 353; Stansbury, North Carolina Evidence, Witnesses, sec. 31; 98 C.J.S., Witnesses, sec. 329.

Generally, leading questions are permissible to arrive at facts when modesty or delicacy prevents full answers to general interrogatories. Hence, because of the delicate nature of the subject of inquiry, many courts have recognized and held that rape and carnal abuse cases, and other cases involving inquiry into delicate subjects of a sexual nature, constitute an exception to the general rule against leading questions, and that in such cases the permitting of leading questions of the prosecutrix, particularly if she is of tender years, is a matter within the sound discretion of the trial judge. *S. v. Beatty,* 226 N.C. 765, 40 S.E. 2d 357; *Antelope v. United States,* 10th Cir., 185 F. 2d 174; *Buckley v. State,* 19 Ala. App. 508, 98 So. 362; *Parker v. State,* 26 Ala. App. 61, 152 So. 610; *State v. Upton,* 65 Ariz. 93, 174 P. 2d 622; *Reynolds v. State,* 220 Ark. 188, 246 S.W. 2d 724; *People v. Jackson,* 124 Cal. App. 2d 787, 269 P. 2d 17; *Wills v. People,* 100 Colo. 127, 66 P. 2d 329 (statutory rape—prosecutrix 17 years of age); *Warren v. People,* 121 Colo. 118, 213 P. 2d 381; *State v. Miller,* 71 Kan. 200, 80 P. 51; *Meredith v. Commonwealth,* 265 Ky. 380, 96 S.W. 2d 1049; *Summerville v. State,* 207 Miss. 54, 41 So. 2d 377 (statutory rape—prose-

cutrix 16 years of age); *State v. Coffman,* 360 Mo. 782, 230 S.W. 2d 761; *State v. Riley,* 28 N.J. 188, 145 A. 2d 601; *Flannery v. State,* 135 Tex. Cr. R. 235, 117 S.W. 2d 1111, Rehearing Denied 22 June 1938; *State v. Tenney,* 137 Wash. 47, 241 P. 669; *State v. Davis,* 20 Wash. 2d 443, 147 P. 2d 940; 98 C.J.S., Witnesses, sec. 331, (d), pp. 45-6. See also *Stinson v. State,* 125 Ark. 339, 189 S.W. 49, a prosecution for carnal abuse of a female under 16 years of age, in which the Court held that, in view of the natural reluctance of the prosecutrix to testify to specific acts, it was not an abuse of the trial court's discretion to ask leading questions tending to show what had taken place and the actual commission of the offense.

S. v. Beatty, supra, was a criminal prosecution upon an indictment charging rape, but the solicitor only asked for a conviction of an assault with intent to commit rape. There was a verdict of guilty as to all defendants, and each defendant was sentenced to imprisonment, from which each defendant appealed. According to the record on file in the office of the clerk of this Court, the victim was 18 years of age, and she was allowed over defendants' objections to answer leading questions asked by the solicitor on direct examination in respect to matters of a sexual nature. Defendants assigned this as error. The Court held that permission to ask leading questions was within the sound discretion of the trial judge, that the exercise of such discretion, in the absence of an abuse thereof, will not be reviewed on appeal, and that no prejudicial error has been shown, and the exception cannot be sustained.

In *Flannery v. State, supra,* defendant was convicted of the crime of rape. The victim was at the time an eight-year-old girl. Defendant excepted to the prosecuting officer eliciting from the victim answers in response to leading questions. The Court said:

> "We can see no error in the State's attorney asking the witness what appellant did to her unionalls, and eliciting the answer that he (appellant) opened the front of her unionalls; and further eliciting the answer 'Yes sir' to the question 'Did he put his male organ into your female organ?' While such question was leading, nevertheless the rigor of the rule forbidding the asking of such questions bears some flexibility when dealing with a witness of tender years. It is a well-known characteristic that little girls of tender years are usually loath to testify about such matters as this one was called to testify, and sometimes refuse to talk at all, through nervousness or innate modesty, and it appears from the bill that the witness did not answer anything at all when first asked to tell what appellant did after he had thrown her to the

ground, and it necessitated a leading question in order to obtain an answer to such a usually embarrassing question. There was other testimony in the record rather strongly corroborative of Drusilla's, and we do not think any injury was shown herein."

In *Antelope v. United States, supra,* the defendant, a full-blooded Indian, was convicted of the crime of statutory rape upon an Indian girl 13 years of age. The Court said:

"Likewise, the contention that the court committed reversible error in permitting the District Attorney to ask Eldine leading questions is without merit. The prosecuting witness here was a young, timid Indian girl. She was in strange surroundings. The questions, of necessity, were embarrassing to her. She testified in a timid, halting manner. Under these circumstances, it was necessary to ask her some leading questions to elicit from her the material facts. It is sufficient to say that we have examined the record and conclude that no reversible error was committed in permitting such leading questions as were asked."

In the trial of criminal cases it is of the utmost importance that the truth be ascertained, yet, at the same time, it is also of the utmost importance that the fundamental rights of the defendant be protected. The trial court was in a much better position to judge the necessity and propriety of his action in permitting the solicitor to ask the prosecutrix, a fourteen-year-old girl, the leading questions appearing in the record than is this Court. He saw this fourteen-year-old girl and observed the delicacy of the situation. He noted her sensibility to going forward, if not refusal to going forward, and explaining in detail the intimate sexual acts necessary for the State to make out its case. One girl of fourteen years of age might be much more humiliated to testify as to the necessary intimate details essential to the crime here charged than another of the same age. Each case must depend upon its own circumstances, and the trial judge is the person best situated to decide upon the course of conduct necessary to elicit the truth, and yet safeguard the rights of the defendant, and unless this Court can say, from the whole record, he abused his discretion and the defendant was deprived of a fair and impartial trial, we should not disturb the exercise of his discretion in permitting the leading questions to be asked the prosecutrix by the solicitor. Ond looking to the entire record in this case we find this: Rosina's mother testified for the State in substance, except when quoted: Rosina came home "around the edge of dark," and said "she had been off with him." After she whipped Rosina, Rosina told her "she went down behind Mano Ker-

ley's Cafe down there and turned down a dirt road somewhere that led to a chicken house down there and had intercourse with him in the car." She took her to a doctor. Dr. Alex Moffett, a practicing physician and surgeon at Taylorsville, examined the prosecutrix on 25 May 1961, and gave testimony for the State tending to show that she had had a recent sexual intercourse or recently had been carnally abused—the details of which it would serve no useful purpose to set forth. Dr. Moffett testified: "She told him that a man had started to have intercourse with her and had partially succeeeded but she pushed him away; that she did not name the person." Defendant, Orville Pearson, at the time, was 20 years of age. Defendant testifying in his own behalf said, in substance, that about 8:00 p.m. on 24 May 1961 prosecutrix rode with him to the FCX store where he bought two Pepsi-Colas and some gasoline, but he did not lay his hands on her, and did not engage in any sexual act with her. On cross-examination defendant admitted he had been convicted of aiding and abetting in larceny, had been placed on probation, had broken the conditions of his probation, and had served time on the roads. In our opinion, the trial judge did not abuse his discretion in permitting the solicitor to ask the prosecutrix the leading questions appearing in the record under the circumstances of this case, and this did not deprive defendant of a fair and impartial trial. The assignment of error in this respect is overruled.

Defendant assigns as error that the court permitted the mother of Rosina to testify as to what Rosina told her after she whipped her upon her return home, without restricting it to the purpose of corroborating Rosina. Defendant made a general objection to the admission of this evidence, but did not ask, at the time of admission, that its purpose shall be restricted. This assignment of error is overruled. Rule 21 of the Rules of Practice in the Supreme Court, 254 N.C. 783, 803; *S. v. Walker,* 226 N.C. 458, 38 S.E. 2d 531.

Defendant has three assignments of error to the exclusion of evidence offered by him. These assignments of error are not sufficient in form to present the alleged errors relied on, for the reason that these assignments of error, and none of them, do not state clearly and intelligently what questions, or question, are intended to be presented without the necessity of the Court going beyond each, and all, of these assignments of error "on a voyage of discovery" through the record to find the asserted errors, or error, and the precise questions, or question, involved, and such a voyage the Court will not embark on. Rules 19 (3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783 *et seq.*; *Kleinfeldt v. Shoney's, Inc.,* 257 N.C. 791, 127 S.E. 2d 573, and the cases there cited. In addition, no reason or argument is stated, or authority cited, in defendant's brief in support of these assignments

of error, and they will be taken as abandoned by him. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810; *S. v. Strickland*, 254 N.C. 658, 119 S.E. 2d 781.

Defendant assigns as error the denial of his motion for judgment of nonsuit made at the close of all the evidence. In defendant's brief no reason or argument is stated, or authority cited, in support of this assignment of error, and further it is without merit. The State's evidence was amply sufficient to carry the case to the jury.

Defendant's assignment of error to the charge is not tenable. Further, no reason or argument is stated, or authority cited, in defendant's brief in support of this alleged error. It is overruled.

In the trial below we find

No error.

JOHN WILEY SANDY, FATHER; BERTHA MAE SANDY, MOTHER; LOU ANN SANDY, J. C. SANDY, GLENN SANDY, DOUGLASS RAY SANDY AND JEANETTE SANDY, MINOR BROTHERS AND SISTERS APPEARING BY THEIR NEXT FRIEND T. B. JOHNSON, OF WILEY JACKSON SANDY, DECEASED, EMPLOYEE v. STACKHOUSE INCORPORATED, EMPLOYER, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY INSURER.

(Filed 21 November 1962.)

1. Appeal and Error § 38—

Ordinarily, exceptions not set out in the brief or in support of which no reason or argument is stated or authority cited will be taken as abandoned. Rule of Practice in the Supreme Court No. 28.

2. Master and Servant § 93—

The findings of fact by the Industrial Commission are conclusive on appeal when they are supported by competent evidence, even though there is evidence that will support a finding to the contrary.

3. Master and Servant § 53—

Whether an accident arises out of the employment is a mixed question of law and fact.

4. Master and Servant § 54—

As used in the Workmen's Compensation Act, the words "out of" refer to the cause of an accident, while the words "in the course of" refer to the time, place and circumstances under which it occurred, and in order to arise out of the employment there must be some causal relation between the employment and the accident so that the accident arises from a hazard incidental to the employment to which the workmen would not have been equally exposed apart from the employment.

5. Same—

Ordinarily when an employee is off duty the relationship of master and servant is suspended and therefore there is no causal relationship between the employment and an accident which happens during such time.

6. Same— Evidence held to support finding that injury to employee did not arise out of his employment.

The evidence disclosed that the employee was temporarily assigned to a distant town in another state for emergency work in repairing power lines, with board and room furnished by the power company, that the employee and members of his crew were dismissed at six o'clock in the evening, with no duties to perform until six o'clock the following morning, that the employee left the motel about nine o'clock that night on a personal mission to a restaurant some quarter mile from the motel, and was hit and killed by an automobile while returning to the motel. *Held:* The evidence supports the finding of the Industrial Commission that the injury did not arise out of and in the course of employment.

APPEAL by plaintiffs from *Mallard, J.*, March regular civil term 1962 of WAKE.

This proceeding was instituted before the North Carolina Industrial Commission to recover compensation pursuant to the provisions of our Workmen's Compensation Act, alleging that the death of Wiley Jackson Sandy arose out of and in the course of his employment with the defendant employer.

It was stipulated that at the time of the accident the deceased employee and the defendant employer were subject to and bound by the provisions of the Workmen's Compensation Act and that the American Mutual Liability Insurance Company was the insurance carrier for the defendant employer; that on 2 October 1959 the deceased employee was injured by accident when he was struck by an automobile and that deceased died the same day from the injuries thus sustained.

The deceased employee was employed by the defendant employer sometime in June 1959 and was working with a line crew in and around Wake County, North Carolina. On 30 September 1959 the deceased employee was assigned to a crew in charge of Roy Lattie Moore to go to South Carolina to assist there in repairing line damage done by Hurricane Gracie; that the crew arrived in Manning, South Carolina, about three o'clock in the afternoon of 30 September 1959 and worked all through that night and the next day until six p.m. After sleeping that night, 1 October 1959, the crew went to Beaufort, South Carolina, arriving there about 2:30 p.m., 2 October 1959. The crew worked until six p.m. The power Company in South Carolina furnished and paid for rooms for the members of the crew at the Star Motel in Beaufort located on Highway No. 21, and also paid for the

meals for the members of the crew. The foreman of the crew stayed at a different motel.

On 2 October 1959 the crew quit work between six and seven o'clock in the evening. The members of the crew were dismissed until six o'clock the next morning, and the deceased did not have any duties to perform for his employer from the time he was dismissed on 2 October 1959 until six o'clock in the morning of 3 October 1959. The members of the crew were not supervised by their foreman when they were off duty at night. Around nine p.m. on the night of 2 October 1959, the deceased employee went to a drive-in restaurant about a quarter of a mile down Highway No. 21 from the motel where he was staying, to purchase a Coca-Cola for himself. He drank the Coca-Cola and then purchased twelve cans of beer to take back to the motel. While returning to the motel he was hit by an automobile and died as a result of the injuries sustained.

The hearing commissioner heard the evidence and concluded as a matter of law that the deceased employee was not injured by accident arising out of and in the course of his employment with the defendant employer. Claim for compensation was denied.

On appeal, the full commission adopted as its own the findings of fact and conclusions of law of the hearing commissioner and upheld the ruling of the hearing commissioner.

The matter was appealed to the Superior Court which, after hearing, affirmed the order of the Industrial Commission.

The plaintiffs appeal, assigning error.

Jack Senter, Robert A. Cotton for appellants.
I. Weisner Farmer for appellees.

DENNY C.J. The appellants have not brought forward in their brief nor do they discuss any of their exceptions and assignments of error. Ordinarily, exceptions in the record not set out in appellants' brief, or in support of which no reason or argument is stated or authorities cited, will be taken as abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 254 N.C. at page 810.

The appellants direct their argument to the proposition that, since the deceased was taken to South Carolina for emergency duty and required to work more than his usual eight hours a day, or 40 hours per week, he was continuously on duty from the time he left North Carolina until his death; that he was subject to call at any time, and that he had no time he could call his own. The appellants concede, however, that at the time of the death of the deceased employee he was not engaged in doing any specific task for his employer, but insist

that the continuous employment doctrine applies to the facts in this case as laid down in *Walker v. Speeder Machinery Corporation,* 213 Iowa 1134, 240 N.W. 725 and in *Griffith v. Cole Bros.,* 183 Iowa 415, 165 N.W. 577, and that the plaintiffs are entitled to recover compensation.

In the case of *Walker v. Speeder Machinery Corporation, supra,* the employee was sent to various cities in the State of Ohio to do certain work for his employer and was ordered, by wire, to report at Pittsburgh, Pennsylvania, for work to be done on Monday following his arrival in Pittsburgh by train on a Sunday afternoon. The employee was in Pittsburgh for the sole purpose of doing work for his employer in connection with the erection or demonstration of some machinery which had been shipped to Pittsburgh by the employer. The employee arrived in Pittsburgh, registered at a hotel, took a nap which lasted through the ordinary time for an evening meal, and then inquired of the clerk, about nine o'clock in the evening, where he could get something to eat. He was directed to a nearby restaurant. While on his way to get his evening meal he received injuries from which he died. The deceased employee had no personal business in Pittsburgh. On these facts his widow was allowed to recover.

In *Griffith v. Cole Bros., supra,* the deceased, a worker on a bridge having finished his work for the day, while sitting in a lodging tent provided by the employer and constructed near the scene of the bridge, was killed by a stroke of lightning. The Court held it was not sufficient that the employee "was injured while in the course of his employment. It must further appear that his injury arose out of such employment." Compensation was denied.

Cases in other jurisdictions are not binding on this Court; even so, in our opinion, the factual situation in the case of *Walker v. Speeder Machinery Corporation, supra,* is distinguishable from that in the instant case, while the opinion in the case of *Griffith v. Cole Bros., supra,* supports the position of the appellees in this case.

The findings of fact of the Industrial Commission are conclusive on appeal when they are supported by competent evidence, even though there is evidence that would support a finding to the contrary. *McGinnis v. Finishing Plant,* 253 N.C. 493, 117 S.E. 2d 490; *Pitman v. Carpenter,* 247 N.C. 63, 100 S.E. 2d 231; *Champion v. Tractor Co.,* 246 N.C. 691, 99 S.E. 2d 917; *Creighton v. Snipes,* 227 N.C. 90, 40 S.E. 2d 612; *Rewis v. Insurance Co.,* 226 N.C. 325, 38 S.E. 2d 97; *Hegler v. Mills Co.,* 224 N.C. 669, 31 S.E. 2d 918.

Whether an accident arose out of the employment is a mixed question of law and fact. *Pope v. Goodson,* 249 N.C. 690, 107 S.E. 2d 524; *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862; *Horn v. Furni-*

ture Co., 245 N.C. 173, 95 S.E. 2d 521.

The Commission found facts which clearly show that the deceased employee, although temporarily assigned to work in a distant town in another State, with board and room furnished by the power company for which the emergency work was being done, was off duty and upon a personal errand, unrelated to any duty in connection with his employment when he was struck by an automobile and killed. The facts found by the Commission are supported by competent evidence.

In the case of *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751, this Court said: "The Act does not contemplate compensation for every injury an employee may receive during the course of his employment but only those from accidents arising out of, as well as, in the course of employment. Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. *Lockey v. Cohen, Goldman & Co., supra* (213 N.C. 356, 196 S.E. 342); *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89; *Marsh v. Bennett College*, 212 N.C. 662, 194 S.E. 303; *Plemmons v. White's Service, Inc., supra* (213 N.C. 148, 195 S.E. 370). The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. *Lockey v. Cohen, Goldman & Co., supra.*"

The words "out of" refer to the cause of an accident, while the words "in the course of" have reference to the time, place and circumstances under which it occurred. *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680.

In *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294, this Court said: " 'So it has been stated as a general proposition that the phrase "out of and in the course of the employment" embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business.' "

Ordinarily, when an employee is off duty the relationship of master and servant is suspended; therefore, there is no causal relation between the employment and an accident which happens during such time. *Canter v. Bd. of Education*, 201 N.C. 836, 160 S.E. 924; *Ridout v. Rose's Stores, Inc.*, 205 N.C. 423, 171 S.E. 642; *Hildebrand v. Furniture Co., supra; Horn v. Furniture Co., supra; Alford v. Chevrolet Co.*, 246 N.C. 214, 97 S.E. 2d 869.

The judgment of the court below is

Affirmed.

W. VANCE FRYE v. INA SPINKS CROOKS.

(Filed 21 November 1962.)

1. Mortgages §§ 6, 39—

Where a mortgage and note secured thereby each contain references to the other, the fact that the mortgage specifies no date for payment of the amount secured is not fatal to foreclosure when the note specifies payment within 12 months, and foreclosure some years after the maturity date of the note cannot be upset on the ground that the debt was not then in default.

2. Abatement and Revival § 4—

Where defendant pleads a prior action pending between the same parties involving the same subject matter, but offers nothing in support of the plea in abatement, the plea is properly disregarded.

APPEAL by defendant from *Olive, J.*, April, 1962 Term, RANDOLPH Superior Court.

Civil action in ejectment to recover possession of a specifically described lot of land in Asheboro Township, Randolph County, North Carolina.

The plaintiff alleged he became the purchaser of the described premises at a mortgage foreclosure sale held on October 8, 1960, paid the purchase price, received a fee simple deed from the personal representatives of one of the mortgagees who had succeeded to the interest of the other mortgagee. The defendant refused to vacate after due notice.

The defendant, one of the mortgagors, admitted the plaintiff's allegations, except the validity of the sale which she challenged on this ground: "(2) That on the 8th day of October, 1960, the indenture (the mortgage) recorded in Book 582, page 316, was not in default, and is not now in default; and that the administratrices were premature in foreclosing upon the land of the defendant, Ina Spinks Crooks; and that the purported sale of the 8th day of October, 1960 is absolutely void."

The defendant further alleged: "As affirmative defense . . . A. Another action is pending in Randolph County involving the parties to this action and the subject of this action, said action being entitled, 'In the Matter of Sale of Land of Ray Crooks, and Ida Spinks Crooks, Under Foreclosure by Ida A. Rhymer and Lois S. Gurganious, Administratrices of the Estate of Cora Nance Smith, Deceased, Mortgagee.' Docketed as S. P. 472 in Randolph County Superior Court, said cause was instituted by motion; was served on the plaintiff, W. Vance Frye; and that the matters and things alleged in said motion in the cause when adjudicated will answer the matters and things alleged

in plaintiff's complaint; that the defendant, herewith, offers this as a plea in abatement demanding dismissal of plaintiff's cause of action since it involves the same cause of action and same parties as S. P. 472."

The plaintiff introduced the note for $725.00, signed by the defendant and her husband, dated August 26, 1955, due 12 months after date, with interest. The note contained the following: "This note is secured by real estate of even date." The plaintiff introduced the mortgage executed by the defendant and her husband, dated August 26, 1955, conveying the described premises to W. B. Smith and wife, Cora Nance Smith, to have and to hold "upon the express condition that if the said part—of the first part pay, or cause to be paid, to the said party of the second part with interest thereon . . . certain bond bearing even date herewith, . . . then these presents and the said bond shall determine and be void. . . . But in case of the non-payment of the said sum of $725.00 SEVEN HUNDRED AND TWENTY-FIVE DOLLARS . . . . the said parties of the second part, their heirs, executors, administrators, or assigns . . . are . . . empowered to sell and convey the above-described premises, . . . and execute title to the purchaser."

The plaintiff offered plenary evidence of the repeated and continued negotiations between the defendant (after the death of her husband) and the attorney for the administratrices, both before and after the advertisement and before and after the sale, with respect to the defendant's purpose and efforts to pay off the note. At no time prior to the sale, or for a considerable period thereafter, did the defendant raise any question about the note or the mortgage, or the validity of the sale. The attorney withheld the execution of the deed pending the further efforts of the defendant to secure sufficient funds to pay the debt. The plaintiff agreed to transfer his bid to the defendant, or to her nominee, upon the payment of the amount of his bid. The deed was executed only after the defendant's efforts to pay the amount due had been unsuccessful.

Upon completion of the plaintiff's case, the defendant rested without offering evidence. The jury answered the issues of ownership and the right to possession in favor of the plaintiff. The defendant appealed from the judgment on the verdict.

Ottway Burton, Linwood T. Peoples, for defendant, appellant.
No counsel contra.

HIGGINS, J. The defendant attempted to interpose two defenses to the plaintiff's cause of action: (1) The debt secured by the mortgage

was not in default; consequently the sale was premature, unauthorized, and the plaintiff's deed void. (2) The action should be abated on the ground there is another action pending between the same parties involving the same subject.

The note, dated August 26, 1955, specifically provided for the payment of $725.00 and interest 12 months after date. The note refers to the security "by real estate of even date." The mortgage was not drawn with legal precision and exactness. Nevertheless it is dated August 26, 1955. It conveys to the payees in the note the property specifically described, as security for "certain bond bearing even date herewith. . . . These presents and the said bond shall determine and be void" upon the express condition of payment. "But in case of non-payment of the said sum of $725.00 SEVEN HUNDRED TWENTY-FIVE DOLLARS with interest the parties of the second part, their heirs, executors, administrators, or assigns are empowered to sell at public auction to the highest bidder and to execute title to the purchaser. . . . After applying the proceeds to . . . said debt and interest, rendering the overplus monies, if any, to the said party of the first part . . ."

The cross references in the note and in the mortgage, each to the other, sufficiently show the note was due 12 months after August 26, 1955, and that the mortgage was intended to secure the note. Both the note and the mortgage were under seal, properly executed, and the mortgage properly registered. The defendant's contention the sale was premature is not substantiated by the record.

The other action pending referred to in the defendant's further answer seems to be a motion to set aside the sale. The defendant makes the allegation. She offers nothing to support it. The evidence amply supports the verdict and judgment.

No error.

WILBURN LEO WHITMAN v. GEORGE THOMAS WHITMAN.

(Filed 21 November 1962.)

1. Automobiles § 49—

Where defendant driver contends that plaintiff passenger was contributorily negligent in consenting to ride in the car driven by defendant after defendant had drunk some beer, the decisive question is what was defendant's condition at the time of and within a reasonable time prior to the accident, and the court properly excludes interrogatories as to whether plaintiff knew of convictions of defendant some years prior to the occasion in suit for drunkenness, driving without a license, and operating an automobile while intoxicated, etc.

2. Insurance § 64—

Where defendant's counsel brings before the jury the requirement of the financial responsibility act, but no issue is raised in the action as to any collusion between the parties in regard to insurance, defendant may not complain of an instruction to the jury that whether defendant had or did not have liability insurance was entirely immaterial and that the jury should decide the issues upon the facts in evidence.

APPEAL by defendant from *Gambill, J.*, July 9, 1962 Term, FORSYTH Superior Court.

The plaintiff alleged, and offered evidence tending to show, that on July 6, 1960, he was a passenger in a Mercury automobile owned and operated by the defendant. At about 6:00 p.m. on that day the defendant ran off the Spainhour Mill Road on a sharp curve, wrecked the vehicle, and caused the plaintiff serious and permanent injuries. Specifically the plaintiff alleged these negligent acts: (1) Excessive speed; (2) failing to keep the vehicle under proper control; (3) operating in wanton and wilful disregard of the plaintiff's safety and in a manner calculated to cause injury.

The defendant, by answer, denied the allegations of negligence and, as a further defense, alleged: (1) The parties are brothers; (2) they had been drinking beer together throughout the afternoon and the plaintiff knew the defendant was sufficiently under the influence materially to affect his ability to drive with safety; and, having full knowledge of the manner in which the defendant had been driving during the afternoon, nevertheless negligently and carelessly continued to ride as a passenger in his vehicle; thus, by his own negligence causing or contributing to his injury, which should bar his recovery.

The plaintiff testified that about twelve o'clock he and the defendant each drank a six-ounce can of Country Club Beer. "It is the smallest can you can get." After drinking one can each, they purchased and took with them and thereafter drank one similar can each; that neither had anything to drink thereafter; that neither was under the influence of any intoxicant.

Mrs. Carroll testified that just before the accident the plaintiff and defendant were at her house. She observed their condition. The defendant "might have had a bottle of beer . . . he acted normal, just like anybody else."

Mr. Radford, then a member of the State Highway Patrol, testified he went to the scene of the wreck, observed the condition there, talked with the defendant who stated he was driving a little too fast to make the sharp curve, ran off the road, broke down a guy wire to a power pole, and turned the car over several times. The interview was an hour to an hour and a half after the accident. "I paid special attention to

George Whitman's condition; I could not determine that the defendant had drunk any alcohol of any kind, as far as I could tell, from odor, or actions, his voice . . . he seemed to be perfectly normal, as far as I could tell."

The defendant did not offer evidence. The court submitted issues of negligence, contributory negligence, and damages, all of which were answered for the plaintiff. From the judgment on the verdict, the defendant appealed.

Deal, Hutchins and Minor, by Roy L. Deal, for defendant, appellant.
William H. Boyer, W. Scott Buck, for plaintiff, appellee.

HIGGINS, J. On cross-examination, defense counsel asked the plaintiff whether he did not know the defendant had been convicted of drunkenness, driving without a license, violating the prohibition laws, and in 1955 ". . . of operating an automobile intoxicated." The court sustained the plaintiff's objection to all of the foregoing questions as to the defendant's court record beginning in 1941. When the defense counsel asked permission to have the answers of the witness inserted in the record, the court made this ruling: "Well, I will make this statement in the presence of the jury, that it is not what he knows or doesn't know that his brother has been convicted of heretofore, if anything. The jury is concerned with what he knew the condition of his brother was at the time he was operating the car, if he was operating it under the influence; that is what the jury is concerned with; not how many times he had been drunk before, or if he had been drunk heretofore, but whether or not on this occasion he was under the influence and whether or not this plaintiff knew that or had reason to believe he was."

If we disregard the question whether counsel may, by cross examination, challenge the character of his client by showing violations of law at times long before the accident and in which the plaintiff had no part, nevertheless the court's ruling was entirely proper and justified upon the ground the prior violations were immaterial. The material question, as the court pointed out, was the condition of the defendant at the time of, and within a reasonable time prior to, the accident. *State v. Kelly,* 227 N.C. 62, 40 S.E. 2d 454; *Moore v. Ins. Co.,* 192 N.C. 580, 135 S.E. 456. The cases cited by the defendant are not in point. They involve situations in which a bailor may be charged with negligence if he trusts his automobile to a driver whom he knows to be incompetent and dangerous because of his propensity to drink and to operate the vehicle while intoxicated. In this case the defendant was driving his own vehicle.

The defendant assigns as error the court's reference to insurance in the charge. The assignment covers the following instruction: "You will disabuse your mind from any consideration of the case based upon whether . . . the defendant has insurance or does not have insurance. This is no concern of any juror in any case. You will not let that prejudice your mind against the defendant . . . or . . . for the defendant. . . . You will try it strictly upon the facts as you find them to be from the evidence. . . . He (the defendant) has argued to you through counsel that everyone knows about the compulsory insurance law requiring insurance before one gets on the road, . . . But the court charges you you will not let the fact that insurance was mentioned in the case affect your verdict in any way."

The defendant, in the argument, had taken notice of and brought before the jury the requirement of the financial responsibility act. The court's instruction was proper in view of the issues and evidence in the case. *Hoover v. Gregory*, 253 N.C. 452, 117 S.E. 2d 395; *Taylor v. Green*, 242 N.C. 156, 87 S.E. 2d 11.

The defendant's counsel suggests the possibility of collusion between these parties to victimize some insurance company not a party to the action. Such an issue does not arise on this record.

The evidence of defendant's negligence was sufficient to go to the jury. Contributory negligence does not appear as a matter of law. The jury resolved these issues. The court's charge, considered contextually, and its rulings on evidence are free from valid objection.

No error.

CHARLES LEE MISENHEIMER, BY HIS NEXT FRIEND, GREEN LEE MISENHEIMER v. CHARLIE ALLEN CARTER, JR.

(Filed 21 November 1962.)

1. Negligence § 24a—

Nonsuit on the issue of negligence is proper only when no legitimate inference of actionable negligence is permissible from the evidence.

2. Automobiles § 41m— Evidence of negligence in striking boy on bicycle held sufficient to overrule nonsuit.

Evidence tending to show that defendant motorist was traveling at a moderate speed upon a highway and saw a hundred feet away a boy on a bicycle enter and cross the highway from an obscured driveway, that the boy gave a signal, presumably to someone following, that a second bicycle with two boys riding on it entered the highway from the drive-

way, that defendant saw the second bicycle when it was some 50 feet distant, and that defendant hit the second bicycle about the center of the road when the front part of the bicycle was to defendant's left of the center of the highway, *held* sufficient to permit the inference of negligence on the part of defendant in failing to avoid the injury by veering to his right, the width of his unobstructed driving lane and the width of the shoulder on his right being sufficient.

APPEAL by defendant from *Gambill, J.*, February, 1962 Term, STANLY Superior Court.

This civil action was instituted on behalf of Charles Lee Misenheimer, minor, to recover damages for his personal injury allegedly caused by the defendant's actionable negligence. The defendant denied negligence and, by way of further defense, alleged that he was driving northward on the old Salisbury road at 25-30 miles per hour when a boy on a bicycle entered the highway from a blind private driveway on his right and crossed over to the left side of the highway; that he immediately reduced speed when two other boys on another bicycle followed the first into the road immediately in front of his moving vehicle; that he was unable to avoid a collision with the bicycle, though he made all possible efforts to do so; that the sole proximate cause of the accident was the sudden and unanticipated entrance of the boys on the second bicycle entering from the blind driveway; that the injured boy was riding as a passenger; that his injury was solely and proximately caused by the boys' negligence.

Both parties offered evidence. The defendant excepted to the court's refusal to grant its motions for nonsuit. The jury answered the issues of negligence and damages against the defendant. From the judgment on the verdict, he appealed.

S. Craig Hopkins, Coble & Behrends, by Samuel Behrends, Jr., for plaintiff appellee.

Richard L. Brown, Jr., D. D. Smith for defendant appellant.

HIGGINS, J. Was the evidence sufficient to present a jury question? Stated in the alternative, was the evidence so deficient in probative value as to require the court, as a matter of law, to hold that a legitimate inference of defendant's actionable negligence is not permissible? *Lake v. Express Co.*, 249 N.C. 410, 106 S.E. 2d 518; *Ward v. Smith*, 223 N.C. 141, 25 S.E. 2d 463.

The collision occurred as the defendant drove north on the old Salisbury road. Michael Eddins, age 9, riding a bicycle, entered the road from a private driveway. The plaintiff, Charles Lee (Chuck) Misenheimer, was behind Michael on the bicycle. The driveway was some-

what obscured by a rock wall and shrubbery. The boys came into the road and attempted to join Lowell Eddins, age 8, who had just preceded them across the road on his bicycle. The defendant's Chevrolet collided with the bicycle on which the boys were riding, about the center of the road.

Lowell Eddins testified he rode his bicycle down the drive to the highway, motioned by waving his hand to the boys on the following bicycle "to come on. . ." I did not see a car at the time I got to the place where the driveway comes in to the road. I looked."

Michael Eddins testified: "I was coming down the driveway slow. . . . I did not see the car before it hit the bicycle and I was almost half way across . . . when the car hit the bicycle. I was sitting on the seat . . . and Chuck (Charles Lee Misenheimer) was behind me. Lowell was in front of me and I saw him wave. He was in the road when he waved."

The defendant testified: "I first saw the first bicycle that entered the road when I was back up the road about 100 feet, I guess. I saw the second bicycle . . . when I was about 50 feet. . . . At the time the second bicycle was struck, the front of it was probably on the left side of the center of the highway and the rear on the right side, about the center of the road. . . . There was no other traffic." The defendant was thoroughly familiar with the road and the driveway.

The evidence permits the inference the defendant could have seen Lowell Eddins give a "come on" signal which should have been notice that another child or children would probably enter the highway and attempt to cross. According to the defendant's own version, he saw the second bicycle for a distance of 50 feet before the collision. By his own admission, the point of impact was at or near the center of the road. Why he did not veer to his right and avoid contact does not appear. The width of his unobstructed driving lane and the width of the shoulder to the right would seem to offer driving room which would enable him to avoid striking the bicycle if he were properly attentive to his duties. Apparently he did not change his course until he pulled partially off on the shoulder beyond the point of collision.

Inference of driver negligence causing the injury is permissible. This was sufficient to take the case to the jury. *Walker v. Byrd,* 258 N.C. 62; *Hamilton v. McCash,* 257 N.C. 611, 127 S.E. 2d 214; *Cassetta v. Compton,* 256 N.C. 71, 123 S.E. 2d 222; *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849; *Chambers v. Edney,* 247 N.C. 165, 100 S.E. 2d 343; *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541; *Greene v. Mitchell County Board of Education,* 237 N.C. 336, 75 S.E. 2d 129.

Review of the record fails to disclose error of law.

No error.

CAROLYN W. THORNTON, WIDOW AND NEXT FRIEND OF ROBERT DuRANT THORNTON, JR., AND JAMES HUNT THORNTON, MINOR CHILDREN OF ROBERT DuRANT THORNTON, DECEASED V. J. A. RICHARDSON COMPANY, INC., EMPLOYER, AND UNITED STATES FIDELITY & GUARANTY COMPANY, CARRIER.

(Filed 21 November 1962.)

Master and Servant § 54—

The evidence in this case held sufficient to support the finding of the Industrial Commission that the death of a traveling salesman occurring at 2:40 a.m., after the salesman had left on a trip begun about midnight, did not arise out of and in the course of his employment, there being no evidence that the trip in question had any connection with the employment.

APPEAL by plaintiffs from *Mallard, J.*, May Regular Civil Term 1962 of WAKE.

This proceeding was instituted before the North Carolina Industrial Commission to recover benefits under the Workmen's Compensation Act for the death of Robert DuRant Thornton, which death resulted from injuries received in an automobile collision occurring at 2:40 a.m. on the morning of 18 May 1961.

The deceased prior to his death was employed as a traveling salesman by J. A. Richardson Company, Inc., food broker or manufacturers' agent, working at or from its place of business in Raleigh, North Carolina. His employer furnished him a station wagon for his use as its salesman. All traveling expenses, including meals and lodging, were paid by the defendant employer.

On Monday, 15 May 1961, the deceased left Raleigh about 8:00 a.m. for Wilmington, North Carolina, where he did some work and spent the night. On Tuesday, 16 May 1961, he proceeded to Whiteville, North Carolina, arriving there about 7:30 p.m. at the home of Mrs. Elizabeth Brooks, a cousin, with whom he spent the night. On Wednesday, 17 May 1961, he worked in Whiteville; on Thursday, 18 May 1961, his itinerary called for him to go from Whiteville through the towns of Bladenboro, Elizabethtown and Clarkton on his return route to Raleigh where he was to attend a meeting of the Raleigh Sales Executive Club that night.

On Wednesday evening, 17 May 1961, the deceased, Robert DuRant Thornton, returned from his work in Whiteville to the home of his cousin, where he was staying, about 6:30 p.m. After dinner, deceased took his cousin's son bowling. At the bowling alley the deceased met one James White. The deceased, his young cousin, and White bowled a few games and the deceased suggested to White that they go to a ball game. The deceased took his cousin home, left his car and joined

White, who had followed them. The game was about over when they arrived at the ball park and White took the deceased back to the Brooks home about 10:30 or 11:00 p.m. The deceased got into his car and left again and returned to the Brooks home about midnight. Thereafter, Mrs. Brooks heard him leave again in his car, and at 2:40 a.m. while the deceased was driving north on Highway No. 17 in South Carolina, about one quarter mile south of the North Carolina line, his vehicle was in a head-on collision with an oncoming truck, causing injuries resulting in the immediate death of the deceased.

The hearing commissioner heard the evidence and concluded as a matter of law that the deceased employee was not injured by accident arising out of and in the course of his employment. Claim for compensation was denied.

On appeal, the full commission adopted as its own the findings of fact and conclusions of law of the hearing commissioner and upheld the ruling of the hearing commissioner.

The matter was appealed to the Superior Court where the appellants' exceptions were overruled and the order of the Industrial Commission affirmed.

The plaintiffs appeal, assigning error.

Ruark, Young, Moore & Henderson for appellants.
Thomas A. Banks, R. L. Savage for appellees.

PER CURIAM. There is no evidence in the record tending to show that the deceased had any duties to perform for his employer in the vicinity where the fatal accident occurred and at the time of night it occurred. Moreover, the findings of fact by the Industrial Commission are supported by competent evidence and support its conclusion of law that the deceased's injuries resulting in death did not arise out of and in the course of his employment.

The ruling of the court below upholding the decision of the Industrial Commission is affirmed on authority of *Little v. Brake Co.*, 255 N.C. 451, 121 S.E. 2d 889, and the case of *Sandy v. Stackhouse Incorporated, ante,* 194, and cases cited therein.

Affirmed.

SOUTHERN OIL TRANSPORTATION COMPANY, INC. v. ASPHALT AND PETROLEUM COMPANY AND ELSON BRITT.

(Filed 21 November 1962.)

Automobiles §§ 41i, 42c—

Evidence tending to show that defendant's vehicle entered the highway from a roadside park so closely in front of plaintiff's vehicle that, to avoid a rear-end collision, plaintiff's driver drove plaintiff's vehicle to the right off the highway onto the shoulder where it turned over, resulting in damage, *is held* sufficient to be submitted to the jury on the issue of negligence and not to disclose contributory negligence as a matter of law.

APPEAL by defendants from *Crissman, J.*, February 19, 1962, Civil Term of GUILFORD, High Point Division.

Plaintiff's action is to recover compensation for damage to its tractor-trailer and for loss of cargo allegedly caused by the negligent operation of corporate defendant's tractor-trailer in the course of its business by defendant Britt, its employee-driver.

The facts alleged by plaintiff on which it predicates its allegations of negligence may be summarized as follows: On December 22, 1960, about 7:50 a.m., as plaintiff's tractor-trailer, operated by Allen Freeman, plaintiff's employee-driver, was proceeding north on U.S. Highway 421, approximately twelve miles south of Clinton, North Carolina, defendant Britt, operating the corporate defendant's tractor-trailer, entered upon 421 from a roadside park on the west side thereof and proceeded (north) into the lane for northbound traffic and directly in front of and in the path of plaintiff's tractor-trailer when it was so close that the driver (Freeman) had to turn out in order to avoid a rear-end collision. Confronted by this sudden emergency, Freeman drove plaintiff's tractor-trailer off said highway and onto the east shoulder thereof where it turned over, thereby damaging plaintiff's tractor-trailer and its cargo.

Issues of negligence and contributory negligence, raised by the pleadings, were submitted and answered in favor of plaintiff; and the jury awarded damages in the amount of $3,319.59.

Judgment for plaintiff, in accordance with the verdict, was entered. Defendants excepted and appealed; and, on appeal, defendants assign as error the court's denial of their motion for judgment of nonsuit.

Martin & Whitley for plaintiff appellee.
Sapp & Sapp for defendant appellants.

PER CURIAM. The only evidence was that offered by plaintiff; and this evidence, when considered in the light most favorable to plaintiff,

was sufficient to support the jury's finding that plaintiff's damage was proximately caused by the negligence of defendants as alleged in the complaint. Moreover, it does not appear therefrom that Freeman, plaintiff's employee-driver, was guilty of contributory negligence as a matter of law.

No error.

LEO RUSS v. I. SHEP SMITH.

(Filed 28 November 1962.)

Negligence § 10—

Where the jury answers the issue of contributory negligence in the negative, the issue of last clear chance is eliminated from the case.

APPEAL by defendant from *McKinnon, J.*, February, 1962 Term, BRUNSWICK Superior Court.

Plaintiff instituted this civil action to recover damages for his personal injuries allegedly caused by the actionable negligence of the defendant's minor daughter, operating the family purpose automobile.

The accident occurred about 7:00 p.m. on May 13, 1960, on U.S. Highway No. 17 within the Town of Shallotte. The evidence disclosed the plaintiff undertook to walk across the highway within a block at a point not marked by any crosswalk; that he stopped near the center of the street to permit a south-bound motor vehicle to pass, when he was struck by defendant's north-bound vehicle operated by his minor daughter. He sustained serious and permanent injuries.

Issues of negligence, contributory negligence, and damages were raised by the pleadings, supported by competent evidence, and answered by the jury in favor of the plaintiff. From the judgment on the verdict, the defendant appealed.

S. B. Frink, for defendant, appellant.
Herring, Walton & Parker, for plaintiff, appellee.

PER CURIAM. The plaintiff, by way of reply to the allegation of contributory negligence, pleaded the defendant's last clear chance to avoid the injury. The jury, having found the plaintiff was not contributorily negligent, left the issue of last clear chance unanswered. The defendant, therefore, may not be heard to complain.

The case was tried in accordance with our decisions as to the matters of law involved and the jury settled the issues of fact.

No error.

LEWIS B. UNDERWOOD, ADMINISTRATOR OF THE ESTATE OF HAROLD DEAN UNDERWOOD, DECEASED v. NATIONAL GRANGE MUTUAL LIABILITY COMPANY AND SOUTHERN EXCESS, INC. (FORMERLY FREEMAN AND STAFFORD INSURANCE AGENCY, INC.).

(Filed 12 December 1962.)

1. Insurance §§ 2, 57— Insurance agency forwarding application for assigned risk policy is not agent for insurer to whom risk is assigned.

The record owner of title to an automobile purchased for the exclusive use of her son made application to an automobile insurance agency for a policy of liability insurance under the assigned risk plan, and the insurance was assigned by the Department of Motor Vehicles to defendant insurer. Thereafter the named insured requested the agency to endorse the insurance to her sister-in-law, and at the suggestion of an employee of the agency transferred title to the sister-in-law, and the employee of the agency agreed to request insurer to so endorse the policy. The parties stipulated that the agency was not an agent of the insurer who issued the policy. *Held:* The contention that the original policy remained in force because of the knowledge and transactions with the employee of the agency is untenable, since the principle that knowledge of the agent will be imputed to the principal cannot apply in the face of the stipulation that the agency was not an agent of insurer.

2. Pleadings § 28—

Plaintiff must recover, if at all, on the theory of the complaint.

3. Insurance § 61—

Where cancellation of liability insurance is made by insured, insurer is not required to give notice thereof to insured. G.S. 20-310.

4. Insurance § 57—

The owner of the record title to an automobile purchased for the exclusive use of her son transferred title to the car to her sister-in-law. *Held:* Her insurer under an assigned risk policy issued pursuant to G.S. 20-279.21 had the right to decline to endorse the policy over to the new record owner of title, notwithstanding that the vehicle continued to be for the exclusive use of the original owner's minor son, and insurer had the right to cancel the policy and advise that new coverage should be applied for in the name of the sister-in-law.

5. Same—

The North Carolina Financial Responsibility Act makes no requirement that upon transfer of title to an insured vehicle the insurance should follow the vehicle.

6. Same—

Where the holder of record title to an automobile for the exclusive use of her minor son transfers title to her sister-in-law, the car continuing to be used exclusively by the son, the son cannot be held to use the car with the permission of the original owner, and is not covered by the omnibus clause of the policy in which his mother is named the insured.

7. Insurance §§ 2, 53.1, 65—

Where an insurance agency agrees to procure and maintain continuous liability insurance coverage with respect to the operation of an automobile, and breaches the agreement to do so, the administrator of the person killed as a result of the negligent operation of the vehicle, who has recovered judgment against the administrator of the deceased driver and obtained an assignment of the cause of action, may maintain a suit against the agency for the loss sustained by reason of the breach of the agreement.

APPEAL by defendant Liability Company and by plaintiff from *Riddle, S.J.*, July 23, 1962, Civil Term of FORSYTH.

Plaintiff seeks to recover benefits under an automobile liability insurance policy, or, in the alternative, damages for failure to procure and maintain liability coverage in accordance with assurances given.

Alvin A. Thomas and Clyde C. Randolph, Jr., for plaintiff.

Womble, Carlyle, Sandridge & Rice for defendant Liability Company.

MOORE, J. The parties waived trial by jury and agreed that the judge hear the evidence, make findings of fact and enter judgment. G.S. 1-184.

The evidence is summarized as follows: In March 1958 Mrs. Bessie Chaffin purchased for the use of her son Jerry Wayne Otwell (Jerry), age 17, an automobile, and registered the title in her own name. She went to the office of Southern Excess, Inc., (formerly Freeman & Stafford Insurance Agency, Inc., and hereinafter referred to as "the Agency") in Greensboro, N. C., and made application for liability coverage for the automobile under the Assigned Risk Plan as a non-certified risk in accordance with the Vehicle Financial Responsibility Act of 1957 (G.S., Ch. 20, Art. 13). Jerry and Mrs. Chaffin's sister-in-law, Mrs. Lillian Underwood, were present at the time the application was made. The application stated that Mrs. Chaffin was the owner of the car, it was registered in her name, and it would be operated by Jerry "100%" of the time. Mrs. Underwood advanced the $50 deposit which must accompany the application. The application was sent to the Motor Vehicle Department at Raleigh, and the North Carolina Assigned Risk Plan (G.S. 20-279.34) assigned the risk to National Grange Mutual Liability Company (hereinafter called "insurer"). The assignment of risk and a copy of the application were sent to insurer. The assignment designated Mrs. Anne B. Welch, an employee of the Agency, as producer of record. The policy, conforming to the requirements of G.S. 20-279.21, was issued, effective 3 April

1958. Mrs. Chaffin decided to move to Florida and arranged for Jerry to remain in North Carolina and reside with Mrs. Underwood. They decided to transfer the title of the automobile to Mrs. Underwood. On 9 June 1958 Mrs. Chaffin, Mrs. Underwood and Jerry went to the office of the Agency in Greensboro, disclosed their plan, asked for information as to procedure, and requested that the insurance be assigned by endorsement to Mrs. Underwood. Assuming that the policy would be thus assigned, Mrs. Welch, employee of the Agency, agreed to request insurer to so endorse the policy. Mrs. Chaffin offered to pay any additional premium needed for the transaction, but was advised that none was required. At the suggestion of Mrs. Welch they went to the office of A. A. A. Motor Club and executed the instruments and certificates necessary to transfer title of the car to Mrs. Underwood. They were then asked for the Form FS-1 (showing insurance coverage in the name of Mrs. Underwood), and, having none, they called Mrs. Welch, who told them to mail the title papers to the Motor Vehicle Department in Raleigh and she would procure the FS-1 from insurer within 15 days. The Agency was not an agent of insurer, it was not one of the Agency's regular companies, and Mrs. Welch was not authorized to issue the FS-1. The title papers were mailed to Raleigh; Mrs. Chaffin delivered her policy to Jerry, and she left for Florida about 20 June 1958. In the meantime Mrs. Welch wrote insurer requesting an endorsement changing the name of insured to Mrs. Underwood and a Form FS-1, and stating that the "principal operator . . . is still Mrs. Chaffin's son." On 20 June 1958 insurer wrote Mrs. Welch that "an Assigned Risk Policy cannot be transferred from one individual to another," that the policy "should be cancelled and new coverage applied for in the name of" Mrs. Underwood. In response to a note from Mrs. Welch, Mrs. Underwood and Jerry went to the Agency's office on 27 June 1958 and were told the contents of insurer's letter, and were advised that the Chaffin policy had to be cancelled and a new policy applied for through the Assigned Risk Plan. The Chaffin policy was then delivered to Mrs. Welch, and Mrs. Underwood signed an application for a new policy. Mrs. Welch then asked for the $50 deposit to attach to and send with the application. At this point the evidence is conflicting. Mrs. Underwood testified that she told Mrs. Welch they did not have $50, Mrs. Chaffin had offered to pay any additional premium required but had gone to Florida, that she asked Mrs. Welch to take the refund of the unearned premium on account of the Chaffin policy and send it to Raleigh and she (Mrs. Underwood) would pay the difference, if any, that Mrs. Welch agreed and said she would have the refund sent to her (Mrs. Welch) and there would be insurance in full force and effect on the car, and that she (Mrs. Underwood) was

told the the Chaffin policy "was being cancelled." Mrs. Welch testified that she told Mrs. Underwood that "a $50 deposit would have to go with the application" and Mrs. Underwood stated that they didn't have $50 and "would have to wait for the return premium from the old policy before they would send in the new application," that she (Mrs. Welch) "held the application waiting for them to bring in $50.00," and that there was no promise that insurance would be in full force and effect while waiting for the refund, "the insurance was to be cancelled — they knew that." On the same day, 27 June 1958, the Agency wrote insurer stating: "We are returning the . . . policy for cancellation. Will you please send the return premium direct to insured, in care of Mrs. . . . Underwood, Route #1, Liberty, N. C. Please Rush." Insurer cancelled the policy on its record, effective 27 June 1958, and within 15 days sent Form FS-4 (termination notice) to the Department of Motor Vehicles. Insurer mailed refund of $33.67 on 28 July 1958. Later, at the request of an attorney, insurer reviewed its file and found error in the refund and sent a further refund of $18.01 on 20 October 1958. On 4 August 1958 plaintiff's intestate (son of Mrs. Underwood) was riding in the car with Jerry. The car overturned and both were killed. Insurer and the Agency were both notified, but they advised that there was no insurance coverage. Plaintiff sued Jerry's administrator to recover for the wrongful death of his intestate. Insurer had notice of the suit but declined to defend the action. Plaintiff recovered judgment for $8000 ($3000 in excess of the policy limit). Before trial the case could have been compromised for $5000, and insurer was so advised. After execution was returned unsatisfied, demand for payment was made on insurer and the Agency, and the present action was instituted.

The complaint alleges facts generally in accord with the above recital of the evidence, but according to the version most favorable to plaintiff, and in addition alleges that Jerry was the owner of the automobile, the Agency was agent of insurer and was at all times acting within the scope of its authority as agent, insurer purported to cancel the policy on the basis of erroneous information furnished it by its agent, the Agency, and contrary to the agreement of the Agency with Mrs. Underwood and Jerry, the Chaffin policy was surrendered to the Agency "on condition that the policy should remain in full force and effect until . . . a new policy was procured, so as to afford . . . continuous coverage," Mrs. Chaffin never authorized the cancellation of the policy, and, if the Agency was not the agent of insurer, it was acting as agent for Mrs. Chaffin, Mrs. Underwood and Jerry and failed to procure and maintain in full force and effect valid insurance coverage in accordance with its agreement to do so.

Insurer denies coverage; and the Agency denies that the Chaffin policy was surrendered to it conditionally, and denies that it agreed to procure and maintain continuous insurance coverage.

The court made full findings of fact, generally in accordance with the foregoing summary of the evidence (where not in dispute), and also the following findings (numbering ours): (1) Jerry Wayne Otwell was the beneficial owner of the automobile; (2) the policy was delivered to the Agency "with the understanding and on condition that this policy should remain in full force and effect until a new policy . . . was procured, so as to afford continuous insurance coverage," and (3) the Agency "had no authority from the named insured or from Jerry Wayne Otwell, or Lillian Otwell Underwood to surrender (the policy) for cancellation. . . ."

The court made, among others, the following conclusions of law: (1) The "policy . . . was in full force and effect as of August 4, 1958," and (2) "there are no circumstances in this action which might constitute a waiver or an estoppel, or render harmless the failure of defendant (insurer) to provide notice to the named insured as required by the provisions of G.S. 20-130."

Judgment was entered decreeing that plaintiff recover of defendant insurer the sum of $8000, together with interest and costs, and dismissing plaintiff's action against the Agency. Insurer appeals. Plaintiff appeals from the dismissal of his action against the Agency.

As against insurer it appears that plaintiff's theory of the case, as set out in the complaint, is that the policy issued to Mrs. Chaffin was in full force and effect on 4 August 1958, date of the accident, for the reason that the Agency was the agent of insurer, and the information received and the agreement made by the Agency are imputed to and binding upon insurer, the principal. But this theory of the case is laid at rest by the stipulations of the parties. It was stipulated that the Agency was not at any time the agent or acting as agent for insurer. We have said that recovery is to be had if allowed at all, on the theory of the complaint, and not otherwise. *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477; *Balentine v. Gill,* 218 N.C. 496, 11 S.E. 2d 456. But we elect to consider also the other questions raised.

The trial court's decision apparently is based on the proposition that insurer failed to give the named insured notice of cancellation in accordance with the provisions of G.S. 20-310. Plaintiff's cause of action against insurer is not grounded on failure to give such notice; the complaint makes no allegation with respect to notice, it alleges that there was no authority to cancel. We point out, parenthetically, that the law is that, where there is a cancellation by *insured* insurer is not required to give notice of such cancellation to the insured. *Faizan v.*

Insurance Co., 254 N.C. 47, 118 S.E. 2d 303; G.S. 20-310; Insurance Handbook, "The 1957 Vehicle Financial Responsibility Law" (N. C. Department of Motor Vehicles), Art. IX, p. 5. Moreover, cancellation is not the determinative question on this appeal. Defendant insurer alleges in its answer that title to the automobile was transferred from Mrs. Chaffin and vested in Mrs. Underwood on 9 June 1958, and after that date Mrs. Chaffin, the named insured, was not the owner of and had no insurable interest in the automobile, and the transfer of ownership terminated the insurance coverage as a matter of law. If this proposition is valid, there was no coverage on 4 August 1958, and plaintiff is not entitled to recover in his action against insurer.

On this phase of the case the facts are not in dispute. Mrs. Chaffin purchased the automobile and registered it in her name. Mrs. Chaffin applied for insurance under the Assigned Risk Plan. Upon receiving her application, the Motor Vehicles Department in Raleigh assigned the risk to insurer, and mailed the assignment and a copy of the application to insurer. The application stated that the automobile was owned by and registered in the name of Mrs. Chaffin and that it would be operated at all times by her minor son. The assignment of risk listed Mrs. Anne B. Welch as "producer of record," that is, producer of the business and entitled to a commission. The policy was issued in compliance with the requirements of G.S. 20-279.21. As required by statute it contained an "omnibus clause," stating in pertinent part the following: "With respect to the insurance for bodily injury liability . . . the unqualified word 'insured' includes the named insured (Mrs. Chaffin) . . . and also includes any person while using the automobile . . . , provided the actual use of the automobile is by the named insured . . . or with the permission of 'named insured.'" The policy also contained a clause entitled "Assignment," which provides: "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon." Sometime after the policy was issued it was cancelled for non-payment of premium, but was reinstated. Later the insurer received Mrs. Welch's letter asking for endorsement changing named insured to Mrs. Underwood. Insurer answered, declining to issue the endorsement, and advising that under the Assigned Risk Plan a policy could not be transferred from one individual to another, and if Mrs. Underwood had assumed ownership the policy should be cancelled and new coverage applied for in her name. Thereafter insurer received by mail the policy for cancellation, and sent Form FS-4 to the Department. In the meantime Mrs. Chaffin on 9 June 1958 assigned the title in due form to Mrs. Underwood and this assignment was mailed to the Motor Vehicles Department. The Agency and Mrs. Welch were not agents of insurer, and their transactions and

agreements with Mrs. Chaffin, Mrs. Underwood and Jerry were not binding on insurer.

We have not had occasion to consider the question of coverage, as related to the Vehicle Financial Responsibility Act of 1957, in a factual situation such as is here presented. But the Virginia Court has considered this precise question, upon essentially similar facts. *Nationwide Mutual Insurance Co. v. Cole,* 124 S.E. 2d 203 (Va. 1962). The North Carolina Vehicle Financial Responsibility Act of 1957 (G.S., Ch. 20, Art. 13) was involved. H resided in North Carolina. His operator's license had been suspended. He transferred the title and possession of his automobile to C, his brother-in-law. C procured an assigned risk policy covering the automobile. When H became entitled to have his license reinstated, C assigned the title and delivered the possession of the automobile to H. The title assignment was not sent to the Department of Motor Vehicles. H applied for an assigned risk policy, which was issued on 11 February 1959. H was involved in an accident in the State of Virginia with this automobile on 1 February 1959, after transfer of the title to him but before the issuance of the policy in his name. Plaintiff Cole recovered judgment for $15,000 against H on account of injuries suffered in the accident. The question, in the case above cited, was whether there was coverage under C's assigned risk policy. The Virginia Court in an unanimous opinion, delivered by Eggleston, C.J., held that there was no coverage. The following excerpts from the opinion are noteworthy:

> ". . . . The problem here is one of *coverage* and not of *cancellation.* There is no contention that the policy had been cancelled. The question is whether the *coverage* afforded by the policy to Clark was extended and transferred to Harris along with the transfer of the ownership of the car.
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> "The plaintiff argues that because of the spirit and purpose of the Financial Responsibility Act to afford better protection to the public against irresponsible and reckless drivers, it was the legislative intent that upon change of ownership of a motor vehicle the insurance coverage thereon under an owner's policy should 'follow the car.' We are cited to no provision in the Act to support this contention, nor do we perceive any.
>
> "G.S. sec. 20-279.21 of the Financial Responsibility Act requires that an owner's motor vehicle policy of liability insurance contain what is commonly called an omnibus coverage clause. The policy here complied with this requirement.
>
> ". . . . But we find in the Act no requirement that the insurance company must see that coverage under an owner's policy issued by

it follows the car with change of ownership. On the contrary, the Act places this burden on the owner. G.S. sec. 20-309 requires 'the owner' of a registered motor vehicle to show and maintain proof of financial responsibility continuously throughout the period of registration. G.S. sec. 20-313 prohibits 'any owner' from operating a motor vehicle without having in force the 'financial responsibility' required by the Act.

"In the absence of any provision in the Financial Responsibility Act broadening the liability of the insurer, such liability must be measured by the terms of its policy as written. See *Howell v. Travelers Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610, 612; *Adkins v. Inland Mutual Insurance Co.*, 124 W. Va. 388, 20 S.E. 2d 471, 472.

"Our inquiry, then, is narrowed to whether the operation of the car by Harris is within the coverage of the policy. Specifically, the question is whether such operation is within the omnibus clause. Under the terms of the policy and consistent with the requirements of G.S. sec. 20-279.21, it afforded protection to the 'Named Insured' and also 'any person while using the automobile * * *, provided the actual use * * * is by the Named Insured,' or his spouse, 'or with the *permission* of either.'

" . . . . It is well settled that 'permission' to drive a car, within the meaning of the omnibus coverage clause, connotes the power to grant or withhold it. Therefore, in order for one's use and operation of an automobile to be within the meaning of the omnibus coverage clause requiring the permission of the named insured, the latter must, as a general rule, own the insured vehicle or have such an interest in it that he is entitled to the possession and control of the vehicle and in a position to give such permission. If the named insured has sold the vehicle, its subsequent use by the buyer is by virtue of the latter's ownership and his right to control it and not by virtue of the permission of the named insured seller. (citing many authorities).

"As is said in *Byrd v. American Guarantee & Liability Ins. Co., supra*, 180 F. 2d 249, 'There is no insurance separate and distinct from the ownership of the car.' This is so because an owner's motor vehicle liability policy is a contract between the insurance company and the owner."

We agree with the reasoning of the Cole opinion and the result reached. There is no factual difference in the instant case which justifies a different result. The Responsibility Act makes no requirement that insurance, in case of transfer of title, follow the vehicle. We said in

Howell v. Indemnity Co., supra (cited in Cole), that if limits of coverage in an insurance policy are consistent with the statute, insurer may not be held liable beyond the coverage specified in the policy. Mrs. Chaffin's policy clearly states that "Assignment of interest shall not bind the Company (insurer) until its consent is endorsed hereon." This is a binding provision of the insurance contract, not in conflict with any statutory provision, and insurer was within its rights in declining to endorse the policy to Mrs. Underwood. See *Rogers v. Lumbermans Mutual Casualty Co.*, 124 S. 2d 70 (Ala. 1960).

It is not clear what significance the trial court placed upon its finding that Jerry Wayne Otwell was the beneficial owner of the automobile. If the import is that he was the owner and had right of possession and control, there was most certainly no coverage. The insurance contract was with Mrs. Chaffin and the policy covered the named insured, Mrs. Chaffin, and any other person while using the automobile, provided the actual use was with the *permission* of Mrs. Chaffin. In order to grant permission, as the word "permission" is used in the policy, there must be such ownership or control of the automobile as to confer the *legal* right to give or withhold assent. It is something apart from a general state of mind. If Jerry actually owned the automobile and had the right to possession and control, or if Mrs. Chaffin parted with the title (and it is undisputed that she assigned to Mrs. Underwood on 9 June 1958 such title as she had) then, in either event, the operation of the car by Jerry on 4 August 1958 was not with the permission of Mrs. Chaffin within the purview of the omnibus clause of the policy. Insurer had no contract with or responsibility to or for Jerry apart from the ownership of the vehicle by Mrs. Chaffin. *Adkins v. Inland Mut. Ins. Co., supra; United States Casualty Co. v. Bain*, 62 S.E. 2d 814 (Va. 1951); *Mason v. Allstate Insurance Co.*, 209 N.Y.S. 2d 104 (1960); *Byrd v. American Guarantee and Liability Ins. Co.*, 180 F. 2d 246 (4 Cir. 1960).

Defendant insurer's defense of non-coverage is clearly sustained by the undisputed facts on this record. As to insurer the judgment below is reversed.

Plaintiff contends that the court erred in dismissing his action against the Agency, Southern Excess, Inc. Plaintiff alleges that the Agency agreed with Jerry Wayne Otwell to procure and maintain continuous liability insurance coverage with respect to the operation of the automobile in question, has breached the agreement, the estate of Jerry Wayne Otwell has suffered damages by reason of the breach, and the administrator of Jerry Wayne Otwell, deceased, has assigned the cause of action to the within plaintiff, who is entitled to maintain the suit. These pleadings raise issues of fact and questions of law

which were not determined by the judgment below. As to plaintiff's cause of action against the Agency, a new trial is awarded.

As to defendant National Grange Mutual Liability Company, the judgment below is

Reversed.

As to defendant Southern Excess, Inc. (formerly Freeman & Stafford Insurance Agency, Inc.)

New trial.

REDEVELOPMENT COMMISSION OF GREENSBORO, PETITIONER v. BERNICE T. HAGINS, (HAGAN) AND HUSBAND J. G. HAGINS, RESPONDENTS

AND

REDEVELOPMENT COMMISSION OF GREENSBORO, PETITIONER v. BERNICE T. HAGINS (HAGAN) AND HUSBAND, J. G. HAGINS, RESPONDENTS.

(Filed 12 December 1962.)

1. Eminent Domain § 1—

The power of eminent domain as limited by constitutional safeguards is inherent in sovereignty. 14th Amendment to the Constitution of the United States; Constitution of North Carolina, Art. I, § 7.

2. Eminent Domain § 7c—

The petition in proceedings by a housing authority to condemn land for a housing project must affirmatively show compliance with the statutory requirements, including the existence of a properly approved redevelopment plan, the boundaries of the project, existing uses, proposed uses, population density, proposed changes in zoning ordinances, street layouts, a feasible plan for the relocation of displaced families, and the estimated cost of the project and methods by which the authority may lawfully finance the entire project, and if the petition fails to allege any of these essentials it is fatally defective. G.S. 160-463.

3. Eminent Domain §§ 3, 7c; Taxation § 6—

The condemnation of land by a housing authority for a housing project is for a public purpose. Whether it is for a necessary purpose, *quaere?* Constitution of North Carolina, Art. 7, § 7.

4. Eminent Domain § 7c—

Condemnation of property is a proceeding *in rem*, and in condemning land for a housing project the authority may join in one proceeding all parties owning land in the area which the authority seeks to condemn, leaving only the question of just compensation due each respondent to be determined in a separate inquiry, but if the authority elects to institute separate proceedings it must allege in each instance all the facts necessary to justify the taking.

5. Same—

In condemnation proceedings instituted by a housing authority each respondent is entitled to defend upon the ground that his property does not qualify for the purpose intended, or that its selection was the result of arbitrary or capricious conduct on the part of the authority.

6. Appeal and Error §§ 2, 7—

A party may demur *ore tenus* in the Superior Court for failure of the pleading to state a cause of action, and even in the absence of demurrer, the Supreme Court will take notice of such defect *ex mero motu.*

APPEAL by respondents from *Shaw, J.,* GUILFORD Superior Court, Greensboro Division, April 26, 1962.

On August 7, 1961, Redevelopment Commission of Greensboro instituted before the Clerk Superior Court two proceedings in condemnation, Nos. 23252 and 23253. The petition in each proceeding called for the condemnation of one small lot. The petitions are identical except as to the description of the lands sought to be taken. Omitting the descriptions, which are not in dispute, each petition alleged:

"Before the Clerk — Petition for Condemnation — #23252. Filed 7 August 1961 — 10:49 a.m., J. P. Shore, C.S.C.

"Comes now the petitioner, REDEVELOPMENT COMMISSION OF GREENSBORO, and respectfully shows unto the Court:

"1. That the petitioner is a corporation organized and existing under and by virtue of the laws of the State of North Carolina, and as such exercises certain powers contained in the National Home and Housing Finance Act, and powers conferred in the General Statutes of North Carolina. That petitioner is now engaged in a program or project of slum and blighted area clearance. That acquisition of certain property is necessary to complete this program of blight and slum clearance, all being in the city of Greensboro, North Carolina.

"2. That records in the office of the Register of Deeds of Guilford County, North Carolina, Book 1019, Page 279, dated September 3, 1943, reflect that the hereinafter described property was conveyed to Bernice Murray Taylor Hagins and husband, J. G. Hagins; that there have been no conveyances of said property since the 3rd day of September 1943.

"3. That the property conveyed to the respondents is situated in Gilmer Township, Greensboro, Guilford County, North Carolina, and more particularly described and defined as follows: * * *

"4. That it is necessary for the petitioner to acquire said property for the purpose of completing the blighted and slum clearance

program. That petitioner has attempted to purchase and acquire the above described property but has been unsuccessful in that the respondents refuse to sell said property to the petitioner for the price tendered by the petitioner, although said property lies within the blighted and slum clearance project area.

"5. That the petitioner is endowed with and has the power of eminent domain; that should the petitioner obtain or take said property it will in good faith proceed to complete the project of blighted and slum area clearance; that its Chairman has been authorized to execute all necessary pleadings.

"WHEREFORE, petitioner prays:

"1. That Commissioners of Appraisal be appointed by this Court to determine the damage to the respondents for the acquisition of the property described in paragraph 3 of this Petition.

"2. That the Court order such amount as is determined upon to be paid by the petitioner into court for the use and benefit of the respondents.

"3. That the petitioner be authorized to enter upon and take possession of said property forthwith upon said payment of monies into this Court."

In answer to the petition in No. 23252, Mrs. Hagins wrote the following:

"In reference to property at 121 N. Regan Street, my home in which I have lived for the past 21 years, a two-story house nine (9) room 1-½ bath steam heat all modern convenience. I have kept my home up.

"If this property is needed for the Street then they can move my house on a corner farther down Regan Street. If it is for business to be built on then I shall keep my land and build a business on it myself or whatever the city require one to build on it. I will not sell. I am hoping there is no law in the land that you can come and take one's home away just because someone want it for their use. What ever the City of Greensboro require to be built here I will build. /s/ Mrs. Bernice T. Hagins."

And in No. 23253, she wrote the following:

"In reference to property at 403 N. Regan Street and 641 Lindsay Street.

"The building is a new brick building with three (3) apt and a Beauty Shop operated by my daughter and myself. It was finished in 1957 by the right given to me, Mrs. B. T. Hagins, by the Greensboro City Council.

"If this property is wanted by the Redevelopment of Greensboro, I will not sell but will exchange if they will build me a building equal

on a corner lot the same distant from downtown Greensboro, North Elm Street. Then we can do business otherwise unless there is a law that you can just come and take my property they will have to take it. /s/ Mrs. Bernice Taylor Hagins."

On August 25, 1961, the Clerk Superior Court, treating the respondents' letters as appearances and answers, concluded that no sufficient cause had been shown against the granting of the relief prayed for, and appointed commissioners to appraise the premises involved. On August 17, 1961, the commissioners filed their report, fixing the value of the property in proceeding No. 23252 at $9,300.00, and in No. 23253 at $17,500.00. After repeated hearings on motions and countermotions, the clerk on May 20, 1962, confirmed the award. Thereupon the respondents appealed.

Judge Shaw, in the superior court, conducted extensive hearings involving the regularity of the proceedings, confirmed the orders of the clerk and adjudged that title to the premises be transferred to the petitioner. The respondents appealed.

Cannon & Wolfe by J. Archie Cannon, for petitioner appellee.
Major S. High, C. O. Pearson, for respondents, appellants.

HIGGINS, J. The power of eminent domain is one of the attributes of a sovereign state. The right to take private property for public use exists independently of constitutional provisions. In fact, such provisions are limitations on the state's power to exercise the right. 18 Am. Jur., p. 634; 29 C.J.S., § 3, p. 781; *DeBruhl v. Highway Comm.*, 247 N.C. 671, 102 S.E. 2d 229; 14th Amendment to the Constitution of the United States; Article I, Section 17, Constitution of North Carolina.

When the State of North Carolina, or one of its subdivisions or agencies thereto lawfully authorized by proper legislation, undertakes to condemn private property, the court will determine as a matter of law whether the proposed use is for a public purpose. *Charlotte v. Heath*, 226 N.C. 750, 40 S. E. 2d 600, 169 A.L.R. 569. This Court, in *Redevelopment Commission v. Bank*, 252 N.C. 595, 114 S.E. 2d 688, has determined that lands acquired for the purposes and in the manner set forth in Chapter 160, Article 37, General Statutes, meet the public purpose test. *Justice Parker's* well documented opinion in *Redevelopment Commission v. Bank, supra*, permits no other conclusion. See especially, *Berman v. Parker*, 348 U.S. 26, 99 L. ed. 27.

Having determined that slum clearance as contemplated by G.S. 160, Article 37, qualifies as a public purpose, we hold the act fixes safeguards and standards sufficiently definite to enable the petitioner, the

City of Greensboro and its agencies, to set up and establish a slum clearance project embracing blighted areas in the city. In order to establish petitioner's right to take the respondents' property by condemnation, the petition must affirmatively show compliance with the statutory requirements. These requirements are set forth in the act. They are fully discussed in *Redevelopment Commission v. Bank, supra.* Among the requisites are: a properly approved redevelopment plan showing the boundaries of the area, existing uses, proposed uses, population density, proposed changes in zoning ordinances, street layouts, a feasible plan for the relocation of displaced families, and "(7) A statement of the estimated cost and method of financing of acquisition of the redevelopment area, and of all other costs necessary to prepare the area for redevelopment." G.S. 160-463, 1961 Cumulative Supplement.

Subsection (c) provides: "A commission shall not acquire real property for a development project unless the governing body of the community in which the redevelopment project area is located has approved the redevelopment plan, as hereinafter prescribed." The section then sets out what the plan must include.

The adoption of the plan is equivalent to a cease and desist order preventing any development, rental, or sale of the property within the area. In order that property owners may be protected against threatened taking which is never consummated, the act wisely requires a showing that the acquiring agency has a lawful plan by which, among other things, it may lawfully finance the whole area. Each landowner has the right to know that the taking agency has on hand the money to pay for his property or, in lieu thereof, has present authority to obtain it. Having held the acquisition is for a public purpose, we must not be understood as holding that the acquisition is for a *necessary* public purpose.

The petitions in these proceedings fall far short of the showing required. This Court considered a similar deficiency in the case of *R.R. v. R.R.*, 106 N.C. 16, 10 S.E. 1041: "The foregoing references are made for the purpose of showing the true spirit and purpose of these laws, and that the performance of the preliminaries required is indispensably necessary before proceedings to condemn can be instituted. It is said that, although the petition in this case fails to allege the performance of these conditions, the omission is not fatal, and that it is but a defective statement of a good cause of action. We do not concur in this view. The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. By the very terms of the law under consideration, these allegations *must* be made in the petition, and we think that they

are as much jurisdictional in their character as is the fact that the landowner and the railroad company have failed to agree. 'If the petition does not state the facts required by the statute to be stated, an objection in that regard can be raised preliminarily . . . by way of demurrer, . . . ' "

Each of the two small parcels of land here involved is the subject of a separate condemnation proceeding. The two proceedings appear to have been joined because the respondents owned both lots. We may seriously question whether the Legislature contemplated a separate judicial proceeding for each lot or parcel of land any more than it contemplated a separate plan for each parcel. It seems obvious the plan embraces the whole area as a unit. Certain it is that ability to finance the acquisition of one or two tracts is not a showing of a proper plan for financing the development, including the arrangements for relocating displaced families.

Reason does not appear why the condemnation proceedings covering the whole planned area may not be instituted and all interested parties served with process and all defenses heard, leaving only the question of just compensation due each respondent to be determined in a separate inquiry. Condemnation under the power of eminent domain is a proceeding in rem — against the property. 18 Am. Jur., § 112, p. 738. Each owner is entitled to defend upon the ground his property does not qualify for the purpose intended, or that its selection was the result of arbitrary or capricious conduct on the part of the taking agency. The case of *North Carolina ex rel Transportation Advisory Commission v. Wilmington-Wrightsville Beach Causeway Company, Tidewater Power Company, Shore Acres Company, Pennsylvania Company, et al,* 199 N.C. 169, 154 S.E. 74, is authority for a single condemnation proceeding against property belonging to different individuals.

"Where it is sought to condemn several tracts of land belonging to different owners, all the owners may be joined in one proceeding, in the absence of any statutory provision to the contrary. Such a course is convenient, and can injure no one if damages are separately assessed to each owner." 29 C.J.S., § 236, p. 1204. "In Virginia, there being no statute requiring a separate proceeding as to each landowner, several owners of land sought to be condemned may be convened in one proceeding." *City of Richmond v. Dervishian,* 190 Va. 398, 57 S.E. 2d 120. See also, *Dexter & N. R. Co. v. Foster,* 203 N.Y. 637, 97 N.E. 1103; *City of Houston v. Culmore,* 154 Tex. 376, 278 S.W. 2d 825.

In *Rudacille v. State Commission,* 155 Va. 808, 156 S.E. 829, the Supreme Court of Appeals sustained a single condemnation proceed-

ing involving the property of many owners within the Shenandoah National Park area: "It is next said that the landowners affected should not be convened in one proceeding. It appears that there are something like two thousand of them living within the proposed park area. Individual petitions would be needlessly expensive and would serve no good purpose. All that can be asked is that there be in each case a separate assessment of damages."

If, however, the petitioner elects to institute a separate and distinct proceeding for each parcel of land taken, it must, in each instance, allege all the facts necessary to justify the taking.

The petitions in these proceedings were fatally defective. The respondents were permitted to file demurrers *ore tenus* challenging the sufficiency of the petitions. Even without the demurrers, it would be our duty *ex mero motu* to take notice of the defects which appear upon the face of the records. *Skinner v. Transformadora,* S.A., 252 N.C. 320, 113 S.E. 2d 717; *Woody v. Pickelsimer,* 248 N.C. 599, 104 S.E. 2d 273; *Fuquay Springs v. Rowland,* 239 N.C. 299, 79 S.E. 2d 774.

The judgment of the superior court is

Reversed.

MRS. MARY LOUISE T. BASS, EMPLOYEE v. MECKLENBURG COUNTY, SELF INSURER, EMPLOYER.

(Filed 12 December 1962.)

1. Master and Servant § 96—

The evidence in this case *is held* to support the findings of the Industrial Commission in regard to the time, place, and circumstances under which claimant suffered an injury by accident, and to support the finding that claimant was furnished board and room on the premises as an incident of her employment in order that she might be available in emergencies at times other than her regular working hours.

2. Master and Servant § 53—

Whether an accident arises out of and in the course of the employment within the meaning of the Workmen's Compensation Act is a mixed question of law and fact; the words "out of" refer to the origin and cause of the accident, and the words "in the course of" refer to the time, place and circumstances under which the accident occurs.

3. Master and Servant § 60—

While injuries to an employee while going to and from his work ordinarily do not arise out of and in the course of the employment, where the employer provides board and room upon the premises as an incident

of the employment, an injury by accident which occurs while the employee is on the premises and going directly from his room to his work may arise out of and in the course of the employment when such injury can fairly be traced to the employment as a contributing proximate cause.

4. Same— Evidence held to support conclusion that injury on premises while going to work arose out of and in course of employment.

The evidence tended to show that claimant was employed as a practical nurse at defendant's County Home, that she was furnished room and maintenance on the premises incident to the employment, that her hours of duty were from 7:00 a.m. to 7:00 p.m. but that she customarily reported for duty a few minutes prior to the designated time in order to get the report of the night nurse, and that on the occasion in question she left her room some twenty minutes before 7:00 a.m. and while on a direct route from her room to the building where she worked, going by the building in which the dining room was located for coffee and to leave some newspapers for a fellow employee, she attempted to go around a bush, wet with rain, which was overhanging the concrete walk, and fell to her injury. *Held:* The evidence supports the conclusion that the injury arose out of and in the course of her employment.

5. Master and Servant § 91—

The failure of the Industrial Commission to find specific facts requested by defendant will not be held for prejudicial error when such findings, if made, would not alter the rights of the parties.

6. Master and Servant § 73—

An exception on the ground that the Industrial Commission failed to impose the limitations prescribed by G.S. 97-25 and G.S. 97-26 in ordering defendant to pay all medical and doctors bills which should be submitted to and approved by the Commission presents a moot question; such challenge will lie only after bills or parts of bills beyond the limitations prescribed by the statute have been submitted to and approved by the Commission.

7. Master and Servant § 96—

Where the ruling of the Industrial Commission awarding compensation is affirmed, the Commission's approval of additional fees for claimant's counsel, in affirming the Hearing Commissioner's findings of fact, conclusions, and award, will not be disturbed. G.S. 97-88.

8. Appeal and Error § 38—

Exceptions not set out in defendant's brief will be taken as abandoned. Rule of Practice in the Supreme Court No. 28.

9. Master and Servant § 94—

The review of the judgment of the Superior Court affirming the award of the Industrial Commission is limited to matters of law.

APPEAL by defendant from *Riddle, S.J.*, 7 May 1962 Special "B" Civil Term of MECKLENBURG.

A proceeding for workmen's compensation.

In addition to the jurisdictional determination, based upon a stipulation of the parties, the operative findings of fact and conclusions of law of the Hearing Commissioner are to this effect.

On 18 July 1959 Mrs. Mary Louise T. Bass, a female about 60 years of age, was employed by defendant as a resident practical nurse at the Mecklenburg County Home, and had been so employed continuously since 4 February 1959. This was her second period of similar employment by defendant—the first period being from 28 January 1958 until 15 June 1958. During both periods of employment she lived on the premises of the Mecklenburg County Home; during the first period she lived in the main building, and during the second period she lived in the new nurses' home. By the terms of her employment when at work she was on duty from 7:00 a.m. to 7:00 p.m. As a day nurse it was her custom to report a few minutes before 7:00 a.m., so she could get the reports of the night nurse. She was off duty on an average of one day a week.

During her second period of employment her contract provided she was to be paid $195.00 in cash per month and was to be furnished free her room, her meals, and her laundry.

She spent the night of 17 July 1959 in her room in the new nurses' home. She was on duty on 18 July 1959, and about 20 minutes before 7:00 a.m. she left her room to report for work in the main building. In going from the new nurses' home to the main building she went by the old nurses' home. The kitchen and dining room where she ate were in the old nurses' home. A newly constructed concrete walk connected the new and old nurses' home, which she was walking on on her way to the main building. It had been raining, and there was water on the trees and bushes. As she approached the old nurses' home, there was a large bush or shrub overhanging the concrete walk. She attempted to go around the bush, and in doing so her feet slipped out from under her, and she fell, breaking her right hip.

The Hearing Commissioner reached the conclusion that claimant sustained an injury arising out of and in the course of her employment with defendant, awarded her compensation, required defendant to pay all medical, doctors', hospital and treatment bills and expenses incurred by plaintiff by reason of her injury "when bills for the same shall have been submitted to and approved by the Industrial Commission," and allowed counsel fees for claimant's lawyers to be deducted from the compensation ordered paid claimant and paid direct to her attorneys. On appeal the Full Commission affirmed the award of the Hearing Commissioner.

From a judgment of the Superior Court overruling all of defendant's exceptions to the order of the Full Commission, and affirming the order of the Full Commission, defendant appeals.

Robert L. Scott for defendant appellant.

Helms, Mulliss, McMillan & Johnston by James B. McMillan for plaintiff appellee.

PARKER, J. Defendant assigns as error that the crucial and operative findings of fact are not supported by competent evidence, and further assigns as error the conclusion that claimant's injury by accident arose out of and in the course of her employment with defendant.

Claimant's evidence is to this effect: She was first hired by Mrs. Lillian Crowe Miller, Superintendent of Nurses at the Mecklenburg County Home, to work at the County Home on 9 January 1958 as a licensed practical nurse, and worked there until 15 June 1958. Her second period of employment there was from 4 February 1959 until her injury on 18 July 1959. Mrs. Miller told her she "would have to live at the County Home* * *that the people who worked there lived there," and she further said "she wanted us all there, so that if anything happened she could get us." During her periods of employment there all the nurses who worked at the County Home lived there, and also all the employees. According to her contract she was to start work at $195.00 a month with full maintenance. She was provided a room to live in on the premises, three meals a day, laundry, and everything. When she returned to work the second time, Mrs. Miller told her she would have a front room in the new nurses' home. During her second period of employment, she lived in the new nurses' home, got her meals in the old nurses' home, and worked in the main building. While she worked at the County Home, she shared a house with an old lady in Charlotte. She carried to her room in the new nurses' home what personal things she needed, and left the rest in Charlotte. She took a day off from work each week. On one occasion when there was a death and she was off duty, she was called back and worked.

The requirements of her job were that she had to have her breakfast and be at the main building in time to get the report of the night nurse and have everything in order at 7:00 a.m. She was on duty on 18 July 1959, and left her room in the new nurses' home about 6:40 a.m. to go to work. She had had no breakfast when she left her room. From the new nurses' home to the old nurses' home is 20 to 30 feet, and from the place where she fell it is about 150 to 200 feet to the main building. There is a little cement walk about two to two and one-half feet wide from the new nurses' home to the old nurses' home. It had been raining and the shrubbery was wet. When she left her home to go to work, she had her raincoat on, had an umbrella, and had in her hand some copies of The Charlotte Observer. She intended to stop at the old nurses' home to have a cup of coffee and to give the papers

to the cook. That was all the breakfast she had planned to eat that morning. She testified on direct examination: "I was going to give the papers to her and get a cup of coffee. This was about five minutes before I was supposed to be over at the main building checking in for work." There was a big shrub at the corner of the old nurses' home whose branches extended partially over the concrete walk. When she came to this shrubbery, she stepped around it, because she didn't want to get her clean uniform spotted to go on duty, and in doing so she fell and broke her right hip. She testified on direct examination: "I fell right at this bush which was on my right. That is the regular and most direct route from where I lived on the premises to where I worked on the premises. I was on that route. I had my meals in the old nurses' home in front of which I fell. I had not had my breakfast that morning."

Walker H. Busbee, County Auditor for Mecklenburg County and director of job classifications, a witness for the defendant, testified in part: "The established policy announced by the Board of County Commissioners was that no job in the County required a person to live in residence at the site of the job." On cross-examination he testified: "All of the regularly employed full-time nurses lived on the premises in 1958 and lived on the premises in 1959 and live on the premises in 1961. This is based upon information given me by Mrs. Miller."

Lillian Crowe Miller, who was her husband's assistant at the Mecklenburg County Home according to her testimony, and a witness for defendant, testified on direct examination: "I told her [claimant] that we had room and board there if she wanted it. Mrs. Bass said she did not drive a car and it would suit her to stay out there. * * *She was never told by me that she had to live on the premises. I told her that her salary would be $195.00 plus maintenance." Mrs. Miller testified on cross-examination: "All the regular nurses who have worked out there during the last three years have lived on the premises. They did it because they wanted to. They did live on the premises. *The woman who did not want to live on the premises was not given a job.*" (Emphasis supplied.)

There is ample competent evidence in the record to support the crucial and operative findings of fact. Defendant's assignments of error challenging such findings on the ground they are not supported by competent evidence are overruled.

Are these findings of fact sufficient to support the conclusion claimant's injury by accident arose out of and in the course of her employment by defendant? The answer is, Yes.

The findings of fact and the evidence are plain and clear that claimant's injury was caused by accident, construing the word "acci-

dent" as used in the North Carolina Workmen's Compensation Act. *Smith v. Creamery Co.*, 217 N.C. 468, 8 S.E. 2d 231.

It is settled law in this State that the words "out of" refer to the origin or cause of the accident, and that the words "in the course of" refer to the time, place and circumstances under which it occurred. *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862; *Alford v. Chevrolet Co.*, 246 N.C. 214, 97 S.E. 2d 869; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370.

Whether an accident arose out of the employment is a mixed question of law and fact. *Horn v. Furniture Co.*, 245 N.C. 173, 95 S.E. 2d 521, and cases cited.

This court said in *Horn v. Furniture Co., supra*:

> "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* (240 N.C. 399, 82 S.E. 2d 410); *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."

The operative findings of fact, fully supported by competent evidence, are: Claimant was employed by defendant as a practical nurse at the County Home. She lived in the new nurses' home on the premises. As part of her salary defendant furnished her a room in the new nurses' home and meals in the old nurses' home on the premises. The work for which she was employed was done at the main building of the County Home. When on duty her working hours at the main building on the premises were from 7:00 a.m. to 7:00 p.m. As a day nurse it was her custom to report at the main building for work a few minutes before 7:00 a.m. to get the reports of the night nurse. She was on duty 18 July 1959, and while she was walking from her room at the new nurses' home to report for work at the main building—all on defendant's premises of the County Home where she lived and worked—she fell on the concrete sidewalk, and broke her right hip.

As an exception to the general rule, known as the "going and coming rule," (99 C.J.S., Workmen's Compensation, sec. 232, p. 807), that injuries sustained by an employee while going to or from work are

not ordinarily compensable (for illustrations of the general rule see *Ellis v. Service Co., Inc.*, 240 N.C. 453, 82 S.E. 2d 419; *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751; *Bray v. Weatherly & Co.*, 203 N.C. 160, 165 S.E. 332), the great weight of authority holds that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the Workmen's Compensation Acts and are compensable, provided the employee's act involves no unreasonable delay. *Kasari v. Industrial Commission of Ohio*, 125 Ohio St. 410, 181 N.E. 809, 82 A.L.R. 1040; *Evans v. Workmen's Compensation Commissioner*, 124 W. Va. 336, 20 S.E. 2d 172; *Murphy v. Wells-Lamont-Smith Corp.*, Mo. App., 155 S.W. 2d 284; *Reed v. Brown*, 129 Ind. App. 75, 152 N.E. 2d 257; *Babkees v. Electrolux Corp.*, 163 N.Y.S. 2d 809, motion for reargument and appeal denied 169 N.Y.S. 2d 892; *Petroleum Casualty Co. v. Green*, Tex. Civ. App., 11 S.W. 2d 388; *Roberts' Case*, 124 Me. 129, 126 A. 573; *Simonson v. Knight*, 174 Minn. 491, 219 N.W. 869; Annos. 49 A.L.R. 426, and 82 A.L.R. 1044, where many cases are cited; 99 C.J.S., Workmen's Compensation, sec. 234, where numerous cases are cited; 58 Am. Jur., Workmen's Compensation, sec. 221. See *Davis v. Manufacturing Co.*, 249 N.C. 543, 107 S.E. 2d 102. Some courts have engrafted a qualification to the exception to the general rule where an accident occurs at a place far removed from the actual place of employment, even though on the employer's premises. Anno. 49 A.L.R. 443.

Bountiful Brick Co. v. Giles, 276 U.S. 154, 72 L. Ed. 507, was a case heard on a writ of error to the Supreme Court of the State of Utah to review a judgment affirming an award by the Industrial Commission of compensation for the death of an employee under the Workmen's Compensation Act. The Supreme Court of the United States affirmed the judgment of the Supreme Court of the State of Utah. In its opinion it said:

> "Whether Giles was negligent in entering through the fence where he did, or in crossing the tracks, or in not selecting the safest way, are matters not relevant to the inquiry. Liability was constitutionally imposed under the Utah compensation law if there was a causal connection between the injury and the employment in which Giles was then engaged substantially contributing to the injury. [Citing authority.] And employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while

passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer. [Citing authority.]"

The new nurses' home on the County Home's grounds was provided by defendant as a place for claimant and nurses employed there to live. It is apparent that one, if not the main, purpose of defendant's maintaining a nurses' home on the premises was to secure the proximity of the nurses to the main building in which those under their care lived, so that they would be close by when on duty, and might quickly respond to a call, if needed, at other than regular hours of work. It is manifest that claimant's leaving her home some twenty minutes before she was to go on duty at 7:00 a.m. was required in the efficient performance of her duties of employment to get the reports of the night nurse, so that she could adequately care for those people defendant employed her to nurse. It is evident that while claimant was going from where she lived at the new nurses' home to the main building to work, all on defendant's premises, some twenty minutes before she was to go on duty at 7:00 a.m., she was in the ambit of her employment, and that her injury grew out of and was incidental to her employment. Based on the findings of fact, claimant's injury can fairly be traced to her employment as a contributing proximate cause, and consequently, the findings of fact support the conclusion that claimant's injury by accident arose out of and in the course of her employment.

Defendant's assignment of error #16 is:

"The Full Commission erred in failing to rule that the Hearing Commissioner failed to find the facts material to the defenses alleged by the defendant and erred in failing to make such findings of fact, particularly:

"(a) The facts relating to the distance between the point where plaintiff allegedly fell and the point where she would have assumed her duties.

"(b) The facts relating to the freedom of plaintiff to leave the premises and to remain off the premises after 7:00 p.m. without signing any register or leaving any word where she could be reached and her freedom to remain absent until the prescribed starting time of 7:00 a.m.

"(c) The facts relating to the existence of two intervening personal errands to be performed by plaintiff before assuming her duties, namely, delivering personal newspapers as a favor to the cook in the old nurses' home and eating her breakfast.

"(d) The facts relating to the time which would have been required for plaintiff to proceed from the point where she allegedly fell to the point where she would have performed any of the duties of her employment exclusive of the intervening personal errands.

"(e) The facts relating to the hazard of an unexplained fall on a wet sidewalk as being common to the general public in Mecklenburg County on the date of the alleged injury.

"(f) The facts relating to her living upon the premises of the Mecklenburg County Home as a convenience to herself and not as a condition of employment.

"(g) The facts relating to her stipulation that she does not claim any liability on the part of defendant for her treatment at the Veterans Administration Hospital.

"(h) The facts relating to her pre-existing disabilities and pension from the Veterans Administration."

Considering all the evidence in the record and the applicable principles of law stated above, it seems clear that if the Commission had made specific findings of fact which would have competent evidence in the record to support them, as requested by defendant in this assignment of error, it would constitute no valid defense to Mrs. Bass' claim for compensation, and, therefore, this assignment of error is overruled.

Defendant assigns as error that the Industrial Commission committed error in failing to impose the limitations contained in G.S. 97-25 and G.S. 97-26 upon the medical, etc., expenses ordered paid by the defendant.

The order of the Industrial Commission, approved by the judge, is that defendant shall pay all medical, etc., bills incurred by claimant

by reason of her injury "when bills for the same shall have been submitted to and approved by the Industrial Commission." Defendant states in its brief it "has no way of predicting what bills will be submitted to the Industrial Commission by plaintiff in the future, nor what amounts will be approved by the Industrial Commission." Until the bills have been submitted to and approved by the Commission, it would seem that this assignment of error presents for decision a moot question. It is our opinion, and we so hold, that when the Commission approves claimant's such bills, defendant shall then have a right on appeal to challenge the action of the Commission in respect to the bills approved by it, in whole or in part, if it deems it advisable to do so.

The Full Commission in affirming the Hearing Commissioner's findings of fact, conclusions, and award, approved a fee of $150.00 for claimant's counsel, in addition to the fee for claimant's counsel approved by the Hearing Commissioner, and ordered that such fee be assessed against defendant as a part of the costs of the appeal in accordance with the provisions of G.S. 97-88. The judge affirmed the Full Commission. Defendant assigns as error the taxing of this fee in the costs against defendant. As we find no error in the Commission's decision, G.S. 97-88 applies. This assignment of error is overruled. *Liles v. Electric Co.*, 244 N.C. 653, 94 S.E. 2d 790.

We have discussed all assignments of error brought forward and discussed in defendant's brief. There are a number of exceptions in the record which are not set out in defendant's brief, which will be taken as abandoned by defendant. Rules of Practice in the Supreme Court, 254 N.C. 783, 810; *Power Company v. Currie, Com'r of Revenue*, 254 N.C. 17, 118 S.E. 2d 155.

The review here is limited to assignments of error relating to matters of law at the trial in the superior court. *Horn v. Furniture Co., supra.* All of defendant's assignments of error are overruled. The findings of fact are supported by competent evidence, the findings support conclusions, and they support the award entered pursuant thereto. The judgment below is

Affirmed.

VICTOR YOUNT AND GARLAND MARSHALL, EXECUTORS OF THE ESTATE OF GEORGE HENRY YOUNT v. MRS. PEARL YOUNT, WIDOW, STUART L. YOUNT, LOUISE YOUNT STEVENS, MARY E. YOUNT, MAYE YOUNT, BILLY YOUNT, HELEN YOUNT, BOBBY LON YOUNT AND G. LONNIE YOUNT.

(Filed 12 December 1962.)

1. Appeal and Error § 4—

Executors are not parties aggrieved by a judgment construing the dispositive provisions of a will and therefore may not appeal therefrom, but may appeal from the construction of the will and codicil as to the designation of the executors.

2. Declaratory Judgment Act § 1; Wills § 8—

Adjudication of the clerk in probating a will that the designation of the executors opposite the names of the subscribing witnesses constituted a part of the will is conclusive until vacated on appeal or declared void in a direct proceeding, and may not be questioned in a proceeding under the Declaratory Judgment Act to construe the instrument. *Semble:* Since the testator is not required to subscribe his signature, such designation is effective.

3. Wills § 28—

The will and the codicil thereto must be construed together as a single instrument taking effect at the time of testator's death, and as a general rule provisions of the codicil will not be construed to revoke provisions of the will relating to the same subject matter unless they are so inconsistent as to exclude any legitimate inference other than that testator had changed his intention, construing both instruments as a whole to ascertain such intent.

4. Wills § 27; Executors and Administrators § 1—

The rule that a will must be construed as a whole to effectuate the intent of the testator applies to its provisions appointing an executor as well as to any other provisions of the instrument.

5. Same—

The will designated P and V executors and the codicil designated V and M as executors. *Held:* V and M are the sole executors.

6. Wills § 33—

The will designated the home place together with all equipment and furnishings to testator's daughter "providing that my wife * * * have a dowry right as long as she lives, together with co-ownership and co-management of the home place." *Held:* The wife takes a life state in common with the daughter in the home place and its equipment and furnishings, and the daughter takes the fee in remainder.

7. Same—

The will gave testator's wife a life estate in his home place and its furnishings in common with testator's daughter and provided "(A)lso life insurance", stock in corporations and moneys in banks or elsewhere. *Held:* The wife was the sole owner of the insurance, stock and money.

PARKER, J., dissenting in part.

APPEAL by petitioners and by defendant, Louise Yount Stevens, from *Froneberger, J.*, May 1962 Term of CALDWELL.

This action was instituted by petitioners under the Declaratory Judgment Act (G.S. 1-253, *et seq.*) to secure an interpretation of the will and codicil of George Henry Yount who died on January 6, 1962. He was survived by children, grandchildren, and his wife, M. Pearl Yount. His will, dated December 18, 1941, was typed and his signature attested by two persons. Below the signature of the testator and opposite the signatures of the witness are the following words: "Executors M. Pearl Yount and/or J. Victor Yount." The codicil is dated May 14, 1952. In it immediately preceding the signatures of the testator and witnesses, appears the following: "Executors, Victor Yount and Garland Marshall."

When the will and codicil were probated on January 11, 1962, the Clerk of the Superior Court designated J. Victor Yount, Garland Marshall, and M. Pearl Yount as executors.

Paragraphs two, three, and four of the will advise certain tracts of land to each of the three sons of the testator. The death of one, and his displeasure with another, caused him to execute the codicil which revoked the gifts to them and made other dispositions of that property. With these provisions we are not concerned. The following paragraphs of the will create the problem:

> (5) "To L. Louise Yount Stevens, the home place containing 11 acres, more or less together with all buildings, furnishings, tools, livestock, or that part remaining at my death if any, provided that my wife, M. Pearl Yount, have a dowry right as long as she shall live together with co-ownership and co-management of the home place and all equipment. . . ."
>
> (8) "To my wife, M. Pearl Yount, Dowry Right, co-ownership, and co-management of the Home Place with L. Louise Yount Stevens. Also, Life Insurance, all stock in Falls Mfg. Co. or other stock and moneys in bank or elsewhere."

Petitioners, Victor Yount and Garland Marshall, instituted this action for the purpose of having the court answer three questions:

1. Was M. Pearl Yount properly named an executor?
2. Who owns the fee in the home place described in paragraph 5 and how is the title to its furnishings and equipment held?
3. Do M. Pearl Yount and L. Louise Y. Stevens own the stock, money, and insurance bequeathed in paragraph 8 or does this personal property belong entirely to the widow?

The trial judge held that M. Pearl Yount was properly designated as one of the executors in the will and that such designation was not revoked by the codicil; that Mrs. Yount and Mrs. Stevens owned the home place with its equipment and furnishings in fee as equal tenants in common; and that the insurance, stock, and money were owned entirely by Mrs. Yount. The petitioners and Mrs. Stevens appealed, assigning as error each of the foregoing rulings.

L. H. Wall for Victor Yount, Garland Marshall, Executors, and Louise Yount Stevens, petitioner appellants.

Earl F. Shuford for Mrs. Pearl Yount, respondent appellee.

SHARP, J. Mrs. Stevens, a devisee whose interests have been adversely affected by the judgment of the court below, is an aggrieved party who may appeal. Her assignments of error are identical with those of petitioners who have appealed in their representative capacity. However, as executors, they are not aggrieved by the ruling which adjudicated the conflicting claims of Mrs. Stevens and Mrs. Yount (the subjects of assignments of error Nos. 2 and 3), and they may not appeal therefrom. *Dickey v. Herbin,* 250 N.C. 321, 108 S.E. 2d 632; *Ferrell v. Basnight,* 257 N.C. 643, 127 S.E. 2d 219.

Petitioners, as the executors named in the codicil, are interested in the answer to the question, "Whose is the right to administer the estate?" When a third person seeks to share in the management of the estate and in their commissions, they may contest his right to letters of administration and appeal from an order appointing him. 33 C.J.S., Executors and Administrators, Section 57(b); *In re Healy,* 122 Cal. 162, 54 Pac. 736.

Appellants contend that the words "Executors M. Pearl Yount and/or J. Victor Yount" are ineffectual because they were typed below the signature of the testator and in line with the signatures of the witnesses. This record shows no contention that they were inserted without the knowledge or consent of the testator or that they are a forgery.

When the Clerk of the Superior Court probated the will in question in common form he adjudicated that the words appellants now seek to question were a part of the will of the testator. That adjudication is conclusive and binding on this Court and the parties to this action until vacated on appeal from the clerk or declared void in a direct proceeding instituted for that purpose. *Coppedge v. Coppedge,* 234 N.C. 747, 67 S.E. 2d 463; *Starnes v. Thompson,* 173 N.C. 466, 92 S.E. 259; *Walters v. Children's Home,* 251 N.C. 369, 111 S.E. 2d 707; *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; *In re Will of Puett,* 229 N.C. 8,

47 S.E. 2d 488; *McDonald v. McLendon,* 173 N.C. 172, 91 S.E. 1017; *In re Johnson's Will,* 182 N.C. 522, 109 S.E. 373; *In re Smith's Will,* 218 N.C. 161, 10 S.E. 2d 676; *In re Hine's Will,* 228 N.C. 405, 45 S.E. 2d 526.

In this action the court below had jurisdiction to construe the duly probated will but not to nullify any part of it. Our derivative jurisdiction extends no further. *Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723. "The Declaratory Judgment Act, G.S. Ch 1, Article 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 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." *Farthing v. Farthing,* 235 N.C. 634, 70 S.E. 2d 664, *Bennett v. Attorney General,* 245 N.C. 312, 96 S.E. 2d 46.

It is noted, however, that the North Carolina Statutes have never required a testator to subscribe his signature to his will. *In re Will of Williams,* 234 N.C. 228, 66 S.E. 2d 902; *Paul v. Davenport,* 217 N.C. 154, 7 S.E. 2d 352.

It is further noted that the signatures of the witness to the will under consideration were subscribed. No dispositive provisions, i.e., those relating either to the disposition or administration of the estate, are written below their signatures. *In re Mackris' Estate,* 124 N.Y.S. 2d 891.

We come now to consider the construction of the will and codicil. They must be considered together as a single instrument taking effect at the time of the testator's death. *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Armstrong v. Armstrong,* 235 N.C. 733, 71 S.E. 2d 119. The first question is whether the designation of Victor Yount and Garland Marshall as executors in the codicil revoked the designation in the will of "M. Pearl Yount and/or J. Victor Yount" as executors?

In the absence of express words of revocation, it is a rule of construction that for a codicil to revoke any part of a will its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that the testator had changed his intentions. *Armstrong v. Armstrong, supra.* However, rules of construction must bend to the testator's intention which is to be ascertained by taking the instrument by its four corners. *Smith v. Mears, supra; Brown v. Brown,* 195 N.C. 315, 320, 142 S.E. 4.

The rule that a will must be construed to effectuate the intent of the testator applies to the appointment of an executor as well as to any other provisions of the will. *In re Johnson's Estate,* 233 N.C. 570, 65 S.E. 2d 12.

Cases construing the appointment by codicil of other or additional executors than those named in the will are apparently few indeed. None have been called to our attention by counsel. In 57 Am. Jur., Wills, Section 480, we find the following: "It seems that a codicil does not import a revocation of the appointment of an executor made in the will, although the codicil appoints an executor, unless the latter appointment is of a 'sole' executor." As authority for this statement the author cites Anno. 51 A.L.R. 710. The annotation relies solely on three English cases: *Evans v. Evans* (1849) 17 Sim. 86, 60 Eng. Rep. 1060; *In the Goods of Daniel Lowe* (1864), 3 Swabey and T 478, 164 Eng. Rep. 1361; *In the Goods of John Howard* (1869) L.R.I., Prob. and Div. 636.

In *Evans,* testator gave the residue of his estate to his niece D and appointed her executrix. By a codicil, he appointed A and B his residuary legatees and executors. Held, the gift to D was revoked but her appointment as executrix was not revoked by the appointment of two other persons for the same purpose. In *Lowe,* testator appointed L and B executors of the will; the codicil named his wife "sole executrix." Held, the appointment of testator's widow as sole executrix was tantamount to a revocation of the appointment of the executors named in the will since it clearly implied an intention that no other person should be associated with her in the office of executor. In *Howard,* the will oppointed C and S executors and guardians. In a second codicil testator said, "I absolutely revoke and make void all bequests and dispositions in my said will and I bequeath all my property to . . . W, and I appoint HH and RH executors and MW executrix." Held, "(T)he legal operation of a codicil is to confirm such parts of the will to which it refers as is does not revoke." The court decreed that all five were named as executors.

Except for *Lowe,* which is clearly correct, these cases are not persuasive. In the will in the instant case, the testator said, "Executors M. Pearl Yount and/or J. Victor Yount." In the codicil he said "Executors, Victor Yount and Garland Marshall." If a testator's executors are A and B, they are not A, B, and C. If in his will a testator names X and Y as his executors and in a codicil names A and B, without more, it seems to us that A and B are in substitution for X and Y and not in addition to them. If testator Yount had not meant a substitution, we think that he would have used the phrase "in addition to" or some other words of like import. It is significant that J. Victor Yount is named executor in both the will and the codicil. If the testator had only intended to add the name of Garland Marshall to the roster of executors, he would not have repeated the name of J. Victor Yount.

We hold that the answer to the first question is: J. Victor Yount and Garland Marshall are the sole executors of the estate of George Henry Yount. Appellants' assignment of error No. 1 is therefore sustained.

The answer to the second question posed requires a construction of paragraphs 5 and 8 of the will, the pertinent portions of which follow:

> (5) "To L. Louise Yount Stevens, the home place . . . provided that my wife, M. Pearl Yount, have a dowry right as long as she shall live, together with co-ownership and co-management of the home place and all equipment. . . ."
>
> (8) "To my wife, M. Pearl Yount, dowry right, co-ownership and co-management of the home place with L. Louise Yount Stevens."

We must attempt to divine the intent of the testator from the will itself since the record consists only of the documents involved. It contains no evidence of "the circumstances attendant" when the will was made. *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246. Apparently, however, the wife and daughter were living with the testator in the home place at the time and he desired this arrangement to continue during the wife's lifetime. The trial judge construed the will to give the wife and daughter equal shares in fee. We do not think this was the testator's intention.

Webster's Third New International Dictionary treats dowry as a variation of dower. The definition in both the Second and Third Editions of Webster's is four-fold: (1) The portion of or interest in the real estate of a deceased husband that is given by law to his widow during her life; (2) The money, goods or estate which a woman brings to her husband in marriage; (3) A gift of property by a man to or for his bride; and (4) Gift of nature, talent, endowment. The third definition refers to the dowry of Biblical times, a gift by a suitor to the father of the bride (Genesis 24-12); the second, to the dowry or dot of the Roman and French law which was the marriage portion the wife brought to her husband in land or money. Ballentine's Law Dictionary; *Corporation Commission v. Dunn,* 174 N.C. 679, 683, 94 S.E. 481.

It is obvious that the testator Yount did not use *dowry* in the sense of either the second, third, or fourth definitions. We think he employed it in the meaning of the first definition, the way the word is often used in the vernacular. In *Wendler v. Lambeth,* 163 Mo. 428, 63 S.W. 684 (1901), testator devised one hundred acres to his nephew with the provision that if his sister in Germany came to the United States

she should have a *dowry* in forty acres. In holding that the devise gave the sister a life estate in the forty acres with remainder to the nephew, the court said: "(T)he compiler of Webster's International Dictionary says, 'Dower in modern use is and should be distinguished from dowry. The former is a provision for a widow on her husband's death; the latter is a bride's portion on her marriage. . .' It is our duty to determine the intention of the testator if we can, notwithstanding his inaccuracy of language. . .If we ascribe to 'dowry' its technical meaning, it would be utterly senseless in the connection in which it is used. If we give it a popular meaning as a portion or provision, it can well mean a use for life of the 40 acres designated, and such we feel sure was the testator's intention and that must govern. . . ."

In the instant case, each time he mentioned the home place, the testator made it plain that the right of the widow therein was a "dowry right." This phrase twice preceded her right of co-ownership and co-management. *Dower or dowry*, whether technically or popularly employed, has never denoted a fee. We think and so hold, that it was the testator's intent to give to the daughter and the widow each a life estate in the home place, and to give the fee to the daughter. Since the daughter has an undivided half interest in the property for life and a remainder in fee in the whole, the greater and lesser estates coincide and merge in her to the extent of her one-half interest. *Trust Co. v. Watkins*, 215 N.C. 292, 1 S.E. 2d 853.

The answer to the second question is: M. Pearl Yount has a life estate in an undivided one-half of the home place, its equipment and furnishings, and L. Louise Yount Stevens owns the fee in one-half of the property with a remainder in fee in the other half, subject to the life estate of M. Pearl Yount. Assignment of error No. 2 is sustained.

The third question, the subject of assignment of error No. 3, is whether Mrs. Yount owns the insurance, stock, and money undividedly or jointly with Mrs. Stevens. Mrs. Stevens concedes in her brief that if the court should hold that she owns the fee in the home place "the court might well hold that the insurance, stock and money, should go to the widow, M. Pearl Yount." We so hold. We think it clearly was the intent of the testator to give this property to the widow. The trial judge correctly answered the question. Assignment of error No. 3 is overruled.

This case is remanded to the Superior Court for judgment in accordance with this opinion.

Error and remanded.

PARKER, J. Dissenting in part. "A codicil is a supplement to a will, annexed for the purpose of expressing the testator's after-

thought or amended intention. [Citing authority.] It is to be construed with the will itself, and the two are to be considered as constituting a single instrument." *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659. As a general rule, the courts are opposed to assuming that a codicil revokes a will by being inconsistent therewith. It seems to be settled law that a codicil does not revoke a will unless the testator's intention to revoke is clear; and, consequently, there must be an absolute, clear and irreconcilable inconsistency between the will and the codicil in order that the codicil may revoke the will by being inconsistent therewith. *Baker v. Edge,* 174 N.C. 100, 93 S.E. 462; Page, Revised Treatise on the Law of Wills, Vol. 2, p. 419, where many cases from many jurisdictions are cited. In *Toms v. Brown,* 213 N.C. 295, 195 S.E. 781, the Court said: "A codicil does not import revocation but an addition, explanation, or alteration of a prior will. The courts are adverse to the revocation of a will by implication in a codicil. [Citing authority.] A will and codicil are to be construed together so that the intention of the testator can be ascertained from both. [Citing authority.]"

In *Page, ibid,* Vol. 4, p. 84, it is stated: "Where a codicil is appended to a will and does not contain any clause of revocation, the provisions of the will are to be disturbed only as far as are absolutely necessary to give effect to the provisions of the codicil; and in other respects such a will and codicil are to be construed together." *Page* cites cases from England and from 27 states, including several from North Carolina, in support of the text.

In the *Goods of Daniel Lowe* (1864), 3 Swabey and T 478, 164 Eng. Rep. 1361, a testator in his will appointed W. L. and W. B. executors, and in a codicil to the will named his wife "sole executrix of this my said will." The Court held that the appointment in the will of W. L. and W. B. as executors was revoked. In this case, Sir J. P. Wilde said: "The Registrars are always very properly reluctant to take upon themselves to exclude from the probate executors whose appointment is revoked only by inference. I think, however, here I cannot give effect to the word 'sole' when the testator says in the codicil, 'I appoint my wife sole executrix of my said will,' without excluding the executors appointed in the will. Probate may therefore go to the widow, as prayed."

In my opinion, the decisions in *Evans v. Evans* (1849) 17 Sim. 86, 60 Eng. Rep. 1060, and in *In the Goods of John Howard* (1869) L.R. 1, Prob. and Div. 636, which are set forth in the majority opinion, when read in connection with *In the Goods of Daniel Lowe,* are convincing. In my judgment, the testator by his codicil did not revoke, and it should not be held by inference that he did revoke, the ap-

pointment of executors that he named in his will. The legal operation of the testator's codicil to his will is to confirm such parts of the will to which it refers as it does not revoke. My vote is M. Pearl Yount, J. Victor Yount, and Garland Marshall, all three, are entitled to serve as executors.

LAWRENCE M. STALEY AND KENNETH W. CHEEK, TRADING AS STALEY'S CHARCOAL STEAK HOUSE v. THE CITY OF WINSTON-SALEM AND ARCHIE ELLEDGE, CARL CHITTY, FLOYD S. BURGE, JR., JAMES J. BOOKER, CARL H. RUSSELL, CARROLL POPLIN, ROSSIE F. SHORE, AND THOMAS L. OGBURN, MEMBERS OF THE BOARD OF ALDERMEN OF THE CITY OF WINSTON-SALEM.

(Filed 12 December 1962.)

1. Intoxicating Liquor § 2—

The State Board of Alcoholic Control exercises sole discretionary power in determining the fitness of an applicant for a permit to sell wine, and the places where wine may be sold, and the State and local taxing authorities in issuing licenses are relieved of responsibility in regard thereto.

2. Municipal Corporations § 24—

Local ordinances cannot override statutes applicable to the entire State.

3. Municipal Corporations § 25; Intoxicating Liquor § 2—

Where an applicant for a municipal license to sell wines on the premises is operating a business permitted by the municipality's zoning ordinances under its provisions relating to pre-existing nonconforming uses, and has complied with all of the requirements of the Alcoholic Beverage Control laws and the regulations of the State Board of Alcoholic Control adopted thereunder, the municipality is without power to refuse applicant a license to sell wine in connection with its business.

APPEAL by respondents from *Phillips, J.,* May 1962 Civil Term of FORSYTH.

Deal, Hutchins and Minor by Roy L. Deal for petitioner appellees.

Womble, Carlyle, Sandridge & Rice by I. E. Carlyle and H. G. Barnhill, Jr., for respondent appellants.

RODMAN, J. This appeal requires an answer to only one question: Can respondents prohibit the sale of unfortified wines for consumption in petitioners' restaurant?

The facts on which the answer must be based were stipulated. Summarized, they are: Winston-Salem, acting under statutory authority, adopted a zoning ordinance on 26 September 1955. Petitioners' property was not then within the corporate limits of the city, but the ordinance was applicable to it by legislative permission. C. 777, S.L. 1953. The property, by the enlargement of the city's boundaries, is now part of Winston-Salem. When the zoning ordinance was adopted, petitioners' property was and has been continuously since that date used as a restaurant. It qualifies for Grade A rating.

The operation of a restaurant is not permitted in residential A 1 zones. Such use is a "nonconforming" use. The ordinances provide: "A nonconforming building or use may be continued, and may be changed to another nonconforming use of the same or a more restricted classification. . .The vacation of a nonconforming building or use for a consecutive period of two years shall be regarded as a permanent vacation and, thereafter, the building shall not be reoccupied except in conformity with the regulations of the district in which it is located, and the use may not be resumed."

The ordinances also provide: "It shall be unlawful for any person to sell beer or wine on any premises in a residential area in the city on which a business may now be conducted as a nonconforming use under chapter 48 of this Code except for such premises on which beer and wine are now being sold under proper permit issued pursuant to the laws of the state and the ordinances of the city, and the violation hereof shall constitute a misdemeanor."

Wine was sold on petitioners' premises until 3 January 1957, when they voluntarily ceased selling. On 17 March 1960 the city, upon application, issued a license to sell. A few days after petitioners began selling wines, the city, acting on advice of counsel that such sale was prohibited by the ordinance, applied for and obtained a temporary restraining order prohibiting such sales. The license under which petitioners made sales in 1960 having expired, they applied to the revenue department of the city for a license on 1 May 1961. The license was issued, but revoked on 6 November 1961.

In addition to the stipulated facts summarized above, the parties expressly stipulated:

"7. The petitioners have complied with all of the requirements of the Alcoholic Beverage Control laws of the State of North Carolina contained in Chapter 18 of the General Statutes of North Carolina and with all of the regulations of the State Board of Alcoholic Control adopted thereunder.

"8. The City of Winston-Salem and its officers have made no claim whatever against the petitioners that they have not complied with all

the requirements of the State laws regulating the sale of alcoholic beverages or the regulations of the State Board of Alcholic Control.

"9. The only grounds on which the respondents have revoked or purported to revoke the wine license permit of the petitioners, No. 18, issued by the City of Winston-Salem are Section 3.1 and 48-19.2 of the Ordinances of the City of Winston-Salem. . . ." (These are the sections previously quoted.)

The correct answer to the question presented requires not only an examination of existing statutes regulating the sale of alcoholic beverages but an understanding of the reasons which led to the enactments.

A special session of the Legislature convened in January 1908 to consider legislation prohibiting the sale of intoxicating beverages. C. 71 of that session, ratified 31 January 1908, made it unlawful to sell "any spirituous, vinous, fermented or malt liquors or intoxicating bitters." A proviso permitted manufacture and sale of wines and ciders made from grapes, berries, or fruits. The statute provided it should take effect on the first day of January 1909, if approved by a majority vote at an election to be held in May 1908. The electors approved the act. Thereafter the chapter in our code laws dealing with intoxicating liquors bore the title "Prohibition." See c. 66, C.S. 1919.

The movement to outlaw the sale of intoxicating beverages was not confined to North Carolina. Congress submitted and the states ratified the Eighteenth Amendment to the Constitution of the United States prohibiting the manufacture, sale, and transportation of intoxicating liquors.

The 1923 Legislature adopted the Turlington Act, now art. 1 of c. 18 of the General Statutes.

Constitutional and statutory provisions absolutely prohibiting the manufacture or sale of intoxicating beverages failed to produce the predicted and desired results with respect to the use of such beverages. The stringent prohibition incorporated in the Constitution of the United States by the Eighteenth Amendment was relaxed by the Twenty-first amendment which merely prohibits transportation in violation of state law.

Soon after the Legislature convened in 1935, it became apparent that efforts would be made to replace, in some portions of the state, total prohibition with governmental control. C. 418, P.L. 1935, ratified 11 May 1935, made the Turlington Act inapplicable to New Hanover County. It created a county liquor commission to be known as New Hanover County Alcoholic Beverage Control Board, invested with complete control over the importation, transportation, sale, and distribution of alcoholic beverages in that county. The statute was not, however, to become effective unless approved by the electorate of New Hanover County. It was so approved.

Shortly after the introduction of the bill relating to the sale of alcoholic beverages in New Hanover County, a similar bill relating to Pasquotank County was introduced. It likewise was ratified 11 May 1935 and became c. 493, P.L. 1935. As enacted it included Pasquotank, Carteret, Craven, Onslow, Pitt, Martin, Beaufort, Halifax, Franklin, Wilson, Edgecombe, Warren, Vance, Lenoir, Rockingham, Nash, and Greene Counties and Southern Pines and Pinehurst in Moore County.

C. 393, P.L. 1935, authorized any person growing grapes, fruits or berries to make therefrom wines having only such alcoholic content as natural fermentation would produce. Wines so made were declared food, which could be sold for consumption "in hotels and bona fide restaurants enagaged in selling food and serving meals." Secs. 3 and 2, c. 393, P.L. 1935.

Foods were subject to sales tax enacted in 1933. Licensing of outlets selling wines produced by fermentation, declared by the 1935 Legislature a food, were natural objects to tax. Schedule F of the Revenue Act of 1937 (c. 127, P.L. 1937) is the foundation on which art. 4, c. 18, of the General Statutes was built. One seeking to retail wines under the Revenue Act of 1937 had to apply to the governing authority of a municipality or to the county commissioners if the sale was to be made outside a municipality. In substance the provisions of sec. 511 of the Revenue Act of 1937 now appear as G.S. 18-75. Sec. 513 of the Revenue Act of 1937, now in substance G.S. 18-77, made it mandatory on the governing body of a municipality to issue the license when proper application had been made unless the application showed licensee was disqualified because convicted of a felony involving moral turpitude or violation of the prohibition laws of the state or nation.

Shortly after the 1937 Legislature convened, a bill "TO PROVIDE FOR THE MANUFACTURE, SALE, AND CONTROL OF ALCOHOLIC BEVERAGES IN NORTH CAROLINA" was introduced. In substance it gave approval to the philosophy exemplified in the so-called New Hanover and Pasquotank bills adopted by the 1935 Legislature. Any county in the State, upon approval by the voters of that county, might set up stores for the sale of alcoholic beverages. This bill became c. 49, P.L. 1937. There was a notable difference, however, between the 1935 acts and the 1937 act in the definition of alcoholic beverages. Sec. 24 of the 1937 act defined the term alcoholic beverages as "alcoholic beverages of any and all kinds which shall contain more than twenty-one per centum of alcohol by weight and this Act is not intended to apply to or regulate the possession, sale, manufacture or transportation of beer, wines or ales containing a lower alcoholic

content than above specified and whenever the term alcoholic beverage is used in this Act it shall be construed as defined in this section." This definition was later changed to read "twenty-four per centum by volume," c. 411, sec. 1(k), P.L. 1937, and subsequently reduced to fourteen per centum by volume, c. 339, sec. 3, P.L. 1941; G.S. 18-60.

Time again demonstrated that it was not easy to draft legislation which would solve the multitudinous problems arising out of the sale and consumption of alcoholic beverages. The fitness of an applicant and the appropriateness of sales outlets could not readily be solved by the answers to generalized questions. The 1941 Legislature found it advisable to limit the sale of fortified wines to ABC stores. C. 339, P.L. 1941; art. 5, c. 18, General Statutes.

Placing fortified wines under the control of the ABC stores failed to solve the problem. The preamble to c. 903, S.L. 1945, reciting the failure of prior legislation to adequately protect the public and hence the need of remedial legislation, expressly stated: ". . . the public welfare demands that there be some regulation and supervision of the identity, quality and purity of wines sold or offered for sale in this State, and some restriction of the places where such wines are sold for consumption on the premises. . .

". . .for purposes of convenience, economy and efficiency, such supervision and regulation should be vested in an appropriate agency of the State already established instead of in a new agency, and the State Board of Alcoholic Control is the proper agency to administer such supervision and regulation. . ."

To rectify the conditions recited in the preamble, the Legislature enacted what are now the first six subdivisions of G.S. 18-109.

The 1947 Legislature found it necessary to further limit the places where sales might be made and to enlarge the powers of the State Board of Alcoholic Control. C. 1098, S. L. 1947. It prohibited the sale of wines in pool rooms or billiard parlors. It added what are now subsections 7 and 8 of G.S. 18-109.

Since 30 April 1947, when c. 1098 of the Session Laws of 1947 became effective, one desiring to sell wines must (1) obtain a permit from the State Board of Alcoholic Control, and (2) licenses from the taxing authorities. The State Board exercises sole discretionary powers in determining fitness of the applicant, the number of retail outlets permitted in any locality, and supervision over those who sell wines. It may revoke or suspend such permits for cause. G.S. 18-109 relieves licensing authorities, state and local, of responsibility with respect to the fitness of the applicant or place where wines may be sold. Of course on premises licenses are limited to those described in G.S. 18-73. The statute has been in effect for more than fifteen years. To interpret

it so as to permit local communities to override and set at nought the conclusions reached by the State Board might well reproduce the condition deplored by the 1945 Legislature. Local ordinances cannot override statutes applicable to the entire State. *Davis v. Charlotte,* 242 N.C. 670, 89 S.E. 2d 406.

Petitioners' right to operate the restaurant being conceded, the zoning ordinance could not set at nought a statewide statute permitting the sale of wines in such restaurants. Such sales are a permitted part of authorized business.

Affirmed.

STATE v. ALVIN MED CHRISTOPHER.

(Filed 12 December 1962.)

1. Criminal Law § 34—

The general rule excluding evidence of defendant's guilt of other offenses is subject to the exception that proof of other offenses is competent when such proof tends to show *quo animo,* intent, design, guilty knowledge or make out the *res gestae,* or to exhibit a chain of circumstances with respect to the offense in issue, and is so connected with the offense charged as to throw light upon one or more of these questions.

2. Same; Homicide § 14—

The State contended that defendant killed deceased in a robbery to obtain money to pay a repair bill to get his car out of a garage, and evidence that defendant had stolen two automobiles on the night of the crime was admitted without objection. *Held:* The admission of that part of defendant's confession that a month before the killing he had stolen the car which was then in a garage for repairs was neither erroneous nor prejudicial in light of the facts of the case.

3. Criminal Law § 162—

The State's evidence tended to show that defendant killed deceased and robbed him to get money to pay a repair bill to get a car, which defendant had stolen, out of a garage. Evidence was admitted that defendant was apprehended and convicted of "improper registration" of a car. *Held:* Even though the evidence of defendant's conviction of "improper registration" may be technically incompetent, the admission of such evidence does not justify a new trial, since its admission could not have affected the result or prejudiced defendant.

4. Criminal Law § 97—

While the solicitor, in his argument to the jury, is not entitled to travel outside of the record, and should not be permitted to characterize

defendant in a manner calculated to prejudice the jury against him, wide latitude must be afforded counsel in the argument, and what constitutes abuse of this privilege must ordinarily be left to the sound discretion of the trial judge.

5. Same—

Argument of the solicitor that in light of the circumstances of the homicide the jury should not recommend life imprisonment *held* permissible under G.S. 15-176.1.

6. Homicide § 22—

Even though all the evidence tends to show murder committed in the perpetration of a robbery, it does not amount to prejudicial error that the court, in its preliminary statement upon the law of homicide, instructed the jury that the law of homicide in the case is divided into the three degrees of murder in the first degree, murder in the second degree, and manslaughter.

7. Criminal Law § 122—

The fact that the court, in stating the contentions of the State that defendant robbed and killed deceased, states also that the State contended that defendant "was a killer" will not be held for prejudicial error, no objections to the statement of the contentions having been brought to the court's attention in time to afford opportunity for correction.

8. Criminal Law § 114—

The fact that the court, after fully charging the jury that if the jury should find defendant guilty of murder in the first degree it had the unbridled discretion to recommend life imprisonment, further states that the jury had the right to recommend life imprisonment if the jury so desired, will not be held for prejudicial error.

APPEAL by defendant from *Clarkson, J.*, 30 July Mixed Term 1962 of CATAWBA.

This is a criminal action tried upon a bill of indictment charging that on 29 April 1962 the defendant, Alvin M. Christopher, feloniously, wilfully, and with malice aforethought, did kill and murder one Ralph Eugene Frye.

The State's evidence tends to show that Ralph Eugene Frye was shot and killed at a service station where he was employed in Catawba County, North Carolina, on the morning of 29 April 1962. A deputy sheriff of Catawba County testified that he arrived at the service station about 3:30 or 4:00 a.m. on 29 April 1962 and found the body of Mr. Frye lying between the gas pumps and the service station. The defendant was arrested that afternoon in Marion, North Carolina, charged with the theft of the Oldsmobile he was driving and which he had stolen on 1 April 1962.

The defendant was interviewed at the headquarters of the Hickory Police Department, Hickory, North Carolina, by Lonnie Williams, an agent for the S.B.I., Detective Ed Groves of the Gaston County Rural Police, and Lt. M. T. Dellinger of the Hickory Police Department, on 1 May 1962. According to the State's evidence, the defendant told these officers that he was a member of the United States Marine Corps stationed at Camp Lejeune, North Carolina; that he lived on Propst Street in Gastonia; that he was home on a pass; that he had been operating an automobile about a month; that he had stolen the car in Marion on 1 April 1962 and had possession of the car until 28 April 1962 when he had trouble with it in Gastonia; that the generator gave out and he put it in a garage to have it repaired. When asked how he got the car out of the garage he stated that he paid for it. He was then asked where he got the money. He said he went by the garage on the night of 28 April 1962 to figure out some way to get his car; that he didn't have any money and the man at the garage watched him too closely and he couldn't get it. He said he went home then and went to bed; that he stayed in bed for a few minutes and got up; that he took a 22 caliber rifle that belonged to his mother and went into the eastern section of Gastonia and stole an Oldsmobile; that he drove this car a short ways until he saw a Ford station wagon. He parked the Oldsmobile and got into the station wagon and started toward Hickory. He was then asked why he was coming to Hickory and he said he was coming to hold up somebody and get some money; that he proceeded on to Hickory; that he went by a number of service stations that were open but didn't stop; that he went on by the fifth service station that was open, then made a "U" turn and came back to the station where he pulled in and stopped. He said there were three or four cars at the station and that he waited until some of the cars left; that there was one car that didn't leave, the man kept staying there and finally the man went into the service station. The defendant stated that in order to stall off the service station attendant, who was Mr. Frye, he asked him to check the different parts of the car, such as oil, the starter, and to wipe off the windshield; that as Mr. Frye was wiping off the windshield, the defendant said he removed the rifle which he had in the station wagon, put it up to the back of Mr. Frye's head, and said, "Don't move." At that time, he said, the service station attendant moved back and he shot him. He said the rifle made a muffled noise, it wasn't a loud noise, and that when he shot, Mr. Frye fell down and he didn't see him move. Defendant stated that he then jumped into the station wagon and started to leave and happened to think about the money; that he went back to the body of Mr. Frye, removed the money pouch, got back in the station wagon and pro-

ceeded in the direction of Conover; that when he got near the office of the State Highway Patrol he unloaded the empty shell from the rifle and reloaded it with a live shell. When the defendant got to Conover he said he turned right, going in the direction of Newton and that just outside or near the edge of the Newton city limits he threw the money pouch out the car window; that he traveled on to Gastonia, parked the station wagon where he had originally found it, got into the Oldsmobile which he had stolen in the eastern section of Gastonia, and was thereafter picked up by the Gastonia police and taken to police headquarters.

The owner of the Oldsmobile did not desire to prosecute the defendant but the police charged him with improper registration. Defendant stated that he got about $80.00 out of the money pouch he took from Mr. Frye and that he used part of the money to pay the fine for improper registration and also paid for having the car fixed, which he said was a stolen car he had in a garage in Gastonia. He further said that each time he would transfer from one car to the other he would take the rifle; that after he got the car out of the garage he carried the rifle back to his mother's home where he ate breakfast and then went to Marion where he was picked up by the police and charged with stealing the Oldsmobile on 1 April 1962.

The State offered evidence to the effect that the defendant offered to show the officers who interviewed him where he threw the money pouch or billfold that he took from the deceased, Ralph Eugene Frye. He did accompany several officers to the place where he said he threw the money pouch or billfold, and a billfold was found by the officers and identified by the defendant as being the one he took from Frye.

The question as to whether the statements made by the defendant to the above named officers on 1 May 1962 were voluntary was inquired into by the court in the absence of the jury, and the court found that the statements were voluntarily made, without any inducement or threats.

The jury returned a verdict of guilty of murder in the first degree. The sentence of death was imposed. The defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General McGalliard for the State.

Charles W. Gordon, Jr., for defendant.

DENNY, C.J., The only exceptions and assignments of error brought forward and argued in the appellant's brief are as follows: (1) Those

challenging the admission of those parts of the defendant's confession which disclosed the commission of other offenses, to wit, the stealing of an automobile some thirty days prior, and that he had paid a fine for improper registration; (2) that the argument of the solicitor was improper and prejudicial to him; and (3) to certain portions of the court's charge to the jury.

Therefore, except as to those portions of the confession challenged as indicated above, the admission of the confession made to the officers by the defendant is unchallenged.

The automobile theft in question occurred about thirty days before the murder was committed. The State proceeded on the theory that the defendant killed the service station attendant in the perpetration of a robbery, the purpose of which was to obtain money with which to regain possession of the stolen automobile which was being held for the payment of certain repairs made thereon by a local garage in Gastonia.

In *S. v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853, Stacy, C.J., in considering the admission of evidence with respect to other crimes, said: " We start with the general rule that evidence of one offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Smith,* 204 N.C. 638, 169 S.E. 230; *S. v. Deadmon,* 195 N.C. 705, 143 S.E. 514; *S. v. Dail,* 191 N.C. 231, 131 S.E. 573; *S. v.* Miller, 189 N.C. 695, 128 S.E. 1; *S. v. Graham,* 121 N.C. 623, 28 S.E. 537. The reason for the rule is to preserve to the accused, unencumbered by suggestion of other crimes, the common-law presumption of innocence which attaches upon his plea of 'not guilty,' and to protect him from the disadvantage of extraneous and surprise charges; also to confine the investigation to the offense charged. *S. v. Lyle,* 125 S.C. 406, 118 S.E. 803.

"To this general rule, however, there is the exception as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge or *scienter,* or to make out the *res gestae,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. *S. v. Stancill,* 178 N.C. 683, 100 S.E. 241; *S. v. Beam,* 184 N.C. 730, 115 S.E. 176; *S. v. Choate, supra; S. v. Morris,* 84 N.C. 756; *S. v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516; *S. v. Payne,* 213 N.C. 719, 197 S.E. 573; *S. v. Ferrell,* 205 N.C. 640, 172 S.E. 186; *S. v. Simons,* 178 N.C. 679, 100 S.E. 239; *S. v. Kent,* 5 N.D. 516, 69 N.W. 1052; Wigmore on Evidence (3rd), Vol. 2, Sec.

390; Note to *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286, as reported in 62 L.R.A. 193-357 (q.v.)."

In the instant case, there is no objection or challenge to the introduction of those portions of the confession relating to the theft of the two automobiles stolen by the defendant during the night of 28 April 1962 in connection with the execution of his plan to rob someone to get money with which to pay for the repairs on the car he had formerly stolen. Therefore, in our opinion, the admission of that portion of the confession relating to the theft of the Oldsmobile on 1 April 1962 in Marion, North Carolina, was neither erroneous nor prejudicial in light of the facts in this case. *S. v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *S. v. Payne,* 213 N.C. 719, 197 S.E. 573; *S. v. Miller,* 189 N.C. 695, 128 S.E. 1.

With respect to the evidence relating to the charge of "improper registration," the rule seems to be, as set out in Strong's N. C. Index, Vol. 1, page 851, Criminal Law, section 162, as follows: "Where there is abundant evidence to support the main contentions of the State the admission of evidence of subordinate matters, even if such evidence is technically incompetent, will not justify a new trial when defendant does not make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result. * * *" These assignments of error are overruled.

Assignment of error No. 6 is based on exceptions to certain arguments made by the solicitor to the jury. The solicitor reviewed the evidence and argued with great zeal and fervor that in light of the defendant's conduct in connection with the killing of Ralph Eugene Frye, the punishment therefor should be death and that the jury should bring in a verdict of guilty of murder in the first degree without a recommendation that the punishment should be life imprisonment.

G.S 14-17 reads in pertinent part as follows: "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's Prison, and the court shall so instruct the jury."

In 1961 the General Assembly adopted G.S. 15-176.1, which reads as follows: "In the trial of capital cases, the solicitor or other counsel appearing for the State may argue to the jury that a sentence of death should be imposed and that the jury should not recommend life imprisonment."

In this jurisdiction wide latitude is given to counsel in the argument of hotly contested cases. Moreover, what constitutes an abuse of

this privilege must ordinarily be left to the sound discretion of the trial judge. *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466. Counsel is not entitled to travel outside of the record and argue facts not included in the evidence. Neither should counsel characterize a defendant in a manner calculated to prejudice the jury against him. *S. v. Bowen, supra; S. v. Little,* 228 N.C. 417, 45 S.E. 2d 542; *Cuthrell v. Greene,* 229 N.C. 475, 50 S.E. 2d 525; *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *S. v. Roberts,* 243 N.C. 619, 91 S.E. 2d 589; *S. v. Roach,* 248 N.C. 63, 102 S.E. 2d 413. We have carefully considered the portions of the solicitor's argument to which exceptions were entered and we hold that in light of the evidence in this case and the provisions of G.S. 15-176.1, the argument made by the solicitor was permissible. This assignment of error is overruled.

Assignment of error No. 9 challenges the correctness of the following portion of the charge: "Now, lady and gentlemen of the jury, the law of homicide in this case is divided into three degrees: murder in the first degree; murder in the second degree; and manslaughter. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Now, we are concerned here in the case at bar with the charge against the defendant of murder in the first degree."

The appellant concedes that it was proper for the court to charge only as to murder in the first degree, the murder having been committed in the perpetration of a robbery, but he contends that the trial judge committed error when he said, "the law of homicide in this case is divided into three degrees: murder in the first degree; murder in the second degree; and manslaughter." The court then defined murder in the first degree and informed the jury that the charge against the defendant was that of murder in the first degree. We cannot conceive that the charge as given was prejudicial to the defendant. There is no merit in this contention and the assignment of error is overruled.

In recounting the State's contentions, the court told the jury: "The State further says and contends that the defendant came to Hickory to rob somebody and did rob and kill Ralph Eugene Frye (and that the defendant is old enough to know right from wrong and that he was a killer, and that it was a calculated crime and that he left Gastonia for the purpose of going to Hickory to rob somebody and that it was a brutal murder and you should so find and convict him of murder in the first degree)."

Assignment of error No. 14 is directed to the use of the words, "and that he was a killer." We hold that the use of the above words in stating the contentions of the State was not prejudicial. Moreover, the rule with respect to the contentions given in a charge is stated in Strong's

N. C. Index, Vol. 1, page 792, Criminal Law, section 112, as follows: "Ordinarily a misstatement of the contentions of the parties, or objection that the court failed to give fully and accurately the contentions of defendant must be brought to the court's attention in apt time to afford opportunity for correction in order for an exception thereto to be considered on appeal." *S. v. Case*, 253 N.C. 130, 116 S.E. 2d 429; *S. v. Rhodes*, 252 N.C. 438, 113 S.E. 2d 917; *S. v. Stone*, 241 N.C. 294, 84 S.E. 2d 923.

The defendant further assigns as error the following portion of the charge. "You may for any reason and within your discretion, should you find the defendant guilty of murder in the first degree, add to that the recommendation, if you desire to do so, that the defendant be imprisoned for life, in which event that disposition will be made of the case."

Immediately prior to giving that portion of the charge set forth above, the court read the proviso contained in G.S. 14-17, and said: "Therefore, the court specifically instructs you, members of the jury, that it is patent that sole purpose of this Act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached the right to recommend that the punishment for the crime shall be imprisonment for life in the State's Prison. No conditions are attached to and no qualifications or limitations are imposed upon the right of you the jury to so recommend. It is an unbridled discretionary right and it is incumbent upon the court to so instruct the jury and the court does so instruct you."

Therefore, we hold that this assignment of error is without merit since the identical question was considered and a similar instruction was upheld in *S. v. Marsh*, 234 N.C. 101, 66 S.E. 2d 684.

We have carefully examined the remaining assignments of error and in them we find no prejudicial error has been shown. We hold, therefore, that in the trial below there was no error in law.

No error.

MRS. RAYMOND W. RUSHING v.
NELL FLOWE POLK AND JAMES K. POLK.

(Filed 12 December 1962.)

1. Automobiles § 35—

Allegation that defendant, in passing a preceding vehicle, was driving at excessive speed under the circumstances is sufficient predicate for

the introduction of evidence that defendant crossed the "no-passing" yellow line in the center of the highway, since the crossing of such line is an evidentiary and not an ultimate fact.

2. Pleadings § 2—

The complaint should state the ultimate facts constituting the cause of action but not the evidence to prove them.

3. Automobiles § 14—

The "no-passing" yellow line in the center of a highway relates primarily to avoidance of danger from on-coming traffic but, even in the absence of on-coming traffic, the presence or nearness of such line may be relevant if it tends to explain the speed obtained by a driver, in response to the implied hazard, while passing a vehicle traveling in the same direction.

4. Automobiles § 37—

Ordinarily, evidence of the conditions and circumstances leading up to and surrounding an automobile accident is competent when such evidence tends to throw light upon the conduct of the parties and the care, or lack of care, exercised by them.

5. Same—

Evidence of physical conditions existing at the scene of an accident is ordinarily admissible.

6. Appeal and Error § 41—

Ordinarily, a party waives objection to admission of evidence when other evidence of the same import is admitted without objection, or when the objecting party first introduces evidence in regard to the matter.

7. Automobiles §§ 54e, f, g—

Evidence that the vehicle operated by the wife was registered in the name of the husband is *prima facie* evidence that she was driving as his agent, G.S. 20-71.1, but even so, parol evidence is competent to show that the husband and wife were in fact co-owners, and when there is such evidence, it is error for the court to peremptorily instruct the jury to answer the issue of agency in the affirmative.

8. Automobiles § 55—

The family purpose doctrine does not apply to the operation by the wife of a vehicle owned in common by the husband and wife.

9. Automobiles § 52—

One co-owner who is not present in the vehicle at the time is not liable, nothing else appearing, for the negligent operation of the vehicle by the other co-owner, and the fact that the co-owners are husband and wife does not affect this principle.

10. Husband and Wife § 3—

The marital relationship alone creates no presumption that the husband or wife is acting as the agent of the other.

11. Automobiles § 52; Partnership § 1—

Where husband and wife are co-owners of an automobile and the wife drives the vehicle to and from her work, the husband not being present, the fact that the wife transports passengers who share the expenses of the transportation does not constitute the wife a carrier for hire, nor does it establish a partnership or joint enterprise by the husband and wife in the absence of evidence that the money the wife received from the passengers was placed in their joint account.

APPEAL by defendants from *McLean, J.*, May 7, 1962, Special "B" Term of Mecklenburg.

Action for damages for personal injuries suffered by plaintiff by reason of the alleged negligence of defendants in the operation of a motor vehicle.

There was judgment for plaintiff. Defendants assign error.

Bailey & Booe for plaintiff.

Kennedy, Covington, Lobdell & Hickman for defendants.

MOORE, J. The accident in question occurred about 7:45 A.M. on or about 28 September 1960 on Highway 27, which, at the point of the accident, is a two-lane blacktop road about 20 feet wide. The speed limit at the place of accident was 55 miles per hour. Plaintiff was a passenger in a Ford station wagon registered in the name of the male defendant and being driven by the *feme* defendant. The defendants are husband and wife. The husband was not in the vehicle at the time. The station wagon was proceeding westwardly in the direction of Charlotte. It came to the crest of a hill. At this point there is a clear view to the west for about a half mile to the crest of another hill. Between the two hills the highway dips into a valley, having a slight hill or ridge between the two higher hills. As she passed the crest of the hill, *feme* defendant saw no meeting traffic and pulled to the left to pass the traffic in front of her. It was raining and the road was wet. The station wagon, in passing, began to skid, the driver lost control, the vehicle skidded from one side of the road to the other and ran off the hardsurface on the right-hand side and collided with a telephone pole. Plaintiff was injured. According to plaintiff's version of the occurrence, there were three vehicles preceding the station wagon, defendant's speed was 50 miles per hour before pulling out to pass, it was as much as 65 or 70 miles per hour in passing the three vehicles, and as the station wagon was pulling back into the right-hand lane it started skidding and the driver lost control. Defendants' evidence tends to show that the speed before passing was 30 to 35 miles per hour and in passing it did not exceed 45, there was only one vehicle

ahead, the station wagon began to skid as it pulled to the left to pass, the left rear wheel slipped off the hardsurface, and the driver lost control.

(1). The first question for decision relates to the admission of evidence respecting the crossing of yellow lines. The highway has a broken white line in the center. Because of the rise or low hill in the vicinity of the accident, there are also yellow lines in the lanes of travel. Plaintiff testified, without objection, as follows: ". . . (T)here are yellow lines along the center of Highway 27 in this immediate area. The yellow lines I am referring to are depicted on the photograph marked plaintiff's exhibit #1. With reference to the crest of the hill east of the point where the wreck took place, I don't exactly know where the yellow line in the lane for westbound traffic begins. I believe it starts up there part of the way from the hill." Without objection or restriction two photographs were introduced in evidence showing the highway in the vicinity of the accident and the yellow lines in question. Thereafter, over defendants' objection, plaintiff and her witnesses were permitted to testify that there was a yellow line in the lane for westbound traffic at the place the station wagon pulled out to pass, continuing to about the point of the accident, and *feme* defendant to testify that there was no yellow line in her lane when she started to pass, she pulled out about 200 feet before she reached it, it begins about 300 feet west of the crest of the hill, and she had passed before reaching the yellow line and only crossed it in skidding. There was evidence that *feme* defendant travelled the road daily and knew the lines were there and their location. Defendants' motion to strike all the evidence relative to the yellow lines was overruled.

Defendants contend that this evidence was prejudicial and should have been excluded, for that (1) plaintiff's complaint does not allege that Mrs. Polk negligently crossed a yellow line, (2) yellow lines are not designed to protect against the type of accident which occurred in this case, and (3) it could not have been a proximate cause of plaintiff's injury and was, therefore, irrelevant and immaterial.

It is true that the complaint does not allege that *feme* defendant crossed a yellow line; it makes no reference whatever to yellow lines. It is also true that the court in the charge did not refer to the challenged evidence, and did not instruct the jury that the negligent crossing of a yellow line by *feme* defendant might be basis for recovery under the circumstances of this case. Had the court so charged, it would have been error. Yellow lines are designed primarily to prevent collision between an overtaking and passing automobile and a vehicle coming from the opposite direction, and to protect occupants of other cars, pedestrians and property on the highway. *Powell v. Clark,* 255 N.C.

707, 710, 122 S.E. 2d 706; *Walker v. Bakeries Co.*, 234 N.C. 440, 443, 67 S.E. 2d 459. The presence and the crossing of a yellow line are evidential details in the totality of circumstances in the instant case. The function of a complaint is to state the ultimate facts which constitute the cause of action, but not the evidence to prove them. *Parker v. White*, 237 N.C. 607, 75 S.E. 2d 615. Plaintiff alleged that *feme* defendant operated the station wagon at a speed in excess of the established limit and at a speed greater than was reasonable and prudent under the circumstances, and failed to maintain control. Plaintiff testified that the passing speed was 65 or 70 miles per hour on a wet road while it was raining. *Quaere:* Did *feme* defendant's knowledge of the presence of the yellow line, implying hazard, influence her in accelerating to such speed, if she did drive at such speed? We are not prepared to say that plaintiff was not entitled to contend that it did. It may be stated generally that any evidence of the conditions and circumstances leading up to and surrounding an automobile accident which will throw light upon the conduct of the parties and the care, or lack of care, exercised by them, is admissible. 5A Am. Jur., Automobiles and Highway Traffic, s. 937, p. 828; 61 C.J.S., Motor Vehicles, s. 515, p. 245. Evidence of physical conditions existing at the scene an accident is ordinarily admissible. 61 C.J.S., Motor Vehicles, s. 516 N (1), p. 260. Furthermore, if there was any error in the admission of the testimony in question, it would seem that it was waived by defendants' failure to object to all of it. An exception is waived when other evidence of the same import is admitted without objection. 1 Strong: N. C. Index, Appeal and Error, § 41, p. 122. Plaintiff had testified to the existence of the yellow lines and photographs had been introduced showing the location of the lines before the objections to such evidence were interposed. Defendants' exceptions to the evidence relating to yellow lines are not sustained.

(2). Defendants assign as error the admission of evidence that plaintiff and other passengers in the station wagon paid for the privilege of riding with *feme* defendant.

Feme defendant was employed as a secretary by Duke Power Company. She drove the station wagon to and from work. Others, including plaintiff, also had employment in Charlotte and rode with the *feme* defendant to and from their work regularly. They paid *feme* defendant an amount agreed upon "for gas"; they "shared expenses." The record does not disclose that there was any contention that *feme* defendant was a common carrier.

In our opinion defendants waived their exceptions to this evidence when they permitted plaintiff without objection to testify as follows: "I was a paying customer, that is, I paid her to ride back and forth

to work with her." This was the first testimony given as to payment for riding.

(3). Male defendant excepts to portions of the charge on the agency issue.

Plaintiff alleges that the station wagon was owned by and registered in the name of the male defendant, James K. Polk, and the *feme* defendant, Nell Flowe Polk, was a member of the household of male defendant, it was a family purpose vehicle, and at the time in question *feme* defendant was operating the station wagon with the permission and consent and as the agent of male defendant and within the course, scope and in furtherance of the agency. Defendants admit that the station wagon was registered in the name of James K. Polk and Nell Flowe Polk was a member of his household, but deny all other allegations relating to agency.

Other than the above admission, the only evidence bearing on the agency issue is the testimony of Nell Flowe Polk, as follows:

> ". . . I was driving a 1959 Ford station wagon. There was another vehicle in our family. The station wagon was registered in my husband's name. I used the station wagon from day to day. I used it for anything I wanted to, back and forth to work or for whatever I wanted to drive it.
>
> "There was a second car in the family, a 1960 Ford, just a sedan. My husband used the second car I just referred to.
>
> "At that time my husband was employed. . . . He was a salesman. He used the car, the sedan, in connection with his work as a salesman. . . . The car I came to work in was a Ford station wagon.
>
> "As to the purchase of the Ford station wagon we both looked at the car and when it was bought, it was put in his name. We put the money in a bank account and I wrote the checks for it. It was joint money. After the car was bought I maintained it."

The court charged the jury with respect to the *prima facie* evidence rule established by G.S. 20-71.1. This rule is clearly apposite and there is no challenge to the charge in this respect.

But male defendant contends that the court erred in instructing the jury as set out in the following excerpts from the charge:

> (a) ". . . (T)he court instructs you . . . that if you believe that evidence, the evidence of Mrs. Polk, that you will answer this second (agency) issue YES, under the family purpose doctrine. If you do not so find, you will answer it NO. . . ."
>
> (b) ". . . Mrs. Polk testified that . . . they had paid for it (station wagon) out of the common bank account, that she did maintain it herself. . . .

"Now, upon that the plaintiff says and contends that that would constitute at least a partnership and upon that theory that he would be liable, that they were hauling these passengers to and from work and that they were receiving compensation for so doing and that that money was applied and used in the upkeep of the automobile, so plaintiff says and contends. So, the court instructs you, members of the jury, that under the statute that if you find from this evidence and by its greater weight that at the time and place in question that Mrs. Polk was operating the automobile as the agent of Mr. Polk or that she jointly owned the automobile and that they were using the funds received therefrom for the payment and upkeep and depositing it in the joint bank account out of which the automobile was paid for and maintained, the Court instructs you that you would answer this second issue YES, upon that theory of agency or ownership. If you do not so find, you would answer it NO."

It seems clear that male defendant's defense on the agency issue is based on joint ownership of the station wagon.

In an action for damages suffered as a result of an automobile accident, proof of the registration of a motor vehicle in the name of any person shall, for the purpose of such action, be *prima facie* evidence of ownership. G.S. 20-71.1. But actual ownership of an automobile, in a situation such as is presented in the instant case, is not required to be evidenced by a written instrument. *Corporation v. Motor Co.,* 190 N.C. 157, 160, 129 S.E. 414. S.L. 1961, C. 835, s. 9 (codified as a part of G.S. 20-75) was enacted after this cause of action accrued, and it relates to transfers of ownership by a dealer. There is evidence in the case at bar which will justify, but not compel, a finding by the jury that defendants were joint owners of the station wagon. If they were in fact joint owners, the court was in error in charging that this would establish the relationship of principal and agent between defendants.

The rule in general acceptance is that joint ownership of an automobile does not render one joint owner liable for an injury caused by another joint owner who is using the vehicle for his or her own purpose and is unaccompanied by the co-owner. *Bolton v. Schimming,* 360 P. 2d 540 (Ore. 1961); *Wood v. Claussen,* 207 S.W. 2d 802 (Mo. 1948); *Knight v. Cossitt,* 172 p. 533 (Kan. 1918); *Towers v. Errington,* 138 N.Y.S. 119 (1912); 5A Am. Jur., Automobiles and Highway Traffic, s. 563, pp. 577-8; 109 A.L.R., Anno. — Automobiles — Operation by Co-owner, pp. 124-9. The foregoing rule is the law in North Carolina. *Gibbs v. Russ,* 223 N.C. 349, 26 S.E. 2d 909. The rule applies where husband and wife are the co-owners. *Wood v. Claussen, supra.* To im-

pose liability on an absent co-owner, there must be evidence of agency or proof of joint enterprise. *Doleman v. Burandt,* 71 N.W. 2d 521 (Neb. 1955); *Goodman v. Wilson,* 166 S.W. 752 (Tenn. 1914). No presumption arises from the mere fact of the marital relationship that the husband or wife is acting as the agent of the other; if such agency is relied on there must be proof thereof. *Air conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828; *Pitt v. Speight,* 222 N.C. 585, 24 S.E. 2d 350. The court suggests in the challenged instruction that there was evidence of a joint enterprise or partnership to transport passengers for hire for the joint account of defendants. We do not so find. Mrs. Polk testified that she did not carry passengers for hire, that by agreement the passengers, including plaintiff, whom she transported to and from work shared expenses. There is no evidence that the money she thus received was placed in the joint acount.

Mere joint ownership of a motor vehicle does not create a partnership. *Towers v. Errington, supra.* There is no evidence that defendants were partners in the legal sense. They had no joint business undertaking, and had made no agreement to share the profits and losses of any enterprise. The *feme* defendant at the time of the accident was not engaged in any business undertaking in which her husband had a legal interest. A wife's earnings are her sole and separate property. *Beasley v. McLamb,* 247 N.C. 179, 100 S.E. 2d 387. The court erred in giving plaintiff's contention that there was evidence of a partnership.

Where husband and wife are joint owners of a motor vehicle and are members of the same household, the family purpose doctrine, nothing else appearing, does not apply as between them. The family purpose doctrine applies where, at the time of an accident, the operator of the motor vehicle is a member of the family and resides in the home of the defendant owner (the person having the right to control the use of the vehicle), and the vehicle is maintained for the use, pleasure and convenience of the family, and was being so used at the time of the accident with the consent, knowledge and approval of the owner. *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427. Where a motor vehicle is jointly owned each joint owner has the right to use and control the vehicle without the permission, knowledge and approval of the other. Each uses it in his or her own right and not by permission of the other, in the absence of the other, unless there is proof of circumstances which in law amount to an actual agency. *Leppard v. O'Brien,* 232 N.Y.S. 454 (1929), aff'd. without opinion 170 N.E. 144; *Mittelstadt v. Kelly,* 168 N.W. 501 (Mich. 1918). The family purpose doctrine is merely an extension of the principle of *respondeat superior,* that is, a method of proving the agency of a non-owner. *Grindstaff v. Watts,*

254 N.C. 568, 119 S.E. 2d 784. As already stated, proof of joint ownership alone is insufficient to establish that one co-owner is the agent of the other.

The court also erred in peremptorily instructing the jury that if they believed the evidence of Mrs. Polk they should answer the agency issue "YES, under the family purpose doctrine." The fact that the vehicle was registered in the name of the male defendant is *prima facie* evidence of his ownership. G.S. 20-71.1. But there was testimony by Mrs. Polk of joint ownership. A peremptory instruction for plaintiff is error when the evidence is conflicting upon the issue. *Lithograph Corporation v. Clark*, 214 N.C. 400, 199 S.E. 398.

There is no way for us to determine upon what theory the jury answered the agency issue in favor of plaintiff. Male defendant is entitled to a new trial on the agency (second) issue.

We have examined and considered all assignments of error and we find no errors sufficiently prejudicial to warrant a new trial on the first and third (negligence and damage) issues.

As to *feme* defendant, No error.

As to male defendant, New trial on the agency issue.

GLEN W. McGINNIS v.
CATHERINE ROBINSON AND HAROLD McGHEE.

(Filed 12 December 1962.)

1. Automobiles § 37; Evidence § 35—

The opinion of an officer as to which occupant of the vehicle was driving at the time of the accident, which opinion is based upon his investigation some time after the occurrence of the accident, is incompetent, and therefore a warrant sworn out by the officer charging a particular occupant with reckless driving on the occasion is likewise incompetent and may not be introduced in evidence under the guise of impeaching the credibility of the officer as a witness when the statement in the warrant does not tend to contradict any previous testimony of the officer.

2. Appeal and Error § 41; Evidence § 56—

The rule that a party waives his objection to the admission of evidence when he thereafter introduces evidence of like import does not preclude a party from cross-examining the witness in regard to the matter objected to in an attempt to explain or destroy the probative value of the evidence objected to, or even contradicting it with other evidence.

3. Automobiles § 35; Evidence § 55—

Evidence or testimony of one witness which is entirely incompetent because it consists of an opinion of the witness as to matters of which the witness had no personal knowledge, may not be admitted under the guise that it was corroborative of the testimony of another witness.

4. Automobiles § 35; Evidence §§ 19, 56—

In this action to recover for injuries sustained in an automobile accident, one of the critical questions was the identity of the driver of one of the cars. *Held:* An indictment found by the grand jury charging one of the occupants on the date in question with assault with an automobile is incompetent and cannot be admitted under the guise of impeaching evidence when there is no showing that the indictment impeached the testimony of the witness.

5. Automobiles § 41d—

Allegations and evidence on counterclaim of one defendant that plaintiff drove his vehicle to his left of the center of a highway and collided head-on with the vehicle in which the defendant asserting the counterclaim was riding, which vehicle was then on its right of the center line of the highway, *is held* sufficient to take such defendant's counterclaim to the jury. G.S. 20-148.

APPEAL by plaintiff and appeal by defendant Robinson from *Clark (Heman R.), J.,* March 1962 Civil Term of VANCE.

Civil action to recover damages for personal injuries, for damage to his automobile, and for loss of his wife's services, allegedly caused by the actionable negligence of the defendant Catherine Robinson in operating an automobile with the consent and approval of the owner, the defendant Harold McGhee.

Plaintiff alleged in his complaint in substance: About 9:15 p.m. on 10 October 1953 he was operating his 1949 Ford automobile in an easterly direction and in a lawful manner on Northwest Boulevard in Vance County. His wife and another woman were passengers therein. At the same time the defendant Catherine Robinson was operating a 1952 Mercury automobile owned by the defendant Harold McGhee and with his consent and approval, he being a passenger on the front seat, in a westerly direction on the same Boulevard. The collision and his personal injuries and damages were proximately caused by the negligence of the operator of the Mercury automobile, Catherine Robinson, in that she, in an attempt to overtake and pass an automobile traveling ahead of her, suddenly swerved to the left into her left-hand lane of traffic and into his lane of traffic so quickly he had no opportunity to avoid a collision, which occurred immediately. He alleges that Catherine Robinson was negligent in operating the Mercury automobile while under the influence of intoxicating liquor, in failing

to keep a proper lookout, at an excessive speed, and in attempting to pass an automobile preceding her when it could not be done in safety.

Defendants filed separate answers. Defendant Robinson's answer consists of a general denial of the essential allegations of the complaint, except it admits that plaintiff was operating a Ford automobile at the time easterly on Northwest Boulevard or Highway #158 and that he was injured and his automobile damaged in the collision. In addition her answer avers that defendant McGhee, the owner of the Mercury automobile, was operating it at the time, and she was a passenger therein and had no control of its operation. Catherine Robinson's answer contains a counterclaim for damages for personal injuries in which she alleges the collision and her personal injuries were proximately caused by the negligence of plaintiff, in that he operated his automobile on his left-hand side of the center line on the highway at a high and dangerous rate of speed and without keeping a proper lookout and while racing another automobile, and as a result thereof ran into the automobile in which she was riding. Defendant McGhee's answer consists of a general denial of the essential allegations of the complaint. His answer contains a counterclaim for damages to his automobile, in which he avers that he was the owner of the Mercury automobile and was its operator at the time of the collision, and that the collision and damages to his automobile were proximately caused by the negligence of plaintiff in the operation of his automobile in the same respect as alleged in defendant Robinson's counterclaim.

Plaintiff filed separate replies to the counterclaims of the defendants consisting of a general denial of the essential allegations.

At the trial plaintiff took a voluntary nonsuit as to defendant McGhee, and was allowed by the trial court to amend his complaint by eliminating therefrom all allegations relating to defendant McGhee and by including therein his wife's medical expenses.

At the close of all the evidence the court, upon motion of plaintiff, entered a judgment of compulsory nonsuit as to the counterclaims of both defendants.

Two issues were submitted to the jury, which found by its verdict that plaintiff was not injured by the negligence of defendant Catherine Robinson as alleged in the complaint, and consequently did not get to the damage issue.

From a judgment that plaintiff take nothing by his action and taxing him with the costs, he appeals.

From the judgment of compulsory nonsuit of her counterclaim, defendant Catherine Robinson appeals. Defendant McGhee does not appeal.

George T. Blackburn, John H. Kerr, and W. Hayes Pettry for plaintiff appellant, and W. H. Taylor for plaintiff appellee.

Banzet & Banzet for defendant appellant, and A. A. Bunn and Hill Yarborough for defendant appellee.

PARKER, J.

PLAINTIFF'S APPEAL

Plaintiff's evidence tends to show:

About 9:20 p.m. on 10 October 1953 he was driving his automobile behind two automobiles ahead of him in an easterly direction and on his right side of the highway on the bypass of Highway #158 north of the town of Henderson. His speed was 45 to 50 miles an hour. The weather was clear. He was meeting two automobiles traveling in a westerly direction on the highway. The automobile behind the first automobile he was meeting started to overtake and pass the automobile ahead of it, came across the white line in the center of the highway into plaintiff's lane of traffic, and crashed head-on into plaintiff's automobile. Plaintiff was knocked unconscious in the collision, and remained in such condition two days. His wife and another woman were passengers in his automobile and were also injured. After the collision plaintiff's automobile was on his right side of the road, and a Mercury automobile that collided with it was four to six inches across the center line in the road to its left and in plaintiff's lane of traffic. The front parts of the automobiles were together. Immediately after the collision defendant Robinson was partially under the steering wheel of the Mercury, leaning to the right with her head dropped over as if dead. Defendant McGhee, the owner of the Mercury, was sitting on the front seat to her right with his head bleeding and partially unconscious. Defendant Robinson's husband and defendant McGhee's wife were slumped down in the back seat and on the floor. A day or two after the collision an officer asked defendant McGhee who was driving the Mercury at the time of the collision, and he said, "Who was on the front seat with me?"

D. M. Pendleton, a police officer of the town of Henderson, went to the scene of the collision in a brief time after it occurred to make an investigation. When he arrived about 9:15 p.m., according to his testimony, the automobiles were head-on against each other on the highway. He testified in detail as to the position of the automobiles on the highway, as to skidmarks and debris on the highway, and as to the condition of the Mercury. Two or three days after the collision Pendleton had a conversation with defendant Robinson in a room in a hospital in Henderson. We summarize its substance, except when quoted: He told her he was an officer investigating the collision and

wanted some information to complete his investigation. She said she could not tell him anything because she had been told not to tell anything. He asked her who was driving the Mercury, and she replied she didn't know, defendant Harold McGhee and she were in the front seat, and his wife and her husband were on the back seat; they had had a few drinks at her home and were en route to a dance at Creedmoor. Pendleton was then cross-examined by a defense counsel, who elicited from him testimony to the effect defendant Robinson told him she could not tell who was driving the Mercury, she was not driving, and that "she did not have an operator's license and did not know how to drive." (Defendant Robinson later testifying in her behalf said: "I had an operator's license at that time and had been driving an automobile ever since I was sixteeen years of age. I did not have a conversation with Mr. Pendleton about my driver's license.") Pendleton then testified: "I signed that paper before some officer and swore to it." Defendant's counsel asked Pendleton to read this paper to the jury, which was identified as Defendant's Exhibit H. Plaintiff objected to the reading of the paper to the jury, was overruled, and excepted. The paper read to the jury was a warrant sworn out in the Recorder's Court of Vance County by Pendleton on 12 October 1953 charging defendant Harold McGhee on 10 October 1953 with unlawfully operating a motor vehicle on a public highway in a careless and reckless manner and damaging the automobile of G. W. McGinnis, and with feloniously assaulting G. W. McGinnis and others with a deadly weapon, to-wit, an automobile.

Plaintiff assigns as error the admission of this warrant in evidence. Defendant Robinson contends that the admission in evidence of this warrant was proper on two grounds: First. To impeach the testimony of Pendleton because he had made a prior inconsistent statement in the warrant. And Second. That it corroborated defendant's evidence later given that McGhee was driving the Mercury.

All the evidence shows Pendleton of his own knowledge did not know who was driving the Mercury. This was a disputed crucial question in the case. The sworn statement of Pendleton in the warrant that McGhee was driving the Mercury was the statement of a guess, or opinion, or conclusion resulting from his investigation which he would not have been permitted to state as a witness, and which would have been a clear invasion of the province of the jury, if he had been permitted to state it. Prior inconsistent statements of a witness are admissible for the purpose of attacking his credibility as a witness. *S. v. Cope,* 240 N.C. 244, 81 S.E. 2d 773; 98 C.J.S., Witnesses, sec. 573. However, when the warrant here was introduced in evidence, Pendleton had not testified as to who was driving the Mercury, and the statement in the warrant of his guess, or opinion, or conclusion as to who was

driving the Mercury was not inconsistent with, and did not contradict, anything he had previously testified to.

But defendant Robinson contends in her brief that when plaintiff's counsel re-examined Pendleton after the warrant was read in evidence in respect to the circumstances under which he swore out the warrant, Pendleton testified that as a result of his investigation he found out defendant McGhee was not the driver of the Mercury, and if the admission of the warrant was error at the time it was admitted, it was cured as a result of Pendleton's testimony on re-direct examination. This contention is untenable. It is to be noted that the defendant objected to the introduction of this evidence given by Pendleton on re-examination, and then moved that it be stricken, which was denied.

Jones v. Bailey, 246 N.C. 599, 99 S.E. 2d 768, was an action for damages arising from an automobile collision. Plaintiff, over defendant's objection, was permitted to testify that after the accident he heard an officer, in response to an inquiry by defendant, tell her she did not have the right of way. This Court held the evidence was inadmissible as hearsay, and also as a declaration of an opinion or conclusion, which the officer could not have given in evidence. Later defendant went on the stand and denied she made an inquiry of the officer as to whether or not she had the right of way, and the officer testified he had no recollection of saying anything at the hospital to defendant. Plaintiff contended this testimony made plaintiff's testimony competent for the purpose of contradicting or impeaching the testimony of defendant and her witness, citing *Hopkins v. Colonial Stores,* 224 N.C. 137, 29 S.E. 2d 455. The Court in awarding a new trial said:

> "We do not concur in this view. Moreover, any statement in the opinion of *Hopkins v. Colonial Stores, supra,* that may be inferred to be in conflict with this opinion, on this particular point, is disapproved. It is the well established rule with us that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost, but as stated by Brogden, J., in *Shelton v. R.R.,* 193 N.C. 670, 139 S.E. 232: 'The rule does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception.' *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609; *S. v. Tew,* 234 N.C. 612, 68 S.E. 2d 291."

Defendant Robinson in her brief has favored us with no citation of authority that the warrant introduced in evidence by defendants for

the purpose of impeaching the officer Pendleton on the ground of a prior inconsistent statement is competent to corroborate defendants' evidence later given that defendant McGhee was driving the Mercury. "In no aspect of the law of evidence can contradictory evidence be used as corroborating, strengthening or confirming evidence." *S. v. Lassiter*, 191 N.C. 210, 131 S.E. 577. Certainly, Pendleton's guess, or opinion, or conclusion derived from his investigation that Harold McGhee was driving the Mercury, as set forth in the warrant, is incompetent, and cannot be used to corroborate defendants' evidence that McGhee was driving the Mercury.

The reading of the warrant in evidence was prejudicial error. Later when defendants were introducing evidence, they were permitted by the court over plaintiff's objection and exception to introduce this warrant in evidence. Plaintiff assigns this as error. This assignment of error is good.

Plaintiff assigns as error the introduction in evidence, over his objection and exception, of an indictment found by the grand jury at the September 1954 Term of the superior court of Vance County charging defendant Harold McGhee on 10 October 1953 with feloniously assaulting Catherine Robinson with a deadly weapon, to-wit, an automobile. This assignment of error is good. Defendant Robinson has favored us with no citation of authority showing how this indictment impeaches the testimony of the witness Pendleton. We cannot conceive of how it does.

For prejudicial error in the admission of incompetent evidence, plaintiff is entitled to a new trial, and it is so ordered.

New trial.

In 252 N.C. 574, 114 S.E. 2d 365, will be found a case of plaintiff's wife against these same defendants, wherein she sought to recover damages for personal injuries growing out of the collision here. In that case, on defendants' appeal, a new trial was ordered for error in the charge.

DEFENDANT ROBINSON'S APPEAL

Defendant Robinson assigns as error the court's allowing, at the close of all the evidence, plaintiff's motion for a judgment of compulsory nonsuit of her counterclaim and entering a judgment to that effect.

Plaintiff's evidence not in conflict with defendants' evidence and defendants' evidence, when considered in the light most favorable to defendant Robinson, tends to show:

About 9:15 p.m. on 10 October 1953 she was riding as a passenger on the front seat of a Mercury automobile owned and driven by Harold McGhee and traveling in a westerly direction on the Henderson by-pass of Highway #158. Immediately preceding the McGhee automobile was an automobile occupied by a Mr. and Mrs. Nelson Boyd. McGhee pulled into his left (south) lane of traffic in an attempt to overtake and pass the Boyd automobile. Seeing an automobile approaching and meeting him driven by plaintiff, he pulled back into his right (north) lane of traffic. At this time the plaintiff McGinnis drove his 1949 Ford automobile into his left (north) lane of traffic colliding head-on with the McGhee automobile which was on its right of the center line on the highway. In the collision defendant Robinson sustained severe injuries.

G.S. 20-148 provides: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the highway as nearly as possible." The standard of care fixed for a motorist in this statute by the Legislature is absolute. *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292. A violation of this statute is negligence *per se,* and if it is the proximate cause of injury, it is actionable. *Wallace v. Longest,* 226 N.C. 161, 37 S.E. 2d 112.

After a careful examination of defendants' evidence and the evidence of plaintiff not in conflict with it, we are of opinion, and so hold, that the trial court improvidently nonsuited defendant Robinson's counterclaim for personal injuries. The judgment of compulsory nonsuit of her counterclaim is

Reversed.

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

(Filed 12 December 1962.)

1. Appeal and Error § 49—

Where there are no exceptions to the findings of fact, it will be presumed on appeal that the findings are supported by competent evidence and are therefore binding.

2. Same; Appeal and Error § 21—

Exceptions to the judgment or order of the court presents the question whether the facts found by the court are sufficient to support the conclusions of law on a judgment entered pursuant thereto, and whether error of law appears on the face of the record.

3. Injunctions § 13—

In an action for a permanent injunction to restrain the enforcement of a municipal ordinance on the ground of its unconstitutionality, a temporary order issued in the cause is properly coontinued to the hearing upon a *prima facie* showing of the primary equity, and that plaintiff would suffer irreparable damage if the order were not continued to the hearing, and that injury to defendant would be inconsequential in comparison, even though defendant should prevail upon the hearing on the merits.

4. Same; Injunctions § 5; Constitutional Law § 4—

In a suit to permanently restrain the enforcement of an ordinance, the conclusion of the court, on the hearing of the order to show cause, that the ordinance is unconstitutional as applied to plaintiff is solely for the purpose of determining whether plaintiff had established *prima facie* his primary equity, and such holding is not *res judicata* upon the question and may not be considered upon the final hearing, since the constitutionality of an ordinance or statute may not be decided upon the issuance of a temporary order but only upon the final hearing on the merits when all the facts can be shown.

APPEAL by defendants from *Copeland, S.J.*, 13 August 1962 Special "A" Term of MECKLENBURG.

Suit to restrain permanently the acting superintendent of building inspection for the city of Charlotte and the city of Charlotte from enforcing the provisions of section 23-84 of chapter 23 of the Charlotte city code, which section regulates signs in the area zoned "B-3 Business Districts," on the ground that this section of the Charlotte city code violates plaintiffs' rights guaranteed to them by Article I, sections 1 and 17 of the North Carolina Constitution, and by amendments I and XIV of the United States Constitution, heard upon an order to show cause why a temporary injunction should not be granted.

The show cause order was heard by Judge Copeland upon the verified pleadings of the parties offered as affidavits, the affidavit of S. A. Schloss, Jr., and the arguments of counsel. Based upon admissions in the answer of facts alleged in the complaint and upon detailed findings of fact made for the purposes of the order, the judge signed a temporary injunction restraining, until a final trial upon the merits, defendants from enforcing the provisions of section 23-84 of chapter 23 of the Charlotte city code as it relates to plaintiffs' business, provided plaintiffs shall conform to such regulations as are imposed by the pro-

visions of this section of the city code with respect to business signs projecting into the street right-of-way in the area zoned as "B-3 Business Districts."

This is a summary of the essential admissions in the answer and of the essential findings of fact set forth in the order granting a temporary injunction:

Plaintiffs are, and have been for many years, engaged in an outdoor advertising business in Charlotte, with an investment of many thousands of dollars and 17 employees. Their business consists of the construction by them on leased premises of outdoor advertising structures, the selling of space on these structures, and the placing and maintaining thereon advertising of their customers. They have in Charlotte as competitors for the advertising dollars two firms engaged in similar business, two newspapers, and TV and radio stations. They have built and own in Charlotte about 500 outdoor advertising structures attached to or placed on leased buildings and land, about one-fifth of which are located in the area zoned as "B-3 Business Districts" in the Charlotte city code.

On 29 January 1962 the Charlotte city council enacted and put into effect a new comprehensive zoning ordinance, which is ordinance 62 and is set forth in chapter 23 of the city code, which is made a part of the findings of fact. Section 23-2, (22), (a), of the city code defines an "Advertising Sign" as "A sign which directs attention to a business, commodity, service or entertainment conducted, sold or offered: (1) Only elsewhere than upon the premises where the sign is displayed, or (2) As a minor and incidental activity upon the premises where the sign is displayed." Section 23-2, (22), (b), of the city code defines a "Business Sign" as "A sign which directs attention to a business, profession or industry located upon the premises where the sign is displayed, to type of products sold, manufactured or assembled, and/or to service or entertainment offered on said premises, but not a sign pertaining to the preceding if such activity is only minor and incidental to the principal use of the premises." Section 23-84 of the city code, entitled "B-3 Business Districts," permits in the area thus zoned only Identification and Business Signs, with no limitation of the number or maximum area of the permitted signs, but with a limitation as to the projection of such signs into the street right-of-way, and prohibits all new "Advertising Signs," as such signs are defined in the city code, in that area which advertise businesses and other activities conducted elsewhere than on the particular property on which the sign is located.

The value of plaintiffs' services to their customers is based upon the exposure of their locations to motor vehicular traffic. Though their

locations in the area zoned as "B-3 Business Districts" comprise only about 20% of their locations in Charlotte, these locations, as measured by standard outdoor advertising traffic measurements, provide more than 20% of the exposure of their locations to such traffic. Advertisers demand coverage in all business and industrial areas in Charlotte in accordance with nationally accepted advertising practice, and without being able to afford such services they cannot successfully compete with their business rivals.

Plaintiffs' leases of locations for their "Advertising Signs" are for periods of one to three years, and are terminable at the discretion of the lessor upon 30 days' notice, if the premises are sold or put to some other use, and because of the growth and change in Charlotte causing a termination of their leases, they must relocate 20% of their signs each year, including their signs in the area zoned as "B-3 Business Districts." Between the effective date of chapter 23 of the city code and the institution of this suit, due to the termination of their leases, they have lost ten sign locations in the area zoned as "B-3 Business Districts." If they are not permitted to seek new locations for their "Advertising Signs," as such signs are defined in the city code, in the area zoned as "B-3 Business Districts," and if their "Advertising Signs," as defined in the city code, are excluded from this area, they will suffer heavy losses of business, their investment in their business will be jeopardized, many, if not all, of their employees will lose their jobs, and they have no adequate remedy at law to contest the validity of section 23-84 of chapter 23 of the city code which will save their business from irreparable damage, unless equitable relief is granted. The damage which plaintiffs will suffer, pending a trial on the merits, if section 23-84 of the ordinance is enforced will greatly exceed any damage defendants may suffer by reason of the issuance of a temporary injunction pending a final trial.

Judge Copeland made conclusions of law, which we summarize in part:

Even if the statute authorizing Charlotte to enact zoning regulations does purport to authorize enactment of section 23-84 of chapter 23 of the city code, permitting in the area zoned as "B-3 Business Districts" Identification and Business Signs, but prohibiting therein "Advertising Signs," which are the signs used by plaintiffs in their business, this section as applied to plaintiffs violates their constitutional right to equal protection of the laws, in that the distinction between "Advertising Signs," as defined in the city code, and "Business Signs," as defined in the city code, is not based upon consideration of health, morals, safety or general welfare, or any other considerations, justifying the exercise of police power, and that this section of the city code as it

operates with respect to plaintiffs and their business is arbitrary and capricious, and "violates constitutional provisions pleaded in the complaint." Plaintiffs have established a *prima facie* case for the granting of a permanent injunction, and it is within the equitable powers of the court to grant a temporary injunction to preserve the *status quo* of the parties and the operation of plaintiffs' business free of the challenged provisions of the Charlotte city code, until the rights of the parties can be finally adjudicated.

From the order granting the temporary injunction, defendants appeal.

John T. Morrisey, Sr., for defendant appellants.
Hunter M. Jones and James O. Cobb for plaintiff appellees.

PARKER, J. Defendants have only one assignment of error, and that is the court erred in signing the order granting a temporary injunction. Defendants have no exceptions to the findings of fact and to the conclusions of law.

Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25; *Goldsboro v. R.R.*, 246 N.C. 101, 97 S.E. 2d 486. However, the exception to the signing of the order presents the questions whether the facts found are sufficient to support the conclusions of law and the order granting a temporary injunction entered pursuant thereto, and whether there is error of law appearing on the face of the record proper. *Logan v. Sprinkle*, 256 N.C. 41, 123 S.E. 2d 209; *Webb v. Gaskins*, 255 N.C. 281, 121 S.E. 2d 564; Strong's Supplement to Vol. I of the N. C. Index, Appeal and Error, sec. 21, where numerous cases are cited.

The right of plaintiffs to test the challenged provision of the Charlotte city code by injunction is not controverted. There is ample authority for the suit. *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E. 2d 764; *Clinard v. Winston-Salem*, 217 N.C. 119, 6 S.E. 2d 867; *Loose-Wiles Biscuit Co. v. Sanford*, 200 N.C. 467, 157 S.E. 432.

The injunctive relief here sought is not merely auxiliary to the principal relief demanded, but it is the relief, and a permanent injunction is demanded. In our opinion, the admissions in the answer of facts alleged in the complaint and the judge's detailed findings of fact are sufficient to show that plaintiffs have made out an apparent case that their property rights will suffer irreparable damage by the threatened enforcement of an alleged unconstitutional provision of the Charlotte city code, if the enforcement of this challenged provision of the city code is not restrained until the hearing on the merits, that

the questions presented are grave, and that there is a reasonable apprehension that injury to plaintiffs will be certain and disastrous, if the application for a temporary injunction be denied and the final judgment be in their favor, while if the temporary restraining order be continued to the final hearing, the injury to defendants, even if the final judgment be in their favor, will be inconsiderable as compared with plaintiffs' damage if they should finally prevail. The judge correctly preserved the matter intact until the suit can be heard upon its merits. *Restaurant, Inc. v. Charlotte,* 252 N.C. 324, 113 S.E. 2d 422; *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116 (Interlocutory injunctions); *Clinard v. Winston-Salem, supra; Advertising Co. v. Asheville,* 189 N.C. 737, 128 S.E. 149; *Marshall v. Commissioners,* 89 N.C. 103; *Ohio Oil Co. v. Conway,* 279 U.S. 813, 73 L. Ed. 972.

The sole question presented to the judge on the show cause order was whether an interlocutory injunction should be granted until the hearing on the merits. Judge Copeland granted the interlocutory injunction upon a showing of equitable grounds for injunctive relief, and then went further and concluded as a matter of law that the challenged portion of the Charlotte city code "violates constitutional provisions pleaded in the complaint."

Carbide Corp. v. Davis, 253 N.C. 324, 116 S.E. 2d 792, quotes 16 C.J.S., Constitutional Law, sec. 95, as follows: " 'The constitutionality of a statute will not be determined on the question being raised in a collateral proceeding, or on preliminary motions, or interlocutory order * * *.' "

This Court said in *Patterson v. Hosiery Mills,* 214 N.C. 806, 200 S.E. 906:

> "The judge hearing the order to show cause why the injunction should not be continued to the hearing had no jurisdiction to hear and determine the controversy on the merits, and his findings of fact and conclusions of law were but instruments of decision in the matter before him. These findings and conclusions were not authoritative as 'the law of the case' for any other purpose, and the judgment or order was not *res adjudicata* on the final hearing in the court below, and was not invested with that character by any action or nonaction by this Court on appeal. North Carolina Practice and Procedure, McIntosh, page 993, section 876."

See *Durham v. Public Service Co.,* 257 N.C. 546, 559, 126 S.E. 2d 315, 324-5.

This Court said in *Huskins v. Hospital, supra:*

> "7. The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not bind-

ing on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing. *Branch v. Board of Education, supra* (230 N.C. 505, 53 S.E. 2d 455); *Grantham v. Nunn,* 188 N.C. 239, 124 S.E. 309; *Hudnell v. Lumber Co.,* 180 N.C. 48, 103 S.E. 893."

In *Carbide Corp. v. Davis, supra,* the fourth headnote in our reports reads:

"In an action to restrain the violation of the North Carolina Fair Trade Act, it is error for the court upon the hearing of an order to show cause why the temporary restraining order theretofore issued should not be continued to the hearing, to dissolve the temporary order on the ground of the unconstitutionality of the statute, since constitutional questions were not before the court on the hearing and could be concluded only by a final judgment on the merits allowing or denying a permanent injunction."

The constitutionality of a statute or ordinance should not be decided in an interlocutory injunction on pleadings and an *ex parte* affidavit, but should be determined at the hearing on the merits, when all the facts can be shown. The judge's conclusion of law that the challenged section of the Charlotte city code "violates constitutional provisions pleaded in the complaint" is not *res judicata* on the final hearing on the merits, and is not, as well as the findings of fact, a proper matter for consideration of the court or jury in passing on the issues for decision at the hearing on the merits. It is to be understood that nothing herein stated shall be construed as the expression of an opinion as to whether or not the challenged section of the Charlotte city code is constitutional or unconstitutional. This is a matter for the superior court on the final hearing on the merits, when all the evidence has been presented.

The admissions in the answer of facts alleged in the complaint and the unchallenged findings of fact support the conclusions of law and the order granting the temporary injunction entered pursuant thereto, and no error of law appears upon the face of the record proper. The temporary injunction issued below is

Affirmed.

BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION v. DUKE POWER COMPANY, DEFENDANT AND CHARLES A. CURTIS AND WIFE, BERTIE H. CURTIS, ADDITIONAL DEFENDANTS.

(Filed 12 December 1962.)

1. Electricity § 2—

The court will take judicial notice that a contract between a power company and an electric membership corporation is in the form approved by the Utilities Commission and therefore equivalent to an order of the Commission subject to its right to review, revoke, or remand.

2. Same—

The right of a person seeking electrical service to choose between competing vendors should not be denied except for some cogent reason.

3. Same—

Plaintiff membership corporation and defendant power company had constructed their respective transmission lines, one approaching the other at a 45 degree angle and terminating 350 feet from the other. *Held:* Under the provisions of the contract between the parties that neither should furnish electricity to premises capable of being served by secondary lines not exceeding 300 feet from existing transmission lines of the other, except if ordered by duly constituted authority, the owners of premises within 300 feet of the existing transmission lines of both are entitled to select either vendor, regardless of which transmission line was first constructed.

APPEALS by defendant and additional defendants from *Froneberger, J.*, February 1962 Term of CALDWELL.

This action was begun 11 September 1961. Plaintiff asked for injunctive relief preventing defendant Power Co. from selling electric current to the owners of four homes situate on the northeast side of U.S. 321. One of these properties is now owned by the additional defendants Curtis, who were permitted to come in as defendants to challenge the right of plaintiff to the relief sought.

Plaintiff is a corporation created pursuant to the provisions of c. 117 of the General Statutes. It purchases and distributes electric current to its members in Caldwell and adjoining counties.

Power Co. is public utility generating and selling current at wholesale and retail. Plaintiff is one of its customers and has been for more than twenty years. Plaintiff purchases current from Power Co. under contracts containing the following provision:

"Neither party shall furnish or offer to furnish electric energy to anyone who, at the time of the proposed service, is receiving electric service from the other, or whose premises are capable of being served by the existing facilities of the other without extension of its distribution system other than by the construction of secondary lines not

exceeding 300 feet in length, nor shall either party unless ordered so to do by a properly constituted authority, duplicate the other's facilities, except insofar as such duplication shall be necessary in order to transmit electric energy between unconnected points on its lines." Plaintiff alleged the sale by Power Co. to the named property owners violated the quoted provision of the contracts, which had been approved by the North Carolina Utilities Commission.

Power Co. admitted it was selling current to plaintiff pursuant to the contracts containing the quoted provision. It denied the contracts had been approved by the Utilities Commission and denied that the sales of current to the named property owners were prohibited by the contracts between plaintiff and Power Co. It sought an affirmative adjudication with respect to its right to sell to the owners of the four homes.

Additional defendants Curtis alleged: Their home could be conveniently served by plaintiff or Power Co. Their home was within 300 feet of the distribution lines of plaintiff and defendant Power Co. They did not want to become a member of plaintiff, but desired to purchase current from Power Co.

The parties waived a jury trial. They stipulated the facts except facts relating to past conduct of plaintiff and Power Co. asserted by Power Co. as a practical interpretation of the quoted portion of the contract affording it the right to serve defendants Curtis and the other property owners.

The court found there had been no interpretation of the contract by the parties with respect to the question presently presented. On this finding and the facts as stipulated, it concluded Power Co. could not serve the owners of the four homes. It permanently enjoined Power Co. from serving defendants Curtis and the three other property owners. Power Co. and defendants Curtis excepted to the findings and conclusions and appealed.

Claude F. Seila and Dickson Whisnant for plaintiff appellee.

Townsend and Todd by Folger Townsend,, Carl Horn, Jr., and William I. Ward, Jr., for appellant Duke Power Company.

A. R. Crisp for defendant appellants Curtis.

RODMAN, J. Contracts between public utilities and membership corporations containing provisions restricting the right of one of the contracting parties to provide service to applicants have fertilized the field, and controversy thrives. *Membership Corp. v. Light Co.*, 255 N.C. 258, 120 S.E. 2d 749; *Power Co. v. Membership Corp.*, 253 N.C. 596, 117 S.E. 2d 812, s.c. 256 N.C. 62, 122 S.E. 2d 782; *Member-*

ship Corp. v. Light Co., 253 N.C. 610, 117 S.E. 2d 764, s.c. 256 N.C. 56, 122 S.E. 2d 761; *Montana-Dakota Util. Co. v. Williams E. Coop.*, 263 F. 2d 431, 70 A.L.R. 2d 1318; *Pennsylvania W. & P. Co. v. Consolidated G., E. L. & P. Co.*, 184 F. 2d 552. Not only are the courts called upon to construe and pass upon the validity of such contracts, but utility commissions are called upon to accord to prospective consumers the right to select between competing vendors. See *Pee Dee E. M. Corp. v. Duke Power Co.*, decided by our Utilities Commission 31 January 1961, reported 37 PUR. 3d 407.

The contract we are now called upon to interpret was considered in *Power Co. v. Membership Corp., supra.* We then said it was binding on the parties because approved by the Utilities Commission. The statement there made was based on judicial admissions. It now appears the contracts relied on have not been formally approved by the Commission; but we take judicial notice of the fact that they are in the form approved by our Utilities Commission subject to complaint and hearing and as such, the equivalent of an order of the Commission, subject, of course, to the right of the Commission to review, revoke, or amend. *Pee Dee E. M. Corp. v. Duke Power Co., supra.*

Since the court found that the parties have not, by past conduct, intentionally interpreted the contract, we must interpret it in the light of the stipulated and admitted facts.

In addition to the facts already stated, the parties stipulated and the court found these facts: (1) Plaintiff, in 1955, extended its distribution line on the southeast side of U.S. 321 to provide electricity to the Caldwell Agricultural Fair. (2) In 1958 Power Co. extended its distribution system to serve a house to be built by Raymond Craig. This extension did not parallel plaintiff's lines but approached plaintiff's lines at an angle approximating 45 degrees. It terminated 350 feet from plaintiff's line. (3) Residences now owned by Perry Triplett, Harold Bean, Charles Curtis, and W. L. Thompson were constructed in 1961. Each of these homes is within 300 feet of plaintiff's distribution line constructed in 1955 and Power Co.'s line constructed in 1958. All are in a rural area of Caldwell County. (4). Power Co., at the request of the owners, connected its service lines to each of these residences and was furnishing them with electric current prior to the institution of this action. Both plaintiff and Power Co. are capable of rendering electric service to anyone they are permitted to serve legally under the contracts between the parties.

The record does not disclose whether plaintiff was requested and refused to extend its distribution line so as to serve the house to be built by Raymond Craig in 1958. Significantly, plaintiff does not suggest that Power Co. violated the letter or spirit of its contract in

1958 when it extended its distribution line for the purpose of providing current to the Raymound Craig property.

What then are the rights as well as the duties of plaintiff and defendant Power Co.? No answer should be given without thoughtful consideration of the rights of those for whose benefit Membership Corp. and Power Co. were created and now exist. Unless compelled by some cogent reason, one seeking electric service should not be denied the right to choose between vendors. It is well settled that a public utility such as Power Co. cannot, without express governmental authority, cease to provide the services for which it was created. *Utilities Comm. v. Casey,* 245 N.C. 297, 96 S.E. 2d 8; *Sweetheart Lake, Inc. v. Light Co.,* 211 N.C. 269, 189 S.E. 785; *Montana-Dakota Util. Co. v. Williams E. Coop., supra;* 36 Am. Jur. 573.

Here the contracting parties recognized this salutary principle by inserting in the contract the clause giving "constituted authority" the power to compel service notwithstanding the agreement not to duplicate service. The contract does not say, as plaintiff would interpret it, that the party who first builds a distribution line shall have the exclusive right to serve all potential customers, then in existence or thereafter created, who are within 300 feet of its line. The right to serve depends on conditions existing at the time the service is sought. When a residence is constructed midway between two distribution lines more than 300 feet apart, such residence is, in the language of the contract, "capable of being served by the existing facilities of the other (either) without extension of its distribution system other than by the construction of secondary lines not exceeding 300 feet in length. . ."

The distribution line was contructed in 1958 to serve Raymond Craig, then without service. This construction was not prohibited by the contract. Under such circumstances, neither party would be prohibited from subsequently serving any customer within 300 feet of its existing distribution line. In reaching this conclusion we have not overlooked plaintiff's assertion that the opposite conclusion was reached when we were called upon to interpret a similar contract in *Membership Corp. v. Light Co., supra.* What is here said is not in conflict with the conclusion then reached. The differing results are due to differences in the factual situations. There Light Co.'s transmission line was crossing Membership's transmission line, necessarily bringing the two transmission lines within 300 feet of each other. There Light Co., presumably in recognition of the proximity of the transmission lines, disclaimed any right to retail current from the interconnecting line. There no one was demanding service from either of the parties.

Since the home owners, exercising their rights, had requested and were being served by Power Co. as permitted by the contract between the two distributors, the court erred in requiring Power Co. to discontinue that service and in forbidding future service to parties within 300 feet of Power Co.'s transmission line. Parties in rural areas living within 300 feet of two transmission lines which are separated by more than 300 feet may purchase current from either. Since defendants Curtis and others had elected to purchase current from Power Co., which had the right to serve, the court should have enjoined plaintiff from interfering with the contracts between Power Co. and its customers.

Reversed.

CORNELIUS N. SINODIS AND NICHOLAS J. FERMANIDES, T/A LAS VAGAS INN, PETITIONER v. STATE BOARD OF ALCOHOLIC CONTROL, MALT BEVERAGE DIVISION, RESPONDENTS.

(Filed 12 December 1962.)

1. Constitutional Law § 24; Intoxicating Liquor § 2— Hearing by examiner for State Board of Alcoholic Control satisfies requirements of due process.

A hearing by an examiner for the State Alcoholic Control Board, under provisions of statute and the rules promulgated pursuant thereto, of which hearing the permittee is given notice, is represented by counsel, introduces evidence, cross-examines the adverse witnesses, all witnesses being sworn, with right to object and except to any ruling and argue the matter, *is held* sufficient to meet the requirements of due process of law, G.S. 18-135, G.S. 18-137, G.S. 18-138, G.S. 143-306, and, in the absence of a request by the permittee for a copy of the examiner's summary of the evidence and his recommended findings of fact, permittee may not complain that he was not furnished a copy of the examiner's report before review by the State Board. Constitution of North Carolina, Art. 1, § 17.

2. Intoxicating Liquor § 2—

The holder of a permit to sell malt beverages is entitled to a copy of the findings and recommendations of the examiner for the State Alcoholic Control Board only upon his request, and in the absence of such request, the State is not under duty to serve respondent with such copy.

3. Same; Administrative Law § 4—

The holder of a permit to sell malt beverages is entitled, after a hearing by an examiner for the Board of charges of violations of law warranting a revocation of permit, to request a hearing by the Board, and when he does not request such hearing after notice of the date the Board would

consider the matter, his application for judicial review under G.S. 143-307 must be dismissed for failure to exhaust available administrative remedies.

APPEAL by respondents from *Clark (Edward B.), S.J.*, May Assigned Civil Term 1962 of WAKE.

Petitioners held a permit to sell malt beverages for consumption on their premises known as Las Vagas Inn. On 30 May 1961 the chairman of the State Board of Alcoholic Control (hereafter Board) notified petitioners they were charged with violations of G.S. 18-78 and 78.1, which, if established, would warrant revocation of their permit. The notice fixed the time and place for hearing the charges. Petitioners were informed they might offer evidence, and the evidence given at the hearing would be transmitted to the Board for appropriate action. The notice specifically stated it was given as required by G.S. 18-137.

The assistant director conducted a hearing at the time and place fixed in the notice. Evidence sufficient to establish the sale of beer to an intoxicated customer named in the charges and failure of licensees to properly supervise the operation of their business was offered by respondents.

Petitioner Fermanides testified at the hearing. Petitioners were represented by counsel. Other witnesses testified for petitioners. Adverse witnesses were cross-examined.

After the evidence was concluded, counsel for petitioners argued the cause of his clients. The hearing examiner then inquired if there was anything further, and, receiving a negative reply, he said: "The evidence taken here today in this case will be presented to the State ABC Board at its next regular meeting which is now scheduled for July 7. At that time the Board will review the evidence taken here today. They will make their decision, and the Chairman of the State ABC Board will notify Mr. Fermanides and Mr. Sinodis by mail in regards to their decision and will send you a copy."

The hearing examiner transmitted the evidence, tentative findings, and recommendations to the Board. At its meeting on 7 July 1961 the Board reviewed the evidence taken by the hearing examiner, found as a fact that petitioners had violated the statutory provisions as charged, and thereupon suspended the permit to sell malt beverages for a period of 45 days, effective July 21, 1961.

In due time petitioners filed a petition for judicial review as permitted by G.S. 143-306 *et seq.* In their petition for review they assert they had no opportunity to see the hearing commissioner's summary of the evidence and his recommended findings of fact nor to appear

before the Board before it acted, and for these reasons the statutory proceeding which permits revocation or suspension of license for the sale of malt beverages violates the provision of the Constitution of North Carolina and the Constitution of the United States "for the reason the same denies the petitioners herein a proper hearing as required by the due process clauses of the constitutions."

Respondents filed certified copy of the entire record, including the testimony taken at the hearing conducted by the assistant director consisting of questions and answers.

Judge Clark reviewed the record as certified by the Board. After reciting the facts stated above, he found petitioners were not furnished a copy of the hearing officer's proposed findings nor were they afforded an opportunity to appear before the Board to argue the facts and law.

The court, being of the opinion that the statutes authorizing the suspension or revocation of permits to sell malt beverages were unconstitutional, entered judgment dismissing the proceedings against petitioners. Respondents excepted and appealed.

Bailey and Dixon by J. Ruffin Bailey for petitioner appellees.

Attorney General Bruton and Staff Attorney Sanders for respondent appellants.

RODMAN, J. The factual situation disclosed by this record does not require an answer to the question: May a permit to sell intoxicating beverages be suspended or cancelled without notice and hearing? Seemingly, a majority of the courts, when called upon to decide, have answered in the negative. See Annotation entitled "Right to hearing before revocation or suspension of liquor license," 35 A.L.R. 2d 1067. 30 Am. Jur. 638.

The Legislature of 1933 declared the policy of this State on the revocation of licenses for the sale of beer. It said such a license could be revoked only "after the licensee has been given an opportunity to be heard in his self-defense." c. 319, sec. 15, P.L. 1933. The policy then declared with respect to the revocation or suspension of permits to sell beer has been expressed in more detail in subsequent legislation. The right of a permittee to a hearing on charges warranting a suspension or revocation now appears as G.S. 18-135 and 137. These were sections 6 and 8, c. 974, S.L. 1949. The rights given by those statutes were supplemented by c. 1094, S.L. 1953, now G.S. 143-306 *et seq.*, giving those adversely affected by administrative decisions the right to judicial review.

Since the statutes expressly accord the permittee the right to a hearing, the only questions for determination are: (1) What kind of

hearing does the statute contemplate? (2) Have petitioners been denied a hearing of the kind contemplated by the statute?

The 1949 Legislature, when it wrote the present statutes, might not have been familiar with the language of Chief Justice Hughes in *Morgan v. U.S.*, 298 U.S. 468, 80 L. ed. 1288, but we think it intended to provide a hearing of the kind described by him. He said: "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given. . . .That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

"This necessary rule does not preclude practical administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analysed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The philosophy expressed in the first Morgan appeal was adhered to by the Supreme Court when the case was again before it. See *Morgan v. U.S.*, 304 U.S. 1, 82 L. ed. 1129. Similar views are expressed in *Fifth Street Pier Corp. v. City of Hoboken*, 126 A. 2d 6, (N.J.), and *Mazza v. Cavicchia*, 105 A 2d 545 (N.J.).

The statute, G.S. 18-137, requires notice of the time and place for the hearing with an opportunity to offer evidence and to be represented by counsel. The charges must be specific. Permittee must have at least ten days to prepare his defense.

The Board, acting pursuant to the authority conferred by G.S. 18-138, promulgated rules governing hearings. Copies of these rules were, as required by G.S. 143-195, filed with the Secretary of State

on 20 September 1956. The rules expressly require witnesses to be sworn. Permittee may object and except to any ruling, including the admission and exclusion of evidence. The exceptions so taken are a part of the record which the Board must consider. Argument, either oral or written, may be made. If the argument is oral, permittee may require it to be recorded and transmitted to the Board as a part of the record Rule 5.

The record is submitted to the Board "for approval, modification or rejection as the Board *may find to be justified by the record.*" (Emphasis supplied) Rule 8. Rules 12 and 13 provide:

"12. When an applicant or permittee makes written request for an additional hearing before the full Board, the Chairman shall cause him to be given at least ten days written notice of the time and place of a Board meeting at which he may be heard.

"13. Upon such hearing, the Board shall consider the record of the hearing before the hearing officer and may take such additional evidence for or against the applicant or permittee as may be presented. The Board may limit the introduction of evidence which is irrelevant or immaterial or which is merely cumulative and may limit the time permitted for oral argument. All testimony shall be taken under oath or affirmation and recorded. All objections to evidence or procedure, rulings thereon, and exceptions thereto shall be entered in the record."

In our opinion the rules as promulgated correctly interpret the statute. They accord a permittee full opportunity to show want of merit in the charges which, if true, would warrant revocation of his permit.

We find nothing in the record which justifies the contention that petitioners have been denied a hearing of the kind contemplated by the statute and provided for by the rules of the Board. True, the record does not show that petitioners were sent a copy of the hearing examiner's recommended findings and action which he thought the Board ought to take; but the record is barren of any suggestion that petitioners ever requested a copy of the proposed findings or recommendations. They knew when the Board would consider the transcript and act thereon. It is, we think, implicit in the rules that if petitioners had requested a copy of the proposed findings or the evidence before the Board acted, their request would have been complied with. All they were entitled to was a copy, if requested. No burden rested on the State to run petitioners down and furnish them with something without binding force, not requested, and probably not wanted. The failure to furnish without a request cannot be held violative of due process or our statutes providing for a hearing. For a similar result, see *Dami v. Department of Alcoholic Beverage Control,* 1 Cal. Rptr. 213.

Petitioners did not request a hearing by the Board—a right expressly accorded them. Hence their application for judicial review must be dismissed. Only those who have exhausted their administrative remedies can seek the benefit of the statute. G.S. 143-307. *Warren v. R.R.*, 223 N.C. 843, 28 S.E. 2d 505; *In re Wright*, 228 N.C. 301, 45 S.E. 2d 370; *In re Employment Security Commission*, 234 N.C. 651, 68 S.E. 2d 311; *Carson v. Board of Education of McDowell County*, 227 F 2d 789; *Carson v. Warlick*, 238 F 2d 724.

Reversed.

GEORGE W. HARTLEY v. NORTH CAROLINA PRISON DEPARTMENT.

(Filed 12 December 1962.)

1. Master and Servant § 53—

The Workmen's Compensation Act provides for recovery for injuries by accident arising out of and in the course of employment, irrespective of any negligence on the part of the employee, and while the intentional violation of an approved safety rule of which the employee had prior notice warrants reduction of the amount of the award, the only complete defense is that the accident resulted from the intoxication of the employee or an injury intentionally self-inflicted. G.S. 97-12.

2. Same—

The evidence tended to show that claimant, in the performance of his duty to go to a guard tower outside a high wire fence, elected to climb over the fence rather than go around by the gate, which would require approximately 200 yards of travel, and was injured when he jumped from the top of the fence to avoid falling therefrom. *Held:* The evidence sustains the award of compensation, and the contention that claimant climbed the fence for his own convenience rather than as a part of his duties is untenable, since the mere fact that an employee selected the more hazardous route in the performance of his duties does not defeat recovery.

APPEAL by North Carolina Prison Department from *Mallard, J.*, April-May, 1962 Civil Term, WAKE Superior Court.

The plaintiff, George W. Hartley, filed a claim under the Workmen's Compensation Act alleging he sustained an injury by accident arising out of and in the course of his employment by the North Carolina Prison Department as a guard at its Camp Polk Prison. Chairman Bean of the North Carolina Industrial Commission, as hearing commissioner, made findings of fact, among which the following are pertinent to the question involved:

"5. That the plaintiff was employed as a prison guard and that his duties on November 17, 1960, and for approximately two weeks prior thereto, was to check around the fence and relieve the guards in the towers.

"6. That the plaintiff's place of employment was in the industrial area at Camp Polk Prison in Northwest Raleigh.

"7. That the industrial area of the prison was surrounded by a fence approximately 5,000 feet in length; that this fence was a non-climbable fence with five strands of barbwire stretched on the top; that the barbwire was on a triangle-shaped frame; that the mesh in the fence was approximately two inches square; that the mesh part of the fence was approximately seven feet high; that the guard towers are located just outside the fence in strategic points around the fence so that the guards would have view of the entire area of the prison surrounded by the fence.

"8. That on November 17, 1960, about 2:30 P.M., because of no toilet facilities in the tower the plaintiff was called to relieve a guard in one of the towers; that to relieve the guard it would be necessary for the plaintiff to walk about 300 feet to a gate, but instead of going to the gate the plaintiff started to climb over the fence; that he climbed up on top of the fence and lost his balance and jumped off to keep from falling, injuring his feet.

"11. That the plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant, as set out in finding of fact no. 8; that as a result of said accident on November 17, 1960, plaintiff was temporarily totally disabled from November 18, 1960, to August 23, 1961, and has a 40 per cent permanent partial disability to each foot as a result of said injury."

The record recites as one of the conclusions of law: "There is conflicting testimony in this case. The plaintiff testified that it had been customary for the employees to climb the fence in the same way and manner that he was climbing the prison fence at the time he was injured, while on the other hand the superintendent of the prison testified that it was against the rules for the employees to climb the fence and that to his knowledge the employees had not climbed the fence."

Chairman Bean entered an award allowing compensation. Upon application for review, the full commission adopted the Chairman's findings and affirmed the award. The superior court, on appeal, also affirmed. The North Carolina Prison Department appealed.

Thomas Wade Bruton, Attorney General, Richard T. Saunders, Staff Attorney, Ted C. Brown, Staff Attorney for the State.

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

HIGGINS, J. The appellant argues the award should be disallowed for that the employee's injury did not arise out of and in the course of his employment. It contends the claimant climbed the fence for his own convenience rather than as a part of his duty. Appellant further contends the conclusions of law are contrary to, and not supported by, the evidence.

According to all the evidence the employee's duties required him to work within the enclosure except when he was called to relieve a guard stationed in a tower on the outside. When guard Prevatte called for relief, Hartley, whose duty it was to answer the call, was on the inside of the fence near the tower where Prevatte was stationed as a guard. Hartley could get to the tower by walking one hundred yards along the inside of the fence to a locked gate and have the guard from a nearby tower unlock it and let him through. He could then return on the outside of the fence to Prevatte's tower, a few feet from, but on the other side of the fence from the point where Hartley received the call. Instead, he undertook to climb the fence, fell or jumped, and was injured. He testified: "Mr. Prevatte asked me to relieve him . . . I started over the fence . . . I lost my balance and it was either jump or fall. I had gone over that fence before for the same purpose to relieve the guard . . . I don't remember how many occasions . . . I know about other guards crossing the fence."

Prevatte testified, and Major Lennon, the institutional head of the camp, admitted: "After Mr. Hartley fell, the guard and the doctor got to him by climbing the fence."

The evidence abundantly supports the finding that Hartley was injured in attempting to go to the tower to relieve guard Prevatte. In fact, the evidence permits no other conclusion. Is compensation defeated because he attempted to cross the fence rather than go to the nearest gate, have a guard from the tower unlock the gate for him, then return on the outside of the fence to a point just a few feet from where he started? In a negligence case contributory negligence is a defense. But not even gross negligence is a defense to a compensation claim. Only intoxication or injury intentionally inflicted will defeat a claim. An intentional violation of an approved safety rule of which he had prior notice will not defeat, but will only reduce the amount of an award. G.S. 97-12 provides: "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or an-

other. When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten per cent. *When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury,* compensation shall be reduced ten per cent. The burden of proof shall be upon him who claims an exemption or forfeiture under this section." (emphasis added)

The evidence does not suggest that Hartley was either intoxicated or that he intentionally injured himself. He was injured while going to the relief of a guard, which was a part of his assigned duty. In crossing the fence and saving approximately 200 yards of travel, he was following a course which he and others before him had followed. On the very occasion of his injury, the doctor and the guard called to his assistance also crossed the fence.

"It is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery." *Chambers v. Oil Co.,* 199 N.C. 28, 153 S.E. 594; *Michaux v. Bottling Co.,* 205 N.C. 786, 172 S.E. 406; *Rowe v. Rowe-Coward Co.,* 208 N.C. 484, 181 S.E. 254 (citing 243 U.S. 210). "We do not think compensation should be denied his dependents because he made an error of judgment and attempted to use a more hazardous means of transportation, . . . nor because in so doing he violated a rule which was not always observed by the employees." *Archie v. Lumber Co.,* 222 N.C. 477, 23 S.E. 2d 834 (citing many cases). (The dissent involved the question of outside transportation to and from work.)

"Negligence is not a defense to a compensation claim. 'The negligence of the employee, however, does not debar . . . compensation for an injury by accident arising out of and in the course of his employment. The only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is when the injury is occasioned by his intoxication or willful intention to injure himself or another.' " *Allred v. Allred-Gardner, Inc.,* 253 N.C. 554, 117 S.E. 2d 476.

The findings and conclusions of the Industrial Commission and approved by the superior court are amply supported by the evidence. To adopt the appellant's view would require a narrow and strained construction not permitted by the terms of the Workmen's Compensation Act. "It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the

benefits thereof shall not be denied upon technical, narrow and strict interpretation." *Johnson v. Hosiery Co.*, 199 N.C. 38, 153 S.E. 591; *Guest v. Iron and Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596; *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862; *Kellams v. Metal Products, Inc.*, 248 N.C. 199, 102 S.E. 2d 841.

The essence of the story in this case may be told in few words: Usually the idea of a short cut is attractive. Sometimes it is dangerous To follow the appellant's contention would require us to hold that contributory negligence in this case is a complete defense. Our cases construing the Act hold to the contrary. The judgment of the Superior Court of Wake County is

Affirmed.

LILLIAN KEY *v.* WILLIAM THOMAS WOODLIEF.

(Filed 12 December 1962.)

1. Automobiles § 38; Evidence § 15—

Where a witness testifies that he saw the lights of an approaching vehicle but does not state that he had observed the movement of the lights for any length of time or that he had more than a fleeting glance at them, the witness fails to qualify himself to testify as to the speed of the approaching vehicle, and his testimony as to speed is without probative force and is incompetent.

2. Evidence §§ 28, 54—

When a party elicits testimony from a physician that he did not know whether plaintiff was intoxicated and the intoxication of plaintiff relates to a collateral matter, the party is bound by the physician's answer, and testimony of another witness that the physician had made a statement to the effect that plaintiff was "loaded" at the time is incompetent as hearsay.

3. Appeal and Error § 41—

Where the jury answers the issue of negligence in the negative and does not answer the issue of contributory negligence and damages, the admission of incompetent evidence to the effect that plaintiff was intoxicated at the time will not be held for prejudicial error, since such evidence relates only to the unanswered issue of contributory negligence and cannot have affected the answer to the determinative issue of negligence, there being ample evidence tending to show the absence of negligence on the part of defendant and defendant not having argued or contended that the plaintiff was under the influence of liquor at the time.

4. Appeal and Error § 39—

The judgment of the lower court is presumed correct and the burden is

upon appellant to show error amounting to the denial of some substantial right.

APPEAL by plaintiff from *Olive, J.*, April, 1962 Term, RANDOLPH Superior Court.

Civil action to recover damages plaintiff alleged she sustained as a result of the defendant's negligent operation of his automobile.

The plaintiff alleged and offered evidence tending to show that on the night of August 6, 1960, just before midnight, she was walking north on the west shoulder of Highway No. 220 when the defendant, driving his automobile south at great speed, ran off the paved portion of the highway, striking her, and inflicting serious and permanent injuries.

The defendant, by answer, denied all allegations of negligence on his part alleged the sole cause of the plaintiff's injuries was her own negligence in suddenly stepping in front of his moving vehicle at a place other than a crosswalk, leaving him insufficient time to avoid the accident. By way of further defense, he alleged the plaintiff's own negligence contributed to her injury.

Mr. C. A. Garner, as a witness for plaintiff, testified he was walking with her on the shoulder of the road. He saw the lights of the defendant's vehicle approaching him. "It might have been 100 to 150 feet away." He did not further qualify himself to testify as to speed. He did not undertake to say that he observed the movement of the lights, or that he had more than a fleeting glance at them. The court sustained the objection and refused to permit him to say that in his opinion the vehicle was moving 50 miles per hour. He admitted on cross-examination that the vehicle stopped on the surface of the road within 35 or 40 feet beyond the impact. He further testified he heard the defendant say, "That he didn't know what happened; that he didn't see her."

He further testified that after the contact Mrs. Key's head was on the paved portion of the highway. According to the defendant's evidence, her head and shoulders were on the pavement.

The defendant testified he was driving not more than 40 miles per hour when he saw Mrs. Key about 40 feet in front and in his lane of traffic. He applied his brakes, tried to cut to the left, but the right side of his vehicle "more or less glanced Mrs. Key, knocking her down."

After the accident the defendant's vehicle stopped on the hard surface at an angle of about 45°. The skid marks were only a few feet long and all on the surface. Coins and other articles from the plaintiff's purse were on the highway. As a result of the contact there was a small dent in the chrome border around the right light and a similar

small dent in the body near the right door. The defendant and his witness testified his vehicle never at any time left the hard surface of the highway.

There was evidence that the plaintiff's witness Garner, who had been with her much of the day, was at the time of the accident under the influence of alcohol. This he denied. The physician who treated the plaintiff for the injury testified he did not examine her "on the point of any intoxication" — he did not comment at the time about the patient being "loaded." He didn't know whether she was intoxicated or not.

The highway patrolman who investigated the accident testified that he talked to the plaintiff's witness Garner who stated that he and Mrs. Key were crossing the road and that she was hit by a car — she hit him and knocked him down. He said he never did see the car. The patrolman testified, over objection, that he talked with the physician at the hospital while he was treating Mrs. Key and, in response to an inquiry about her condition, the doctor replied, " . . . she was loaded."

The court submitted issues of negligence, contributory negligence, and damages. The jury answered the first issue, no, and left the other unanswered. From a judgment dismissing the action, the plaintiff appealed.

Ottway Burton, Linwood T. Peoples, for plaintiff, appellant.

Jordan, Wright, Henson & Nichols, and G. Marlin Evans, by G. Marlin Evans, for defendant, appellee.

HIGGINS, J. The jury's negative finding on the issue of negligence ends the case unless the plaintiff is able to show reversible error on that issue. Any errors involving contributory negligence or damages, unless they likewise materially affect the first issue, are nonprejudicial.

The assigned errors requiring discussion are (1) the exclusion of the witness Garner's testimony that the defendant's speed was 50 miles per hour, and (2) the admission of the highway patrolman's testimony that the attending physician made the statement while he was treating the plaintiff that "she was loaded."

1. Mr. Garner testified he saw the lights of defendant's vehicle when it was 100-150 feet away. He did not say he observed them for any distance. If it be admitted a witness may qualify himself to testify as to the speed of an approaching vehicle by merely seeing the lights, the observation must be for such distance as to enable him to do more than hazard a guess as to speed. In this case the witness did not qualify himself to testify as to speed. Therefore, the testi-

mony was without probative force, clearly incompetent, and properly excluded. *Hudson v. Transit Co.*, 250 N.C. 435, 108 S.E. 2d 900; *Fleming v. Twiggs*, 244 N.C. 666, 94 S.E. 2d 821; *State v. Becker*, 241 N.C. 321, 85 S.E. 2d 327.

2. At the time of the mishap the plaintiff and her companion Garner were on their way to visit in the home of a relative. It was near midnight. They had been together much of the day. The evidence strongly indicated that Garner was intoxicated. The plaintiff denied that she, or Garner to her knowledge, had been drinking. The physician who testified for the plaintiff as to her injuries was asked on cross-examination if the plaintiff was intoxicated. He stated he did not examine her for intoxication and did not know. He denied making the statement, "She was loaded." The highway patrolman, a witness for the defendant, was permitted, over objection, to contradict the doctor by testifying the doctor said "she was loaded." We need not quibble about the meaning of "loaded." Among the jurors, no doubt at least one will remember the jingle:

"When going up or down the road,
A little jug of liquor makes a big man a load."

Whether the plaintiff was "loaded" presented a collateral matter. When the doctor denied making the statement the defendant was bound by the answer. The testimony of the patrolman as to what the doctor said was hearsay and should have been excluded. *Gurganus v. Trust Co.*, 246 N.C. 655, 100 S.E. 2d 81; *Jones v. Bailey*, 246 N.C. 599, 99 S.E. 2d 768. However, was the evidence sufficiently prejudicial to justify sending the case back for a new trial? Did the evidence adversely affect the plaintiff's efforts to establish defendant's negligence?

A careful review of the charge on the first issue discloses that at no time did the court refer to any contention or suggestion the plaintiff was drinking. Not even Garner's condition was alluded to as having any bearing on defendant's negligence. The only reference to intoxication in the charge related to the issue of plaintiff's contributory negligence. The court thus stated the defendant's contentions: ". . . That she was walking along with Garner and that he was drinking and that he and she . . . were not paying attention and that they walked right into the lane of traffic." The court stated the plaintiff's contentions: ". . . That you should find from the evidence that she did cross the highway carefully, cautiously, lawfully, and that she was normal, that she had not been drinking anything."

There is no evidence in the record the defendant at any time argued or contended the plaintiff was under the influence of liquor.

The defendant's contention on the issue of contributory negligence was that Garner was drinking. Of this, there was ample evidence. The plaintiff was not prejudiced as a result of the contributory negligence issue for the simple reason that issue was not answered. If the jury had found the defendant guilty of negligence and the plaintiff guilty of contributory negligence, a more serious question would be presented.

The physical evidence strongly corroborated the defendant's contention that he was not speeding; that he remained in his lane of traffic; that the vehicle moved only 35-40 feet after contact; that it was at a 45-degree angle to the left, still on the highway; that all the skid marks were on the highway; and that dents on the right front light and the right side of the car indicated that the plaintiff was on the hard surface and the defendant tried, as he testified, to avoid her by turning to the left. Articles from plaintiff's purse were scattered on the highway. She was partially on the hard surface after the impact. The physical evidence, corroborating as it did the defendant's version of the case, was decisive. The disagreement between the highway patrolman and the doctor as to whether the latter said "she was loaded" was not enough materially to discolor the clear stream of evidence favorable to the defendant.

A presumption exists that the judgment is correct. Error warranting a reversal or a new trial must amount to the denial of some substantial right. *Rubber Co. v. Distributors, Inc.*, 256 N.C. 561, 124 S.E. 2d 508; *Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767; *In re Gamble*, 244 N.C. 149, 93 S.E. 2d 66; Strong's N. C. Index, Vol. 1, "Appeal and Error," §§ 39-41, and the same sections in the Supplement to Vol. 1.

The record shows technical error which in view of the whole case did not have material bearing on the question of defendant's negligence. We conclude there was, in law,

No error.

WILLIE EDWARDS CLINE v. CARL C. CLINE AND MYRTLE CLINE PATTERSON, EXECUTORS OF ANNIE S. CLINE, DECEASED.

(Filed 12 December 1962.)

1. Quasi-Contracts § 1—

Where personal services are rendered by one party to another without an express contract to pay for such services, the law implies a promise to pay fair compensation therefor unless the services are rendered

gratuitously or in discharge of some obligation, and failure to establish the express contract alleged does not defeat recovery on an implied promise to pay.

2. Executors and Administrators § 24c—

The relationship of mother-in-law and daughter-in-law does not raise a presumption that personal services rendered by the one to the other were gratuitous.

3. Same—

Evidence that a daughter-in-law rendered personal services to her mother-in-law in caring for her in her old age and last illness, that the mother-in-law made repeated statements that she intended to pay or reward her daughter-in-law for such services by testamentary disposition, and that the daughter-in-law expected payment for the services is held sufficient to overrule nonsuit in an action against the estate of the mother-in-law to recover for such services for the three years prior to the mother-in-law's death.

4. Executors and Administrators §§ 24a, 24d; Husband and Wife § 3—

The fact that the husband files claim against the estate of his mother for rent and for personal services rendered by his wife to his mother is incompetent in the wife's action to recover for the services rendered by her in the absence of evidence that the wife authorized the husband to file a claim in her behalf or fix the amount owing her for such services. G.S. 52-10.

5. Executors and Administrators § 24d—

Decedent lived in the home of her son and his wife. The wife brought action against the estate to recover for personal services rendered decedent during the last three years of her life. Testimony of commissioners who partitioned the land to the son that they recommended that the decedent be given the right to occupy part of the dwelling as her dower *is held* irrelevant in the action to recover for the services, there being no claim for rent or suggestion that decedent was wrongfully in the home.

6. Same; Damages §§ 2, 15—

The damages recoverable on an implied contract to pay for personal services rendered decedent is the reasonable market value of such services, without considering the financial condition of the recipient or the value of such services to him, with the burden upon plaintiff to establish by evidence facts furnishing a reasonable basis for the assessment of the damages according to some definite and legal rule, and an instruction merely that the jury should answer the issue of damages in whatever amount the jury should find to be the reasonable value of the services must be held for error.

APPEAL by defendants from *Olive, J.*, June 1962 Civil Term of CABARRUS.

Annie S. Cline (hereafter decedent) died testate. Defendants qualified as executors of her will. As the basis for her cause of action

plaintiff alleged: She rendered personal services to decedent. The services rendered covered a period of several years and continued until decedent's death. The services were rendered pursuant to a contract which provided for "suitable compensation to plaintiff for such labor and services by a provision for plaintiff's benefit in her (Mrs. Cline's) will. . ." The will contained no provision for payment for the services rendered. The services rendered during the three years immediately preceding decedent's death were reasonably worth $10,800. She asked for judgment for this amount.

Defendants denied that plaintiff had rendered services to decedent pursuant to a contract, either express or implied, asserting such services as might have been rendered were gratuitous and so understood to be by plaintiff and decedent.

The court submitted issues which were answered as follows:

"1. Did the defendants' testate, Annie S. Cline, during her lifetime enter into a contract and agreement with the plaintiff, Willie Edwards Cline, as alleged in the complaint?

"ANSWER: YES

"2. If so, did the plaintiff, Willie Edwards Cline, render services to said Annie S. Cline in good faith, relying on said contract and agreement with her, as alleged in the complaint?

"ANSWER: YES

"3. If so, did the defendants' testate, Annie S. Cline, breach said contract as alleged in the complaint?

"ANSWER: YES

"4. What amount, if any, is the plaintiff entitled to recover of the defendants?

"ANSWER: $10,800.00"

Hartsell, Hartsell & Mills by Williams L. Mills, Jr., for plaintiff appellee.

Williams, Willeford & Boger for defendant appellants.

RODMAN, J. Defendants assign as error the court's refusal to allow their motion to nonsuit. The evidence was sufficient to permit the jury to find these facts: Plaintiff married Charlie Cline, son of decedent and R. S. Cline, in 1934. R. S. Cline died prior to the marriage. Decedent and Charlie occupied the same home prior to the marriage. It belonged to R. S. Cline at his death. Decedent continued to live in the home with plaintiff and her husband until her death in April 1959. She was then approaching 90, nearly blind, and a diabetic. This condition "started about 1945." She was in need of care and attention for several years prior to her death. Decedent's other children, although

living nearby, did little for her. The burden fell on plaintiff. The nature and extent of the services required and rendered increased as decedent grew older. Decedent "didn't expect anybody to do anything for her without being compensated." Decedent stated "she had it in her will" that plaintiff "would be well paid to take care of her." Plaintiff testified: "Mrs. Cline said she had in her will that I'd be paid at her death. She told me that time and time again." Plaintiff testified to her affection for decedent, but when asked the direct question whether she expected compensation for the services rendered, she answered in the affirmative.

Where there is an express contract to pay for services rendered, the parties are bound by the terms of the contract, both with respect to the time of payment and the manner of computing the sum owing.

Where there is no express contract to pay, the law implies a promise to pay fair compensation for services rendered unless rendered as a gratuity or in discharge of some obligation. *Allen v. Seay,* 248 N.C. 321, 103 S.E. 2d 332; *Twiford v. Waterfield,* 240 N.C. 582, 83 S.E. 2d 548; *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764; *Grady v. Faison,* 224 N.C. 567, 31 S.E. 2d 760; *Landreth v. Morris,* 214 N.C. 619, 200 S.E. 378.

If it be conceded plaintiff has failed to establish an express contract, such failure would not defeat her right to recover the fair value of services rendered under an implied promise to pay. *Allen v. Seay, supra; Thormer v. Mail Order Co.,* 241 N.C. 249, 85 S.E. 2d 140; 58 Am. Jur. 542.

The relationship of mother-in-law and daughter-in-law was not sufficient to raise a presumption that the services were gratuitously rendered and received. *Lindley v. Frazier,* 231 N.C. 44, 55 S.E. 2d 815; *Grady v. Faison, supra.*

Plaintiff does not seek damages for services rendered more than three years prior to decedent's death. Hence the time when payment became due is not material.

The court properly declined to allow the motion for nonsuit.

Plaintiff's husband filed a claim with defendants for rent asserted to be owing to him by his mother. He included in the statement so filed a claim for plaintiff's services for $4,380. Defendants rejected the claim but offered it in evidence to show the services assertedly rendered by plaintiff were not in fact worth the amount claimed by her. The court sustained plaintiff's objection. Defendants offered no evidence to show plaintiff had authorized her husband to file a claim in her behalf or to fix the amount owing to her. An unauthorized act of a husband cannot impair the property rights of his wife. Her earn-

ings are her separate estate. G.S. 52-10; *Beasley v. McLamb*, 247 N.C. 179, 100 S.E. 2d 387; *Coley v. Dalrymple*, 225 N.C. 67, 33 S.E. 2d 477.

There is no dispute about the fact that the building occupied by plaintiff, her husband, and decedent was originally owned by plaintiff's father-in-law. His property was partitioned among his heirs about 1934, prior to plaintiff's marriage. Defendants sought to show by two of the commissioners who made the partition that they recommended that decedent be given the right to occupy part of the dwelling as her dower. The court, on plaintiff's objection, excluded the evidence. Its pertinency is not apparent. Plaintiff was making no claim for rent nor was she suggesting that decedent was wrongfully in the home. If pertinent to the inquiry, the court record would be the source to look to in ascertaining the rights of the parties.

Defendants assign as error the charge on the fourth issue. The court charged: "Now the court instructs you as a matter of law on this fourth issue, if you come to it, that if you are satisfied from the evidence and by its greater weight that plaintiff rendered services to the deceased, Annie S. Cline, and that these services had a reasonable value, then you would answer this issue in whatever amount you are so satisfied—that is, services during the last three years of her life, and that these services had a reasonable value for the last three years of Annie S. Cline's life, then you would answer this issue in whatever amount you are satisfied by the greater weight of the evidence is the reasonable value of those services, not in excess of ten thousand eight hundred dollars."

Defendants concede that plaintiff, if entitled to recover anything, is entitled to the fair market value of the services performed. They insist that plaintiff on this record is not entitled to recover more than nominal damages because of plaintiff's failure to prove the value of the services rendered. Plaintiff offered no evidence specifically directed to the reasonable cost of providing such services, that is, the market value of such services. She insists that the jury could fix the fair value of the services performed as a matter of common knowledge and without any evidence as to the market value or cost of such services. Plaintiff described in some detail the services she performed. She injected insulin as needed. She washed decedent's clothes and bed linen, helped bathe her, cooked for her, and did such other things as needed to make decedent comfortable and happy. The only evidence which in any way touched on the cost of providing such services was the amount paid a practical nurse who helped plaintiff take care of decedent for the last three or four months of her life.

When a plaintiff seeks to recover compensation for an article sold or services rendered, he must allege and prove its value. As said by

Parker, J., in *Lieb v. Mayer*, 244 N.C. 613(616), 94 S.E. 2d 658: "Damages are never presumed. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule." The amount to be paid is not the value of the services to the recipient, *Turner v. Furniture Co.*, 217 N.C. 695, 9 S.E. 2d 379, nor should his financial condition be taken into consideration in determining the value of the services performed. *Sawyer v. Weskett*, 201 N.C. 500, 160 S.E. 575. Many factors serve to fix the market value of an article offered for sale. Supply, demand, and quality (which is synonymous with skill when the thing sold is personal services) are prime factors. The jury, when called upon to fix the value, must base its decision on evidence relating to the value of the thing sold. Without some evidence to establish that fact, it cannot answer. To do so would be to speculate. *Lieb v. Mayer, supra; Clark v. Emerson*, 245 N.C. 387, 95 S.E. 2d 880; *Berry v. Lumber Co.*, 183 N.C. 384, 111 S.E. 707; *Winch v. Warner*, 174 N.Y.S. 819; *Dakoff v. National Bank of Commerce*, 254 S.W. 2d 550; *Bianco v. Floatex, Inc.*, 144 A 2d 310; *Wysowatcky v. Lyon*, 328 P 2d 576. The failure of the court to properly instruct the jury with respect to the fourth issue requires a

New trial.

STATE v. EDWIN G. MOORE, II.

AND

STATE v. EDWIN G. MOORE, II.

AND

STATE v. EDWIN G. MOORE, II.

(Filed 12 December 1962.)

1. Appeal and Error § 2; Criminal Law § 139—

The Supreme Court has the power to allow *certiorari* to bring up the entire record for review in the exercise of its supervisory jurisdiction, irrespective of any appeal procedures, in order to insure the orderly administration of justice. Constitution of North Carolina, Art. IV, § 8.

2. Criminal Law § 15; Jury § 2; Venue § 8—

The discretionary power of a judge of the Superior Court to remove a cause to an adjacent county for trial on the ground that a fair trial cannot be had in the county in which the action or prosecution is pending, may be exercised only if the judge is satisfied, after hearing all the testimony offered by both sides by affidavit, that the ends of justice so

required; upon the hearing of the motion for removal the judge may, instead of ordering a removal, order that a special venire be summoned from another county. G.S. 1-84; G.S. 1-86.

3. Same; Courts § 9—

Where, upon the hearing of motion to remove on the ground that defendant cannot obtain a fair trial in the county in which the offense was committed, the judge orders a special venire to be drawn from another county, such order is tantamount to a refusal of the motion to remove.

4. Same—

Where one Superior Court judge, upon the hearing of a motion to remove, orders a special venire to be drawn from another county, another Superior Court judge may not thereafter, in the absence of motion, affidavit or hearing, order that the cause be removed to another county of the district.

APPLICATION by the State for writ of *certiorari* and supersedeas allowed 29 August 1962 in the Supreme Court. From DARE.

At the October Criminal Term 1961 of the Superior Court of Dare County three bills of indictment were returned against the defendant by the grand jury, charging that the defendant wilfully, wantonly, maliciously and feloniously, and for an unlawful purpose, to wit, for the collection of insurance, set fire to certain buildings situate in Dare County, owned by the defendant and his wife, as follows: The first bill of indictment, No. 23, charges that the defendant set fire to two uninhabited houses, designated as cottages Nos. 1 and 2, situated near the Flagship Hotel. The second bill of indictment, No. 24, charges that the defendant burned the Flagship Hotel. The third bill of indictment, No. 25, charges that the defendant burned an uninhabited house, designated as cottage No. 3, situated near the Flagship Hotel.

After the arrest of the defendant on a warrant charging him with burning the properties involved, the defendant through his counsel filed a motion in the Superior Court of Dare County on 30 September 1961 for the removal of the actions to another county for trial on the alleged ground that the defendant could not get a fair trial in Dare County.

On the same date the defendant filed a motion for a bill of particulars.

His Honor, Chester Morris, Judge Presiding at the regular October Criminal Term 1961, after the above bills of indictment had been returned, heard the motion for removal. The three cases were consolidated for the purpose of the hearing. The court, after hearing all the testimony in behalf of the defendant in support of his motion for removal, and all the evidence in opposition thereto by the State through

the District Solicitor, concluded on his own motion that the ends of justice would be met if a jury was summoned from Perquimans County for trial of the actions, and an order was thereupon entered to the effect that a venire of sixty jurors be duly summoned from Perquimans County to appear at the next regular or special term of the Superior Court of Dare County to serve as jurors for the trial of the charges against the defendant.

In the meantime, with the approval of the attorneys for the defendant, a special term of court in Dare County was called for the trial of these cases to begin on 18 June 1962 and a venire of sixty jurors was chosen in Perquimans County to serve as jurors at said term.

Prior to the convening of the regular May Term 1962 for the trial of criminal cases in Dare County, the motion for a bill of particulars was heard by Judge Stevens in Pasquotank County. During the hearing, Judge Stevens stated: " * * * (T)hat this defendant probably could not receive a fair trial in Dare County, and that the court intended to when the court convened in Dare County, on May 28, 1962, sign an order removing the case to Pasquotank County for trial to the end that the defendant might get a fair trial * * *."

On 28 May 1962, in open court at Manteo, Judge Stevens entered an order moving the cases against the defendant to Pasquotank County for trial.

The State entered certain exceptions to this order and later filed an application for a writ of *certiorari* and supersedeas as hereinabove set out.

Attorney General Bruton, Asst. Attorney General Moody for the State.

Leroy, Wells & Shaw for defendant.

DENNY, C.J. The defendant contends that although an appeal was noted to the order of Judge Stevens for a change of venue, no case on appeal has been certified. We deem it unnecessary to discuss the failure on the part of the State to perfect the appeal in the usual manner since we allowed the application for writ of *certiorari*. The record and its contents are before us. Under the provisions of the Constitution of North Carolina, Article IV, Section 8, this Court is empowered "to issue any remedial writ necessary to give it a general supervision and control over the proceedings of the inferior courts." *S. v. Schlichter,* 194 N.C. 277, 139 S.E. 448; *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656; *S v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663.

The statute, G.S. 1-84, is quite clear that a judge may order a copy of the record in civil or criminal actions removed to some adjacent

county for trial. But he can only do so, "if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits."

Likewise, under the provisions of G.S. 1-86, a judge in hearing a motion to remove, as provided in G.S. 1-184, may "on his own motion * * * instead of making order of removal may cause as many jurors as he deems necessary to be summoned from any county in the same judicial district or in an adjoining district," to serve as jurors in such action or actions. We hold that when Judge Morris entered the order directing that venire of jurors be drawn from Perquimans County to serve as jurors in the trial of these cases in Dare County, it was tantamount to a denial of the motion to remove the cases to another county for trial.

There is ample evidence on the record before us tending to show that Judge Stevens had been informed that a special term of court had been called for Dare County to begin on 18 June 1962 for the trial of these cases and that a venire of sixty jurors had been drawn from Perquimans County to serve as jurors in said trial or trials. It appears that the attorneys for the defendant wrote the solicitor on 21 April 1962 and sent a copy of the letter to Judge Stevens at Warsaw, North Carolina, which letter among other things contained the following statements: "If this case cannot be tried at the regular term in May then June 18 is agreeable to us for the trial of the case. * * * I (one of the attorneys for the defendant) gather from your letter of the 20th that a special venire has already been drawn. I will inquire into this and, unless there has been some irregularity, will certainly not suggest the drawing of another one."

There is nothing in the record before us to indicate that the attorneys for the defendant requested Judge Stevens to move these cases to Pasquotank County or that Judge Stevens heard any evidence with respect to any motion for removal or that he ever examined the affidavits filed before Judge Morris in the original hearing. Moreover, there was no exception entered to the order entered by Judge Morris or an appeal therefrom. *Rutherford College v. Payne*, 209 N.C. 792, 184 S.E. 827; *Neighbors v. Neighbors*, 236 N.C. 531, 73 S.E. 2d 153.

This Court said in *Oettinger v. Live Stock Co.*, 170 N.C. 152, 86 S.E. 957: "The defendant * * * by failing to except to the judge's denial of the motion for removal and by failing to appeal, waived all rights for removal."

In *S. v. Smarr*, 121 N.C. 669, 28 S.E. 549, the defendant filed an affidavit for removal. The court refused, and the defendant excepted. On appeal, this Court said: "The Superior Court of the county in which the offense was committed had the sole jurisdiction to try the

offense unless the cause is removed therefrom, and the authority to order such removal is granted and restricted by the Code, secs. 196 (now G.S. 1-84), 197 (now G.S. 1-85.) Section 196 provides that, in all civil and criminal actions upon affidavits in behalf of either party that justice cannot be obtained in the county in which the action is pending, 'the judge shall be authorized to order a copy of the record of said action to be removed to some adjacent county for trial, if *he* shall be satisfied that a fair trial cannot be had in said county.' Section 197 says that it shall be competent for the other side to offer counter-affidavits, and 'the judge shall not order the removal of any such action *unless he shall be satisfied,* after thorough examination of the evidence as aforesaid, that the ends of justice demand it.' * * * It has always been held that the granting or refusing to grant an order of removal is a discretion which the law-making power has vested in the trial judge and that his action is not reviewable." *S. v. Turner,* 143 N.C. 641, 57 S.E. 158; *Oettinger v. Live Stock Co., supra; Gilliken v. Norcom,* 193 N.C. 352, 137 S.E. 136.

An examination of our present statutes, G.S. 1-84 and 1-85, will reveal some changes in the wording thereof but not in legal effect. For instance, Code section 196 authorized the removal "if he (the judge) shall be satisfied that a fair trial cannot be had in said county." This provision has been changed in the present statute to read, "if he (the judge) is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits." Section 197 of the Code provided, "the judge shall not order the removal of such action unless he shall be satisfied, after thorough examination of the evidence * * * that the ends of justice demand it." The present statute has been changed to read, "the judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence * * * that the ends of justice demand it."

The rule with respect to removal upon the grounds that the defendant cannot get a fair trial in the county where the action is pending, contemplates that affidavits for the removal must "set forth particularly in detail the ground of the application." *Gilliken v. Norcom, supra.*

In the last cited case, Brogden, J., speaking for the Court, said: "The rule of law governing motions for removal of causes specified, is thus declared in *Phillips v. Lentz,* 83 N.C. 240: 'The distinction seems to be where there are no facts stated in the affidavit as grounds for the removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final," citing authorities.

In light of the facts revealed on the record before us, we hold that the order removing these cases to Pasquotank County was improvidently entered and should be reversed.

These cases ought to be tried without further unnecessary delay. They have been pending and at issue since the October Criminal Term 1961 in Dare County. Therefore, we suggest that the proper authorites request a special term of the Superior Court of Dare County to try these cases and that an order be obtained for a venire of jurors from Perquimans County to serve as jurors in the trial of these cases.

Reversed.

ETHEL ARMSTRONG ALLEN v.
GOLIAH ALLEN, A. H. PHILLIPS AND WIFE, LUCILLE PHILLIPS.

(Filed 12 December 1962.)

1. Appeal and Error § 59—

A decision of the Supreme Court must be read in the light of the facts of the particular case in which it is written.

2. Partition § 7—

On appeal from order of the clerk confirming the report of the commissioners actually partitioning the lands, the judge may confirm the report or he may vacate it and enter appropriate interlocutory orders, but he may not adjudge a partition different from that made by the commissioners. G.S. 46-7, G.S. 46-10, G.S. 46-18, G.S. 1.276.

3. Appeal and Error § 55—

Where an order is entered under a misapprehension of law, the cause must be remanded.

APPEAL by petitioner from *Carr, J.*, June Civil Term 1962 of CUMBERLAND.

Partition proceedings relating to a tract of land in Cumberland County in which petitioner, Ethel Armstrong Allen, owns an undivided 17/28 interest and respondents, A. H. Phillips and wife, Lucille Phillips, as tenants by entirety, own an undivided 11/28 interest. Respondent Goliah Allen is the husband of petitioner.

The clerk resolved the question of fact, whether there should be actual partition, as asserted by petitioner, or a partition sale, as asserted by respondents Phillips, in petitioner's favor, and appointed commissioners.

Pursuant to proper orders, the land was surveyed and divided by the commissioners into two tracts. The "First Tract," containing 10.85 acres, more or less, was allotted to petitioner. The "Second Tract," containing 6.94 acres, more or less, was allotted to respondents Phillips.

Petitioner excepted to the commissioners' report. After hearing, the clerk, finding that the commissioners had "fairly and equitably partitioned the land and that each party has received his or her proper equitable share," confirmed the report of the commissioners. Petitioner excepted and appealed.

In the superior court, evidence was offered by petitioner and by respondents Phillips. At the conclusion of the hearing, judgment was entered in which the court (1) set aside the report of the commissioners, and (2) adjudged a new partition or division, different from that made by the commissioners, in which a "First Tract," containing 13.79 acres, more or less, was allotted to petitioner and a "Second Tract," containing 4 acres, more or less, was allotted to respondents Phillips. In the judgment, the court found as a fact that the new partition or division ordered by the court was "equitable, just, fair and reasonable" and "a more proper and equitable division of the land" than the division made by the commissioners and set forth in their report.

Petitioner excepted and appealed.

Bryan & Bryan and Robert B. Morgan for petitioner appellant.
Quillin, Russ & Worth for respondent appellees.

BOBBITT, J. The question for decision is whether the court, after setting aside the report of the commissioners, had authority, based on its own findings as to what would constitute an equitable division, to adjudge a partition of the land different from that made by the commissioners.

Since 1868, the partition of land between tenants in common has been regulated by statute. *Haddock v. Stocks,* 167 N.C. 70, 74, 83 S.E. 9; *Bank v. Leverette,* 187 N.C. 743, 746, 123 S.E. 68. The statutory procedure is set forth in G.S. Chapter 46, Article 1.

G.S. 46-10 provides, in part, that the commissioners appointed under G.S. 46-7 "must meet on the premises and partition the (land) among the tenants in common . . . according to their respective rights and interests therein, . . ." G.S. 46-18 authorizes the commissioners to employ a surveyor "who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners." G.S.

46-19, in part, provides: "If no exception to the report of the commissioners is filed within ten days, the same shall be confirmed."

It is expressly provided that the partition (division) shall be made by the commissioners. If exceptions are filed in apt time, whether the report of the commissioners *should be confirmed* is for determination by the clerk and, upon appeal from his order, by the judge. All orders of the clerk or judge are interlocutory except a final judgment or decree confirming the report of the commissioners. *Hyman v. Edwards,* 217 N.C. 342, 7 S.E. 2d 700; *Tayloe v. Carrow,* 156 N.C. 6, 72 S.E. 76.

In a hearing on exceptions to the report of the commissioners, "the clerk may (1) recommit the report for correction or further consideration, or (2) vacate the report and direct a reappraisal by the same commissioners, or (3) vacate the report, discharge the commissioners, and appoint new commissioners to view the premises and make partition thereof," but the clerk "is without authority to alter the report filed either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commissioners." *Langley v. Langley,* 236 N.C. 184, 72 S.E. 2d 235.

While conceding the clerk had no authority to do so, appellees contend the superior court judge, when the matter came before him on appeal from the clerk, had authority to order a division different from that made by the commissioners. To support this contention, they call attention to the following portion of the opinion of Barnhill, J. (later C.J.), in *Langley v. Langley, supra, viz.*:

"When the cause came before the judge on appeal, he was not limited to a review of the action of the clerk. He was vested with jurisdiction to review the report in the light of the exceptions filed, hear evidence as to the alleged inequality of division, and render such judgment, *within the limits provided by law,* as he deemed proper under all the circumstances made to appear to him." (Our italics) The opinion then cites these prior decisions: *Tayloe v. Carrow, supra; McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602; *Hyman v. Edwards, supra; Skinner v. Carter,* 108 N.C. 106, 12 S.E. 908.

Appellees also call attention to the following portion of the opinion of Barnhill, J. (later C.J.), in *Hyman v. Edwards, supra, viz.*:

"The clerk may, upon the hearing on the report of the commissioners, confirm the report or set the same aside and order a sale. His judgment on appeal may be reviewed by the judge and reversed, *modified* or confirmed and the judge has the authority to set aside the report and order a sale. *Tayloe v. Carrow, supra.*" (Our italics)

Mindful that "(t)he law discussed in any opinion is set within the framework of the facts of that particular case," *Light Co. v. Moss,* 220

N.C. 200, 208, 17 S.E. 2d 10, an analysis of the factual situation in *Langley v. Langley, supra,* and the cases cited therein, is appropriate.

In *Langley v. Langley, supra,* the commissioners partitioned the land and assessed an owelty charge of fifty dollars against the tract allotted to the plaintiffs. The defendants filed exceptions to the commissioners' report. After a hearing, the clerk found the division made by the commissioners just and fair but that, in order to make equality of division, the owelty charge should be increased from fifty dollars to one hundred dollars. The defendants excepted to the clerk's order and appealed. After a hearing, *the judge confirmed the report of the commissioners as filed,* expressly fixing the owelty charge at fifty dollars. Upon appeal by the defendants, this Court affirmed the judgment of the superior court. With reference to the owelty charge, the opinion states: "Whether the judge below reduced the owelty charge assessed by the clerk against the share allotted to the plaintiff for the reason the clerk was without authority to increase the same or because he concluded from the evidence offered that the partition made by the commissioners was fair and just is immaterial. In either event he was acting within the authority vested in him." When considered in relation to the factual situation, the significance of the portion of the opinion to which appellees call attention is that, upon appeal from the clerk to the judge, the hearing before the judge was *de novo,* upon evidence then offered, to determine whether, in the light of the exceptions filed thereto, the report of the commissioners should be confirmed, rather than a hearing to determine whether the clerk erred in some respect when the matter was before him. The judge did not alter the owelty charge as set forth in the report of the commissioners. On the contrary, the judge confirmed the report of the commissioners in its entirety.

In *McDaniel v. Leggett, supra,* the hearing was on a motion by purchasers at a partition sale to correct the record. The clerk allowed the motion and on appeal the judge affirmed the clerk's order. On appeal to this Court, it was contended the clerk's order was void for want of authority. This Court, basing decision on G.S. 1-276, said: "Where the clerk exceeds his authority (citation), or has no jurisdiction (citations), and the cause for any ground is sent to the judge, the judge may retain jurisdiction and dispose of the cause as if originally before him." Clearly, the clerk has authority and jurisdiction, initially, to pass upon exceptions to the report of the commissioners in a special proceeding for partition.

In *Hyman v. Edwards, supra,* the petition was to sell land for division. However, as requested by one of the defendants, the clerk ordered actual partition; and, upon appeal by the petitioners, the

judge affirmed the clerk's order. On the petitioners' appeal to this Court, it was held the judge's order was interlocutory and the appeal was dismissed as premature.

In *Tayloe v. Carrow, supra,* cited as authority for the portion of the opinion in *Hyman v. Edwards, supra,* to which appellees call attention, there was a continuing controversy as to whether there should be a partition sale or actual partition. The clerk ordered actual partition and confirmed the report of the commissioners. Upon appeal, the judge set aside the report of the commissioners, ordered that commissioners set apart and allot 1/7 (her interest) in value of the land to defendant Carrow and that the remainder be sold for division among the other tenants in common. A second set of commissioners made this division and their report was confirmed by the clerk. However, upon appeal, the judge set aside the report of the commissioners and directed a partition sale of the entire property, "finding as a fact that this property could not be fairly divided and that a sale would best subserve the interests of all parties." On appeal by defendant Carrow, this Court, on the ground all prior orders were interlocutory, upheld the judge's order for a partition sale of the entire property. The factual situation suggests the manner in which prior orders of the clerk may be "modified" by the judge.

In *Skinner v. Carter, supra,* the clerk confirmed the report of the commissioners but, on appeal, the judge ordered that new commissioners be appointed to divide the land. In affirming the order of the judge, this Court, in opinion by Avery, J., said: "Having the power to set aside the report, he might also make any order that could formerly have been made by either the clerk or the judge under such circumstances. He might, therefore, have appointed new commissioners or have ordered those already appointed to act again, or he was empowered to remand the proceedings, with directions to the clerk to appoint others, as he did." Earlier in the opinion, Avery, J., said: "It seems therefore, that even before the passage of the Act of 1887 (chapter 276), which gives to the judge power, whenever special proceedings are brought before him by appeal or otherwise, to make any order *that could have been made by the clerk,* the report of commissioners appointed by the clerk was treated by the judge as if submitted directly to him like that of a referee." (Our italics) The Act of 1887 is now codified as G.S. 1-276.

With reference to actual partition, our statutory provisions and decisions impel this conclusion: Actual partition must be on the basis of the division made by commissioners and not otherwise. In a *de novo* hearing before the judge, where the question is whether the report of the commissioners should be confirmed, the judge may confirm

or he may vacate and enter appropriate interlocutory orders. However, the judge may not, based on his findings as to what would constitute an equitable division, adjudge a partition of the land different from that made by the commissioners.

Here, the clerk had confirmed the report of the commissioners. The question before Judge Carr was whether the division made by the commissioners was fair and equitable. *Byrd v. Thompson*, 243 N.C. 271, 90 S.E. 2d 394, and cases cited. If so, a final judgment or decree confirming the report of the commissioners should have been entered. If not, the report of the commissioners should have been set aside; and, if set aside, the court by interlocutory order, should have ordered a new division by commissioners or, if the facts justified, a partition sale.

We are constrained to hold that Judge Carr, in adjudging a partition of the land different from that made by the commissioners, acted under a misapprehension of law. *Morris v. Wilkins*, 241 N.C. 507, 514, 85 S.E. 2d 892; *Merrell v. Jenkins*, 242 N.C. 636, 638, 89 S.E. 2d 242; *Jones v. Loan Association*, 252 N.C. 626, 639, 114 S.E. 2d 638, and cases cited. For error in this respect, the judgment is vacated and the cause remanded for hearing *de novo* before a judge of the superior court upon the exceptions to the report of the commissioners in accordance with the law as stated herein.

Error and remanded.

IN THE MATTER OF: THE WILL OF WILLIE SPAIN WILSON, DECEASED.

(Filed 12 December 1962.)

1. Wills § 4; Evidence § 11— The fact that person "finding" will knew of its location prior to testatrix's death is immaterial.

Testimony of a beneficiary of a holographic will that he found the instrument in a pigeon hole of a desk in the hall of his home, that other valuable papers of testatrix were also in the pigeon hole, and that he knew of the will and had put it with testatrix's other valuable papers, *is held* competent when other evidence discloses that testatrix lived in the home for a number of years prior to her death, had access to the papers and that a number of transactions recorded on her bankbook deposited with the other papers had been made by her subsequent to the execution of the will, there being no contention or suggestion of any suspicious circumstances or undue influence. The fact that the beneficiary knew of the location of the will does not preclude his "finding" the will, nor does the testimony come within the purview of G.S. 8-51, precluding testimony of a transaction by an interested party with a decedent.

2. Trial § 37—

While the court, if it gives the contentions of one party, must give the contentions of the opposing party with equal stress, the court is not required to state the contention of either party at all, and if the court does not do so the contention that the charge contained the expression of an opinion in the manner of stating the contentions is untenable.

APPEAL by caveators Robert L. Reavis, *et al,* from *Clark (H.R.), J.,* March Term 1962 of VANCE.

This is a caveat proceeding.

Willie Spain Wilson died on 21 March 1960. For seventeen years prior to her death she had lived in the home of her brother, Frank H. Spain, in Vance County, North Carolina. Subsequent to her death, the paper writing, "Exhibit A," written entirely in the handwriting of Mrs. Willie Spain Wilson and purporting to be her last will and testament, was found in a pigeon hole of a desk located in Mr. Spain's home. The paper writing was enclosed in an envelope, "Exhibit H," on which Mrs. Wilson had written her name and the word "Important"; this envelope was in turn folded and enclosed in another envelope, "Exhibit I," on which Mrs. Wilson had written the words "Important Papers." Also included within the same pigeon hole of the desk were certificates of title (deposit) belonging to Mrs. Wilson; an envelope, "Exhibit F," on which Mrs. Wilson had written the words "My Bank Books," and which contained four bank books, "Exhibits B, C, D and E," belonging to Mrs. Wilson, and two keys to Mrs. Wilson's safe deposit box at the bank; and another envelope, "Exhibit G," on which Mrs. Wilson had written "Important" and "Insurance on the home," containing fire insurance papers, crop insurance papers, and life insurance papers. All of these items in the pigeon hole belonged to Mrs. Willie Spain Wilson.

On 12 May 1960, the paper writing in question, "Exhibit A," was probated in common form as the last will and testament of Mrs. Willie Spain Wilson before the Clerk of the Superior Court of Vance County, and Frank H. Spain qualified as administrator c.t.a. of Mrs. Wilson's estate. On 23 June 1961, a caveat to the purported will was filed in the Superior Court of Vance County. The issue of *devisavit vel non* was tried at the March Term 1962 of the Vance County Superior Court, at which time the jury answered the issue in favor of the propounders and judgment was rendered on the verdict.

The caveators appeal, assigning error.

Zollicoffer & Zollicoffer for propounder appellees.

Charles F. Blackburn, guardian ad litem.

Charles M. Davis and William T. Watkins for caveator appellants.

DENNY, C.J. The primary question presented on this appeal is whether or not an interested party may testify as to where the purported will of a testatrix was found after her death.

On direct examination, Frank H. Spain, a beneficiary under the purported will, testified that the paper writing, including the testatrix's signature, was in the handwriting of the testatrix, Willie Spain Wilson; that the paper writing was found in a pigeon hole of the desk that sat in the hall of his home where she had lived for seventeen years prior to her death, and that other valuable papers and effects of the testatrix were found in this same location, including insurance papers, four bank books and two keys to her lock box at the bank.

On cross-examination, Mr. Spain testified that he knew Mrs. Wilson had a will and knew where it was; that he put it there. He further testified that the purported will had been kept in the pigeon hole of the desk with the testatrix's other valuable papers for more than eight years prior to her death.

It is apparent, we think, from the evidence disclosed by the record that the testatrix had access to her valuable papers whenever she desired to have access thereto, since her life insurance policies were there, the proceeds of which she referred to in the purported will, and her fire and crop insurance policies. Furthermore, the bank books disclose deposits and withdrawals over a long period of years prior to her death and show a balance in the savings departments of the Citizens Bank of Henderson, North Carolina, and the First National Bank in Henderson, North Carolina, in the name of the testatrix, aggregating more than $12,000.

The caveators contend, however, that the testimony of Frank H. Spain was inadmissible since his knowledge of the existence of the will and its location was known to him prior to the death of the testatrix; that he could not possibly have found the will within the meaning of the statute since he already knew where it was. Therefore, they say the will must be "found after testator's death." Hence, the caveators contend that the paper writing which the propounders contend is the last will and testament of Willie Spain Wilson was never found. The caveators further contend that the word "found," being the past participle of "find," means to discover, and that the word "discover" means to "uncover that which was hidden, concealed, or unknown from everyone; to get first sight or knowledge of; to get knowledge of what has existed but has not theretofore been known to the discoverer." We do not concede that since Frank H. Spain knew his sister had a will and that it had been placed with her valuable papers kept in his desk in the home where she had lived for seventeen years prior to her death, he was disqualified from testifying that

after her death he found the purported will among her valuable papers. *In re Will of Gilkey,* 256 N.C. 415, 124 S.E. 2d 155; *In re Westfeldt,* 188 N.C. 702, 125 S.E. 531; *In re Will of Foy,* 193 N.C. 494, 137 S.E. 427; *Cox v. Lumber Co.,* 124 N.C. 78, 32 S.E. 381.

The testimony of Frank H. Spain is further challenged on the ground that any knowledge regarding the purported will and where it was located was obtained as the result of a personal transaction or communication with the testatrix and should have been excluded by virtue of the provisions of G.S. 8-51.

In light of the testimony adduced in the hearing below, we reject these contentions both as to where the purported will was found and the contentions based upon the provisions of G.S. 8-51 with respect to a personal transaction or communication with the testatrix.

The correct rule with respect to evidence on the particular point under consideration is laid down in the case of *In re Jenkins,* 157 N.C. 429, 72 S.E. 1072: "The fact that it (a paper writing) is found among the writer's valuable papers and effects implies that it must have been placed there by him, or with his knowledge and consent or approval, with the intent that it should operate as his will, and not that it was deposited surreptitiously by another person for the purpose of defeating instead of executing his will. If the paper is so found, it will be presumed that the deposit of it in the first place was made by him or with his assent, and, in the absence of evidence to the contrary or of suspicious circumstances, no proof of the fact is required. * * * The statute does not demand proof that the author of the paper made the deposit, but only that it was *found* among his valuable papers and effects, and proof of this fact is quite sufficient, at least, in the first instance and when there is no countervailing proof. ' "Valuable papers' " within the meaning of the statute are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for land, obligations for the payment of money, or certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently, the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangements of the testator." *In re Cole's Will,* 171 N.C. 74, 87 S.E. 962.

In this proceeding there is no contention or suggestion that the testatrix did not have the mental capacity to make a will or that any

undue influence was brought to bear upon her in connection with the preparation and execution of the purported will. In fact, there are no suspicious circumstances revealed on the record in connection with the preparation, execution, or preservation of the testatrix's will.

These assignments of error are overruled.

The caveators assign as error the charge of the court for that the court failed to explain the law arising on the evidence given in the case, "and failed to give equal stress to the contentions of the caveators and the propounders; in fact, the court failed to give any of the contentions whatsoever of the caveators when the contentions of the propounders were repeatedly stressed, in violation of General Statutes 1-180."

A careful examination of the charge in the trial below reveals that the trial judge devoted most of the charge to the applicable law in the case raised by the evidence. On the other hand, the court did not give a single contention of the propounders or of the caveators in the entire charge. The trial judge is not required by law to state the contentions of litigants to the jury. When, however, the judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the opposing party. *S. v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768; *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196; *S. v. Colson,* 222 N.C. 28, 21 S.E. 2d 808; *Trust Co. v. Insurance Co.,* 204 N.C. 282, 167 S.E. 854.

This assignment of error is without merit and is overruled.

The remaining assignments of error reveal no prejudicial error, and, in the trial below, we find

No error.

C. P. OWENS AND WIFE, BETTY SUE OWENS v. J. W. ELLIOTT AND WIFE, WINNIE ELLIOTT.

(Filed 12 December 1962.)

1. Dedication § 1—

The owners of a subdivision sold the entire tract and thereafter a map of the subdivision showing streets was recorded. The grantor then sold to plaintiff a lot adjacent to the subdivision, bounded on one side by a public road and on the other by a street of the subdivision, and the deed referred to the street. *Held:* At the time of the deed to plaintiff the grantor had no interest in the subdivision and could not convey to plaintiff any right or easement with respect to the streets therein, and plain-

tiff's right to use the street was solely that of a member of the public generally, and if the public has no rights therein, plaintiff has none.

2. Dedication § 2—

While the sale of lots in a subdivision with reference to a map showing the streets constitutes a dedication of such streets to the purchasers of the lots, as to the public it is but an offer of dedication which does not constitute such streets public ways unless and until the offer of dedication is accepted in some recognized legal manner by the proper public authorities.

3. Dedication § 1; Highways § 4—

Mere use of a way over land by the public does not constitute it a highway, and mere permissive use by the public does not imply a dedicatory right in the public.

APPEAL by defendants from *Crissman, J.*, June 1962 Civil Term of WILKES.

Action for damages allegedly suffered by reason of the closing of a street by defendants, and to restrain defendants from interfering with the use of the street by plaintiffs, and for mandatory injunction to require defendants to remove obstructions from the street.

There was a jury trial, and in consequence of the verdict the court entered judgment denying the recovery of damages but granting the injunctive relief sought by plaintiffs.

Defendants appeal.

Whicker and Whicker for plaintiffs.
Ralph Davis for defendants.

MOORE, J. This is the second appeal in this case. The first appeal was heard at the Spring Term 1962. *Owens v. Elliott*, 257 N.C. 250, 125 S.E. 2d 589. Much of the evidence necessary to a clear understanding of the legal questions involved had been excluded or was not brought forward in the record on the former appeal. The present record makes clear the factual situation and brings the legal questions for decision into focus.

The pleadings are reviewed in our former opinion. In summary, the facts are: In May and June 1958 Howard Owens and wife subdivided a part of their land into 108 lots. The subdivision does not lie within the boundaries of an incorporated town or city. A 30-foot unnamed street (hereinafter referred to as "the Street") extends in a generally east-west direction across the north side (and through a small portion of the northwest side) of the subdivision, connecting with Crysel Road and Congo Road. These two roads are public highways, Crysel Road lies at the east end and Congo Road at the

west end of the Street. The Street was laid out, graded and opened. A map of the subdivision was made, showing the location of lots and streets. In June 1958 the subdividers conveyed to the defendants all of the lots in the subdivision, 108 in number, and "all the right, title and interests of . . . (subdividers) . . . in and to the streets shown on the map." The map was recorded in August 1958, after the conveyance to defendants. Defendants have sold and conveyed to various purchasers a number of the lots in the subdivision, by deeds referring to the map. In February 1960 plaintiffs herein purchased from Mr. and Mrs. Howard Owens, the original subdividers, a lot outside the subdivision. This lot is situate at the northwest intersection of Crysel Road and the Street; it abuts the western margin of Crysel Road a distance of 100 feet, and the northern margin of the Street 150 feet; it lies directly across the Street from lot 40 of the subdivision. The description in the deed to plaintiffs refers to the Street. Plaintiffs erected a dwelling house facing the Street and constructed a driveway from the Street to their carport. In May 1960 they moved in. Defendants were engaged in paving the Street, but plaintiffs paid no part of the paving cost, though they were requested to do so. Defendants barricaded the Street and later made it impassable by filling it, in front of plaintiff's lot, with dirt and rock to a depth of several feet. From June 1958 to the time the Street was closed, many persons, not owning lots within the subdivision, used the Street freely and without interference. The State Highway Commission has not at any time accepted or maintained the Street as a part of the State highway system. It was maintained entirely at the expense of defendants and the purchasers of lots within the subdivision. Plaintiffs instituted this action to restrain defendants from interfering with their use thereof, and for mandatory injunction to require defendants to open the Street and remove all obstruction therefrom.

The trial court erred in overruling defendants' motion for nonsuit.

Plaintiffs acquired no right, title or interest in or to the Street by virtue of the deed of conveyance from Mr. and Mrs. Howard Owens to them. The description refers to the Street, but the effect of the reference is only descriptive. *Farmville v. Monk & Co.*, 250 N.C. 171, 108 S.E. 2d 479. Mr. and Mrs. Howard Owens had theretofore conveyed to defendants all their right, title and interest "in and to the streets shown on the map" (and this Street is shown on the map), and therefore, at the time of the conveyance of the lot outside the subdivision to plaintiffs, had no title or interest that they could convey to plaintiffs. *Sheets v. Walsh*, 217 N.C. 32, 6 S.E. 2d 817.

The trial judge proceeded on the theory that there was *prima facie* evidence of a consummated dedication of the Street to the use of the

public. He seems to be of the opinion that where there is a subdivision of a tract of land into lots, and streets are opened within the subdivision, that use of a street by a member of the general public "for as much as ten minutes" (to use his expression) works an irrevocable dedication to public use. This is, of course, not the law. The judge was probably confused by failure to distinguish the principles applicable to a dedication to the use of purchasers of lots within a subdivision and those applicable to a dedication to the use of the public. The law is clearly stated in our former opinion. We repeat a portion of the former opinion in the three following paragraphs.

Where lots are sold and conveyed by reference to a map which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and a purchaser of a lot located in the subdivision acquires the right to have all and each of the streets kept open and it makes no difference whether the streets be in fact open or accepted by the appropriate public authority. However, the dedication referred to in the preceding sentence, insofar as the general public is concerned, without reference to any claim or equity of the purchasers of lots in the subdivision, is but a *revocable offer* and is not complete until accepted, and neither burdens nor benefits with attendant duties may be imposed on the public unless in some proper way it has consented to assume them. *Steadman v. Pinetops,* 251 N.C. 509, 515, 112 S.E. 2d 102; *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898; *Rowe v. Durham,* 235 N.C. 158, 69 S.E. 2d 171; *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664.

An acceptance by the public of an offer to dedicate a street or road must be by the proper public authorities — that is, by persons competent to act for the public, *e.g.,* the governing board of a municipality or State Highway Commission. 16 Am. Jur., Dedication, s. 32, p. 379. To be binding, the acceptance by the public authority must be in some recognized legal manner. *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104. "According to the current of decisions in this Court there can be in this State no public road or highway unless it be one either established by public authorities in a proceeding regularly instituted before the proper tribunal or one generally used by the public and over which the public authorities have assumed control for the period of twenty years or more; or dedicated to the public by the owner of the soil with the sanction of the authorities and *for the maintenance and operation of which they are responsible.*" (Emphasis added) *Chesson v. Jordan,* 224 N.C. 289, 291, 29 S.E. 2d 906; *Scott v. Shackelford,* 241 N.C. 738, 743, 86 S.E. 2d 453; *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153.

"The mere use of a way over land by the public does not constitute it a highway. Nor does the mere permissive use of it imply a dedicatory right in the public to use it." *Chesson v. Jordan, supra.*

A person who purchases a lot or parcel of land situate outside the boundaries of a subdivision has no rights with respect to the dedicated streets of the subdivision other than those enjoyed by the public generally, even though his lot or parcel abuts upon one of the streets. *Janicki v. Lorek,* 255 N.C. 53, 120 S.E. 2d 413; *Rose v. Fisher,* 42 S.E. 2d 249, 172 A.L.R. 160 (W. Va. 1947). Even if the Street has been opened and is in use for the purposes of the persons owning lots in the subdivision, if the offer of dedication has not been accepted by proper public authorities or in a manner recognized by law, the owner of the lot outside the subdivision has no right to use the street by reason of any purported dedication. There does not arise on the record in the instant case any question of private easement by grant, prescription, implication or of necessity. Where streets have been laid out and opened in a duly established subdivision and the proffered dedication of the streets has not been accepted on behalf of the general public in a manner recognized in law, if a member of the general public, not a resident of or owner of land in the subdivision, uses the streets for his own purposes and convenience, such use is at best permissive and not of right.

The judgment below is

Reversed.

JOSEPH LANE v. IOWA MUTUAL INSURANCE COMPANY.

(Filed 12 December 1962.)

1. Insurance § 60—

The right of an injured party, after recovery of unsatisfied judgment against insured, to recover against insurer in an assigned risk liability policy may not be defeated by the failure of insured to notify insurer of the accident or failure of insured to file an accident report with the Department of Motor Vehicles as required by statute.

2. Appeal and Error § 1—

The Supreme Court will not pass upon a constitutional question which was not raised and passed upon in the court below.

APPEAL by defendant from *Mallard, J.,* April 1, 1962, Regular Civil Term of WAKE.

This appeal is from a judgment which, after recitals, including a recital that the cause was heard in the Small Claims Division of Wake County Superior Court, provides:

"The Court, after having considered the evidence and stipulations of counsel and the contentions of the parties relative thereto, finds the following facts:

"1. That the plaintiff is an individual and the defendant a corporation duly organized and existing under the laws of the State of Iowa with its home office located in DeWitt, Iowa, and that the defendant is an insurance company engaged in the business of writing policies of insurance, including automobile liability insurance, and is licensed to do business in the State of North Carolina.

"2. That the plaintiff and defendant are properly before the Court, and the Court has jurisdiction of this matter.

"3. That the defendant issued a policy of liability insurance to Lemon Haley, which was an assigned risk policy and as such, had been certified to the North Carolina Department of Motor Vehicles as proof of financial responsibility; that in addition, said policy had been certified to the Department of Motor Vehicles of the State of North Carolina as proof of financial responsibility pursuant to the Financial Responsibility Act of 1957; that the same was a 'motor vehicle liability policy as defined in G.S. 20-279.21'; that said policy issued to Lemon Haley covered a 1950 Chevrolet automobile with limits of 5/10/5 and covered the period of May 15, 1958, to May 15, 1959.

"4. That said poilcy of insurance issued to Lemon Haley, S. Main St., Louisburg, North Carolina, contained inter alia, the agreements as follows:

'(b) To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including loss of use thereof caused by accident arising out of the ownership, maintenance or use of the automobile.'

"5. That plaintiff instituted suit against Lemon Haley in Franklin County Superior Court on or about the 29th day of September, 1959, alleging that due to the negligence of Lemon Haley, the plaintiff hit the shoulder of the road and struck a culvert causing damages to his automobile; that said complaint and summons were duly served on said defendant Haley by the Sheriff of Franklin County.

"6. That said Lemon Haley did not report the alleged accident to his insurance carrier, the defendant, Iowa Mutual Insurance Co., and did not notify said insurance company that a suit had been instituted against him; that said Lemon Haley did not file forms SRI and SR21 with the Department of Motor Vehicles of North Carolina; that plaintiff did not notify the Motor Vehicles Department of North Carolina that said Lemon Haley had been involved in the accident and there was no notice to the defendant, Iowa Mutual Insurance Company of any pending action or of the alleged accident.

"7. That on December 4, 1959, plaintiff obtained a judgment by default and inquiry that on February 29, 1960, the jury awarded damages against said Lemon Haley and in favor of the plaintiff in the amount of $677.70, plus interest from February 23, 1960 and thereafter on March 11, 1960, plaintiff's attorney advised defendant, Iowa Mutual Insurance Company, at its office in DeWitt, Iowa, that plaintiff had obtained final judgment against the said Lemon Haley.

"8. That the legal liability of Lemon Haley to plaintiff as damages because of the property damage arising out of the use of the insured automobile had been finally determined by the aforesaid judgment and that the defendant has not paid or tendered payment of any part of the said judgment against the insured.

"And the Court being of the opinion, upon the foregoing facts, that the plaintiff is entitled to judgment against the defendant in this action;

"It is, therefore, ORDERED, ADJUDGED AND DECREED, that the plaintiff have and recover of the defendant the sum of $677.70, plus interest from February 23, 1960, the costs of court in the suit entitled '*JOSEPH T. LANE v. LEMON HALEY*, and the costs of this action to be taxed by the Clerk."

Defendant excepted "(t)o the foregoing judgment and the signing thereof" and appealed.

Dupree, Weaver, Horton & Cockman for plaintiff appellee.
Teague, Johnson & Patterson for defendant appellant.

BOBBITT, J. Defendant contends the judgment should be reversed on the basis of the facts set forth in Finding of Fact No. 6.

Reference is made to *Swain v. Insurance Co.*, 253 N.C. 120, 116 S.E. 2d 482, where this Court, with reference to a similar factual situation,

cited and discussed the statutory and policy provisions relevant to decision.

Plaintiff had no legal right under policy or statutory provisions to sue defendant unless and until plaintiff first obtained a final judgment against Haley. His final judgment against Haley established the amount of Haley's legal obligation to plaintiff. Defendant's agreement was to pay the amount for which Haley became "legally obligated."

Under G.S. 20-279.21(f)(1), as construed in *Swain*, Haley's failure to comply with policy provisions as to notice of accident and of suit did not defeat plaintiff's right to recover from defendant the amount of the judgment by which Haley's legal obligation to plaintiff was finally determined.

With reference to the finding of fact that Haley "did not file forms SR1 and SR21 with the Department of Motor Vehicles of North Carolina," it is noted: G.S. 20-279.31(a) prescribes the penalties for failure to report an accident as required in G.S. 20-279.4. G.S. 20-279.4 prescribes the contents of a report filed as required in G.S. 20-166.1(b). We perceive no sound reason why the legal obligation of Haley or of defendant to plaintiff is impaired or affected by Haley's failure to file an accident report as required by statute.

With reference to the finding of fact that "plaintiff did not notify the Motor Vehicles Department of North Carolina that said Lemon Haley had been involved in the accident," it is noted: There is no finding that plaintiff failed to report the *accident*. It does not appear when plaintiff was advised that Haley was the driver who caused him to run off the road and strike the culvert. The accident occurred February 26, 1959, (so alleged and admitted in the pleadings) and plaintiff's action was commenced September 29, 1959. If plaintiff had failed to report the accident to the Department of Motor Vehicles as required by statute, such failure did not impair or affect the legal obligation of Haley or of defendant to plaintiff. Under G.S. 20-279.21(f)(1), as construed in *Swain*, defendant's liability (within the limits of the compulsory coverage) for the payment of the damages for which Haley was "legally obligated" became absolute on February 26, 1959, when plaintiff's car was damaged, at which time the policy issued by defendant to Haley was in full force and effect.

In *Swain*, the policy under consideration was issued voluntarily by the defendant. Relevant to the constitutional question then raised, this Court said: "When defendant voluntarily issued its policy to Owens, it did so with full knowledge that the provisions of G.S. 20-279.21(f)(1) became a part thereof as fully as if written therein; and, having

voluntarily assumed the risk, it may not challenge the constitutionality of the statutory provisions."

The policy now under consideration is referred to in the findings of fact (but not in the pleadings) as an assigned risk policy. There are no findings of fact as to the plans and procedures adopted for the issuance of assigned risk policies under G.S. 20-279.34 or as to the circumstances relating to the issuance by defendant to Haley of the policy now under consideration.

On appeal, by brief in this Court, defendant challenges for the first time the constitutionality of G.S. 20-279.21(f)(1) as construed in *Swain* when applied to an assigned risk policy. This constitutional question was not raised in the court below and may not be raised for the first time in this Court. *Phillips v. Shaw, Comr. of Revenue,* 238 N.C. 518, 78 S.E. 2d 314; *Baker v. Varser,* 240 N.C. 260, 267, 82 S.E. 2d 90; *Pinnix v. Toomey,* 242 N.C. 358, 367, 87 SE. 2d 893. "Therefore, in conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *Denny, J.* (now C.J.), in *S. v. Jones,* 242 N.C. 563, 564, 89 S.E. 2d 129.

With reference to the constitutional question defendant belatedly attempted to raise, see *Sanders v. Traverlers Indemnity Company,* 144 F. Supp. 742.

As stated in *Swain* and quoted with approval in *Nixon v. Insurance Co.,* 255 N.C. 106, 109, 120 S.E. 2d 430: "The 1957 Act required *every owner* of a motor vehicle, as a prerequisite to the registration thereof, to show 'proof of financial responsibility' in the manner prescribed by G.S. Article 9A, Chapter 20, to wit, the 1953 Act. The manifest purpose of the 1957 Act was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle; and, in respect of a 'motor vehicle liability policy,' to provide such protection notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claims."

On authority of our decision in *Swain,* the judgment of the court below is affirmed.

Affirmed.

THURSTON MOTOR LINES, INC. v.
GENERAL MOTORS CORPORATION AND PAYNE TRUCK SALES, INC.

(Filed 12 December 1962.)

Limitation of Actions § 4— Action for damages resulting from dangerous defect in machinery accrues at time of sale and not time substantial damage occurs.

Plaintiff's allegations were to the effect that one defendant sold and the other defendant manufactured a motor vehicle equipped with a faulty and dangerous carburator, that defendants knew or by the exercise of due care should have known of such defect and failed to warn plaintiff thereof, and that by reason of such defect the vehicle subsequently caught fire to plaintiff's damage. *Held:* Plaintiff's cause of action, whether for negligence or for breach of warranty, accrued at the time plaintiff purchased the vehicle, since plaintiff then had a cause of action for nominal damages at least, and it appearing from the complaint that the action was not instituted until more than three years thereafter, judgment on the pleadings in favor of defendant is without error, it being immaterial that the actual or substantial damage did occur within three years of the institution of the action.

PARKER, J., dissents.

APPEAL by plaintiff from *Clark (Edward B.), Special Judge,* March 26, 1962, Special Term of WAKE.

Civil action instituted September 8, 1958, to recover damages allegedly caused by the joint and concurrent negligence of defendants.

The complaint, summarized in part and quoted in part, alleged:

In the latter part of June, 1955, plaintiff purchased from Payne Truck Sales, Inc. (Payne), agent and dealer for General Motors Corporation (General Motors), the manufacturer, a new 1955 GMC truck-tractor. On September 9, 1955, while being operated by plaintiff's driver, said truck-tractor was damaged by "a floorboard fire" that "enveloped the motor." The truck-tractor had been in service less than sixty days and had been driven less than four thousand miles.

The alleged facts on which plaintiff predicates its allegations of negligence are as follows:

> "7. That plaintiff is informed and believes, and therefore alleges that said fire was caused by the loosening of the main jet passage plug in the model 660D Holly carburator of said GMC tractor, and such loosening was caused by vibration and fell out by reason of the fact that the carburator was *patently* defective and had been negligently manufactured and installed on said GMC tractor causing gas to leak from the carburator and fall upon the hot manifold and burst into flames thereby causing said fire and the resulting damage to plaintiff's truck." (Our italics)

The gist of plaintiff's numerous specifications of negligence is that each of defendants knew or should have known the carburator was defective and negligently failed to warn plaintiff of its defective condition.

Defendants filed separate answers, each consisting of a general denial of plaintiff's allegations.

On January 30, 1962, plaintiff moved for leave to amend its complaint by substituting the word "latently" in lieu of the word "patently" in paragraph 7 of the complaint, asserting the word "patently" had been used through inadvertence. On February 5, 1962, the court allowed plaintiff's said motion and also ordered "that defendant shall have an additional period of 30 days within which to file an amended answer to the complaint or amendment to complaint, in such manner as defendants or either of them deem advisable."

Thereafter, each defendant filed an amended answer. Each defendant, alleging as a further defense that plaintiff's cause of action, if any, arose in June, 1955, when the truck-tractor was delivered to plaintiff, pleaded the three-year statute of limitations in bar of plaintiff's right to recover. General Motors also pleaded the three-year statute of limitations in bar of the cause of action, if any, alleged in the amendment to complaint filed February 5, 1962.

After said amended answers were filed, each defendant moved in writing for judgment on the pleadings in its favor on the ground it appeared from the complaint that the cause of action alleged therein accrued more than three years prior to the commencement of this action.

Allowing said motions, the court entered judgment "that the plaintiff recover nothing of the defendants or either of them and that the costs of this action be taxed against the plaintiff." Plaintiff excepted and appealed.

Teague, Johnson & Patterson and Ronald C. Dilthey for plaintiff, appellant.

Smith, Leach, Anderson & Dorsett for defendant appellee General Motors Corporation.

Morgan, Byerly, Post & Van Anda and S. Perry Keziah for defendant appellee Payne Truck Sales, Inc.

BOBBITT, J. The question is whether defendants are entitled to judgment on the pleadings on the ground plaintiff's action, if any, is barred by the three-year statute of limitations.

While plaintiff alleges its damages were caused "as a direct and proximate result of the aforesaid negligence on the part of both de-

fendants," it is noted plaintiff alleged that both defendants, at the time plaintiff purchased the truck-tractor, "assured plaintiff that said GMC truck had been manufactured properly, was in good running condition and that defendants gave plaintiff the usual guarantee when said GMC truck was purchased."

For a full statement of the rules applicable upon consideration of a motion for judgment on the pleadings, see *Erickson v. Starling,* 235 N.C. 643, 656, 71 S.E. 2d 384.

For present purposes, the pertinent facts are: (1) The truck-tractor was purchased by plaintiff the latter part of June, 1955; (2) it was put into service on July 17, 1955; (3) the fire occurred September 9, 1955; (4) no alleged negligent act or omission of defendants occurred subsequent to the sale and delivery of the truck-tractor the latter part of June, 1955.

The period prescribed for the commencement of this action, whether considered an action for breach of warranty or an action for negligence, is three years from the time the cause of action accrued. G.S. 1-15; G.S. 1-46; G.S. 1-52(1); G.S. 1-52(4).

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises, . . ." 54 C.J.S., Limitations of Actions § 109; 34 Am. Jur., Limitation of Action § 113; *Shearin v. Lloyd,* 246 N.C. 363, 367, 98 S.E. 2d 508.

Plaintiff contends its cause of action did not accrue until September 9, 1955, when the truck-tractor was damaged by fire; and that this action was instituted within three years, to wit, on September 8, 1958. Defendants contend plaintiff's cause of action, if any, accrued in the latter part of June, 1955, when the truck-tractor was sold and delivered to plaintiff, and is barred by the three-year statute of limitations.

"It is a firmly established rule that with certain exceptions, such as in the cases of covenants and indemnity contracts, the occurrence of an act or omission, whether it is a breach of contract or of duty, whereby one sustains a direct injury, however slight, starts the statute of limitations running against the right to maintain an action. It is sufficient if nominal damages are recoverable for the breach or for the wrong, and it is unimportant that the actual or substantial damage is not discovered or does not occur until later. However, it is well settled that where an act is not necessarily injurious or is not an invasion of the rights of another, and the act itself affords no cause of action, the statute of limitations begins to run against an action for consequential injuries resulting therefrom only from the time actual

damage ensues." 34 Am. Jur., Limitation of Actions § 115; 54 C.J.S., Limitations of Actions § 168.

In *Shearin v. Lloyd, supra,* decisions of this court tending to support the quoted general statement were cited and discussed. We refer, without repetition, to what is there stated.

In *Hooper v. Lumber Co.,* 215 N.C. 308, 1 S.E. 2d 818, it was held that the plaintiff's action, based on the alleged negligence of the defendant, was barred by the three-year statute of limitations; and the ground of decision was "that the running of the statute must be computed from the time of the wrongful act or omission from which the injury resulted," not from the time the injury occurred. The opinion states: "The law will not permit recovery for negligence which has become *a fait accompli* at a remote time not within the statutory period, although injury may result from it within the period of limitation." In this connection, see *Baucum v. Streater,* 50 N.C. 70; *Hughes v. Newsom,* 86 N.C. 424; *Daniel v. Grizzard,* 117 N.C. 105, 23 S.E. 93; *Bank v. McKinney,* 209 N.C. 668, 184 S.E. 506.

In decisions from other jurisdictions cited by plaintiff (*White v. Schnoebelen* (N.H.), 18 A. 2d 185; *Schmidt v. Merchants Despatch Transp. Co.* (N.Y.), 200 N.E. 824, 104 A.L.R. 450; *Wabash County v. Pearson* (Ind.), 22 N.E. 134), and in other decisions, it was held that a cause of action for negligence does not accrue unless and until injury results. Indeed, in *Hocutt v. R.R.,* 124 N.C. 214, 32 S.E. 681, it was held that the cause of action did not accrue until there had been an invasion of plaintiff's rights.

Whether this Court, in a case where there is no injury to plaintiff or invasion of his rights at the time of defendant's negligent act or omission, would follow *Hooper v. Lumber Co., supra,* need not be decided on this appeal. Decision on this appeal, as in *Shearin v. Lloyd, supra,* is based on the ground that plaintiff did sustain injury and his rights were invaded at the time of the alleged negligent acts and omissions of defendants.

In *Shearin v. Lloyd, supra,* it was held that plaintiff's cause of action for malpractice accrued when a surgeon, upon completing an operation, closed the incision without first removing a lap-pack he had introduced into plaintiff's body, not when the injurious consequences were or should have been discovered.

It is noted that the damages alleged by plaintiff relate directly and solely to the truck-tractor manufactured by General Motors and purchased by plaintiff from Payne. Plaintiff's cause of action, if any, derives from the relationship subsisting between plaintiff and defendants with reference to said truck-tractor.

Assuming, as alleged by plaintiff, the truck-tractor was equipped with a faulty and dangerous carburator, likely to cause said truck-

tractor to be "ignited with fire," when sold and delivered to plaintiff, and that defendants knew or by the exercise of due care should have known of such defective condition, and failed to warn plaintiff thereof, we are of opinion and hold that plaintiff suffered injury and his rights were invaded in the latter part of June, 1955, immediately upon the sale and delivery of the truck-tractor to plaintiff, and that a cause of action in favor of plaintiff and against defendants then accrued for which plaintiff was entitled to recover nominal damages at least. Hence, the judgment of the court below, based on the ruling that plaintiff's action is barred by the three-year statute of limitations, is affirmed.

Affirmed.

PARKER, J., dissents.

HIRAM VAN BELLAMY, EMPLOYEE v. MORACE STEVEDORING COMPANY, EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 12 December 1962.)

Master and Servant § 65—

Evidence that plaintiff suffered a coronary occlusion while rolling a heavy rope net in the course of his employment, with medical expert testimony that the exercise could not be the cause of the condition although the attack might have been excelerated or precipitated by the exertion, *is held* insufficient to sustain a finding that the coronary occlusion and resulting myocardial infarction arose out of and in the course of the employment.

APPEAL by employer and its insurance carrier from *McKinnon, J.*, March, 1962, Term, BRUNSWICK Superior Court.

This proceeding originated before the North Carolina Industrial Commission as a compensation claim filed against Morace Stevedoring Company by Hiram Van Bellamy for injuries resulting from an industrial accident. The employment, the insurance, weekly wages, and other jurisdictional facts were found by the deputy commissioner upon competent evidence.

The deputy commissioner, after hearing, found the claimant since 1955 had been employed as a carpenter by the present employer and its predecessor, Sunny Point Army Terminal. The deputy commissioner's further findings are:

"(4) On March 3, 1961, plaintiff reported for work shortly before 8:00 A.M. and plaintiff and his brother Lee Bellamy were instructed to get two four-wheeled trucks which were located on the dock. In order to get the trucks to the desired place, plaintiff and his brother had to move two pallets weighing about 400 pounds each and to partially lift, roll and move two safety nets made of heavy rope weighing 500 pounds or more each. While lifting the second net, plaintiff sustained pain in his chest and became sick at his stomach. It was unusual for plaintiff to do such heavy and strenuous lifting and same was usually done by stevedores or longshoremen who are younger and much stronger men than plaintiff.

"(5) Plaintiff was hospitalized from March 3, 1960, to April 14, 1960. A diagnosis of coronary occlusion with myocardial infarction was made. Plaintiff reached the end of the healing period on January 25, 1961, and has at least a 50 per cent incapacity for work due to his residual heart condition presently diagnosed as angina pectoris.

"(6) On March 3, 1960, plaintiff sustained an injury by accident arising out of and in the course of his employment with Morace, which precipitated and resulted in a coronary occlusion with myocardial infarction with a present diagnosis of angina pectoris."

The deputy commissioner awarded compensation based on the claimant's weekly wages. The employer and the carrier applied for and were granted a review by the full commission upon specifically assigned errors. After hearing, the full commission adopted as its own the findings and conclusions of the deputy commissioner and affirmed the award. The employer and the insurance carrier appealed to the superior court. After hearing on the record, the superior court overruled, seriatim, all exceptions, and affirmed the award. The employer and the carrier appealed.

Bowman and Prevatte by James C. Bowman for plaintiff appellee.

Poisson, Marshall, Barnhill & Williams, by Lonnie B. Williams for defendants, appellants.

HIGGINS, J. The claimant testified as a witness in his own behalf: "I remember the morning of March 3, 1960. I was sick a little bit before I left home and then I vomited and I got all right, and then I went . . . down to Sunny Point . . . I moved the first net two or three feet . . . just enough to get by . . . there were two of them . . . Well,

when I got so I started to moving it good, I taken a pain in my breast, so I went in the box car and told this man I was sick. He said go to the office, so I did so, . . . I vomited and was just as sick as I could be. . . . I was hurting in my breast and arm."

On cross-examination, he testified: "When I moved them, I mean I rolled them. . . . I had not rolled nets too many times before. It's part of a carpenter's duties if he is asked to. . . .There was one man helping me roll the net. . . . I was rolling the net, . . . There was no lifting involved."

Claimant was a carpenter, 65 years of age. The defendant's evidence indicated that the work of moving nets, etc., was usually done by longshoremen. However, this duty was sometimes assigned to carpenters. In moving a net, "it is rolled similar to a barrel."

The claimant's medical expert, a specialist in the field of "heart conditions," in response to a hypothetical question involving the effect of physical exertion, said: "I think it might have been a precipitating or a hastening factor in this situation. As far as being the underlying cause, generally speaking, it is not. I don't think it would be in this case. * * * This man also, besides being at an age where he had a fair amount of arteriosclerosis, had diabetes, which accelerates the arteriosclerotic hardening process, or narrowing or hardening of the arteries. So that actually it happens that people who have myocardial infarction, such as he did, at least half of them have them when they are at rest . . . or when they are in bed sleeping, I should say — the other half have them when they are awake. So, generally speaking, activity has nothing to do with the production of a myocardial infarction. Now, it is true that a person who is on the verge of having such an attack, by strenuous exertion this could be accelerated or precipitated." Dr. Tidler testified the claimant told him three men were helping him.

We conclude that so much of finding of fact No. 4 as relates to the heavy and strenuous lifting usually done by younger and much stronger men does not find support in the evidence. Finding No. 5 relates to diagnosis and treatment after the disability. Finding No. 6 must be treated as a conclusion and not a finding of fact.

This case is very similar to, no stronger than, and governed by, the decision in *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410, from which we quote:

"Ordinarily a death from heart disease is not an injury by accident arising out of and in the course of the employment, nor an occupational disease, so as to be compensable under our statute. * * *

"There was medical evidence to the effect that the fire (in the theater where she worked) and Mrs. Lewter's excitement would have

aggravated her condition to such an extent as to cause the cerebral hemorrhage from which she died.

"In our opinion, there is no evidence tending to show that Mrs. Lewter died as a result of an injury, as those words are used in our Workmen's Compensation Act. This is in accord with our decisions in *Neely v. Statesville, supra,* (212 N.C. 365, 193 S.E. 664)." *Gilmore v. Board of Education,* 222 N.C. 358, 23 S.E. 2d 292; *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324.

The evidence before the Industrial Commission, the Superior Court, and now before us, was insufficient to support any finding the claimant was engaged in strenuous lifting not usually a part of his customary duties, or that he sustained any injury by accident arising out of and in the course of his employment.

The Superior Court will remand the proceeding to the North Carolina Industrial Commission with instructions to enter an award disallowing the claim.

Reversed.

STATE v. JARVIS GLENN WARD.

(Filed 12 December 1962.)

1. Automobiles § 59— Evidence held for jury on issue of culpable negligence.

In this prosecution for manslaughter in striking an aged woman crossing a highway, the testimony and the physical facts at the scene, including evidence that defendant's car skidded 150 feet sidewise before striking deceased and skidded an additional 136 feet after stricking her, that defendant saw deceased when she was some 700 feet away but did not attempt to avoid the collision until within 150 feet of her, together with evidence of other facts and circumstances, *is held* sufficient to justify a finding that defendant violated both the reckless driving and speeding statutes and, even though such violations were unintentional, that defendant evinced such recklessness and carelessness as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and therefore motion for nonsuit was correctly denied.

2. Automobiles § 57; Negligence § 32—

Contributory negligence of the person injured and killed is no defense in a prosecution for manslaughter, but is relevant and material solely on the question of whether defendant's negligence was a proximate cause of the injury and death, and defendant is not exculpated by contributory negligence if the injury and death resulted directly and naturally from his culpable negligence.

STATE *v.* WARD.

APPEAL by defendant from *Froneberger, J.*, February 1962 Mixed Term of CATAWBA.

This is a criminal action in which defendant is charged with involuntary manslaughter in the operation of an automobile.

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

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

Richard A. Williams and Martin C. Pannell for defendant.

MOORE, J. Defendant contends that the court erred in overruling his motion for nonsuit.

Defendant offered no evidence. The State's evidence, in the aspect most favorable to the prosecution, is summarized as follows:

About 1:00 P.M. on 25 March 1961 Mrs. Alice Melvina Caldwell, while walking across the Providence Road, was struck and killed by a 1954 Oldsmobile driven by defendant. Mrs. Caldwell was 85 years old. At times she wore glasses; sometimes she had "a little trouble hearing," and at other times "she could hear real good." The accident occurred in a rural area. Providence Road runs generally north and south; it is paved and is 20 feet wide. The speed limit at the place of the accident was 55 miles per hour. On the day in question the weather was clear and the road was dry. Defendant was proceeding northwardly. There is a curve in the road 3/20 of a mile, or about 700 feet, south of the point of the accident. From this curve to the point of impact the road is straight and is on a slight upgrade. The accident occurred about the crest of the hill. Defendant stated to the investigating patrolman that "he was running at least 55 miles per hour," and that "when he came around the curve there was a woman standing on the East side of the road, and that when he first saw her, she was walking very slowly towards the middle of the road, and that she got to the center and stopped — paused momentarily — and continued on towards the other side of the road." Defendant pulled to the left side of the road and applied brakes. Defendant's car skidded 150 feet along the west side of the highway before it struck deceased. Most of this distance it was skidding sidewise, the front toward the west and the rear toward the center of the road. Deceased was struck by the right rear door of the car at a point 3 feet and 10 inches west of the centerline of the highway. She was knocked upwards, turned over and over, and landed in a field on the east side of the road. The car skidded an additional 136 feet after striking her, and in the process knocked down two mail boxes, left the highway on the west side, crossed a ditch and came to rest in a field 17 feet and 2 inches from the hardsurface.

Deceased's daughter-in-law, an eyewitness, stated that defendant "was coming up the road as fast as he could go." Deceased's granddaughter testified: "I heard a car coming up the road, and it was coming real fast — with a noise like a car makes when it goes real fast." There was evidence that no horn was sounded. There was a strong odor of intoxicants on defendant's breath. The patrolman testified: ". . . (H)e was under the influence of intoxicants, but not to the degree that I would charge him with driving an automobile drunk. In my opinion a borderline situation." Mrs. Caldwell suffered multiple injuries, and all of her ribs, both arms, both legs, and the collarbone on one side were broken, and she had a head injury. Death was instantaneous.

In our opinion the State's evidence is sufficient to withstand the motion for nonsuit. It warrants the following inferences: Defendant first saw Mrs. Caldwell when he rounded the curve 700 feet away. His view was clear and unobstructed. She was then at or within a few feet of the edge of the hardsurface. He observed her walking slowly across the road, saw her pause momentarily at the center of the highway and then continue westwardly. At a distance of more than 150 feet from the point of impact he turned to the left and applied brakes. He then skidded 286 feet out of control. The road was dry, yet he skidded sidewise 150 feet uphill before he struck her at a point 3 feet and 10 inches west of the centerline of the road, and then skidded 136 feet beyond. He knocked down two mail boxes, crossed a ditch and came to rest in a field 17 feet west of the hardsurface. He had been drinking. When the vehicle struck Mrs. Caldwell it knocked her aloft, tumbling over and over, and threw her into a field on the east side of the highway. The impact was so great that all her ribs, both legs, both arms and her collarbone were broken, her head was injured and death was instantaneous.

The physical facts speak in terms loud and clear. *State v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *State v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724; *State v. Hough,* 227 N.C. 596, 42 S.E. 2d 659. The evidence is sufficient to justify a jury in finding that defendant was in violation of the reckless driving and speed statutes (G.S. 20-140 and G.S. 20-141), and such violations proximately caused the death of Mrs. Caldwell. The reckless driving and speed statutes are designed for the protection of life, limb and property. *State v. Palmer,* 197 N.C. 135, 147 S.E. 817. Though it be conceded that the violation of these statutes in the instant case was unintentional, yet the circumstances permit the inference that defendant evinced such recklessness and carelessness, proximately resulting in death, as imports a thoughtless disregard of consequences or a heedless indifference to the right and safety of others. *State v. Phelps, supra; State v. Cope,* 204 N.C. 28, 167 S.E.

456. The fact that defendant at length made an effort to avoid the accident does not avail him when it appears that his recklessness was responsible for his inability to control the vehicle. *State v. Stansell,* 203 N.C. 69, 164 S.E. 580.

Defendant relies heavily upon two civil cases, *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, and *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246. Both involved pedestrians crossing highways, and in both contributory negligence was strongly urged. In the former it was held that it was a case for the jury, and in the latter that material on the question whether defendant is guilty of culpable negligence is no defense in a criminal action, but is relevant and deceased was contributorily negligent as a matter of law. Contributory negligence. The act of the accused need not be the immediate cause of death; defendant is legally accountable if the direct cause is the natural result of the criminal act. *State v. Phelps, supra; State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844. The case at bar is in some respects analogous factually to the following cases: *State v. Renfrow,* 245 N.C. 665, 97 S.E. 2d 218; *State v. Phelps, supra; State v. Smith,* 238 N.C. 82, 76 S.E. 2d 363; *State v. Triplett,* 237 N.C. 604, 75 S.E. 2d 517; *State v. Huggins,* 214 N.C. 568, 199 S.E. 926; *State v. Cope, supra; State v. Durham,* 201 N.C. 724, 161 S.E. 398. Of course, no two cases are factually identical.

Defendant makes 13 other assignments of error based on 17 exceptions. They present no novel questions of law and do not justify discussion and restatement of familiar principles. We have carefully considered them and find no errors which would justify a new trial.

No error.

LESTER C. SUGG, ADMINISTRATOR OF JOHN WAYNE SUGG, DECEASED v. JAMES H. BAKER, SR.

(Filed 12 December 1962.)

1. Trial § 33—

Even though the parties waive a recapitulation of the evidence, the court is required by statute to give a summary of the evidence sufficient to bring into focus the controlling legal principles and to apply the law to the evidence, and an instruction which leaves the application of the law to the evidence entirely to the jury does not meet the requirements of the statute. G.S. 1-180

2. Automobiles § 64—

Failure to keep a proper lookout may be, but is not necessarily, a component of reckless driving, and does not alone constitute reckless driving. G.S. 20-140.

3. Automobiles §§ 41b, 46—

In this action to recover for the wrongful death of a child, plaintiff alleged that defendant failed to keep a reasonable lookout and violated the reckless driving statute. An instruction of the court on plaintiff's evidence of defendant's failure to keep a proper lookout, that plaintiff contended that defendant violated the reckless driving statute, which the court then read to the jury, *is held* prejudicial as permitting the conclusion that the jury could not find that defendant was negligent under the rule of an ordinarily prudent man in failing to keep a reasonable lookout unless the jury also found that defendant was guilty of reckless driving as defined by statute.

4. Trial § 33—

It is error for the court to instruct the jury upon a principle of law even though alleged in the pleading, when there is no evidence presenting the matter.

5. Trial § 32—

One of the most important purposes of the charge is the elimination of irrelevant matters and causes of action or allegations as to which no evidence has been offered, and thereby to let the jury understand and appreciate the precise facts that are material and determinative.

APPEAL by plaintiff from *Bundy, J.*, February 1962 Term of GREENE.

Action by plaintiff to recover damages for the alleged wrongful death of his intestate John Wayne Sugg, a child 2½ years of age. The child, while crossing a street, was struck and fatally injured by a motor vehicle driven by defendant. The accident occurred about 7:00 P.M., 12 July 1960, on Fourth Street in the town of Snow Hill. Defendant was driving northwardly along Fourth Street at a speed of 25 miles per hour. The street is 31 feet wide; it was dry and there was no other traffic. Defendant saw a man and two boys with a homemade motor scooter in a lane or driveway just off the west side of the street. His eyes were focused in their direction. He slackened speed to 15 or 20 miles per hour. He could see the street in front of him, but was watching the boys to see if they were going to drive the scooter into the street. On the east side of the street there was no sidewalk, and there was a hedge about 1 foot from and running parallel to the curb. The hedge was 4 or 5 feet high and extended to the driveway at the south edge of Ivan Godwin's lot. The view to defendant's right was also obstructed by other objects. Ivan Godwin's lot fronted on the street a distance of 50 feet. As defendant was passing this lot, travelling about 3 feet from the curb, he caught a glimpse of an object

proceeding into the street from the Godwin lawn. It was John Wayne Sugg (Godwin's grandchild), who had alighted from an automobile in the Godwin driveway and had proceeded across the lawn into the street. Defendant's right headlight struck the child. Defendant stopped at the curb about a car's length away. The child died within the hour.

Plaintiff alleges that defendant was negligent in the following respects (among others): (1) he failed to keep a reasonable lookout, and (2) he violated the reckless driving statute (G.S. 20-140).

The court submitted two issues — negligence and damages. The jury answered the negligence issue in favor of defendant, and the court entered judgment denying recovery and dismissing the action.

Plaintiff appeals.

Jones, Reed & Griffin for plaintiff.
Whitaker & Jeffress for defendant.

MOORE, J. Instructing the jury, the court stated:

> ". . . (O)rdinarily in a case of this kind the Court would recapitulate and summarize the substance of the evidence. That is done unless the doing of that is waived by both of the parties. In this case the parties, through their counsel respectively have waived the Court recapitulating or summarizing the evidence."

The charge is entirely devoid of any summary of the evidence. There is no attempt to apply the law to the facts. The few contentions given are extremely general and conclusional and do not in any sense review the crucial facts. The final instruction on the first issue is:

> ". . . (I)f you find from the evidence and by its greater weight that the death of plaintiff's intestate was proximately caused by the negligence of the defendant as alleged in the complaint, applying these rules of law to the facts in the case, then it would be your duty to answer this issue 'Yes.' If you fail to so find, then it would be your duty to answer it 'No.' "

The charge does not comply with the requirement of G.S. 1-180. The court places upon the jury the duty which the statute imposes upon the judge, that is, to apply the law to the crucial facts in the case. The charge is for the guidance of the jury, not for the benefit of counsel. Even though the parties waive a recapitulation of the evidence, such waiver does not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. It is not sufficient for the court to read a statute or to state the appli-

cable law bearing on an issue in controversy, and leave the jury unaided to apply the law to the facts. *Bulluck v. Long,* 256 N.C. 577, 124 S.E. 2d 716; *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196. "The court is not required to recapitulate the evidence, witness by witness. Nor is it required to instruct on subordinate features of the case without a proper request therefor. A summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence." *Rubber Co. v. Distributors, Inc.,* 256 N.C. 561, 564, 124 S.E. 2d 508.

A further error in the charge graphically illustrates the importance and necessity of complying with the requirements of G.S. 1-180. The judge instructed the jury:

> "The plaintiff contends that his intestate's death was proximately caused by the negligence of the defendant in that he failed to keep a proper lookout. There were other allegations of negligence in the complaint but it resolves itself to this allegation of negligence, and that is what is generally spoken of as careless and reckless driving, of which failure to keep a proper lookout could be considered, and is contended to be a part.
>
> . . . .
>
> "The plaintiff contends further, and in furtherance of that contention with respect to failure to keep a proper lookout that the defendant was driving his automobile in a manner that is commonly referred to as carelessly and recklessly, the statute pertaining to which I specifically call your attention, the plaintiff contending that the defendant drove his motor vehicle in violation of this statute in that he failed to keep the proper lookout that the law requires of a motorist along the highway."

The judge then read to the jury G.S. 20-140.

Failure to keep a proper lookout may be, but is not necessarily, a component of reckless driving. From the instructions given the jury could have, and probably did, conclude that they could not find that defendant was negligent, under the rule of the ordinarily prudent man, in failing to keep a reasonable lookout, unless they also found that he was guilty of reckless driving as defined by the statute. The evidence on this record is insufficient to support a finding of reckless driving. The judge below probably had in mind the statement in *Kolman v. Silbert,* 219 N.C. 134, 137, 12 S.E. 2d 915, that the reckless driving and speed control statutes "constitute the hub of the Motor Traffic Law around which all other provisions regulating the operation of automobiles revolve." This expression is true as a general proposition

and as applied in the *Kolman* case, in which there was abundant evidence of excessive speed and reckless operation. But it does not mean that the violation of any other common law or statutory rule or duty with respect to the operation of automobiles constitutes reckless driving, nor that damage arising from any such violation is not actionable unless it amounts to reckless driving. The court is not justified in giving instructions with respect to a principle of law, not applicable to the evidence, merely because a breach of such law has been pleaded. Before a breach of a particular law or duty may be submitted for jury determination, there must be both allegation and proof of such breach. One of the most important purposes of the charge is the elimination of irrelevant matters and cause of action or allegations as to which no evidence has been offered, and to thereby let the jury understand and appreciate the precise facts that are material and determinative. *Dunlap v. Lee*, 257 N.C. 447, 450, 126 S.E. 2d 62.

New trial.

STATE v. EDWARD MITCHUM.

(Filed 12 December 1962.)

1. Criminal Law § 85—

The introduction in evidence by the State of a declaration or admission by defendant does not preclude the State from showing that the facts are other than as related in defendant's declaration.

2. Criminal Law § 101—

When evidence offered by the State is contradictory, some tending to inculpate and some tending to exculpate defendant, the conflicting evidence carries the issue to the jury.

3. Criminal Law § 98—

The jury may believe a part and reject a part of defendant's statements introduced in evidence by the State.

4. Homicide § 20— Where the State's evidence permits diverse inferences on question of self-defense nonsuit is correctly denied.

The State introduced in evidence statements by defendant tending to show that deceased had made an unprovoked attack upon defendant with a knife, and that during the assault defendant took a knife from his pocket and cut deceased, inflicting the fatal wounds. Other evidence offered by the State tended to show that deceased was unarmed and also tended to contradict certain portions of defendant's statement in regard to the conduct of deceased immediately after the infliction of the fatal wounds. *Held:* The State is not precluded by defendant's statements

tending to establish self-defense, since the jury was entitled to accept part of defendant's statements and reject other parts, and the evidence is sufficient to sustain a verdict of guilty of manslaughter.

APPEAL by defendant from *Farthing, J.*, April 1962 Term of McDOWELL.

The defendant was charged with having murdered Thurmond Harris on March 26, 1962. He plead not guilty; he was convicted of manslaughter. From a sentence of imprisonment the defendant appealed.

T. W. Bruton, Attorney General for the State.
E. P. Dameron for defendant appellant.

SHARP, J. The crucial question on this appeal is whether the evidence was sufficient to survive the defendant's motion for nonsuit made at the close of all the evidence.

In summary, the evidence tells the following story:

The defendant and the deceased Harris worked in the same department on the second shift at the Marion Manufacturing Company on Baldwin Avenue in Marion. Defendant was in charge of the department. Six weeks prior to the homicide there had been trouble between the two men in the Mill when Harris had complained that everybody in the department was working against him and that defendant had been talking about him. Defendant had denied the accusation and had cursed him; Harris, a larger man than defendant, had grabbed defendant by the collar and threatened to get him on the outside. As a result of this difficulty, the supervisor suspended Harris for three days. At the end of that time he returned to work with the consent of the defendant; the two men shook hands, and their relations had apparently been friendly from then until the night of the homicide.

There were no witnesses to the homicide. To establish the circumstances of it the State had to rely upon the statement which the defendant made the next morning when he went to the sheriff's office after having been informed that Harris was dead. He told the sheriff, and testified at the trial, that on March 26, 1962 he left the Mill about 11:15 p.m. with D. L. Wood, another employee, and walked north on Baldwin Avenue towards his home. Wood left him at Second Street. Between the Mill and Second Street Harris passed them, driving his automobile south. Just as defendant crossed Third Street, Harris pulled up to the sidewalk and stopped his vehicle headed north. He opened the door on the right and angrily ordered the defendant to get in the car. The defendant refused and asked Harris what was bother-

ing him. Harris got out of the car and responded in abusive language that things were not going right at the Mill. Defendant told him to take his complaints to the Mill office and started walking away. Harris continued his abusive language and, when defendant had gone ten or twelve steps, ran in front of him with an open knife in his left hand, a three-inch blade sticking up from the thumb. Harris grabbed defendant by the collar with his right hand and began hitting him in the mouth and face with his left which held the knife. Defendant's face was never cut during this procedure, but his lip was broken on the inside. While Harris was thus hitting him, defendant struck at Harris several times with his bare fists, took his knife from his pocket, opened it with his thumb, and "switched" at Harris with it.

On the trial, defendant testified as follows:

> "When Harris caught hold of my collar, I did not call anybody. I did not call Mr. Wood and ask him to come up there. Yes, I say that while he had hold of me and had the knife in his left hand, I took my hand and reached down in my pocket and got my knife. Yes, I had to use my thumb to open it. Yes, I was standing and opening my knife and he was standing and hitting me in the face with the knife and did not cut me anywhere in the face. Yes, that is the knife I took out of my pocket and I opened it while I was standing there and switched at him three or four times and he still had hold of my collar. I was swinging at him; I don't know how far I went around; . . . I had my knife somewhere around waist-high. My knife did not ever stop that I know. As soon as I switched around three or four times, I broke and ran. I knocked him loose with my left hand. I never did get loose until I got my knife out."

According to defendant, when he broke loose he had been cut across his coat collar, his left sleeve, and scratched on his right hand and left arm. When he ran from the scene Harris ran after him as hard as he could run for 150 feet to Fourth Street. He then turned around and went back to his car, put on the headlights and started the motor. The defendant went on to his home on Baldwin Avenue, a short distance from Fourth Street, and told his wife what had occurred. At that time, his lips were swollen and his mouth bleeding and he said that he did not know whether he had cut Harris. He then awakened his supervisor, E. D. Lawing, who lived across the street, and reported the matter to him. Thereafter defendant returned home, barred the doors, and sat up until about 3:00 a.m. fearing Harris would come to the home. The defendant denied that he ever intended to kill deceased. He said: "I swiped at him . . . because he was beating

me to death and he had that knife in his hand and I didn't know what he would do to me, and I had to get him off of me."

State Highway Patrolman Burrell testified that about 11:15 p.m. on March 26, 1962, he was called to investigate a wreck on Baldwin Avenue. He found Thurmond Harris dead in the front seat of his 1956 Pontiac automobile which had gone through the heavy steel mesh fence on the edge of the street and stopped on top of two cars in the Mill parking lot ten to twelve feet below the level of the street. An autopsy revealed two stab wounds in Harris' chest cavity. The first one was between the seventh and eighth ribs. It was inclined inward and upward, crossing over the midline into the right ventricle of the heart. The other wound was in the left side in the line back of the armpit. It went through the chest cavity and into the lower lobe of the left lung. Dr. John C. Reese, an expert physician, surgeon, and pathologist, testified that in his opinion a person receiving such wounds could run 150 feet if he ran immediately but, having done so, he would be incapable of walking back that distance.

No knife was found on the deceased or in his car. The deputy sheriff who searched the area involved found no knife or blood on the street. When defendant went to the sheriff's office the following morning, the sheriff saw no cuts or other wounds about his face. The deceased was right-handed. Between 3:00 and 4:00 and 6:00 and 7:00 on the afternoon of the homicide he had borrowed and returned a pocket knife from Harry Lee Gardin, a fellow employee.

The defendant contends that the version of his fight with deceased which he gave the sheriff makes out a perfect case of self defense and that, having offered it, the State is bound by it. If his narrative of events did make out a complete defense, and if that were all the evidence, the defendant would be entitled to a judgment as of nonsuit. Howver, "(t)he State, by offering evidence of the declarations or admissions of a defendant, is not precluded from showing that the facts are other than as related by him. And when the substantive evidence offered by the State is conflicting — some tending to inculpate and some tending to exculpate the defendant — it is sufficient to repel a demurrer thereto." *State v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201.

We think the additional evidence offered by the State and the conflicting inferences which arise from the defendant's statement itself were sufficient to make his guilt a question for the jury.

The jury is not required to believe the whole of defendant's statement; they may believe a part and reject a part because they are the triers of the fact. *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39. In the instant case, the jury rejected a part. The evidence, considered in the light most favorable to the State, as we are required to do

in passing upon a motion as of judgment of nonsuit, *State v. Haddock*, 254 N.C. 162, 118 S.E. 2d 411, was sufficient to justify the jury in finding that the defendant unlawfully killed the deceased. *State v. Robinson*, 188 N.C. 784, 125 S.E. 617; *State v. Marshall*, 208 N.C. 127, 179 S.E. 427, and *State v. Grainger*, 223 N.C. 716, 28 S.E. 2d 228.

The judgment of the court below is affirmed.

Affirmed.

JERRY PARKER v. DOCTOR CALVIN E. BRUCE.

(Filed 12 December 1962.)

1. Automobiles § 41f—

Evidence that plaintiff gave the statutory signal for a left turn preparatory to entering a side road from the highway, that plaintiff slowed down and had to stop before attempting a left turn because of on-coming traffic, and that about a minute after he had stopped defendant crashed his vehicle into the rear of plaintiff's vehicle, *is held* to take the issue of defendant's negligence to the jury.

2. Same—

While the relative duties of drivers traveling in the same direction must ordinarily be governed by the circumstances of each particular case, the mere fact of a rear-end collision ordinarily affords some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout.

3. Automobiles § 42h—

Evidence that plaintiff gave the statutory signal for a left turn preparatory to turning into an intersecting road from the highway and that plaintiff was forced to stop before attempting the turn because of on-coming traffic does not disclose contributory negligence as a matter of law in plaintiff's action to recover for damages resulting from defendant's crashing into the rear of his car.

4. Appeal and Error § 42—

An instruction which presents an erroneous view of the law upon a substantive phase of the cause must be held for prejudicial error even though the misstatement is made in stating the contentions.

5. Automobiles § 46—

The evidence tended to show that plaintiff gave the statutory signal preparatory to making a left turn from the highway and slowed and stopped his vehicle because of on-coming traffic, and that defendant's following vehicle crashed into his rear. *Held:* An instruction, not supported by allegation, evidence, or contention by plaintiff that defendant was negligent in failing to give the statutory signal for a left turn, must

be held for prejudicial error, the rule regarding the signal for a left turn not being applicable to a following vehicle.

APPEAL by defendant from *Crissman, J.*, July 1962 Civil Term of SURRY.

Civil action to recover damages for personal injuries and for other expenses and losses in connection therewith, and for damage to an automobile arising out of defendant driving his automobile into the rear of plaintiff's automobile.

Defendant's answer denies the essential allegations of the complaint, conditionally pleads plaintiff's contributory negligence as a bar to recovery, and avers in a counterclaim that he sustained personal injuries and his automobile was damaged as a result of plaintiff's actionable negligence in suddenly and without warning stopping his automobile on the highway ahead of him so that he could not avoid running into its rear.

There was a verdict in plaintiff's favor awarding him damages for personal injuries and damage to his automobile.

From a judgment in accord with the verdict, defendant appeals.

Folger & Folger by Fred Folger, Jr. for defendant appellant.
Barber and Gardner by Wilson Barber for plaintiff appellee.

PARKER, J. Plaintiff's evidence tends to show:

About 1:30 p.m. on 2 October 1960, at a time when the weather was clear and the highway was dry, he was driving his automobile south on U. S. Highway #52 near the town of Mount Airy and approaching the place where Welch Bridge Road intersects the highway from the east. The highway was level for one-half mile with a slight curve to the north. The pavement of the highway is twenty-four feet wide with eight-foot shoulders on the west side and twelve-foot shoulders on the east side. He was traveling about fifty miles an hour. Through his rear view mirror he saw Dr. Calvin E. Bruce, who was driving his automobile south on U. S. Highway #52, pass a tractor-trailer and get in behind him. When he approached within 150 to 200 feet of the intersection of the highway by Welch Bridge Road, he gave a left-hand signal to indicate his intention to make a left turn onto Welch Bridge Road. When he approached closer to the intersection, he saw five or six automobiles meeting him on the highway traveling north. In consequence he brought his automobile to a complete stop on his right-hand side of the highway to permit this traffic to pass so he could make his indicated left turn. After he had been stopped for about a minute, with his left hand out of the window the entire time, defendant drove his

automobile into the rear of his automobile forcing his automobile over an embankment on the left of the highway. As a result of the collision he and defendant were injured, and their automobiles were damaged.

Plaintiff alleges in his complaint that defendant was negligent in operating his automobile in a careless and reckless manner in violation of G.S. 20-140, in driving it at a speed in excess of fifty-five miles an hour in violation of G.S. 20-141 (b) (4), in failing to reduce his speed in approaching an intersection in violation of G.S. 20-141 (c), in failing to keep a proper lookout, and in failing to exercise due care.

Defendant's evidence tends to show:

He was following plaintiff's automobile at a speed of about fifty miles an hour, and was about 150 to 200 feet behind it. When he approached within about 150 feet of Welch Bridge Road, he saw an automobile come down the road and slide his wheels as if he might slide into the highway. He had seen no hand signal to turn or stop given by plaintiff. He watched the automobile on Welch Bridge Road until he saw its driver was able to stop before sliding into the highway. He then turned his attention to plaintiff's automobile in front of him, and was surprised to see it had slowed down very much or had completely stopped in the middle of the highway, where there was a high bank on the right. He applied his brakes, and slowed down to twenty or twenty-five miles an hour before he collided with the rear end of plaintiff's automobile.

Considering plaintiff's evidence, and defendant's evidence favorable to him, it is our opinion that the trial court properly overruled defendant's motion for judgment of compulsory nonsuit made at the close of all the evidence. Ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout. *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184; *McGinnis v. Smith,* 253 N.C. 70, 116 S.E. 2d 177; *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804; *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838. However, "The relative duties automobile drivers owe one another, when they are traveling along a highway in the same direction, are governed ordinarily by the circumstances in each particular case." *Beaman v. Duncan,* 228 N.C. 600, 604, 46 S.E. 2d 707, 710.

Plaintiff's evidence tends to show when he approached within 150 to 200 feet of the intersection of the highway by Welch Bridge Road, he gave a left-hand signal to indicate his intention to make a left turn onto this road, and that when he had stopped his automobile on the highway by reason of traffic meeting and passing him he had his left hand out of the window for about a minute before defendant ran into his rear. Surely under those circumstances plaintiff cannot be held

guilty of contributory negligence as a matter of law. *Dreher v. Divine,* 192 N.C. 325, 135 S.E. 29; *McGinnis v. Smith, supra.*

The court in its charge on the first issue, which is, "Was the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint?", said in part: "Then, the plaintiff says and contends that the defendant was also in violation of the speed statute, subsection 'a'—he then read G.S. 20-141 (a)—and subsection 'c'—he then read G.S. 20-141 (c)—(and that the defendant was in violation of General Statutes 20-154, subsection 'b', 'The signal herein required shall be given by means of the hand and arm in the manner herein specified. . .for left turn the hand and arm horizontal forefinger pointing, that all hand and arm signals shall be given from the left side of the vehicle, and signal shall be maintained or given continuously for the last one hundred feet traveled prior to stopping or making a turn.')"

Defendant assigns the part of the charge above in parentheses as error. This assignment of error is good.

The Court said 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 authority.)

Plaintiff neither alleges nor contends that defendant violated G.S. 20-154 (b). So far as this collision is concerned this subsection of the statute has no application to defendant's operation of his automobile, because defendant was driving behind plaintiff. To charge the jury that plaintiff contended defendant was violating this subsection of the statute was an incorrect application of the subsection of the statute to the facts, and was prejudicial to defendant, which entitles him to a

New trial.

IN RE COUCH.

IN THE MATTER OF LEAMON F. COUCH, THE BEMAC CORPORATION, FRED M. DUNCAN AND WIFE, GLADYS S. DUNCAN.

(Filed 12 December 1962.)

1. Municipal Corporations § 25—

Where a zoning ordinance permits in the zone in question commercial uses incidental to the needs of the local residential neighborhood, including service stations, an applicant is entitled as a matter of right to a permit to operate a car-wash service in the zone, since cars are commonly washed at gasoline service stations and the whole includes all of its parts.

2. Same—

Zoning ordinances are in derogation of the rights of private property and should be liberally construed in favor of the property owner.

APPEAL by petitioners from *Hobgood, J.*, May, 1962 Civil Term, DURHAM Superior Court.

The petitioners applied to the building inspector of the City of Durham for a permit to erect a car wash service station on a lot located in a C-1 Local Community Commercial Zone. The building inspector, without passing on the application, referred it to the Board of Adjustment, requesting advice whether such a structure is permissible in C-1 zone.

Among the many uses permitted in a C-1 zone are the following: "3. Automobile service stations for the sale of gasoline, oil, and minor accessories only, where no repair work is done except minor repairs made by the attendant, subject to the prohibitions of Section XVIII. (The prohibitions are not material). . . . 5. It is the intent to limit the commercial uses permitted in this zone to those uses properly incidental to the needs of the local residential neighborhood in which the commercial use is situated."

The petitioners objected to the reference to the Board for advice, contending they were entitled to the permit as a matter of right.

The Board of Adjustment conducted a hearing at which arguments for and against granting the permit were heard. The Board voted 3-2 to allow the permit. However, the Board's rules required approval by four members. Consequently the permit was denied.

The petitioners applied to the superior court for, and were granted a writ of *certiorari* to review the proceeding. After hearing, Judge Hobgood affirmed the decision of the Board of Adjustment and dismissed the writ. The petitioners appealed.

Blackwell M. Brogden for petitioners, appellants.

Claude V. Jones for Board of Adjustment of City of Durham, respondent appellee.

Newsom, Graham, Strayhorn & Hedrick, Josiah B. Murray, III, for Ralph N. Strayhorn, amicus curiae.

HIGGINS, J. We may disregard the petitioners' technical objection that the building inspector should have passed on the application for the permit without referring it to the Board of Adjustment for advice. Likewise, we may disregard the contention of the protestants that the Board has passed on the question in its discretion.

The petitioners contend they were entitled to the permit as a matter of right. The ordinance involved was passed in 1951. At that time a service station devoted exclusively to washing automobiles was unknown. Practically every filling station performed this service where water in sufficient quantity was available. We think Sections (3) and (5) of the ordinance, when construed together, contemplate the washing of automobiles as a permitted activity on the part of automobile service stations selling gasoline and oil, and doing light repair work. The service certainly is a commercial use properly incidental to the needs of a local residential neighborhood. The City Director of General Services certified: "This property is located in a C-1 Commercial Zone which permits along with other uses service stations where normally cars are washed."

The petitioners propose to erect a building which admittedly meets all the requirements of the building code. The intended use is the only objection. Apparently if the proprietor were to sell gasoline, oil and minor accessories, and to make minor repairs and wash cars, the petitioners would be entitled to the permit. Certainly, according to the Director, washing cars is a permissible use in the zone, if done in connection with the other activities named.

On the theory that the whole includes all the parts, we think the petitioners have the right to erect a building for any one or more of the permitted uses. "The law is disposed to interpret language in the light of surrounding circumstances and to give to words their ordinary meaning and significance. . . . Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner." *In re Appeal of Supply Co.*, 202 N.C. 496, 163 S.E. 462; *In re O'Neal*, 243 N.C. 714, 92 S.E. 2d 189; *Penny v. Durham*, 249 N.C. 596, 107 S.E. 2d 72.

The many cases cited by the attorney for the City and by the *Amicus Curiae* involve matters passed on by zoning and other boards as discretionary matters. The petitioners' showing entitled them to the requested building permit as a matter of right. The Superior Court

will remand the proceeding to the proper City authorities, directing that a permit issue, unless cause for denial has arisen since the hearing.

The judgment of the Superior Court of Durham County is

Reversed.

PETER HEWETT, FRANCE HEWETT, GOLDIE HEWETT, ESSO CLEMMONS, EMMA C. HALL v. DR. LUBIN F. BULLARD, JR., AND WIFE, LONA W. BULLARD.

(Filed 12 December 1962.)

1. Fraud § 2; Physicians and Surgeons § 8—

Where a physician regularly treats a chronically ill person for a period of years, a confidential relation is established which raises a presumption that financial dealings between the physician and patient are tainted with fraud.

2. Cancellation and Rescission of Instruments § 10—

Evidence that a physician treated the decedent for more than two years prior to her death, that a short time before her death and while she was in very serious condition, the physician, treating her at her home, waited for her to dress and then took her in his car to a notary public where she signed and acknowledged the deed attacked, is sufficient to be submitted to the jury in an action to cancel the deed for fraud and undue influence, notwithstanding conflicting evidence on the part of defendant tending to show that the transaction was *bona fides*.

APPEAL by defendants from *McKinnon, J.*, February 1962 Civil Term of BRUNSWICK.

Plaintiffs are the heirs at law of Laura Lambro, who died intestate 30 January 1960. On 23 January 1960 she signed, acknowledged, and delivered a deed to defendants for her home in Brunswick County. The deed recites a consideration of "Ten Dollars and other valuable considerations." The deed reserves to grantor "the right to live on said land during her lifetime, but if she vacates or abandons same then she may not lease or sublease to anyone else."

Plaintiffs alleged the deed is void because procured by fraud and undue influence and because of lack of mental capacity of grantor to execute a deed. Defendant denied the asserted invalidity.

Issues arising on the pleadings were submitted to the jury. It answered the issues in the affirmative. Judgment was entered declaring the deed void. The register of deeds was directed to make an appropriate entry on his records. Defendants excepted and appealed.

Herring, Walton & Parker for plaintiff appellees.
Bowman and Prevatte by E. J. Prevatte for defendant appellants.

PER CURIAM. The assignments primarily relied on are the denial of motions to nonsuit, made first at the conclusion of plaintiff's evidence and renewed at the conclusion of the evidence.

When defendant elected to offer evidence, he waived his exception taken at the conclusion of plaintiffs' evidence. G.S. 1-183.

The correctness of the ruling made at the conclusion of the evidence must be determined by an examination of all the evidence viewed in the light most favorable to plaintiffs. When so viewed, the evidence was sufficient to establish the following facts: Mrs. Lambro was 58 when she died. She was a widow. She had no children. She lived alone. She was "chronically ill," suffering from aortic aneurism and complications thereof. Male defendant was her physician and had been for more than two years. During that period she had grown progressively worse. She had not been eating for two weeks or thereabouts prior to 23 January, only drinking coffee with milk. She had difficulty in swallowing. She weighed less than 100 pounds. Male defendant went to her home about 9:00 a.m. on the 23rd. Her condition was then essentially the same as on the preceding day. She was suffering pain and shortness of breath. The doctor injected Thorazine, a tranquilizer, and Bronkephrine, a bronchial dilater, to improve her breathing. He waited for her to be dressed and then took her in his car to a notary public where she signed and acknowledged the disputed document She was then taken back to her home by *feme* defendant. The doctor was again called about midday to treat Mrs. Lambro. He then found it necessary to use drugs. He was called again about dark. Again he administered drugs. About midnight Mrs. Lambro was in a critical condition. She was sent by ambulance to Duke Hospital. Arrangements for her admission had been made by the doctor on the 20th or 21st. When Mrs. Lambro arrived at the hospital on the morning of the 24th, she was "acutely and extremely ill, being comatose. . .not responding to deep painful stimulants — she had no blood pressure. . .she was blue, dusty from lack of adequate air." She died on the sixth day following her admission. She was paid $150 when she signed the deed. The property at that time had a market value of $4000. The deed conveyed all of Mrs. Lambro's land. Her household furnishings sold after her death for $360. She had, in the fall of 1959, withdrawn her moneys deposited with banks. She had no money or personalty, except household furnishings, when she died.

The evidence for defendants was sufficient for the jury to find the conveyance was not tainted by fraud, that the deed was prepared

by an attorney selected by Mrs. Lambro and in conformity with her expressed direction, given some considerable time prior to the date of the deed. The attorney had delayed preparing the deed because of his illness. Male defendant testified the consideration for the deed was a payment in cash, cancellation of debts due him, plus the obligation assumed by grantees (not recited in the deed) to make monthly payments to Mrs. Lambro for the balance of her life were fair consideration for the property conveyed.

Where a physician regularly treats a chronically ill person over a period of two years, a confidential relationship is established, raising a presumption that financial dealings between them are fraudulent. *Lee v. Pearce,* 68 N.C. 76 (87); 41 Am. Jur. 196.

The court was not, nor are we, permitted to reconcile the conflicts in evidence. That is the prerogative of the jury. G.S. 1-180. The evidence was sufficient to support the verdict. It follows the jury was properly called on to resolve the conflict in the evidence.

The remaining assignments of error have been examined. None, in our opinion, require discussion. The court's definition of undue influence was taken from *In re Franks,* 231 N.C. 252 (260), 56 S.E. 2d 668.

Affirmed.

STATE v. OGGIE LEE LANE.

(Filed 12 December 1962.)

Constitutional Law § 31; Criminal Law § 86—

The denial of motion for continuance made by the attorney appointed by the court to defend the defendant in a criminal prosecution and the forcing of defendant to trial on the afternoon of the same day the attorney was appointed entitles defendant to a new trial for the denial of his constitutional right of confrontation, which embraces an opportunity fairly to prepare and present his defense. Constitution of North Carolina, Art. I, §§ 11, 17; Fourteenth Amendment to the Constitution of the United States.

APPEAL by defendant from *Hobgood, J.,* March 1962 Criminal Term of DURHAM.

The forty-year-old defendant is a prisoner serving a sentence for assault in State Prison Camp No. 051. On March 26, 1962, the grand jury returned a true bill of indictment charging that on March 18, 1962, defendant had committed the crime against nature with a

sixteen-year-old boy, a prisoner confined in the same camp. When the case was called for trial at 9:30 a.m. on March 27, 1962, the presiding judge, on his own motion, appointed Mr. Wade Penny of the Durham Bar to represent the defendant without compensation. Immediately upon being appointed, counsel requested a continuance of the case. The request was denied. The trial began at 2:30 p.m. Counsel again moved for a continuance on the ground that he had not had an adequate opportunity to investigate and prepare the defense which defendant contended he had. The motion was again denied. The defendant entered a plea of not guilty and trial began. After hearing the evidence of the alleged victim and one other witness for the State, court recessed at 5:00 p.m. The trial was resumed at 9:30 a.m. on the next day, March 28th. The State completed its testimony at 10:30 a.m.

When the State rested, counsel for defendant moved for a mistrial on the premise that he had not had sufficient time to confer with witnesses for the defendant nor opportunity to ascertain if reliable medical opinion would corroborate the defendant's contention that a drug he had been taking, "an ingredient from a nose inhaler," had rendered him impotent. Counsel urged that considering defendant's criminal record (which included two previous convictions of the crime against nature), the penalty of "not less than five nor more than sixty years" provided by G.S. 14-177 for the offense charged, and "other adverse circumstances" confronting him, the allowance of only five hours for the preparation of the case resulted in a denial of defendant's right to counsel and the right of confrontation.

The judge denied the motion for a mistrial. He found as a fact that he had had all witnesses requested by the defendant brought into court and that there was no justification of the motion. Thereafter the defendant offered evidence and the State offered evidence in rebuttal. The trial was concluded on March 29, 1962. The verdict was guilty as charged. From a sentence of not less than twelve nor more than fifteen years, the defendant appealed.

T. W. Bruton, Attorney General, G. A. Jones, Jr., Assistant Attorney General for the State.

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

PER CURIAM. The defendant's only assignments of error are to the denial of his motions for a continuance and a mistrial. He contends that his request for a continuance was based on a right guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, sections 11 and 17 of the North Carolina Constitution.

Ordinarily, whether a case shall be continued rests in the sound discretion of the trial judge. "But when the motion is based on a

right guaranteed by the the Federal and State Constitutions, 14th Amend., U. S. Const., Art. I, sections 11 and 17, N. C. Const., the question presented is one of law and not of discretion, and the decision of the court below is reviewable." *State v. Farrell*, 223 N.C. 321, 26 S.E. 2d 322.

There is no statutory requirement in this jurisdiction that the court must appoint counsel for indigent defendants not accused of capital felonies. If counsel is requested and the circumstances show an apparent necessity for counsel to protect his rights, a defendant has the constitutional right to have counsel assigned him. Otherwise, the propriety of providing counsel for a person accused of an offense less than capital is in the discretion of the trial judge. *State v. Davis*, 248 N.C. 318, 103 S.E. 2d 289.

In this case the trial judge, presumably in recognition of an apparent necessity, of his own motion appointed counsel for defendant. Thereafter, the defendant and his counsel were entitled to a reasonable opportunity in the light of all the attendant circumstances to investigate, prepare, and present his defense. *State v. Speller*, 230 N.C. 345, 53 S.E. 2d 294. "The rule undoubtedly is, that the right of confrontation carries with it not only the right to face one's 'accuser and witnesses with other testimony' (sec. 11, Bill of Rights), but also the opportunity fairly to present one's defense." *State v. Farrell, supra.* On the record in the instant case, we cannot say that the defendant has had this opportunity. He has decided that he wants to assume the risks involved in a new trial. He is entitled to pursue his rights if so minded. *In re Taylor*, 229 N.C. 297, 49 S.E. 2d 749.

For the reasons indicated, it is ordered that there be a new trial.

New trial.

IN RE ESTATE OF JO ANN LASATER GLENN, DECEASED.

(Filed 12 December 1962.)

Wills § 59—

Husband and wife were killed in an accident, the husband surviving the wife a short time. The father and mother of the husband filed a renunciation of their right to any share in the estate of the wife to which the husband might otherwise be entitled. The husband's father was also administrator for his son's estate, and the administrators of both the husband and wife had respectively filed suits against third persons for the wrongful deaths. *Held:* The renunciation was within the purview of G.S. 29-10, but such renunication may not be allowed to affect adversely any rights or defenses in the actions for wrongful death.

APPLICATION for writ of *certiorari* allowed by the Supreme Court 5 September 1962. From DURHAM.

The facts pertinent to this appeal are as follows:

Herbert Vincent Glenn, Jr. and his wife, Jo Ann Lasater Glenn, died from injuries sustained in an automobile accident on 30 November 1961. Herbert Vincent Glenn, Jr. survived his wife. Both decedents died intestate.

Herbert Vincent Glenn, Sr. qualified as administrator of his son's estate on 18 December 1961. Jo Ann Lasater Glenn's mother, Mrs. J. R. Lasater, qualified as administratrix of her daughter's estate on 2 January 1962.

The administrator of Herbert Vincent Glenn's estate and the administratrix of Jo Ann Lasater Glenn's estate have instituted actions in the Superior Court of Durham County, which are now pending, in which these personal representatives are attempting to collect damages from certain defendants for the wrongful deaths of the aforesaid decedents.

Herbert Vincent Glenn, Sr., as administrator of the estate of Herbert Vincent Glenn, Jr. and individually as an heir of said estate, together with Edith C. Glenn, the mother of Herbert Vincent Glenn, Jr. and the wife of Herbert Vincent Glenn, Sr., as an heir of her son's estate, petitioned the Clerk of the Superior Court of Durham County to be allowed to renounce their succession to any share in the estate of Jo Ann Lasater Glenn to which the estate of Herbert Vincent Glenn, Jr. might otherwise be entitled, as provided in G.S. 29-10.

The Clerk of the Superior Court of Durham County gave permission to file the proposed renunciation, and said renunciation was filed in writing and acknowledged and approved by said Clerk as required by the statute, G.S. 29-10, subsection (a). The statute also requires that such renunciation be approved by the Resident Judge of the Superior Court. Judge Hall, Resident Judge of the Fourteenth Judicial District, being of the opinion that G.S. 29-10 does not authorize a renunciation by an administrator, declined to approve the same.

Everett, Everett & Everett for petitioners.

PER CURIAM. We are inclined to the view that since Herbert Vincent Glenn, Jr. died intestate, and Herbert Vincent Glenn, Sr. is the administrator of his son's estate, and that he and his wife, Edith C. Glenn, are the sole heirs and beneficiaries of their son's estate, the renunciation as prayed for is permissible within the intent and purpose of the statute.

The renunciation, however, shall not adversely affect any rights or defenses which may be asserted to defeat any claim on behalf of the estate of the decedent.

Error & remanded.

REVERIE LINGERIE, INC. v. HUGH W. McCAIN, ASA WILLIAMS, JR., WALTER V. ASHLEY, BENJAMIN DANSAVAGE AND INTERNATIONAL LADIES' GARMENT WORKERS' UNION.

(Filed 11 January 1963.)

1. Principal and Agent § 4—

Evidence that a person purporting to act as an agent for a nonresident labor union, over a period of years, held meetings for the purpose of organizing or attempting to organize employees into a local of the union, distributed application blanks, etc., that he called a strike of the employees who had joined the union, and that the nonresident union, during the course of the strike, filed with the National Labor Relations Board a complaint charging unfair labor practices, *is held*, sufficient to show that such person was the agent of the union, and further that the union ratified his acts.

2. Process § 13; Associations § 5—

Evidence that a nonresident labor union, over a period of years, was active in this State through its agent in organizing or attempting to organize employees into a local of the union and in calling a strike, and that the union, during the strike, filed a complaint for unfair labor practices with the NLRB, *held* sufficient to support a finding that the union was doing business in this State for the purpose of service of process upon it by service upon the Secretary of State. G.S. 1-97(6); G.S. 1-69.1.

3. Principal and Agent § 4; Evidence § 19—

While certified copy of the transcript of testimony of certain witnesses in a hearing before the National Labor Relations Board in connection with a union charge of unfair labor practices is incompetent to show the disposition of the charges by the Board, such transcript is competent to show that the union was doing business in this State so as to render it amenable to process.

4. Appeal and Error § 49—

The trial court's findings of fact which are supported by competent evidence are conclusive notwithstanding that incompetent evidence may also have been admitted, since it will be presumed that the court disregarded the incompetent evidence in making its findings.

5. Process § 7—

Persons who are in this State as defendants in a criminal prosecution sequent to their arrest in another state and waiver of extradition, are immune to service of process in a civil action arising out of the same facts as the criminal proceeding. G.S. 15-79.

6. Same—

Where it appears from the record that one of defendants voluntarily came into this State and posted bond in a criminal prosecution, and was not brought into this State by or after waiving extradition, such person is not immune from service of process in a civil action growing out of the same facts as the criminal prosecution.

7. Appearance § 2—

Where certain of defendants, while in this State in connection with a criminal prosecution against them, are served with process in a civil action, in which civil action they are arrested, the acts of such defendants in procuring the reduction of the civil arrest bond by consent order invokes the power of the court in the civil action, and such acts constitute a general appearance waiving any defect in the service of process.

BOBBITT, J., dissents in part.

APPEAL by defendants from BICKETT, *J.*, June Civil Term 1962 of ORANGE.

This is a civil action instituted against the International Ladies' Garment Workers' Union (hereinafter referred to as ILGWU, or Union), with its principal headquarters in the City of New York, and the four individual defendants, to recover compensatory and punitive damages for the alleged tortious destruction of the plaintiff's manufacturing plant in Hillsboro, Orange County, North Carolina, on 27 September 1957.

The defendant Union is an unincorporated association which has never certified to the Clerk of the Superior Court of Orange County, nor to the Clerk of the Superior Court of Durham County, the name and address of an agent in this State upon whom process and precepts may be served.

The action was instituted on 23 September 1960 by the issuance of summons, and on the same date the plaintiff procured an order for extension of time to file a complaint until 13 October 1960. The summons was duly served on one Morton Shapiro, alleged to be a business agent for the defendant Union and a resident of Guilford County, North Carolina, and upon the Honorable Thad Eure, Secretary of State, as process agent for the defendant Union pursuant to the provisions of G.S. 1-97 (6).

On 13 October 1960 the complaint was filed and an order issued for the service of the complaint. Service of the complaint and order was

made in the same manner the summons was served. Copies of the summons, the complaint, and the order to serve the copy of the complaint were mailed by the Secretary of State to the defendant Union as required by law.

On 26 September 1960 an order of arrest was issued by the Clerk of the Superior Court of Orange County, directing the Sheriff of Orange County to arrest the individual defendants, and hold them to bail in the sum of $10,000 each. On 27 September 1960 summons was served on each of the individual defendants while they were present as defendants in a criminal trial in the Orange County courtroom on charges allegedly arising out of the same facts alleged in plaintiff's cause of action in this case. Also on 27 September 1960, these individual defendants were arrested by the Sheriff of Orange County pursuant to the order of arrest issued by the Clerk of the Superior Court. Subsequent thereto and on the same day an order was entered by the trial judge, consented to in writing by the defendants, reducing the amount of bail bond from $10,000 to $7,500 each. The defendants Hugh W. McCain, Asa Williams, Jr., and Benjamin Dansavage waived extradition and were in North Carolina as defendants in the criminal case, the results of which are reported in the case of *S. v. Williams, et al,* 255 N.C. 82, 120 S.E. 2d 442, at the time process was served on them. Walter V. Ashley came into the State voluntarily to stand trial in the above criminal action.

On 17 October 1960 the defendant Union entered a special appearance and moved that the return of service of process purportedly served upon it be quashed or stricken and that the action be dismissed.

On 19 August 1961, plaintiff filed a motion to make more definite and certain the defendant Union's motion to quash, and at the September Term 1961 of Civil Court of Orange County, the Honorable Clawson Williams entered an order requiring defendant ILGWU to make more definite and certain its motion to quash the return of service of process.

Thereafter, defendant ILGWU filed its amendment to the motion to quash, making said motion more definite and certain, and praying the court, in ruling upon said motion, to find the facts upon which it bases its ruling.

The defendant Union's motion to quash and the amendment to the motion to quash came on for hearing at the January Civil Term 1962 of Orange County. The matter was heard by the Honorable William Y. Bickett, Judge Presiding, and it was stipulated that the court might enter its order in or out of term or out of the district. At the June Civil Term 1962 of Orange County an order was entered by Judge Bickett finding the facts and denying defendant Union's motion to

quash the return of the service of process. The defendant Union gave notice of appeal.

On 17 October 1960, defendants Hugh W. McCain, Asa Williams, Jr., and Benjamin Dansavage filed a motion to quash the return of service of process in this cause upon the ground that said service was invalid because the defendants when served were in attendance at a criminal trial involving the same matters as alleged in the civil suit and had previously waived extradition to the State of North Carolina to stand trial. The motion was denied and these defendants excepted and gave notice of appeal.

Likewise, the defendant Walter V. Ashley on the same date made a motion to quash the return of service of process on him upon the ground that said service was invalid because when served he was in attendance at a criminal trial involving the same matters as alleged in the civil suit, and that he had, while a resident of the State of Georgia, voluntarily appeared and made bond for his appearance at said criminal trial in order to avoid arrest and extradition to the State of North Carolina on such criminal charges. The court likewise denied Ashley's motion.

All the defendants appeal, assigning error.

Bryant, Lipton, Bryant & Battle for plaintiff.
Ledford & Ledford for defendants McCain and Williams.
Sawyer & Loftin for defendants Dansavage and Ashley.
Newsom, Graham, Strayhorn & Hedrick for defendant Union.

DENNY, C.J. The question for determination is whether or not the respective defendants have been legally and properly served with process. If each one of these defendants has been legally and properly served with process in this action, then the Superior Court of Orange County has jurisdiction of each one of them and the denial of the respective motions to quash the return of the service of process must be upheld; otherwise, the ruling must be reversed as to any one or more of the defendants not properly served, unless such defendant has made a general appearance and thereby waived any defect in the service of process.

APPEAL OF THE DEFENDANT ILGWU

The statutes involved are as follows:

G.S. 1-97 (6), which provides: "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this State by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this State upon whom all processes and precepts may be served, and certify

to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the Secretary of State of the State of North Carolina. Upon such service, the Secretary of State shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the Secretary of State, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization.

"Any such unincorporated association or organization, now performing any of the acts for which it was formed, shall, within thirty days from the ratification of this subsection, appoint an agent upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, processes and precepts may be served upon the Secretary of State, as provided in this subsection. Upon such service, the Secretary of State shall forward a copy of the process or precept to the last known address of such unincorporated association or organization"; and

G.S. 1-69.1, which provides: "All unincorporated associations, organizations or societies, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated. This section shall not apply to partnerships or co-partnerships which are organized to engage in any business, trade or profession."

Section 3 of the Constitution and By-Laws of the ILGWU provides: "The object of the I.L.G.W.U. shall be to obtain and preserve for all workers engaged in the ladies' garment industry just and reasonable conditions of work with respect to wages, work hours and other terms of employment; to secure sanitary surroundings in their places of work and humane treatment on the part of the employers; to aid needy workers in the industry; to cultivate friendly relations between them and generally to improve their material and intellectual standards.

Such objects shall be accomplished through negotiations and collective agreements with employers, the presentation, adjustment and settlement of justified grievances of workers against employers, the dissemination of knowledge by means of publications and lecture courses, through concerted efforts to organize the unorganized workers in all branches of the industry and through all other lawful and peaceable means and methods customarily employed by organized workers, to maintain or better their standards of life."

The defendant Union bases its appeal on the ground that the court below made findings of fact that one Morton Shapiro and others were acting as agents for the defendant Union based on certain acts and declarations of Shapiro. The defendant Union contends that these findings are not supported by competent evidence in that testimony of the acts and declarations of purported agents is not competent to show agency.

In 3 Am. Jur. 2d, Agency, section 355, page 714, it is stated: "Generally, any competent witness may tell what he saw the agent do, though he may not state the inferences drawn by him therefrom. But the fact of agency cannot be established by proof of the acts of a professed agent, unless the acts are of such a character and so continuous as to justify a reasonable inference that the principal had knowledge of them. Where the acts are of such character and so continuous as to justify a reasonable inference that the principal had knowledge of them and would not have permitted them if unauthorized, the acts themselves are competent evidence of agency.

"As a general rule, an agent's authority to bind his principal may not be shown by evidence of the agent's acts. Nor may the extent of an agent's authority be shown by testimony as to his acts and conduct not within the actual or implied scope of the powers granted to him by his principal. But it has also been held that what an agent did with the knowledge and approval of his principal is circumstantial evidence of what the agent was authorized to do." See Strong's North Carolina Index, Vol. 3, Principal and Agent, section 4, page 665, and cited cases.

In *Smith v. Kappas,* 218 N.C. 758, 12 S.E. 2d 693, this Court quoted with approval from 1 Mechem on Agency, section 261, page 185: " ' * * * The agency may be shown by conduct, by the relations and situation of the parties by acts and declarations, by matters of omission as well as of commission, and, generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy,' etc. 'Agency, like any other controvertible fact, may be proved by circumstances.

It may be inferred from previous employment in similar acts or transactions, or from acts of such nature and so continuous as to furnish a reasonable basis of inference that they were known to the principal, and that he would not have allowed the agent so to act unless authorized. In such cases the acts or transactions are admissible to prove agency. But in order to be relevant the alleged principal must in some way directly or indirectly be connected with the circumstances. The agent must have assumed to represent the principal, and to have performed the acts in his name and on his behalf.' "

In the instant case, there is evidence tending to show that Morton Shapiro and others, beginning in March 1957, purporting to act as agents of the defendant Union, met with the management and employees of the plaintiff, at various times and places in Orange and Durham Counties in North Carolina, for the purpose of organizing or attempting to organize the employees of the plaintiff into a local affiliate of the defendant Union and to obtain an agreement with the plaintiff to recognize the defendant Union as the exclusive bargaining agent for the employees of the plaintiff. That Shapiro called and held meetings of the plaintiff's employees, solicited memberships in the defendant Union, distributed applications for membership in the defendant Union, took applications for membership in said Union, and issued buttons having on them "I.L.G.W.U., A.F.L.-C.I.O.," to employees of the plaintiff who joined the defendant Union. That on 3 April 1957 Shapiro called a strike of the employees of plaintiff who had joined the defendant Union and set up a picket line outside the plaintiff's plant in Hillsboro, North Carolina; that the defendant Union rented a house across the street from plaintiff's plant and used it as headquarters for the striking employees; that the defendant Union paid the strikers $20.00 a week and furnished them one meal a day. That the defendant Union during the course of the strike filed with the National Labor Relations Board (hereinafter referred to as NLRB) a complaint charging unfair labor practices on the part of the plaintiff; that defendant Union and Shapiro pressed the charges before the NLRB, and Shapiro in the hearing before the NLRB testified as to his acts on behalf of the defendant Union in connection with the organization of the local Union at plaintiff's plant affiliated with the defendant Union.

The evidence further tends to show that Morton Shapiro and others, representatives of the defendant Union, have taken part in other acts resulting in the organization of a local Union at a plant owned by the Durham Drapery Company and the Croscill Curtain Company of Durham, North Carolina; that the efforts to organize said Union began in the early part of 1960 and resulted in an election in June 1961; that the

activities of the defendant Union in connection with the organization of said local Union, consisting of the employees of the above companies, continued up to and past the date when summons was issued and served in this action; that in connection with its efforts to organize the employees of the Durham Drapery Company and the Croscill Curtain Company the defendant Union lodged a protest with the NLRB charging said employers with unfair labor practices.

We hold that the filing of the complaint with the NLRB charging the plaintiff in this action with unfair labor practices, constituted a ratification of the acts and conduct of Shapiro in his efforts to organize the employees of the plaintiff at its Hillsboro plant. We further hold that the evidence adduced in the hearing below was sufficient to support the finding that at all times herein involved Morton Shapiro was a representative of the defendant Union, and that the findings of fact are sufficient to support the conclusion of law that at the times herein involved the defendant Union has been doing business in North Carolina by performing some of the acts for which it was formed.

The defendant Union assigns as error the admission in evidence in the hearing below of a certified copy of the transcript of the testimony of certain witnesses offered in behalf of the defendant Union in the hearing before the NLRB in connection with the defendant Union's charge of unfair labor practices against the plaintiff. In our opinion, this evidence was not admissible to show what disposition the NLRB made of these charges, but it was admissible to be considered on the question as to whether or not the defendant Union was doing business in North Carolina.

When a trial court finds the facts on matters addressed to it, the court's findings are as conclusive as the verdict of a jury if supported by competent evidence. This is true even though some incompetent evidence may also have been admitted, since it will be presumed that the incompetent evidence was disregarded by the court in making its decision. *In re Simmons,* 256 N.C. 184, 123 S.E. 2d 614; *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443.

In our opinion, the ruling of the court below denying the motion of the defendant Union to quash the return of service of process in this cause, should be upheld, and the exception thereto and the assignment of error based thereon are overruled.

APPEAL BY THE INDIVIDUAL DEFENDANTS

The individual defendants appeal on the ground that service of process on them while they were in the State as defendants in a criminal action, after having waived extradition, is invalid under G.S. 15-79, which provides: "A person brought into this State by or after waiver

of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceeding or, if acquitted until he has had reasonable opportunity to return to the state from which he was extradited."

It does appear from the record in this case that the defendants Hugh W. McCain, Asa Williams, Jr., and Benjamin Dansavage were arrested in another State and that each one of them did formally waive extradition. Therefore, we hold that under the provisions of G.S. 15-79 they were immune from process in a civil action arising out of the same facts as the criminal proceedings upon which the extradition proceedings were based.

The defendant Walter V. Ashley was not arrested outside of the State of North Carolina and therefore was not brought into this State by or after waiving extradition, but voluntarily came into the State of North Carolina and posted bond on or about 16 August 1960 for his appearance at the criminal term of the Superior Court of Orange County, North Carolina, to commence on 26 September 1960. Therefore, we hold that this defendant was not immune from civil process in an action growing out of the same facts as the criminal proceeding in which he was a defendant. *Hare v. Hare,* 228 N.C. 740, 46 S.E. 2d 840; *White v. Ordille,* 229 N.C. 490, 50 S.E. 2d 499.

The most serious question confronting the defendants McCain, Williams and Dansavage is whether or not in procuring the reduction of the civil arrest bond from $10,000 to $7,500, such action constituted a general appearance and thereby cured any defect in the service of process.

In 5 Am. Jur. 2d, Appearance, section 14, page 490, *et seq.,* it is said: "* * * In determining the character of an appearance, the court will always look to matters of substance, rather than form, and a party's conduct, as well as other circumstances, are to be considered in determining whether he has actually appeared. Thus, a general appearance may arise by implication from the defendant's seeking, taking, or agreeing to take some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one to contest jurisdiction over his person only, or from some act done with the intention of appearing and submitting to the court's jurisdiction. The distinction between a special and a general appearance is not so much in the manner in which, or the proceeding by which, the appearance is made, as in the purpose and the effect of the appearance. The test is in the relief asked," citing *In re Blalock,* 233 N.C. 493, 64 S.E. 2d 848, 25 A.L.R. 2d 818; *Smith v. Smith,* 138 W. Va. 388, 76 S.E. 2d 253.

In the case of *In re Blalock, supra,* this Court said: "An appearance merely for the purpose of objecting to the lack of any service of process or to a defect in the process or in the service of it, is a special appearance. In such case the defendant does not submit his person to the jurisdiction of the court. 3 Am. Jur. 783.

"On the other hand, a general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. 3 Am. Jur. 782, 6 C.J.S. 66, McIntosh N. C. P. & P. 323. *Scott v. Life Asso., supra* (137 N.C. 515, 50 S.E. 221); *Motor Co. v. Reaves, supra* (184 N.C. 260, 114 S.E. 175).

"A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof. * * *"

In *Motor Co. v. Reaves,* 184 N.C. 260, 114 S.E. 175, it is said: "An appearance for any other reason other than to question the jurisdiction of the court is general."

In *Smith v. Smith, supra,* the Supreme Court of West Virginia said: "It is well settled that no authority is needed for the proposition, that an appearance in a suit or action for any purpose other than one to test the jurisdiction of the court, or the sufficiency and service of a process, is a general appearance."

It is contended by these individual appellants that there is nothing in the record to show that they or their counsel made any motion in connection with the procurement of the order reducing the civil arrest bond required by each of them from $10,000 to $7,500. Likewise, there is nothing in the record to indicate or from which it may be inferred that the order was made *ex mero motu.*

Probably what happened was this: Counsel for the plaintiff and counsel for the defendants agreed privately to present an order to the court consenting to the reduction of the bail bonds. The court signed the order which had been consented to in writing by each of the four defendants and by counsel of record for the plaintiff.

In cases of civil arrest the statute, G.S. 1-417, among other things, provides: "A defendant arrested (in a civil action, G.S. 1-409) may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail."

We do not think it is material whether a formal motion was made by these defendants or their counsel to reduce the amount of bail. When the consent order authorizing the reduction of bail, as authorized in G S. 1-417, was signed, these defendants invoked the power of the court in their behalf and for their benefit which, in our opinion, constituted a general appearance and waived any defect in connection with the service of process.

The order of the court below refusing to sustain the defendants' motions to quash the return of service of process on them will be upheld.

In view of the fact that the appellants have set out 94 assignments of error in the record, it has not been feasible to discuss them *seriatim*. However, we have discussed what we deem to be the pertinent questions presented on the appeal.

The orders from which this appeal was taken are

Affirmed.

BOBBITT, J., dissents as to McCain, Williams & Dansavage.

GEORGE T. CORNWELL, THE FIRST NATIONAL BANK OF MORGANTON AND G. MAURICE HILL, EXECUTORS AND TRUSTEES UNDER THE WILL OF MARY LOUISE HUFFMAN CORNWELL, AND GEORGE T. CORNWELL V. R. O. HUFFMAN, G. T. CORNWELL AND THE FIRST NATIONAL BANK OF MORGANTON, TRUSTEES UNDER AGREEMENT WITH MARY LOUISE HUFFMAN AND MARY LOUISE HUFFMAN CORNWELL, DATED DECEMBER 31, 1937, AND R. O. HUFFMAN, G .T. CORNWELL AND THE FIRST NATIONAL BANK OF MORGANTON, TRUSTEES UNDER AGREEMENT WITH MARY LOUISE HUFFMAN, MARY LOUISE HUFFMAN CORNWELL, AND OTHERS, DATED DECEMBER 31, 1960, R. O. HUFFMAN, G. T. CORNWELL AND THE FIRST NATIONAL BANK OF MORGANTON, TRUSTEES OF THE HUFFMAN-CORNWELL FOUNDATION, MARY LOUISE CORNWELL McCOMBS, ANN CORNWELL AVERY, BARBARA CORNWELL NORVELL, MARY LOUISE McCOMBS, JAMES HENRY McCOMBS, III, THOMAS HUFFMAN McCOMBS, ANN LOUISE NORVELL, JEAN ALLEN NORVELL, MARY LOUISE HUFFMAN, AND ALL UNBORN PERSONS HAVING ANY INTEREST IN THE ESTATE OF MARY LOUISE HUFFMAN CORNWELL, OR IN THE TRUSTS HEREIN REFERRED TO, AND RUSSELL BERRY, GUARDIAN AD LITEM FOR MARY LOUISE McCOMBS, JAMES HENRY McCOMBS, III, THOMAS HUFFMAN McCOMBS, ANN LOUISE NORVELL, JEAN ALLEN NORVELL, AND ANY UNBORN ISSUE.

(Filed 11 January 1963.)

1. Wills § 70—

There is no statute in this State which directs a method of apportionment of estate and inheritance taxes as between the testamentary and the trust estates in those instances in which testator creates a trust which must be included in the gross estate in computing the tax, and therefore the court must look to the equity of the situation upon the facts of each particular case. 26 USCA 2036; G.S. 105-2(3), (7), (8).

2. Same— Under the facts of this case, inheritance and estate taxes should be apportioned between the testamentary and trust estates.

Testatrix transferred property to a trustee with provision that income therefrom should be paid to herself and her mother and that the trust should terminate upon the death of her mother, with further provision that if she predeceased her mother the property should be divided upon the termination of the trust among her descendants *per stirpes*. The will provided that in the event testatrix predeceased her mother the property passing under the will should be liable for estate and inheritance taxes as though the testamentary property comprised the entire estate for tax purposes, and that the remainder of such taxes should be paid out of the principal of the trust. The property passing under the will was relatively much less than the trust estate. *Held:* The inheritance and estate taxes were properly apportioned between the trust estate and the property passing under the will in accordance with the intention of testatrix as expressed in the will and in accordance with the equity of the particular factual situation.

APPEAL by defendant Berry as guardian *ad litem* from *Clarkson, J.*, August 1962 Mixed Term of BURKE.

This action was begun to determine how the tax burden created by the death of Mrs. Mary Cornwell should be apportioned among the several properties which created the tax liability. A jury trial was waived. The parties offered evidence. Judge Clarkson made findings of fact. Judgment was rendered based on the facts found. Defendant Berry as guardian *ad litem* excepted and appealed. The facts found are, to the extent necessary for an understanding of the questions presented and the reasons for the conclusions reached, summarized in the opinion.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by H. G. Hudson, Patton and Ervin, by Frank C. Patton, and S. McD. Tate for appellees.

Russell Berry for appellant.

RODMAN, J. Mary Louise Huffman Cornwell, hereafter Mrs. Cornwell, died testate in December 1961. She left surviving her husband, George T. Cornwell, three daughters, Mrs. Mary Cornwell McCombs, Mrs. Ann Avery, Mrs. Barbara Norvell, all over twenty-one and five grandchildren, Mary L. McCombs, James H. McCombs III, Thomas H. McCombs, Ann L. Norvell, and Jean Norvell. All the grandchildren are minors. Mrs. Mary L. Huffman also survived her daughter, Mrs. Cornwell. Mr. Cornwell, the First National Bank of Morganton, and G. Maurice Hill are the executors of Mrs. Cornwell's will.

On 31 December 1937 Mrs. Huffman and Mrs. Cornwell transferred and conveyed to R. O. Huffman, Mr. Cornwell, and First National

Bank of Morganton as trustees, stocks in fourteen different corporations and a note for $5000 given by Mr. Cornwell in August 1936. The properties transferred came to the grantors from F. O. Huffman and were owned one-third by Mrs. Huffman, two-thirds by Mrs. Cornwell. The trust agreement provided that Mrs. Huffman should receive $6000 annually from the income produced by the securities transferred. The amount so to be paid was the first charge against the income which the securities might yield. Mrs. Cornwell should, after the payment of $6000 to her mother, receive $1000 from the income. If the securities yielded more than $7000 annually, the next $2000 should be divided one-half to Mrs. Cornwell and one-half to Mrs. Huffman. Income in excess of $9000 a year would be invested and added to the principal so as to guarantee Mrs. Huffman an income of $6000 during her life. The trust agreement was not subject to modification or change as to principal during Mrs. Huffman's life, but by unanimous agreement of the grantors and trustees the provisions with respect to income could be modified. The trust agreement provided for termination on the death of Mrs. Huffman. If Mrs. Cornwell survived her mother, Mrs. Cornwell became the owner of all the trust properties; but if Mrs. Huffman survived her daughter, the trust would continue in effect until Mrs. Huffman's death, at which time the trust estate would be payable "to the children of Mary Louise Cornwell, or their representative, per stirpes and not per capita."

The properties delivered to the trustees pursuant to the agreement of 31 December 1937 were valued at that time at $190,000. When Mrs. Cornwell died, these trust properties were valued at $3,682,693.11. Mrs. Cornwell's proportionate share of this trust at her death was $2,455,128.74, which is includible in her estate.

In addition to her interest in the trust estate, Mrs. Cornwell owned at her death real and personal property valued at $815,791.92, which, for convenience, we refer to as the probate estate. She also had $10,000 of life insurance payable to her husband and owned as tenant by the entirety real estate chargeable with estate taxes valued at $27,385. Thus the aggregate value of the properties to be accounted for in computing estate and inheritance taxes was $3,308,305.66. In addition to these properties there is a possible tax liability for properties held under "A Living Trust Agreement" created by Mrs. Cornwell and others on 31 December 1960. If it should be determined that any part of that trust is part of the taxable estate, the tax liability for that part can be determined in accord with the principles stated in this opinion.

Mrs. Cornwell's will gave jewelry and household furniture to her daughters. She gave her automobile to her husband. Except for these

relatively small bequests, the remainder of her estate passed under the residuary clause.

The residuary estate is expressly declared liable for debts owing by Mrs. Cornwell. Subject to the payment of debts and other charges against the residuary estate, one-half is given to Mrs. Cornwell's husband and the remaining half is left in trust for her three daughters and their children.

When the will was prepared, it was uncertain whether the trust agreement of December 1937 would have terminated by the death of Mrs. Huffman prior to the death of Mrs. Cornwell, thereby vesting title to all of the trust properties in Mrs. Cornwell and subject to disposition by her will, or whether Mrs. Cornwell, not having survived Mrs. Huffman, would be unable to direct by will to whom the trust property should go.

The will undertakes to provide how taxes accruing by reason of Mrs. Cornwell's death should be paid in either situation. First she assumes that the trust created in December 1937 will have terminated and she will be the owner of all the trust properties. In that event she directed "all estate and inheritance taxes and other taxes in the general nature thereof which shall become payable upon or by reason of my death in respect of any property passing by or under the terms of the will or of any codicil thereto hereafter executed by me, or in respect of the proceeds of any policy or policies of insurance on my life, or in respect of any other property included in my gross estate for the purposes of such taxes, shall be paid by my Executors out of my residuary estate. If I shall not survive my mother or if so much of the said properties as may be attributable to my contribution to the said trust shall not be subject to disposition by me as a part of my estate, I direct, to the extent that I may lawfully do so, that estate and inheritance taxes and other taxes in the general nature thereof which are levied upon the property passing under this will shall be paid out of my residuary estate as if the property passing under this will constituted my entire estate for the purpose of such taxes, and that all the remainder of such taxes shall be paid out of the principal of the said trust which does not pass under this will."

The Internal Revenue Code enacted by Congress imposes a tax on the transfer of property by death. 26 USCA 2001. The taxable estate is the gross estate less exemptions and deductions. 26 USCA 2051. Executors must include in the gross estate life insurance, 26 USCA 2042, property held by the entirety, 26 USCA 2040, and property transferred subject to the right of the transferor to the income for life, 26 USCA 2036.

Executors, chargeable with responsibility for filing the required reports and paying the tax, may deduct from the gross estate certain debts, funeral and administrative expense. 26 USCA 2053. A spouse is entitled to a marital deduction computed as provided in 26 USCA 2056.

Our inheritance tax statutes likewise require, subject to exemptions and deductions, inclusion for tax purposes properties where grantor retains the right to receive the income for his life, properties held as tenants by the entirety and life insurance. G.S. 105-2(3), (7), (8).

The executors, as it was their duty to do, prepared tentative estate and inheritance tax returns. The estate tax, using values as of date of death, exceeds $1,000,000. Estimated inheritance taxes amount to $192,765.95. The probate estate, less debts having priority over the estate tax and estimated costs of administration, is only $790,000. Where shall the money come from to pay estate and inheritance taxes? Manifestly the properties held in the trust created in December 1937 must, because no other source is available, pay a part of these taxes. What method shall be employed to determine the extent of liability of the trust?

All of the parties to this action who have reached their majority, except the guardian *ad litem,* agreed that the taxes, estate and inheritance, should be apportioned and paid in accord with the final method of computation hereafter set out.

Three tentative methods of computing the tax were made by public accountants for the executors. They testified as to the amount of tax due based on the method employed. One method was based on the assumption that the probate estate would pay the tax computed as if it constituted the gross estate; property passing to the husband outside of the probate estate (insurance and land held by the entirety) would pay no tax because of the marital deduction. The balance of the tax would be paid by the trust estate. Using this method of computation, the tax would amount to $1,012,939.15, of which $105,665.47 would be payable by the probate estate. The remainder, $907,273.68, would be payable by the trust estate.

The second method used in computing the tax would exhaust the probate estate before imposing liability on the trust estate. Again no tax would be imposed on the husband for the properties received outside the probate estate .The tax based on this method of computation would be $1,162,139.73, of which $790,000 would be paid by the probate estate and the balance, $372,139.73, would be paid by the trust.

The third method assumed each class should pay in the proportion which it contributed to the adjusted gross estate. The tax computed

according to this method would be $1,053,212.61, payable $252,254.95 by the probate estate, $12,013.99 by the husband for properties received outside the probate estate, and $788,943.67 by the trust. This in substance is the method which Mrs. Cornwell directed the executors to use.

The court ordered an apportionment of the taxes and directed payment in accord with the third method, which conforms to the agreement.

The guardian *ad litem* insists Mrs. Cornwell had no interest in the trust estate created in 1937 which survived her death, and because she had no interest extending beyond her death, the direction given in her will with respect to the payment of death taxes imposed no obligation on the trust; nor did the agreement between the trustees and Mrs. Cornwell's daughters, whose rights to participate in the trust are subject to termination by their death before the death of Mrs. Huffman, create any obligation on the trust. If the logic of these contentions be conceded, the trust estate is not discharged of all liability, because estate taxes are by statute, 26 USCA 6324, a lien on the property included in the trust estate. Congress has not fixed the manner in which tax burden shall be apportioned among those taking properties which are subject to the lien. *Fernandez v. Wiener,* 326 U.S. 340, 90 L. ed. 116; *Riggs v. Del Drago,* 317 U.S. 95, 87 L. ed. 106.

We have no statute prescribing the manner in which the burden of estate taxes shall be borne.

Where the ultimate burden of paying estate taxes rests has been the subject of much litigation. Results of course vary with the many differing factual situations. Where, as here, the taxable estate includes properties outside the probate estate, there is lack of uniformity of decision.

In the absence of statute or testamentary direction, some courts hold the probate estate is liable for the tax without any right of contribution from the nonprobate properties. *Ericson v. Childs,* 198 A 176, 115 A.L.R. 907; *Warfield v. Merchants Nat. Bank of Boston,* 147 N.E. 2d 809; *Central Trust Co. v. Burrow,* 58 P 2d 469, are illustrative of a line of cases holding no right of contribution exists in favor of the probate estate against the nonprobate estate. The rule so announced was in several instances stated prior to the decision of the Supreme Court of the United State in *Riggs v. Del Drago, supra.* Some decisions assumed the Federal statute did not permit contribution. That question, as previously noted, was settled in the *Riggs* case. The legislatures of many states have since adopted statutes providing for apportionment. CCH Fed Estate and Gift Tax, par. 2490.16.

Many other courts have held that in the absence of testamentary direction to the contrary, equity required apportionment. The reasoning supporting this view is forcefully stated in the opinion of Legge, J., speaking for the Supreme Court of South Carolina in *Myers v. Sinkler,* 110 S.E. 2d 241. Similar conclusions are reached in *Carpenter v. Carpenter,* 267 S.W. 2d 632; *Boyd v. Jordan,* 168 A 2d 286; *Sebree v. Rosen,* 349 S.W. 2d 865; *Bragdon v. Worthley,* 153 A 2d 627; *Trimble v. Hatcher's Executors,* 173 S.W. 2d 985. The subject is treated at length in the annotations appearing 115 A.L.R. 916, 142 A.L.R. 1135, 15 A.L.R. 2d 1216, and 37 A.L.R. 2d 169.

As previously noted we have no statute which is controlling in the present factual situation. We must, therefore, look to the equity of the situation and apply rules previously announced in somewhat related cases. The right of equitable contribution has been recognized and applied with respect to gift taxes. *Nebel v. Nebel,* 223 N.C. 676, 28 S.E. 2d 207.

The earliest case we find dealing with liability for estate taxes and the fund which should be used to provide payment is *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222, decided in 1946. The Court stated the question relating to estate taxes thus: "The fourth question was whether the amount of Federal Estate tax of $604 should be paid by the executors out of the general funds of the estate, or charged against the individual beneficiaries." The Court made this answer: "The ruling of the trial judge that the Federal Estate tax should be paid out of the general funds of the estate is affirmed. *Riggs v. Del Drago,* 317 U.S. 95. The general rule, in the absence of contrary testamentary provision, is that the ultimate burden of an estate tax falls on the residuary estate. 142 A.L.R. 1137, and cases cited."

The next case in which the Court had occasion to consider the question was *Craig v. Craig,* 232 N.C. 729, 62 S.E. 2d 336, decided in 1950. The case as reported merely refers to facts agreed without stating what the agreed facts were. We have, however, examined the record and find that the estate taxable by the Federal government in that case included property passing by the entirety and life insurance—nonprobate assets. The Superior Court held that the Federal tax was to be paid by the residuary estate without contribution. This Court said in a *per curiam* opinion: "This ruling is supported by the holding of this Court in *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222, and is in accord with the weight of authority in other jurisdictions. 28 AJ 136, 142 A.L.R. 1137. *No contrary testamentary provision appears in the will.*" (Emphasis added)

The briefs filed in that case have been examined. The question whether the Craig will did or did not direct the manner in which

the Federal taxes should be paid was debated. Hence the language of the Court is particularly pertinent, we think, in the disposition of this case. Here Mrs. Cornwell has, in language not subject to misinterpretation, expressly provided that her probate estate should not be subject to taxes which would accrue and become a lien thereon because the Federal government likewise taxes the funds held in the 1937 trust. Her express direction with respect to the payment of the taxes gives, we think, the executors of her estate the right to ask the court to apply the rule of contribution.

Minnesota, prior to the adoption of an apportionment statute in 1962, was among the states which place the burden of payment on the probate estate. The Federal District and Eighth Circuit Court of Appeals were, in *U.S. v. Goodson,* 253 F 2d 900, called upon to interpret the Minnesota law where the testator had expressly provided that his probate estate should only be liable for its proportionate part of the taxes. The District Court held that the tax burden should be prorated in accordance with the values of the estate and as directed by testator. The Circuit Court of Appeals, affirming the trial judge, said: "Where the government by its tax statutes has a constitutional right to tax as a part of the gross estate certain property not passing by will, it does not seem unreasonable to permit the testator to provide by his will that the pro rata share of the tax, imposed by reason of the inclusion of such nontestamentary property in the gross estate subject to the tax, shall be borne by the beneficiaries of the nontestamentary gifts."

This Court was next called upon to consider the computation and payment of estate taxes in *Trust Co. v. Green,* 236 N.C. 654, 73 S.E. 2d 879, decided in 1953. There the widow dissented from the will and took her rights as fixed by statute. She insisted that the part of the estate to which she was entitled should be computed without considering the estate tax. This Court held to the contrary and directed computation and payment to her of her portion of the estate after the payment of estate taxes. The net result was that she contributed her proportionate part towards the payment of the Federal taxes. Her rights, of course, were fixed by statute. Her husband could not, by will, deprive her of her marital rights.

Judge Clarkson, in his findings, said: "The apportionment and contribution approved and directed by this judgment is in the interest of all the parties including those represented by the guardian *ad litem,* and such apportionment and contribution are fair, just and equitable and in accordance with the laws of this state." We think this finding warranted by the record.

The judgment is

Affirmed.

WILLIAM H. POINDEXTER v. WACHOVIA BANK AND TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF DORA L. POINDEXTER; LAFAYETTE WILLIAMS, GUARDIAN AD LITEM FOR JULIA LEE POINDEXTER AND PEGGIE ELIZABETH POINDEXTER, BOTH MINORS; AND SAMUEL G. SEAWELL, GUARDIAN AD LITEM FOR THE UNBORN ISSUE OF WILLIAM H. POINDEXTER.

(Filed 11 January 1963.)

1. Judgments § 32; Wills § 39—

A provision of a judgment to which no exception is taken is binding on the parties, the appeal relating solely to other provisions of the judgment.

2. Wills § 33—

Where testatrix's son is given the entire beneficial interest of a trust with limitations over to others in the event the son should die leaving no issue, the son ordinarily takes a fee defeasible in trust, but when it is apparent from the will, construed in its entirety in the light of the attendant circumstances, that the testatrix intended to provide for the support of her son for his life only, with limitation over in the event the son should die with issue him surviving as well as in the event he should die without surviving issue, such intent will be given effect and the son takes only a life estate in trust.

3. Wills § 27—

The intent of testatrix is her will and must be carried out unless some rule of law forbids it.

4. Same—

Where there is a latent ambiguity as to the object of a devise or bequest, a former will is admissible as bearing upon the intention of testatrix.

5. Wills § 65—

Testatrix left property in trust to her son for life with remainder over to his issue, and in the event the son should leave no issue, to testatrix's brothers and sisters. All except one of testatrix's brothers and sisters predeceased her, and the sister who survived her died during the lifetime of the son. *Held:* The limitation over to the brothers and sisters of testatrix lapsed, since the children of the brothers and sisters of testatrix who predecease testatrix do not qualify under G.S. 31-42, and no transmittible estate vested in the sister of testatrix who died during the lifetime of testatrix's son.

6. Wills § 30—

A vested estate is transmittible, a contingent estate is not.

7. Wills § 40—

A devise to a person and his issue violates the rule against perpetuities when the word "issue" is used in its technical sense to designate a perpetual succession of lineal descendants.

8. Wills § 27—

The presumption that technical words are used in their technical sense does not obtain over testatrix's intent as gathered from the entire instrument and the attendant circumstances.

9. Same—

Where a provision of a will is susceptible to two constructions, one of which would be valid and operative and the other invalid, the former must be preferred.

10. Same—

The presumption that a testator did not intend to die intestate will be employed as an aid in ascertaining his intent.

11. Wills § 42—

A limitation over to the "issue" of the life tenant will be construed to mean "children" or issue living at the death of the life tenant when such intent is apparent from the entire instrument and the attendant circumstances, and the fact that at the time of the execution of the will testatrix had a son but no grandchildren may in proper instances indicate that testatrix did not intend more remote issue as the object of her bounty.

12. Wills § 40—

Testatrix left property in trust for the benefit of her son for life with limitation over to his issue. *Held:* It being apparent from the will and the attendant circumstances that testatrix used the word "issue" to mean issue living at the time of the son's death, the provision does not violate the rule.

13. Wills § 33—

Where the testamentary trust provides that testatrix's grandchildren should receive the income from the trust indefinitely, and there is no limitation over, the grandchildren take the fee, subject to the trust, in the absence of plain and express language indicating testatrix's intention to convey an estate of less dignity.

14. Wills § 40—

Where the beneficial interest vests within the time specified by the rule against perpetuities, the fact that the trust may not terminate until thereafter does not violate the rule against perpetuities.

15. Trusts § 3—

Where property is left in trust for the purpose of providing for the support of the beneficiaries, the trust is an active trust and the legal and equitable titles do not merge. G.S. 41-7.

16. Wills § 27—

Where there is an irreconcilable conflict between two clauses of a will, the second clause ordinarily prevails over the first.

17. Wills § 54—

While the term "personal property" includes in its broadest sense all of testator's property except land or interests in land, the meaning of

the term varies according to the subject matter and context, and when to construe it in its technical sense would result in an irreconcilable conflict with a prior provision and defeat the obvious intent of testatrix, the term will be construed in its popular sense as embracing only tangible goods and chattels.

18. Wills § 27—

Expressions in a will must be considered with a view to the context and the circumstances of their use.

19. Wills § 36—

A bequest of personal property to testatrix's son to be used by him as long as he should live and by his issue also and then to testatrix's brothers and sisters "the same as the other property," *is held* to give the son absolutely the personal property consumed in its use, but as to personal property permanent in its nature, it transfers only a life estate to the son with the same future interests in such personalty as were provided for the other property. G.S. 39-6.3.

SHARP, J., not sitting.

APPEAL by defendants from *Gambill, J.*, August 27, 1962, Term of FORSYTH.

This is a proceeding under the Declaratory Judgment Act (G.S., Ch. 1, Art. 26) for construction of the will of Dora L. Poindexter.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson, and G. D. Humphrey, Jr., for plaintiff.

Womble, Carlyle, Sandridge & Rice and W. P. Sandridge for defendant Wachovia Bank and Trust Company, Executor and Trustee.

LaFayette Williams, Guardian Ad Litem for Peggie Elizabeth Poindexter, defendant.

Samuel G. Seawell, Guardian Ad Litem for the unborn issue of William H. Poindexter, defendant.

MOORE, J. Dora L. Poindexter executed a will on 10 January 1923 and another on 10 February 1936. She died on 4 October 1952 and both paper writings were admitted to probate in common form as her last will and testament by the Clerk of the Superior Court of Forsyth County on 16 October 1952.

Dora L. Poindexter was survived by the following: a son, William H. Poindexter; two minor granddaughters, Julia Lee Poindexter and Peggie Elizabeth Poindexter, children of William H. Poindexter; a sister, Cora A. Philpott; and "children of one or more (of testatrix's) brothers or sisters who had predeceased her."

The will of 10 February 1936 is in pertinent part as follows:

"First, after paying any just debts and funeral expenses including an appropriate family monument to cost not exceeding $500.00 I trust all of the balance of my property which I shall own at the time of my death to Wachovia Bank and Trust Company to be held in trust for my son William Harvey Poindexter and be paid out to him in the manner herein after stated.

"2nd. To pay to my said son for his use all of the net income from my estate for the purpose of giving him proper support and if he should get disable to work and if the income is not sufficient, I direct that so much of the principal be used as may be deemed wise to properly support him.

"Three (3) Personal property to be owned and used by him as long as he should live and by his issue also. Then to go to my brothers and sisters the same as the other property.

"Fourth, if however my son should die leaving issue then his issue shall receive the income from my estate as he did. But if he should leave no issue then I will and direct that what remains of my property . . . be divided between my brothers and sisters that is living and have led a sober and good life in every way."

The Wachovia Bank and Trust Company accepted the trust and entered upon its duties as trustee.

William H. Poindexter, son of testatrix, instituted this action and asked the court to declare: (1) that the will of 10 February 1936 revoked the will of 10 January 1923; (2) that the "beneficial interest" in the trust "will not in all events vest within the life or lives of a person or persons in being at the death of the testatrix plus twenty-one (21) years and ten (10) lunar months; the trust therefore fails and the property . . . passes to the heirs and next of kin of testatrix under the laws of intestacy"; and (3) plaintiff is entitled to the property absolutely, free of the trust.

Cora A. Philpott, sister of testatrix, died before the institution of this action, and none of testatrix's nieces and nephews or collateral kinsmen are parties to the action. Guardians *ad litem* were appointed for the children of William H. Poindexter and for his unborn issue, and they filed answers. The trustee answered. Julia Lee Poindexter came of age before judgment was entered and filed answer in her own behalf. The answers contest the legal construction placed on the will by plaintiff.

The facts, hereinbefore recited, are not in dispute. In the judgment the court below made the following judicial declarations:

1. ". . . (T)he will of Dora L. Poindexter dated February 10, 1936, revoked the paper writing . . . dated January 10, 1923, and is the last will and testament of Dora L. Poindexter."

2. All necessary parties are before the court.

3. The word "issue" as used in item fourth of the will means "a perpetual succession of lineal descendants of William H. Poindexter," and the will "purports to create a trust in which the beneficial interest therein will not in all events vest within the life or lives of a person or persons in being at the death of the testatrix plus twenty-one (21) years and ten lunar months. . . ." Therefore the purported trust is void as violative of the rule against perpetuities.

4. The property held by the trustee vested in William H. Poindexter by the laws of intestate succession as of the date of the death of testatrix and he is entitled to the property.

All defendants appealed. There is no exception to the adjudication that the will of 10 February 1936 revoked the former will, and the judgment is, as to this declaration, binding on the parties. *Humphrey v. Faison,* 247 N.C. 127, 100 S.E. 2d 524; *Bell v. Gillam,* 200 N.C. 411, 157 S.E. 60. Defendants challenge the other declarations listed above.

The trust provisions of the will are in pertinent part as follows: "I trust . . . my property . . . to Wachovia . . . to be held in trust for my son William Harvey Poindexter and to be paid out to him in the manner herein after stated. To pay to my son for his use all of the net income from my estate . . . and if the income is not sufficient, I direct that so much of the principal be used as may be deemed wise to properly support him. . . . (I)f however my son should die leaving issue then his issue shall receive the income from my estate as he did. But if he should leave no issue then I will and direct that what remains of my property . . . be divided between my brothers and sisters that is living. . . ."

Some of the language of the will and some of the facts appearing in the record seem, at first glance, to indicate that testatrix intended that William have a fee defeasible in the trust property, subject to the trust. The property is "to be held in trust for . . . William Harvey Poindexter." In the 1923 paper writing testatrix made provision for her husband's support, but there is no mention of him in the later will and it is assumed that he died in the meantime. William had no children in 1936 and if he was married at that time the record does not show it. Both daughters were minors when this action was commenced and could not have been living in 1936. So it is apparent that William was the primary natural object of testatrix's bounty. Nevertheless, when the entire will and all the record facts are considered, we are of the

opinion that testatrix intended for William only a beneficial life estate, that is, all of the net income from the trust estate and a sufficiency of the corpus for his proper support so long as he lives. The intent of the testatrix is her will and must be carried out unless some rule of law forbids it. *Barton v. Campbell,* 245 N.C. 395, 95 S.E. 2d 914. There are limitations over to take effect if he dies either with or without issue him surviving, that is, his estate is limited in either event. In 1923 William had not reached college age, and the paper writing executed by testatrix that year made provision for his "education through college" and states that "when he becomes thirty years of age (trustee) to pay to him one half that remains of . . . said estate and when he becomes thirty-five years of age (if he has used the one half wisely and made good with it as the good men of the Bank and Trust Co. may have advised him) then to pay over to him the balance of my said estate and close the trust herein created. But if he should spend the first one half extravagantly and not used or invested it to a good advantage the Wachovia . . . to hold in trust for him five years more." Further, if William dies "before receiving his legacy leaving issue then his issue shall receive the estate." Where there is a latent ambiguity as to the object of a devise or bequest former wills are admissible as bearing upon the intention of the testator. 57 Am. Jur., Wills, s. 1107, p. 708. In the 1936 will Mrs. Poindexter makes no devise or bequest of the trust corpus to her son, except such as is necessary for his proper support. The last will states specifically what is to be paid to the son and what benefits he is to receive. It indicates why the property is put in trust for him — his support. We do not speculate as to what occurred to cause testatrix to change her intentions, but it is clear that she did. William Harvey Poindexter is vested of a beneficial life estate.

We next consider, out of order, the executory devise to brothers and sisters, to wit: ". . . (I)f he (William) should leave no issue then I will and direct that what remains of my property . . . be divided between my brothers and sisters that is living. . . ." The expression "that is living" means those living at his death. All of testatrix's brothers and sisters are now dead. All predeceased Mrs. Poindexter except Mrs. Philpott, and she died before this litigation commenced. The class is extinct and there are no executory devisees to answer roll call at William's death. The children and issue of the brothers and sisters who predeceased testatrix do not qualify under the terms of G.S. 31-42. At testatrix's death Mrs. Philpott had neither the immediate right of present enjoyment nor a present fixed right of future enjoyment. An executory interest is not vested until the time comes for taking possession. *Parker v. Parker,* 252 N.C. 399, 405, 113 S.E. 2d 899. A vested estate is

transmittible, a contingent estate is not. *Trust Co. v. Schneider,* 235 N.C. 446, 452, 70 S.E. 2d 578. Testatrix's nieces and nephews are not necessary parties to this action. The executory devise has lapsed.

The will provides: ". . . (I)f my son should die leaving issue then his issue shall receive the income from my estate as he did." This clause is the principal subject of debate on this appeal. Plaintiff contends, and the court below decided, that the word "issue" as used here "means a perpetual succession of lineal descendants of William H. Poindexter," and the clause is violative of the rule against perpetuities. If the clause is considered out of relation to the rest of the will, the ruling seems justified. The word 'issue" in its strict technical sense includes an indefinite succession of lineal descendants. And a devise or bequest to "issue" in this sense violates the rule against perpetuities and is void. *Elledge v. Parrish,* 224 N.C. 397, 30 S.E. 2d 314; *Edmondson v. Leigh,* 189 N.C. 196, 126 S.E. 497; *Albright v. Albright,* 172 N.C. 351, 90 S.E. 303; *Harrell v. Hagan,* 147 N.C. 111, 60 S.E. 909. But courts are not required to indulge the presumption of technical use of words against the testamentary intent from a contextual construction of the will. *Elledge v. Parrish, supra.* The presumptions are contrary to plaintiff's interpretation. If under one construction a devise or bequest would become an illegal perpetuity while under another construction it would be valid and operative, the latter mode must be preferred. 57 Am. Jur., Wills, s. 1126, pp. 720-1. It is presumed that a testator did not intend to die intestate, and this presumption will be employed as an aid in seeking to ascertain his intent. *Finch v. Honeycutt,* 246 N.C. 91, 97 S.E. 2d 478. At the time of the execution of the will (1936) testatrix had one child and no grandchildren, and at the time of her death she had two grandchildren and no great-grandchildren. "The absence of remote issue at the time of making a will has in some instances given rise to a presumption that such issue were not intended as objects of testator's bounty." 117 A.L.R. 698. "A limitation or gift over to issue does not offend the rule against perpetuities where the context or surrounding circumstances show that the word issue is used in a limited sense as meaning issue living at a date within the period specified by the rule. . . ." 70 C.J.S., Perpetuities, s. 14, p. 593. In our opinion testatrix, in the instant case, did not have in mind an indefinite succession of lineal descendants. She intended to make provision for the issue of William living at the time of his death. In the 1923 will testatrix had provided that, if her son died before receiving his legacy leaving issue, his issue should receive the estate, that is, receive it at his death. Her 1936 will, considered as a whole, indicates that the ultimate disposition of the property should be determined as of the time of the death of William. The roll is to be called at

William's death. *Turpin v. Jarrett,* 226 N.C. 135, 136, 37 S.E. 2d 124; *Faison v. Odom,* 144 N.C. 107, 56 S.E. 793.

At this point we are concerned with the quality of the estate the issue take. The clause with respect to the "issue" mentions only the *income.* But a devise of the use and profits from property indefinitely will be held a devise in fee simple unless it appears in plain and express words of the instrument that the testator intended to convey an estate of less dignity. *Mangum v. Wilson,* 235 N.C. 353, 70 S.E. 2d 19. The *Mangum* case is factually analagous to the case at bar. There the testator made a devise to his wife for life, "remainder to stand as it is altogether" and the rents to be equally divided among his five children. It was held that there was a devise of the remainder in fee to the children. In *Finch v. Honeycutt, supra,* it is said: ". . .(T)he doctrine of devise or bequest by implication is well established in our law. *Burcham v. Burcham,* 219 N.C. 357, 13 S.E. 2d 615. See also *Burney v. Holloway,* 225 N.C. 633, 36 S.E. 2d 5; *Efird v. Efird,* 234 N.C. 607, 68 S.E. 2d 279." There was no limitation over after the bequest to issue, in the case at bar. If William died leaving no issue the brothers and sisters who could qualify were to take the fee. G.S. 31-38. Testatrix certainly did not intend that her collateral kinsmen should have an estate of greater dignity than her own descendants who survived her son. The issue surviving at William's death take the fee, subject to the trust. It must be understood that we do not undertake in this opinion to anticipate and provide for contingencies which might or might not arise, nor do we deal with legal questions not presented on this appeal.

Plaintiff also insists that the trust itself offends the rule against perpetuities in that it will not in all events terminate within a life in being at the death of testatrix plus twenty-one years and ten lunar months. It is true that there is a possibility that the trust will extend beyond such period. It was formerly the law in this jurisdiction that a trust for private purposes must *terminate* within a life or lives in being and twenty-one years and ten lunar months thereafter. *Mercer v. Mercer,* 230 N.C. 101, 52 S.E. 2d 229; *Trust Co. v. Williamson,* 228 N.C. 458, 46 S.E. 2d 104; *Springs v. Hopkins,* 171 N.C. 486, 88 S.E. 774. But the principle is now established that the rule against perpetuities "does not relate to and is not concerned with the postponement of the full enjoyment of a vested estate. The time of the vesting of title is its sole subject matter. . . . The question is not the length of the trust but whether title vested within the required time." *McQueen v. Trust Co.,* 234 N.C. 737, 68 S.E. 2d 831. *Finch v. Honeycutt, supra,* is not in conflict with the *McQueen* decision as has been suggested (36 N.C. Law Rev. 467). In the case at bar the title vests in the beneficiaries in any event no later than ten lunar months following the death

of William Harvey Poindexter, a life in being at the death of testatrix. The trust will terminate at the death of the issue of William who are living or *en ventre sa mere* at his death. The equitable and legal titles of said issue of William will not merge. In a passive trust the legal and equitable titles are merged in the beneficiary by virtue of the statute of uses. G.S. 41-7. But if the trust is active they do not merge. *Phillips v. Gilbert,* 248 N.C. 183, 102 S.E. 2d 771; *Finch v. Honeycutt, supra; Fisher v. Fisher,* 218 N.C. 42, 9 S.E. 2d 493. The trust created by Mrs. Poindexter is an active trust and it does not violate the rule against perpetuities. It will continue until the purpose for which it was created ceases. *Welch v. Trust Co.,* 226 N.C. 357, 38 S.E. 2d 197; *Baker v. McAden,* 118 N.C. 740, 24 S.E. 531.

Finally, we consider item 3 of the will. In this item testatrix undertakes to dispose of her "personal property" outside the trust. She devised all of her property, after payment of debts and funeral expenses, in trust, and thereafter inserted item three freeing "personal property" from the trust. Where there is an irreconcilable difference between two clauses, the last will generally prevail as the latest expression of testator's intention. *Bank v. Corl,* 225 N.C. 96, 101, 33 S.E. 2d 613. It is therefore necessary to determine the meaning of the words "personal property" as used in item 3. We would be in a much better position to resolve the question had we been advised of the character and extent of the property of the estate. *Andrews v. Andrews,* 253 N.C. 139, 146, 116 S.E. 2d 436; *Hubbard v. Wiggins,* 240 N.C. 197, 209, 81 S.E. 2d 630.

Item 3 states: "Personal property to be owned and used by him (William H. Poindexter) as long as he should live and by his issue also. Then to go to my brothers and sisters the same as other property." It is clear that item 3 is dealing with a specific class of property. The "personal property" is to be "owned and used" by testator's son. The other property is to be held in trust. The testator refers to the trust property as "my property" and "my estate", using these terms interchangeably. Ordinarily the word "estate" as used in a will, unless restricted by the context, embraces a testator's entire property, real and personal, although the word in its primary technical sense refers to the quality of a person's interest in property. The meaning of the word "property" and of the words "personal property" varies according to the subject treated of and according to the context. *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246. Every expression to be correctly understood ought to be considered with a view to the circumstances of its use. *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. Courts have frequently held that the words "personal property" are susceptible of two meanings: one, the broader, including all property which is the

subject of ownership, except land or interests in land; the other, more restricted, oftentimes embraces only goods and chattels. If to give the words the more restricted meaning would give effect to all of the provisions of the will, such meaning will be adopted if, to give them the broader meaning, other items of the will would be impossible of execution. *Blakeman v. Hartwell,* 31 S.E. 2d 50 (Ga. 1944). These words, "personal property," have a popular meaning different from their technical meaning, and are frequently used as including goods and chattels only, and embracing such movable and tangible things as are the subject of personal use. Marin's Estate, 158 P. 2d 412 (Cal. 1945); *Bills v. Putnam,* 15 A. 138 (N.H. 1888). See 162 A.L.R. 1134; 137 A.L.R. 212. It is our opinion that the testatrix in the instant case used the expression in this popular sense. It is apparent from a cursory examination of the will that it is of the "homemade" variety and testatrix was not taking into account the technical meanings of words. She had in mind personal effects and tangible goods, chattels, and heirlooms which her son might personally possess and use, as distinguished from tangible business chattels of substantial nature and value, and intangible personal property such as deposits, stocks, bonds and choses in action. Our interpretation of the words "personal property" gives effect to all of the provisions of the will; a broader construction might defeat the execution of the trust provisions. It is our duty to uphold the will in all of its parts if we can legally do so. *Johnson v. Salisbury,* 232 N.C. 432, 61 S.E. 2d 327.

In our opinion testatrix intended that title to this personal property should be held and devolve in the same manner, as to quality, as the trust property — a life estate in William, remainder to his issue living at his death. The clause "then to go to my brothers and sisters" is limited by the added phrase "the same as other property." The qualifying phrase refers to the terms of the executory devise in favor of brothers and sisters, which has lapsed. Of course William owns absolutely the "personal property" *quae ipso usu consumantur,* for there can be no remainder interest in property which is consumed or dissipated in the use. *Williard v. Weavil,* 222 N.C. 492, 23 S.E. 2d 890. But as to personal property permanent in nature the generally accepted rule is that the same future interests that are permissible in the field of real property law are also permissible in the law of personal property. *Barton v. Campbell,* 245 N.C. 395, 95 S.E. 2d 914; *Woodard v. Clark,* 236 N.C. 190, 72 S.E. 2d 433. This is now the law by statutory enactment. S. L. 1961, Ch. 435 (codified as G.S. 39-6.3).

This cause is remanded that judgment be entered in accordance with

this opinion.

Error and remanded.

SHARP, J., not sitting.

JAMES A. SIMON AND NEW AMSTERDAM CASUALTY COMPANY v. RALEIGH CITY BOARD OF EDUCATION, ACTING BY AND THROUGH BOARD OF TRUSTEES, RALEIGH CITY ADMINISTRATION UNIT, ORIGINAL DEFENDANT AND GUY E. CRAMPTON, JR., J. STANLEY FISHEL, C. FRANK BRANNAN, JR., LINDSEY B. HOPKINS, DAVID R. NOLAND, JAMES R. PITTMAN, JR., AND MARL E. RAY, CO-PARTNERS PRACTICING ARCHITECTURE UNDER THE NAME OF GUY E. CRAMPTON AND ASSOCIATES, ADDITIONAL DEFENDANTS.

(Filed 11 January 1963.)

1. Parties § 7— Owner may not by counterclaim interplead party whose claim to fund does not arise from common source.

The construction contract in suit provided that upon breach by the contractor the contractor should pay the owner, as one of the items of damage, compensation for additional management and administrative services necessary to the completion of the contract. *Held:* The amount due architects necessarily employed by the owner to supervise the completion of the contract after breach by the contractor would be an item which the owner might assert as an offset against the amount due the contractor, but in no event would the contractor be liable directly to the architects, and therefore in the contractor's action to recover the balance alleged to be due on the contract price, the owner is not entitled to interplead the architects either under the general remedy of interpleader or under a bill in the nature of interpleader.

2. Same—

In order to be entitled to interplead, plaintiff must have no claim or interest in the fund or subject matter in question and two or more parties must assert a claim thereto derived from a common source without the incurrence of any independent liability to either by plaintiff, and G.S. 1-73(3) does not supersede the equitable remedy and is governed by the same doctrine and principles. A bill in the nature of interpleader may be maintained even though plaintiff has an interest in the subject matter of the controversy.

3. Parties § 4—

In an action by the contractor for the balance alleged to be due on the contract price, the owner alleged breach of contract and asserted he had incurred expenses for architectural supervision in completing the contract for which the contractor was liable. *Held:* Whether the owner was entitled to assert the architects' fee as an offset against the contract

price would have to be litigated in the action between the contractor and the owner, and the architects were proper, although not necessary, parties, and therefore no prejudice resulted to the contractor by the discretionary order of the court making the architects additional parties.

4. Appeal and Error § 3—

The court has discretionary authority to order the joinder of proper parties, and its order doing so is not appealable unless it adversely affects a substantial right which appellant might lose if the order is not reviewed before final judgment.

HIGGINS, J. concurs in result.

APPEAL by the plaintiffs from *Copeland, S.J.*, August 1962 Nonjury Term of WAKE.

This civil action was instituted by the plaintiff Simon, general contractor, and plaintiff Casualty Company, surety on his performance bond, to recover the sum of $32,036.81, balance alleged to be due on the contract entered into between defendant Board of Education and Simon on December 4, 1957 for the construction of a gymnasium and cafeteria at Needham Broughton High School in Raleigh.

The contract provided that Simon should furnish all labor and materials, and construct the building, within 400 days after notice to proceed, in accordance with enumerated contract documents prepared by Deitrick and Associates, architects. The contract price, subject to additions and deductions to be certified by the supervising architects, was $538,960.00. Partial payments based on the architects' estimate of the cost of labor and materials provided were to be made as the work progressed.

Plaintiffs allege that during the course of construction Simon encountered financial difficulties and received assistance from the Casualty Company which became partially subrogated to his rights under the construction contract; that Simon substantially completed the work in January, 1960 at which time defendant owed him a balance of $73,626.65; and that on December 13, 1959, defendant paid plaintiffs $41,589.84, leaving the balance for which plaintiffs sue.

Answering the complaint, the defendant denied that plaintiffs had substantially performed the contract. On the contrary, defendant alleged the following facts:

Plaintiffs furnished faulty material and workmanship; delayed the completion of the building beyond the time prescribed in the contract, persistently disregarding the instructions of the supervising architects; and failed to pay his subcontractors and materialmen. On August 25, 1959, pursuant to the contract, defendant notified Simon and Casualty Company that the contract was terminated because of Simon's failure

to comply with it. Thereafter, Casualty Company undertook to finish the building under the terms of its bond, but Casualty Company also failed to comply with the building contract. On November 13, 1959, after notice to the plaintiffs, defendant occupied the building and employed another contractor to finish the work. On that date the supervising architects, Guy E. Crampton and Associates, inspected the building and certified to the defendant that under the terms of the original contract there had been a delay of 192 days in completing the gymnasium for which defendant was entitled to a deduction of fifty dollars a day; that after taking into account all additions and deductions, and after withholding the further sum of $10,000.00 to correct "leaks in walls, roof and windows," the contractor was entitled to the sum of $41, 589.84. Accordingly, the defendant paid this amount to the plaintiffs. Thereafter the leaks were corrected by defendant at a cost of only $5,611.58, leaving a balance in defendant's possession of $4,388.42.

By further answer, the defendant alleged that it holds this sum for plaintiffs subject to a claim of $5,641.70 in favor of the supervising architects; that to protect the defendant in the event it had to terminate the contract because of plaintiffs' substantial violation of its terms, article 22 of the contract contained the following provision:

> "(T)he Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work including compensation for additional managemental and administrative services, such excess shall be paid to the Contractor. If such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, and the damage incurred through the Contractor's default, shall be certified by the Architect."

The defendant further averred that the architects, without collusion with defendant, have made demand upon it for the payment to them of the entire balance due plaintiffs; that the claims of the plaintiffs and the architects is derived from a common source and that as to the amount of $4,388.42, the defendant is a mere stakeholder; and that the architects are necessary parties for a complete determination of the controversy involved in this action. Upon these allegations the defendant moved the court that the copartnership of Crampton and Associates be made parties to this action and be required to interplead their claim against the funds retained by the defendant; that the defendant be allowed to pay the sum of $4,388.42 into court and be discharged from any further liability with reference to the contract.

The clerk of the Superior Court held that the architects were necessary and proper parties to the action without whom a complete determination of the controversy could not be had and the rights of the defendant protected. He ordered them to interplead within thirty days and directed the defendant to pay into court the said sum of $4,388.42 to be held pending a final determination of the claims of the plaintiffs and the additional defendants to the said fund. His order further provided that upon the payment of the said $4,388.42 into court, "the defendant Raleigh City Board of Education shall be discharged from liability to the plaintiffs and to the additional defendants with respect to the said $4,388.42." From the clerk's order plaintiffs appealed to the judge of the Superior Court. Upon the hearing before him the architects also moved that they be made additional defendants to the action in order to assert their claim. The judge confirmed the order of the clerk in all respects. From his order making the architects additional parties defendants, the plaintiffs appealed to this Court.

Dupree, Weaver, Horton & Cockman for plaintiff appellants.
Lassiter, Leager & Walker for defendant appellee.

SHARP, J. The plaintiffs' only assignment of error raises the one question, did the court err in making the architects additional parties to this action?

Plaintiffs have sued for $32,036.81, the balance they allege to be due under the construction contract. The defendant alleges that because of the plaintiffs' breach of the contract the balance due plaintiffs is only the sum of $4,388.42 which is subject to a claim by the architects. In making this contention the defendant has misconstrued the nature of the architects' claim. The architects have no contract with plaintiffs. Defendant says they base their claim to the fund on article 22 of the contract between plaintiffs and defendant which provides that in the event of contractor's breach of the contract he should pay *to the owner compensation for additional managemental and administrative services.* Conceding a breach of the contract by plaintiffs which required additional work by the supervising architects, this language is broad enough to require plaintiffs to reimburse defendant for reasonable and necessary compensation to the architects for such services. However, it was included for the protection of the defendant and not the architects. They are not, therefore, third party beneficiaries. The architects' claim is not against the funds which the defendant owes to the plaintiffs but against the defendant Board of Education. However, if the architects have a valid claim against the defendant for additional work made necessary by a breach of contract by plaintiff, the amount

of their claim would be an item of damages which defendant would be entitled to deduct from the balance it owes plaintiffs. In both the claim of the plaintiffs and the claim of the architects against defendant these questions arise with reference to the architects' bill: (1) Did plaintiffs breach the construction contract? (2) If so, did the breach require defendant to obtain additional managemental and supervisory services from the architects? and (3) If required, what were the additional services reasonably worth?

Thus, we have here a situation where A sues B for a balance alleged to be due by contract. B alleges that because of A's breach of the contract he had to employ C to do extra work and that A's claim should be reduced by the amount of C's claim against B.

If the architects are not made parties and, upon trial of the issue of indebtedness between the plaintiffs and defendant, the jury should find the defendant owed plaintiffs nothing, presumably the architects would be entitled to recover from the defendant only the sum which it has paid into court. Having failed to include their claim in the certificate under which defendant, according to its answer, paid plaintiffs all but the amount estimated to be necessary to correct leaks in the walls and roof, the architects would be estopped to claim from the defendants any more than the difference between the amount of $10,000.00 retained and the sum of $5,611.58 which was actually required to correct the leaks, to wit, $4,388.42. However, if the jury should find that the defendant was not entitled to offset the architects' claim, against plaintiffs' claim, notwithstanding other possible defenses the defendant might have, the architects would not be estopped *by the judgment* in this case to pursue their claim against the defendant for their services to it. While the architects have expressed their desire to be made parties they have as yet filed no pleadings, and we cannot now anticipate their case against the defendant or its possible defenses to it. In any event, whether the architects are parties, or not, the validity and amount of their claim will be one of the issues in this case, and presumably they will be material witnesses.

Defendant earnestly contends that it is entitled to make the architects parties to the action under the general equitable remedy or interpleader as well as under the third section of G.S. 1-73 which, in practical effect, is a codification of the remedy of interpleader. The statute does not supersede the equitable remedy and is governed by the same doctrine and principles. 48 C.J.S., Interpleader, Section 4.

"Interpleader is an equitable remedy in which a person, who owes or is in possession of money or property in which he disclaims any title or interest but which is claimed by two or more persons, prays that the claimants be compelled to state their several claims, so that the

court may adjudge to whom the matter or thing in controversy belongs. The office or function of the remedy is to protect one against conflicting claims and double vexation with respect to one liability." 48 C.J.S., Interpleader, Section 2.

The equitable remedy of interpleader requires the existence of four essential conditions. "1. The same thing, debt or duty must be claimed by both or all the parties against whom the relief is demanded. 2. All their adverse titles or claims must be dependant, or be derived from a common source. 3. The person asking the relief — the plaintiff — must not have nor claim any interest in the subject-matter. 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder." *Knights of Honor v. Selby,* 153 N.C. 203, 69 S.E. 51; Pomeroy's Equity Jurisprudence (5th Ed.) Sec. 1322. Anno: Interpleader in Equity — General Principles, 35 Am. Dec. 695.

The third provision of G.S. 1-73 provides: "A defendant against whom an action is pending upon a contract or for specific real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, may at any time before answer apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court directs. The court may make such an order."

It is obvious that the defendant is not entitled to interplead the architects either under this statute or the equitable remedy of interpleader. The defendant may not be discharged from liability, and the architects substituted in its place, upon the payment into court of the amount which defendant alleges it owes plaintiffs. Plaintiffs claim a sum approximately eight times greater than that amount. The amount defendant owes plaintiffs is a disputed question of fact which a jury must decide. The defendant therefore has an interest in the subject matter. It is not an independent stakeholder who can be dismissed from the suit. Since dismissal is one of the essentials of interpleader, the remedy must be denied an interested party.

Furthermore, the plaintiffs and the architects (the would-be claimants whom defendant [plaintiff in interpleader] would interplead) do not claim the same debt or fund. While the difference in the amount of the claims would not be fatal, *Pomeroy, supra,* Section 1322; School District No. 1 of *Grand Haven v. Weston* (1885), 31 Mich. 85, under the facts stated in defendant's answer — which are accepted for the purposes of this appeal though they may appear quite different on the

trial of the action — there is no common fund to which the plaintiffs and the architects may lay claim. The architects were not a party to the contract under which plaintiffs claim the right to recover from the defendants nor were plaintiffs in any way connected with or bound by the contract between the architects and defendant. These two contracts were wholly independent transactions in respect to which there appears no privity of interest between the architects and the plaintiffs even though the contractual duty of the architects was to supervise the plaintiffs' construction for defendant. If the plaintiffs performed their contract as alleged they would be entitled to recover from defendant without reference to the right of the architects under their contract, and if the architects performed their particular contract with defendant the same would be true as to them, nothing else appearing. It is conceivable that defendant might be liable to both plaintiffs and the architects. *Alton & Peters v. Merritt et al,* 145 Minn. 426, 177 N.W. 770, was a case in which two real estate agents by virtue of separate contracts claimed a commission from the defendant for having produced a purchaser ready, willing, and able to buy defendant's lands on the terms he specified in each contract. When one sued him for the commission the defendant attempted to interplead the other. The court denied the right upon the grounds above set out.

Defendant contends further, however, that if it is not entitled to the remedy of interpleader proper because of its interest in the subject matter of the suit, it is entitled to a bill in the nature of an interpleader. This latter is a device resorted to in order to avoid the strict requirements of Pomeroy's four requisites for interpleader proper. Beckman, Jr., Interpleader, 16 U. of Cinn. L. Rev. 117; Chafee, Modernizing Interpleader, 30 Yale L.J. 814.

"On a bill of interpleader, a complainant simply prays that the hostile claimants be required to cease from troubling him and to settle their dispute among themselves, while on a bill in the nature of an interpleader, a complainant may ascertain and establish his own rights and may have affirmative relief. . . 'A bill in the nature of an interpleader is one in which a complainant asks some relief over and above a mere injunction against suits by the contesting parties, and states facts which entitle him to such relief independent of the fact of the adverse claims of the several defendants.' " *Urban v. Olson,* 127 N.J. Eq. 311, 13 A. 2d 221.

The statements of the characteristics of a bill in the nature of an interpleader are frequently general and indefinite, but the material difference between a strict interpleader and a bill in the nature of an interpleader seems to be that in the latter the plaintiff may show that he has an interest in the subject matter of the controversy be-

tween the claimants. The claimants must still claim the same property, fund or a portion of it, from the plaintiff, and they must derive their claims to it from a common source unless this requirement has been abolished by statute. *Stephenson and Coon v. Burdett,* 56 W. Va. 109, 48 S.E. 846; *Ross Const. Co. v. Chiles,* 344 Mo. 1084, 130 S.W. 2d 524.

While statutes in some jurisdictions have eliminated the requirement, many opinions say that a bill in the nature of interpleader lies only when the applicant can show that in addition to multiple vexation from several suits he has some other grounds for going into equity such as the administration of a trust or enforcement of a lien or the cancellation of an instrument. 16 U. of Cinn. L. Rev. 117, 163, *supra;* 48 C.J.S., Interpleader, Section 7; Anno. Interpleader by Interested Persons, 83 L. Ed. 840, 849. *Aleck v. Jackson,* 49 N.J. Eq. 507, 23 A. 760.

Chafee, in his article cited *supra,* 839, points out that many courts get around Pomeroy's four requirements by showing great readiness to find an independent ground of equitable jurisdiction on which to base a bill in the nature of interpleader; that often this ground is not stated but it is hard to find any except multiplicity, which is not far removed from double vexation and nothing more; and that a skillful pleader can usually work out some ground. In this case defendant has stated no other ground for equitable relief but, in any event, the fact that the claims of plaintiffs and the architects do not arise out of a common source or obligation precludes the remedy of a bill in the nature of an interpleader.

In holding that the architects are necessary and proper parties without whom a complete determination of the controversy could not be had nor the rights of the defendant properly protected, the court employed some of the wording of Section 1 of G.S. 1-73. However, it acted under Section 3 of the statute when it purported to release defendant from the claim of both the plaintiffs and the architects *to the extent of the $4,388.42* it deposited with the court. Although no particular prejudice is apparent from it, this order was improvidently entered. Under the circumstances of this case, the judge had no authority to discharge the defendant from liability for a portion of the disputed claim upon the payment of an equivalent amount into court nor to transfer the claim of the architects and a portion of plaintiffs' claim to that particular fund. Actually, the defendant has not admitted that it owes plaintiffs any sum whatsoever. The defendant's plea is that it owes plaintiffs nothing because plaintiffs' breach of contract made additional architectual services necessary.

Section 1 of G.S. 1-73 is mandatory. It says that the court *must cause* necessary parties to be brought in. *Overton v. Tarkington,* 249

N.C. 340, 106 S.E. 2d 717. It contemplates only the making of necessary parties. *Moore v. Massengill,* 227 N.C. 244, 41 S.E. 2d 655, 170 A.L.R. 147. However, in the other two sections which provide for interpleader, the legislature has said that the court *may* order additional parties to be brought in. *Kornegay v. Steamboat Co.,* 107 N.C. 115, 12 S.E. 123. Thus, the granting or refusal of a petition for interpleader is within the sound discretion of the court. *Barnett v. Woodland,* Tex. Civ. App., 310 S.W. 2d 644; *Maxwell v. Philadelphia Fire Department Relief Ass'n.,* 138 *Pa. Superior Ct.* 356, 10 A 2d 857. The trial judge was therefore acting in his discretion when he purported to order the architects to interplead in this action.

For the reasons heretofore stated, the defendant is not technically entitled either to a bill of interpleader or to a bill in the nature of an interpleader. Furthermore, the architects are not necessary parties because the amount, if any, which the defendant owes plaintiffs can be completely and finally adjudicated without the presence of the architects in this suit and without directly affecting their rights. *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843; *Childers v. Powell,* 243 N.C. 711, 92 S.E. 2d 65; *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809. However, the architects are most certainly proper parties. "Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court." McIntosh, 2d Ed. Section 584; *Gaither Corporation v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659. The making of proper parties is always in the discretion of the court. *Childers v. Powell, supra.* As pointed out by *Rodman, J.,* in *Overton v. Tarkington, supra,* "When not regulated by statute the procedural processes which will best promote the administration of justice are left to the judicial discretion of the trial judge. He has plenary power with respect to those who ought to be made parties to facilitate the administration of justice."

From the pleadings now before us it appears that the architects' claim against defendant is based solely on extra supervisory work which they claim was necessitated by plaintiffs' breach of contract. Their claim is one of the items of damages by which defendant seeks to reduce plaintiffs' claim against it. We perceive no sound reason why this controversy should not be determined once and for all in one law suit. It is inconceivable that any prejudice could come to the plaintiffs from the presence of the architects in the suit since, whether they are parties or not, the validity and amount of their claim will be one of the issues in the case. Both convenience and the ends of justice will be promoted by making the architects parties so that both claims can be settled in one suit. This is just what the judge did.

Whether he admitted them as interpleaders or proper parties, he made them parties in the exercise of his discretion. Under the circumstances of this case, the order will not be disturbed under the well recognized rule that ordinarily no appeal lies from an order making additional parties unless such order adversely affects a substantial right which appellant might lose if the order is not reviewed before final judgment. *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669; *Snipes v. Estates Administration, Inc.* 223 N.C. 777, 28 S.E. 2d 495, *Childers v. Powell, supra.* Appellants have shown no prejudice which would warrant an appeal.

HIGGINS, J. concurs in result.

SPENCER ALEXANDER SIMPSON, JR. v. MARY C. (CRENSHAW) PLYLER, ADMINISTRATRIX OF FURMAN LEE CRENSHAW, JR., DECEASED, AND CHARLOTTE FLORIST SUPPLY COMPANY.

(Filed 11 January 1963.)

1. Torts § 2—

Joint tort-feasors are persons who act together in committing a wrong, or persons who, independently and without concert of action or unity of purpose, commit separate acts which concur as to time and place and unite in proximately causing injury.

2. Torts § 1—

A person injured by the negligence of joint tort-feasors has a single and indivisible cause of action for all resulting damages, which action he may bring against any one or more of the tort-feasors or all of them together.

3. Torts § 7—

A valid release of one joint tort-feasor releases all.

4. Same—

A covenant not to sue given one joint tort-feasor, even though given after the institution of action, does not release the cause of action and does not bar action against the other tort-feasors, although they are entitled to have credited on the total recovery against them the consideration paid for the covenant not to sue.

5. Same—

Whether an ambiguous instrument is a release or a covenant not to sue depends upon whether or not the parties intended to discharge or extinguish the cause of action, and the recitals of the parties are not controlling but the court must look also to the consideration paid, the

effect of the instrument, and the attendant circumstances. If the instrument in law discharges the cause of action there is no room for construction and the instrument constitutes a release.

6. Same— Consent judgment terminating action against one joint tort-feasor is a release discharging other tort-feasor.

Pursuant to a covenant not to sue executed in favor of one tort-feasor a consent judgment was entered which recited the covenant and decreed that the cause of action against the covenantee should be terminated upon the payment of the amount agreed, and satisfaction of the judgment was thereafter duly entered, but both the judgment and the satisfaction stipulated that plaintiff's cause of action against the other tort-feasor was reserved. *Held:* The judgment terminated the cause of action and constituted a release barring the right to maintain the action against the other tort-feasor notwithstanding the intent of the parties, and the provisions attempting to reserve the right of action against the other tort-feasor are ineffective.

7. Courts § 9—

The denial of a motion of one tort-feasor to dismiss on the ground of a release given by plaintiff to another tort-feasor, but permitting the movant to amend his answer to allege the release, is not a denial of the motion on the merits and therefore does not preclude another Superior Court judge from finding the facts and ruling that plaintiff executed a release extinguishing the cause of action.

8. Same; Trial § 54.1—

An order of the court setting the verdict aside and ordering a new trial vacates all rulings made during the course of the trial, and therefore a ruling made during the course of the trial cannot preclude another Superior Court judge from thereafter making a contrary ruling in regard to the matter.

APPEAL by plaintiff from *Gambill, J.*, February 1962 Mixed Term of UNION.

Wilson and Clark for plaintiff, appellant.
Richardson and Dawkins for appellee.

MOORE, J. Plaintiff was injured by the alleged concurrent negligence of Furman Lee Crenshaw, Jr., and Charlotte Florist Supply Company (corporate defendant). About 7:45 P.M. on 20 October 1957 plaintiff was a passenger in an automobile owned and being operated by Crenshaw. Corporate defendant's truck collided with the rear of Crenshaw's automobile. The accident occurred on U. S. Highway 601 in Union County. Crenshaw was fatally injured. Plaintiff instituted this action against corporate defendant and the administratrix of Crenshaw (administratrix).

On 10 May 1961, after issues were joined and the case transferred to the civil issues docket, plaintiff and his wife entered into an "Agree-

ment and covenant not to sue and to indemnify and hold harmless" defendant administratrix. The agreement recites that plaintiff "desires to settle and adjust any claim which he . . . might have against . . . administratrix . . . by reason of said injuries . . . and further to execute a consent judgment as to . . . administratrix. . . . so as to avoid any suit or other legal action." In consideration of $3500 plaintiff and wife agreed and covenanted with administratrix not to "further prosecute any suit now pending in the Superior Court of Union County . . . against . . . administratrix and . . . that a consent judgment may be entered in the action now pending . . . insofar as said action affects or concerns . . . administratrix . . . and (decedent's) estate, and not to re-institute said suit or prosecute any other suit against said estate . . . by reason of the injuries (of plaintiff)." The agreement also states: "It is understood and agreed that this agreement is only an agreement and covenant not to sue and is not a release of any claim or cause of action" against corporate defendant, "and it is expressly understood and agreed that this agreement is in no way to affect the liability, if any, of" corporate defendant "and all rights, causes of action and remedies against . . . (corporate defendant) are expressly reserved." The agreement declares that the sum paid as consideration for the agreement is neither paid nor accepted as a satisfaction of the injuries sustained, and the payment is not intended as an admission of liability on the part of administratrix. Plaintiff and wife also agreed to "indemnity and save harmless" administratrix and her insurer "against any and all liability, loss, damages, cost and expenses which the said . . . administratrix (and insurer), or either of them, may hereafter suffer, incur, be put to, pay, or lay out to the undersigned, or either of them, by reason of, or having as their origin, claims for personal injuries, or property damage, or claims of any kind or nature whatsoever arising out of said injuries or damages, or either of them, sustained by . . . (plaintiff and wife), or either of them," in the accident.

On 10 May 1961 Preyer, J., signed a judgment at term which was entered by consent of plaintiff and wife and administratrix. The judgment recites that the consenting parties "have entered into an agreement and covenant not to sue . . . (and) not to further sue or prosecute this cause of action against . . . (administratrix) upon payment" of $3500. The judgment decrees "that the cause of action by plaintiff against . . . administratrix . . . shall be terminated upon payment by . . . administratrix, of the sum of . . . $3500 . . . (and) cost of this action . . . and the plaintiff shall forever be barred from prosecuting this cause against . . . administratrix. . . ."

On the same date plaintiff and wife, administratrix and their attorneys signed a "Satisfaction of Judgment," stating: ". . . (I)n con-

sideration of the sum of . . . $35000 . . ., the receipt of which is hereby acknowledged, the plaintiff acknowledges any judgment against . . . administratrix . . . paid and satisfied in full." The Clerk was authorized to satisfy the judgment of record. The instrument then purports to reserve plaintiff's cause of action as against corporate defendant.

Thereafter corporate defendant filed a motion in writing, alleging that the agreement, judgment and satisfaction of judgment constitutes a release, and praying that the action be dismissed as of nonsuit. At the August 1961 term the motion was denied, but corporate defendant was permitted to amend its answer to allege release.

The cause came on for trial at the November 1961 term before Gwyn, J., and a jury. The jury found that the transactions in question constitute a covenant not to sue, answered all issues in favor of plaintiff and awarded $12,500 in damages. In his discretion the judge set the verdict aside *in toto* and ordered a new trial.

At the March 1962 term Gambill, J., found facts and concluded that the agreement, judgment and satisfaction of judgment constitute in fact and in law "a release, satisfaction and accord of plaintiff with one of two alleged joint tort-feasors." The action was dismissed and plaintiff appeals.

The main question for determination on this appeal is whether the transactions in question constitute in law a release so as to bar the prosecution of the action against corporate defendant.

When a person is injured by the negligence of joint tort-feasors, he may elect to sue either of them severally or all of them together. *Bell v. Lacey*, 248 N.C. 703, 104 S.E. 2d 833. In law, joint tort-feasors are persons who act together in committing the wrong, or persons who, independently and without concert of action or unity of purpose, commit separate acts which concur as to time and place and unite in proximately causing the injury. *Bost v. Metcalfe*, 219 N.C. 607, 14 S.E. 2d 648. For an injury by joint tort-feasors there is a single cause of action for all damages and there may be only one recovery and satisfaction. *Ramsey v. Camp*, 254 N.C. 443, 119 S.E. 2d 209; *Bell v. Hankins*, 249 N.C. 199, 105 S.E. 2d 642; *Holland v. Utilities Co.*, 208 N.C. 289, 180 S.E. 592. The cause of action is single and indivisible *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909; *Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822.

A valid release of one joint tort-feasor releases all the joint wrongdoers and is a bar to a suit against any of them for the same injury, for the injured person is entitled to but one satisfaction and the release operates to extinguish the cause of action. *MacFarlane v. Wildlife Resources Com.*, 244 N.C. 385, 93 S.E. 2d 557; *King v. Powell*, 220 N.C. 511, 17 S.E. 2d 659; *McInturff v. Trust Co.*, 201 N.C. 16, 158 S.E. 547;

Howard v. Plumbing Co., 154 N.C. 224, 70 S.E. 285. But a "covenant not to sue" given by the injured party to a joint-feasor does not release the cause of action, and in such case the action is not barred and may be maintained against the joint wrongdoers. *Ramsey v. Camp, supra; Holland v. Utilities Co., supra; Brown v. R.R.*, 208 N.C. 423, 181 S.E. 279; *Slade v. Sherrod*, 175 N.C. 346, 95 S.E. 557. The fact that the covenant not to sue is given after the action is instituted does not alter the effect. *Ramsey v. Camp, supra; Register v. Andris*, 64 S.E. 2d 196 (Ga. 1951).

"A release has been defined as the abandonment, relinquishment or giving up of a right or claim to the person against whom it might have been demanded or enforced (Black's Law Dict.; Ballentine's Law Dict.) and its effect is to extinguish the cause of action; hence it may be pleaded as a defense to the action. A covenant not to sue, on the other hand, is not a present abandonment or relinquishment of the right or claim, but merely an agreement not to enforce an existing cause of action. It does not have the effect of extinguishing the cause of action; . . . a covenant not to sue one of several joint tort-feasors may not be . . . pleaded in bar of the action by the covenantee, who must seek his remedy in an action for breach of the covenant." *Pellett v. Sonotone Corp.*, 160 P. 2d 783, 160 A.L.R. 863 (Cal. 1945). See also 45 Am. Jur., Release, ss. 3, 4, 5; 76 C.J.S., Release, s. 50. As to a sole tort-feasor a covenant not to sue is in effect a release and where given to a sole tort-feasor or to all joint tort-feasors the courts have permitted convenantees to plead it as a defense, not strictly as a bar but to avoid circuity of action. 45 Am. Jur., Release, s. 3.

Joint tort-feasors, not parties to the covenant not to sue, are entitled to have credited on the total recovery against them the amount paid for the covenant by covenantee. *Ramsey v. Camp, supra.* Where, because of uncertainty and conflict in the terms of the instrument, construction is necessary to determine whether it is a release or a covenant not to sue, the problem is to determine the intention of the parties. In making the determination the court may look to the consideration paid, the effect of the instrument and the circumstances attending the execution. The recitals of the parties are not controlling. *Haney v. Cheatham*, 111 P. 2d 1003 (Wash. 1941); 76 C.J.S., Release, s. 50, p. 694. See also 30 N.C. Law Rev. 75. Where the language of the instrument is so comprehensive and inclusive that it amounts to a relinquishment of the injured person's claim and right of action against a joint tort-feasor, or where the instrument expressly provides that it shall be a defense and bar to the former's cause of action against the latter, all of the joint tort-feasors are released. This is true even if the instrument purports to save and reserve the cause of action

against the other wrongdoers. *Braswell v. Morrow,* 195 N.C. 127, 141 S.E. 489; *Haney v. Cheatham, supra; First & Merchants National Bank v. Bank of Waverly,* 197 S.E. 462, 116 A.L.R. 1156 (Va. 1938); *Roper v. Florida Utilities Co.,* 179 S. 904 (Fla. 1938); *Byrd v. Crowder,* 60 S.W. 2d 171 (Tenn. 1933). See 22 Minn. Law Rev. 692. If it appears from the instrument that covenantor has discharged his cause of action against the covenantee, a joint tort-feasor, it is not a matter for construction, all joint tort-feasors are released. *Smith v. Mann,* 239 N.W. 223 (Minn. 1931); 2 Williston on Contracts, s. 338A. The crucial question, in determining whether an instrument is a release or a covenant not to sue, is whether the cause of action has been extinguished. The cause of action is single, indivisible and non-apportionable. Once it is extinguished it has no further vitality. A holding otherwise would abolish the release rule altogether and ignore the basis upon which the rule rests.

In the case at bar we need not consider the "Agreement and Covenant" alone. We are of the opinion that the entry of judgment and the "Satisfaction of Judgment" have barred and extinguished the cause of action.

"It is a universal rule that where there has been a judgment against one of two or more joint tort-feasors, followed by acceptance of satisfaction, all other tort-feasors are thereby released, and the judgment and satisfaction may be successfully pleaded by them to the maintenance of the same or another suit by the same plaintiff involving the same cause of action." *Hunt v. Ziegler,* 271 S.W. 936 (Tex. 1925); *Pearson v. Jacobs,* 293 S.W. 2d 543 (Tex. 1956). ". . . (I)t is the general rule in this country that the mere entry of a judgment against one joint tort-feasor does not of itself release the plaintiff's claims against other joint tort-feasors liable for the injury. Payment of such a judgment and acceptance of such payment by the plaintiff are, however, generally held to operate as a release of the plaintiff's claims against such other wrongdoers." And it is the majority view that "a provision in a judgment in an action against one joint tort-feasor which attempts to reserve the rights of the injured person against other joint tort-feasors liable for the same wrong must be regarded as ineffective and nugatory." 135 A.L.R. 1498. Entry of a voluntary nonsuit is not necessarily a release, however, for it does not ordinarily terminate and extinguish the cause of action. *Brown v. R.R., supra; Lewis v. Johnson,* 86 P. 2d 99 (Cal. 1939); 124 A.L.R. 1315.

In *Battle v. Morris,* 93 S. 2d 428 (Ala. 1957), plaintiff was injured by the concurrent negligence of defendant and another, and by consent a judgment for $3000 was entered against defendant and the judgment was satisfied. Thereafter plaintiff sued the other joint tort-feasor for

the same injury. Learning that the latter planned to plead the consent judgment as a defense, plaintiff moved to vacate the consent judgment in order that another judgment might be substituted setting out that the settlement was partial and plaintiff's claim against the other wrongdoer was reserved. The trial court set aside the consent judgment but the appellate court reversed the ruling, saying: ". . . in the absence of a statute providing otherwise, damages against joint tort-feasors are not apportioned. Joint tort-feasors are jointly and severally liable for the entire damage sustained. (citing authorities) . . . The recovery of a judgment against one and its satisfaction is a satisfaction of the entire claim, and the judgment cannot be so expressed as to have a different meaning. (citing authorities)."

Eberle v. Sinclair Prairie Oil Co., 120 F. 2d 746, 135 A.L.R. 1492 (10th Cir. 1941), is a similar case. Plaintiff sued and settled with two of four joint-feasors for a consideration of $7500. An agreement was executed releasing the two from liability, authorizing dismissal of the action, and reserving plaintiff's claim against the other two. A judgment was entered reciting and approving the settlement with prejudice as to the two, but without prejudice to plaintiff's claim against the others. Plaintiff then sued the other two wrongdoers who pleaded the judgment and satisfaction in bar. The court said:

> "A person injured by a joint tort has a single and indivisible cause of action. He may proceed against the wrongdoers either jointly or severally and may recover a judgment or judgments against all, but he can have but one satisfaction of his single cause of action. Neither may he split his cause of action. . . ."
>
> "The effect of the settlement and compromise of the cause of action, the receipt of the sum stipulated, the judgment approving the compromise of the causes of action, and dismissing the action with prejudice was an extinguishment of the two single causes of action. The causes of action having been extinguished, the district court of Seminole County, Oklahoma, was powerless to reserve the right in the administratrix to prosecute another suit on the same causes of action. . . ."

In *Blake v. Kansas City Southern R. Co.*, 85 S.W. 430 (Tex. 1905), plaintiff was ejected from a pullman car. He sued the railroad company and the pullman car company. He made a compromise settlement with the latter. The settlement was approved by order of the court reserving the cause of action against the railroad company. Held: The judgment and the satisfaction thereof constituted a release. A similar result was reached in *Jenkins v. Southern Pac. Co.*, 17 F. Supp. 820 (D.C. 1937). There the plaintiff for a consideration of $2500 gave

two joint tort-feasors a covenant not to sue, authorizing dismissal of the action as to them and reserving claims against others. The action was dismissed as to the covenantees. The court held that the judgment and acceptance of satisfaction constituted a release. To the same effect are: *Sykes v. Wright,* 205 P. 2d 1156 (Okla. 1949); *City of Wetumka v. Cromwell Franklin Oil Co.,* 43 P. 2d 434 (Okla. 1935); *Cain v. Quannah Light and Ice Co.,* 267 P. 641 (Okla. 1928); *Vattani v. Damiano,* 153 A. 841 (N.J. 1931).

Plaintiff relies on *Colby v. Walker,* 171 A. 774 (N.J. 1934), which is often cited by text writers as supporting a more liberal view. Plaintiff, passenger in an automobile, was injured when the vehicle in which he was riding collided with another car. Plaintiff sued the drivers, but for a consideration released one and entered a consent judgment terminating the action as to him. The other defendant pleaded the release and judgment in bar. The court said: "It is law here that a judgment on the merits against one liable for a tort, followed by satisfaction, works a discharge of others similarly liable for the same injury. . . . Although the judgments here invoked were entered by agreement, they were judgments concerning the merits of the case, and are of the same virtue as though rendered upon verdicts of juries. (Citing cases)." After thus stating and approving the law generally applied throughout the country, the court declared in effect that plaintiff might request a hearing as to whether the judgment should be altered to conform to the alleged intention of the parties that plaintiff reserved his claim against the other defendant. It is not clear upon what theory the court might reform the judgment and what form the judgment would take if reformed. In view of the holdings of the New Hampshire Court as to releases generally (that an absolute release, reserving claim against other joint tort-feasors, is a covenant not to sue and not a release) this case is not authoritative on the present appeal.

In the instant case plaintiff and defendant administratrix entered a consent judgment. It is as much a judgment on the merits as if it had been entered on a jury verdict. "A consent judgment as well as a judgment on trial of issues, is *res judicata* as between the parties upon all matters embraced therein." *Herring v. Coach Co.,* 234 N.C. 51, 65 S.E. 2d 505. The consent judgment decrees "that the cause of action by plaintiff against . . . administratrix . . . shall be terminated upon payment by . . . administratrix, of the sum of . . . $3500 . . . and plaintiff shall be forever barred from prosecuting his action against . . . administratrix." The $3500 was paid and "Satisfaction of Judgment" was executed and filed in the cause. Notwithstanding the recitals in the settlement agreement, the judgment and "Satisfaction of Judgment" that it was not a full settlement and plaintiff reserved her right to

maintain the action against the corporate defendant, the judgment and the satisfaction thereof extinguished the cause of action as against administratrix and constitutes a release and bars the cause of action as to corporate defendant also. It is our view that intention does not govern in the face of the judgment terminating the cause of action. *Cain v. Quannah Light and Ice Co., supra.* There was a single and indivicible cause of action, and it cannot be split or apportioned. *Gaither Corp. v. Skinner, supra; Bruton v. Light Co., supra.* The court is without authority, after extinguishment of the cause of action as to one joint tort-feasor, to retain and reserve it as to another. Once extinguished, it has no further vitality.

Plaintiff contends that Judge Gambill erred in reversing the ruling of Judge Nettles who denied the motion of corporate defendant to dismiss the action on the ground of release. It is true that one superior court judge may not modify, reverse or set aside a judgment of another superior court judge for error. *In re Burton*, 257 N.C. 534, 541, 126 S.E. 2d 581; *Davis v. Jenkins*, 239 N.C. 533, 80 S.E. 2d 257. But it does not appear that Judge Nettles denied the motion on the merits. He undoubtedly took the position that the motion constituted a speaking demurrer. He properly permitted the corporate defendant to amend its answer and plead the agreement, consent judgment and satisfaction of judgment as a bar to the action. At the November 1961 term Judge Gwyn submitted issues to the jury with respect to release. But he set the verdict aside and ordered a new trial. This vacated all rulings made by him in the course of the trial. He made no formal judgment or order with respect to the question of release. As a matter of law, Judge Gambill did not reverse a judgment of another superior court judge.

The judgment below is

Affirmed.

IN THE MATTER OF THE AD VALOREM VALUATION OF PROPERTY OF PINE RALEIGH CORPORATION FOR THE YEAR ENDED DECEMBER 31, 1961.

(Filed 11 January 1963.)

1. Taxation § 25—

The fact that a taxpayer does not seek reduction of the tax valuation placed on his property during the year in which the factors which he contends warrant the reduction occurred does not preclude him from seeking a reduction in the tax valuation in subsequent years. G.S. 105-279; G.S. 105-295.

2. Same—

Net income produced by property is one of the factors properly considered in determining its tax value, but the property's fair earning capacity must be considered instead of its actual rentals if the rentals are less than the property's fair earning capacity.

3. Same—

The fact that property is under a long-term lease does not justify the use of the constant rental therein provided as a factor in determining the tax value of the property when subsequent to the execution of the lease there is a devaluation in the value of the dollar so that the value of the property would be a great deal more if it were not subject to the lease.

4. Same; Administrative Law § 4—

Upon review of an order of the State Board of Assessment, the Superior Court is without authority to make findings at variance with the findings of the Board and, when the findings of the Board are supported by the evidence and it is apparent that the Board considered all of the evidence relating to the determinative factors, the Superior Court properly refuses to remand the cause.

APPEAL by petitioner from *Phillips, J.*, September 1962 Civil Term of WAKE.

As authorized by c. 716, S.L. 1955, as amended by c. 280, S.L. 1957, the commissioners of Wake County, in 1958 and 1959, appraised all real property situate therein. This appraisal was made to fix the value of each piece of property for tax purposes for 1960 and subsequent years.

Petitioner owns two pieces of property in Raleigh designated as (a) 228 Fayetteville Street appraised at $151,657, valued for tax purposes for 1960 at 35% ($53,080) of its appraised value; and (b) 230-32 Fayetteville Street, 229 South Salisbury Street, appraised at $365,235, likewise valued for tax purposes for 1960 at 35% ($127,832) of its appraised value. It held as lessee a third lot designated as 14 West Martin Street. This lot adjoins the lots on Fayetteville Street owned by petitioner in fee. The Martin Street lot is owned by "the Rogers family." Its 1960 appraised value was $167,919, and 35% tax value was $58,771. The lease to petitioner is for thirty years, beginning 1 September 1951, expiring 31 August 1981. For the first ten years of the term the rent is $10,000 per annum, for the second ten-year period, $10,500 per annum, and for the final ten-year period, $11,000 per annum. This lease does not appear in the record, but petitioner's brief indicates petitioner also is obligated to pay the taxes and insurance premiums on the building on this lot.

Petitioner, deeming the appraised values excessive, in 1961 filed with the County Board of Equalization and Review a request as permitted

by G.S. 105-327 (g) (2) for a reduction in the assessed and tax values of the three pieces of property.

The basis on which petitioner relied for a change in value was the fact that rent received pursuant to a lease of all these properties to a third party for a term beginning 1 January 1952, terminating 30 August 1981, did not justify the appraised value. This lease fixed the rent at 5½% of lessee's gross sales with a guaranteed minimum of $25,966 per annum. Petitioner received as rent for these properties for the years ending 30 June the following sums: 1953 — $44,196.09; 1954 — $39,200.69; 1955 — $29,558.07; 1956 — $32, 504.30; 1957 — $29,151.36; 1958 — $29,382.04; 1959 — $30,262.77; 1960 — $32,899.06.

County Board of Equalization and Review heard petitioner. It refused to reduce the appraised values. Petitioner, in apt time, appealed to the State Board of Assessment, as permitted by G.S. 105-275(3). State Board heard the evidence offered by petitioner to support its claim that its property had been excessively valued.

State Board, in May 1962, notified the chairman of the Board of County Commissioners of Wake County and counsel for petitioner that it "did carefully consider all pertinent facts and data in the above appeal. On the basis of the information submitted a decision was rendered by the Board which did,

"ORDER, that the appraised valuation of the above property as determined by Wake County be sustained."

Petitioner thereupon sought judicial review of the order of the State Board as permitted by G.S. 143-306 *et seq.* As the basis for review, it alleged that the State Board's decision was not supported by "competent, material and substantial evidence in view of the entire record, and is arbitrary and capricious." As the basis for this assertion, it said that the State Board of Assessment had not taken into consideration the fact that the properties were subject to a lease which would not terminate until 1981, and the rents received under that lease were not sufficient to support a finding that the property was fairly worth the sum or value at which it was appraised. It requested the court to reduce the values to $400,000 or for such other relief as the court was authorized to grant.

The court, reciting that petitioner at the hearing before the State Board had the opportunity to offer, and did in fact offer, evidence in detail with respect to the income of the properties, denied the relief sought. Petitioner excepted and appealed.

Blanchard & Farmer for petitioner appellant.
Thomas A. Banks for appellee.

RODMAN, J. Appellee urges an affirmance on two grounds: (1) Petitioner, not having applied to the State Board in 1960 when the property was appraised, could not seek a reduction in 1961 based on past income, a fact known in 1960; and (2) the appraised value was determined after due consideration of all facts bearing on that question.

Appellee moved before the State Board to dismiss petitioner's appeal on the theory that not having sought review in 1960, it was concluded and could not seek a review in 1961. State Board denied the motion to dismiss. It proceeded to hear evidence on which it could act in determining the value of the property. We are of the opinion and hold that the State Board acted correctly in refusing to dismiss the appeal from the County Board for the reasons urged. Once real estate has been appraised for taxation, it continues to be listed at that figure until reappraised, unless some good reason warrants a change in value. Some specific conditions justifying a change in value are enumerated in G.S. 105-279. When that section is read and considered, as it must be, with G.S. 105-295, it is, we think, apparent that the Legislature intended to authorize County Board of Equalization and Review, when requested so to do, to correct any unjust and inequitable assessment. If it refuses to act, the taxpayer may appeal to the State Board of Assessment. The Legislature never contemplated that an injustice done a taxpayer must continue for a period of years merely because he failed at the first opportunity to bring the injustice to the attention of the authority having the power to correct.

Holding, as we do, that petitioner was entitled to the hearing accorded it, we must examine the record to see if, as it asserts, the hearing was a pure formality, and the conclusion arbitrary and capricious because not supported by substantial evidence. If petitioner's assertion is correct, the trial court should have allowed its motion to remand to the State Board with directions to comply with the statute, G.S. 105-295, and consider income as one of the elements of value. If, on the other hand, the State Board, as its order states, did in fact consider all the pertinent evidence, then the court correctly refused to grant petitioner the relief sought.

Petitioner, to establish its claim of overvaluation, called as an adverse witness the president of Southern Appraisal Company, employed by Wake County to determine the fair values of all properties in the county for use in levying ad valorem taxes. This witness approved the values assigned to each of petitioner's pieces of property. He listed the factors used to fix the value. He listed replacement costs less depreciation, values assigned to similar properties in the neighborhood, and then said: "The rental or the fair rental income that could be realized in each of the properties was another factor which was

taken into consideration." When the value was assigned to these properties, the witness did not know the actual rental income which petitioner was receiving. He had asked for that information, but it had not been supplied. He said: "Capitalization was taken into consideration in this particular only on a comparable basis with other property in the vicinity." Most of the properties in the block in which petitioner's property is situate is owner occupied, but, according to the witness, two pieces in the block were rented and the rents produced by those properties were taken into consideration in determining values. As a result of the appraisal, the properties were actually assessed for taxation in 1960 at a lower value than in 1959.

Petitioner had a real estate broker, an expert real estate appraiser, value the properties. He fixed the fair value of the property at $400,000. He expressed the opinion that real property ought to yield 7%. Using the rent received by petitioner for the year ending 30 June 1960 of $32,899, he deducted taxes, insurance, and the $10,000 rent paid to the owner of the property on Martin Street, and arrived at a net income of $13,420. This, when capitalized at 7%, gave a value of $191,736 for all three tracts. He recognized this was not the fair value. He said: "This would not be the fair market value of the property. That is what. . .if you were selling it on income alone. . .that would be the value, but somewhere between the physical value and the income approach you have a value. Now with every merchant it is not the same and therefore, that is where the matter of judgment comes in, as to whether the property produces what it should. Some are producing far in excess of the physical value and some less, but this is a percentage lease." He further said: "I used the following factors in arriving at the fair market value of this property; the physical value which includes land and buildings, the existing contracts on the property, the income from the existing contracts at the time. The income from this property has dropped from $44,000.00, approximately in 1953 to $30,000.00 in 1961."

In addition to the parol testimony, the State Board had the benefit of statements by petitioner showing the purchase price for each of these lots. Petitioner, who purchased in 1928 and 1939, paid $355,500 for the properties on Fayetteville Street. Its lessor purchased the Martin Street property in 1952 for $100,000. It is a matter of common knowledge that the value of the dollar has depreciated during the past several years, resulting in a higher price for commodities, including real estate.

Without regard to petitioner's duty, if any, to pay taxes or insurance premiums on the building on Martin Street, that property has a value of $150,000 when capitalized at 7% on the rent currently paid by

petitioner. If, instead of using 7% as a fair rate of return, it should be found that 6 ¼% was a fair rate of return, the value assignable to this property under the capitalization theory would be $168,000—slightly more than the value actually placed on it of $167,919. The amount paid for the Martin Street property represents approximately 22% of the total purchase money paid for all three lots. Apply that percentage to the total value which petitioner insists should be assigned to the three properties, and it would be valued at $88,000. Using that value and the rent paid by petitioner, the rate of return to the Rogers estate would exceed 11½%. This is 50% higher than the rate petitioner's witness says is a fair rate to capitalize rents.

Ordinarily it is the duty of the property owner to list his property for taxation. This includes, when the property is real estate, the buildings and permanent fixtures, although they may be owned separately. *Investment Co. v. Cumberland County,* 245 N.C. 492, 96 S.E. 2d 341. If the Martin Street property were listed to its owner, it would, using income as the sole factor in determining its value, be listed at $150,000 to $170,000. The value assessed by the county was $167,919. But petitioner says: It has obligated itself to list and pay taxes thereon; it exercised bad judgment and made a lease which does not expire for nearly twenty years; and because of its bad business judgment, the value of this property should be cut in half, and Wake County should lose its taxes. Applying this reasoning to the man who owns property, borrows money mortgaging the property as security, and investing the funds obtained in securities which become worthless, he ought to be taxed only on the value of his equity of redemption. The statute, G.S. 105-295, in fixing the guide which assessors must use in valuing property for taxes, includes as a factor "the past income therefrom, its probable future income." But the income referred to is not necessarily actual income. The language is sufficient to include the income which could be obtained by the proper and efficient use of the property. To hold otherwise would be to penalize the competent and diligent and to reward the incompetent or indolent.

Net income produced is an element which may properly be considered in determining value, but it is only one element. If it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both.

The case of *Donovan v. City of Haverhill,* 141 N.E. 564, 30 A.L.R. 358, bears remarkable similarity to the facts of this case. There the owners of the property were challenging the valuation placed on the properties for taxation for the year 1921. They insisted the value was

entirely too high because of leases having a long time to run. These leases were made several years prior to 1921 and when the leases were made, the rents reserved were fair, but when the properties were assessed in 1921, the properties could have been rented for several thousand dollars in excess of the rent paid. The conclusion reached by the Supreme Court of Massachusetts is epitomized in the headnote reading: "The fact that long-term leases carry rent which reduce the market value of the property below what it would be in their absence does not prevent the assessment of the property for taxation at its full value, as compared with other property in the neighborhood, or what it would be if free from the leases." In *Richmond F & P R Co. v. Commonwealth,* 124 S.E. 2d 206, the Supreme Court of Appeals of Virginia was called upon to determine whether assessors could consider rental which property would currently yield or was bound by a rental fixed in 1905 extending to 2001. The court said: "Under the terms of these contracts appellant receives an annual return of $12,500 from the real estate, and it is contended that the Commission's assessor should have reduced his valuation because of the limited return which the railroad receives. This is without merit." Justice Ronan, speaking for the Supreme Judicial Court of Massachusetts, said in *Old Colony R. Co. v. Assessors of Boston,* 35 N.E. 2d 246 (251): "Taxation is a practical matter, and mathematical uniformity in the distribution of the public burden arising from governmental expenses is an impossible attainment. The difference in income derived by the owners from different parcels of realty of substantially the same market value might be due to imprudent management, irresponsible tenants or disadvantageous leases. The tax to the owner receiving the smaller income is undoubtedly a heavier burden than it is to a neighbor who obtains a greater income. Such inequality arises from business and economic conditions. It cannot be attributed to the taxing statute." Similar statements are found in *Slatersville Finishing Co. v. Greene,* 101 A 226; *Assessors of Quincy v. Boston Consolidated Gas Co.,* 34 N.E. 2d 623; *People v. Boyland,* 121 N.Y.S. 2d 238; *Somers v. Meriden,* 174 A 184, 95 A.L.R. 434; 84 C.J.S. 797-8.

The fact-finding body had before it all of the evidence necessary to fix the value. It had petitioner's statement of the amounts paid for the properties when purchased, the rent which petitioner was paying for a part of the properties, the rent which it was receiving from its lessee. The record does not disclose the relationship, if any, between petitioner and its lessee. The record gives no indication as to why total sales had decreased so substantially in a seven-year period. Was it due to the management of lessee, or some other cause?

Petitioner sought review in the Superior Court on the record made before the State Board. That court was without authority to make find-

ings at variance with the findings of the State Board, supported as the findings were by material and substantial evidence. G.S. 143-315. That was the exclusive function of the State Board of Assessment. It says it considered all the evidence. Necessarily that includes the single element of rents currently received which petitioner relies on exclusively to justify its claim for a reduction in value. Having considered this evidence, there was no reason why the Superior Court should remand the cause to the State Board of Assessment to further consider petitioner's claims or to hear further evidence which at best could only corroborate petitioner's witness.

Affirmed.

RUBY QUEEN v. DAVID JARRETT AND HAROLD R. MITCHELL.

(Filed 11 January 1963.)

1. Automobiles § 41h—

Allegations to the effect that a defendant failed to keep a proper lookout and observe traffic conditions and drove his vehicle to the left of the center of the highway as a following vehicle was attempting to pull around him to pass, *is held* sufficient, with supporting evidence, to present the question of such defendant's negligence in violating G.S. 20-154, notwithstanding the failure of the complaint to refer to the statute.

2. Automobiles § 41d—

Plaintiff passenger's evidence that defendants were both traveling north on a three-lane highway and that as the following vehicle was attempting to pass in a passing zone for northbound traffic, the driver of the preceding vehicle turned from a direct line of travel without first seeing that such movement could be made in safety and without giving the required signal, and collided with the right front of the following vehicle, *is held* sufficient to be submitted to the jury on the issue of such defendant's negligence. Whether the evidence of the other defendant or plaintiff's evidence introduced after plaintiff had rested her case against the first defendant should be considered in passing on the first defendant's motion to nonsuit, quaere?

3. Pleadings § 28—

Plaintiff must make out his case *secundum allegata.*

4. Automobiles § 46—

In plaintiff passenger's action to recover for injuries received in a collision between two vehicles traveling in the same direction as one attempted to pass the other, plaintiff's allegations that the collision resulted from each driver turning from a direct line, without reference to speed as a proximate cause of the accident, do not present the question

of liability on the ground of excessive speed, and therefore extended instructions as to the statutory provisions relating to speed and speed zones are not applicable and constitute prejudicial error.

APPEAL by defendants from *Phillips, J.*, April, 1962, Civil Term of DAVIDSON.

Civil action growing out of a collision that occurred April 17, 1961, about 7:00 a.m., on Westchester Drive (Highway #68) in High Point, North Carolina, between a 1953 Buick, owned and operated by defendant Jarrett, and a 1956 Chevrolet pickup truck, owned and operated by defendant Mitchell. Plaintiff was a guest passenger in the Jarrett car, riding on the right front seat.

Westchester Drive was a three-lane, north-south highway. Both vehicles had been proceeding north, the Mitchell truck in front of the Jarrett car. The collision occurred on a portion of Westchester Drive designated and marked as a passing zone for northbound traffic.

Plaintiff alleged "the defendant Jarrett turned his automobile to his left and attempted to pass the defendant Mitchell; that as the defendant Jarrett attempted to pull around the defendant Mitchell, the defendant Mitchell also pulled his truck to the left of the center of the highway, at which time the right front of the defendant Jarrett's automobile collided with the left rear side of the defendant Mitchell's truck, and immediately thereafter the defendant Jarrett lost control of his automobile and the same ran off the highway down an embankment on the West side of the highway"; and plaintiff was injured on account thereof.

Plaintiff alleged the collision and her injuries were proximately caused by the joint and concurrent negligence of Jarrett and Mitchell. In addition to particular allegations set forth below, plaintiff alleged each defendant operated his car (truck) upon said highway "carelessly and heedlessly, in willful and wanton disregard of the rights and safety of others, and without due caution and circumspection, and at a speed and in a manner so as to endanger, or be likely to endanger persons and property upon said highway."

As to Jarrett, plaintiff alleged, in substance, (a) that he followed the Mitchell truck more closely than was reasonable and prudent in violation of G.S. 20-152; (b) that, when attempting to overtake the Mitchell truck, he failed to pass at least two feet to the left thereof in violation of G.S. 20-149; and (c) that he failed to keep a proper lookout ahead of him and to observe the traffic conditions then and there existing upon the highway.

As to Mitchell, plaintiff alleged, in substance, (a) that he failed to give way to the right in favor of the Jarrett car when it was over-

taking and attempting to pass him and increased the speed of his truck before the Jarrett car had passed him in violation of G.S. 20-151; and (b) that he failed to keep a proper lookout and to observe the traffic conditions then and there existing upon said highway.

In separate answers, each defendant, while admitting the negligence of his codefendant in the respects alleged by plaintiff proximately caused plaintiff's injury, denied all of plaintiff's allegations relating to his own alleged actionable negligence. Each defendant admitted the collision was between the right front of the Jarrett car and the left rear of the Mitchell truck.

After said pleadings had been filed, plaintiff, by leave of court, filed an amendment to her complaint in which she alleged, with reference to each defendant, that "(h)e was operating his automobile (truck) within the city limits of High Point, N. C., at an unlawful rate of speed in excess of 35 miles per hour, said speed limit of 35 miles per hour being lawfully established by proper signs lawfully erected and maintained by the State Highway Commission." Jarrett answered said amendment and denied the allegations thereof. Mitchell's answer to said amendment, if any, does not appear in the record.

At the conclusion of plaintiff's evidence, each defendant moved for judgment of nonsuit and excepted to the court's denial thereof. Evidence was then offered by defendant Jarratt. At the conclusion thereof defendant Mitchell renewed his motion for judgment of nonsuit and excepted to the court's denial thereof. Defendant Mitchell then rested his case, without offering evidence, and again moved for judgment of nonsuit and excepted to the court's denial thereof. Thereupon, plaintiff offered additional evidence and, as part of plaintiff's additional evidence, defendant Mitchell was called and examined as a witness by plaintiff. At the conclusion of plaintiff's additional evidence, which was at the conclusion of all the evidence, each defendant moved for judgment of nonsuit and excepted to the court's denial thereof.

The court submitted and the jury answered three issues, *viz.*:

"1. Was plaintiff injured by the negligence of the defendant, David Jarrett, as alleged in the Complaint? ANSWER: Yes.

"2. Was plaintiff injured by the negligence of the defendant, Harold R. Mitchell, as alleged in the complaint? ANSWER: Yes.

"3. What amount, if any, is plaintiff entitled to recover on account of said injuries? ANSWER: $7,000.00."

Judgment, "that the plaintiff have and recover of the defendants the sum of seven thousand dollars ($7,000.00) together with the costs to be taxed by the Clerk," was entered. Each defendant excepted and appealed.

W. H. Steed for plaintiff appellee.

Deal, Hutchins & Minor for defendant appellant Jarrett.

Jordan, Wright, Henson & Nichols and G. Marlin Evans for defendant appellant Mitchell.

BOBBITT, J. The appeal of each defendant requires separate consideration.

MITCHELL'S APPEAL

Mitchell's only assignment of error is directed to the court's denial of his motions for judgment of nonsuit.

When plaintiff offered her evidence and rested, Mitchell moved for judgment of nonsuit; and, when the court refused his said motion, Mitchell excepted to the court's ruling and announced that he did not choose to introduce evidence. G.S. 1-183. He contends he did not offer evidence or otherwise waive his exception to said ruling.

Unquestionably, testimony *subsequently* offered by Jarrett and by plaintiff includes evidence favorable to plaintiff. Mitchell contends this evidence may not be considered, that the question as to nonsuit is whether the evidence offered by plaintiff before she (originally) rested her case was sufficient to support a finding that plaintiff was injured by his (Mitchell's) actionable negligence. As in *Van Landingham v. Sewing Machine Co.*, 207 N.C. 355, 177 S.E. 126, where a similar question was raised, we find it unnecessary on this record to pass upon Mitchell's said contention.

Mitchell contends his said motion for judgment of nonsuit should have been allowed because the evidence was insufficient *to support plaintiff's allegations* as to his (Mitchell's) actionable negligence.

According to plaintiff's testimony, Jarrett had been following the Mitchell truck "about a mile or half a mile," stayed "within four or five feet of it," both vehicles proceeding north in the east traffic lane at a speed of 55 miles per hour when they reached and entered the passing zone.

There is merit in Mitchell's contention that G.S. 20-151 is not applicable to the factual situation presented by plaintiff's evidence. *Dreher v. Divine*, 192 N.C. 325, 135 S.E. 29. Moreover, as discussed in connection with Jarrett's appeal, according to plaintiff's allegations and testimony, the collision was proximately caused by the act of each defendant in turning from a direct line of traffic, not because Jarrett or Mitchell was driving at excessive speed. Too, while plaintiff, as set forth in the statement of facts, alleged each defendant violated the provisions of the reckless driving statute, G.S. 20-140, she did not indicate

the conduct she considered "reckless driving." In this connection, see *Dunlap v. Lee*, 257 N.C. 447, 126 S.E. 2d 62.

Plaintiff did allege Mitchell "failed to keep a proper lookout and failed to observe the traffic conditions then and there existing upon said highway." This allegation must be considered in relation to plaintiff's basic factual allegation, namely, "as the defendant Jarrett attempted to pull around the defendant Mitchell, the defendant Mitchell also pulled his truck to the left of the center of the highway, at which time the right front of the defendant Jarrett's automobile collided with the left rear side of the defendant Mitchell's truck."

According to plaintiff's evidence, there was, within the passing zone, a line of traffic, "other traffic ahead of the pickup truck." Plaintiff testified (1) that she saw no signal given by Mitchell "for a change of lane," and (2) that "the rear bumper of the pickup truck caught the right front fender of Jarrett's car." True, plaintiff testified that Jarrett blew his horn just as he pulled out to pass the pickup truck. Moreover, the collision occurred in a zone where it might be reasonably anticipated that passing would be attempted.

The provisions of G.S. 20-154 are pertinent to the basic factual situation alleged by plaintiff. Moreover, plaintiff's testimony, when considered in the light most favorable to her, was sufficient to support findings that Mitchell, in violation of G.S. 20-154, turned from a direct line of travel (1) without seeing that such movement could be made in safety, and (2) without giving the required signal of his intention to do so.

True, plaintiff's allegations contain no reference to G.S. 20-154. Nor does plaintiff allege Mitchell failed to signal his intention to turn from his direct line of travel. Even so, without reference to statutory provisions, plaintiff's allegations, as indicated above, to the effect that Mitchell, without keeping a proper lookout and without observing traffic conditions then and there existing upon the highway, drove his truck to the left of the center of the highway *as Jarrett was attempting to pull around him*, and the evidence in support thereof, were sufficient to require submission of an issue as to Mitchell's actionable negligence and to support a jury finding in favor of plaintiff. We are of opinion, and so decide, that the evidence offered by plaintiff before she (originally) rested her case was sufficient to withstand Mitchell's motion for judgment of nonsuit.

Since Mitchell does not assign error in any other respect, the verdict and judgment, as between plaintiff and defendant Mitchell, will not be disturbed.

JARRETT'S APPEAL

The only assignments of error brought forward and discussed in Jarrett's brief relate to the court's instructions to the jury.

Jarrett excepted to and assigns as error the following portion of the court's charge:

> "So, as you find from the evidence and by the greater weight thereof, the burden of proof being on the plaintiff to so satisfy you, if you find it was a thirty-five mile zone, then you will consider the maximum speed for each of the vehicles to be thirty-five; but if you fail to so find from the evidence and by the greater weight thereof, then the speed restriction will be the open-road or fifty-five miles per hour as the maximum speed."

There was uncontradicted evidence that the area in which the collison occurred was annexed to and became a part of the City of High Point early in 1961 and that Westchester Drive was "kind of a by-pass around High Point." Elsewhere in the charge, the court instructed the jury that, according to all the evidence, the place where the collision occurred was not in a business or residential district.

Preceding the quoted portion, the court, in instructing the jury, read the provisions of paragraphs (a), (b), except subsection 3 thereof, (c), and (d), of G.S. 20-141 as set forth in G.S. Volume 1C, Recompiled 1953.

G.S. 20-141(d) provides:

> "Whenever the State Highway Commission shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said Commission shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway."

Immediately preceding the quoted portion, the court, reviewing the contentions of plaintiff and of defendants, respectively, with reference to whether the collision occurred within a 35-mile speed zone, said:

> "Plaintiff insists and contends that at the time of this accident that only two signs were there leading up north in the direction of the place of the accident—that one was some two miles or more back which said a 'thirty-five mile zone,' and then another one was about one and six-tenths miles by measurement from the place of the accident, and that that was the last thirty-five mile zone

sign; that there were no other speed restriction signs placed on the highway by the Highway Commission at any place between where the first sign was placed and where the second sign was placed and where the point of the accident took place. Therefore, plaintiff insists and contends that you should find that it was a thirty-five mile zone.

"The defendants on the other hand insist and contend that they were too far away from the nearest sign to designate this area as a thirty-five mile zone, but that on the date of the accident, some year ago, there was a sign in between the two, beyond the last one which was one and six-tenths miles from the place of the accident, stating 'Resume safe Speed' which was a highway sign but which has been removed; and that neither of the signs was close enough to establish this area as a thirty-five mile zone from the signs erected by the Highway Commission."

For the reasons stated below, we think the quoted instruction is erroneous and prejudicial and that Jarrett is entitled to a new trial on account thereof.

In addition to the evidence referred to in the court's quoted review of contentions, there was other evidence as to highway (speed) signs, the location thereof and when observed. Moreover, there were conflicts in the evidence relating to such signs. Assuming, but not deciding, there was evidence which, when considered in the light most favorable to plaintiff, would support a finding that the Highway Commission had erected appropriate signs giving notice to northbound traffic that the portion of Westchester Drive in which the collision occurred was in a 35-mile speed zone, the quoted instruction is deficient in that it fails to provide the jury with any guide or standard as to what facts plaintiff was required to establish as a basis for a finding that the collision occurred within a 35-mile speed zone. Hence, the quoted instruction does not comply with the requirements of G.S. 1-180.

There was evidence that, immediately preceding the collision, both Jarrett and Mitchell were operating their respective motor vehicles at a speed in excess of 35 miles per hour. However, if it be conceded that the collision occurrred within a 35-mile speed zone, and if the collision occurred as set forth in plaintiff's allegations and evidence, it does not appear that excessive speed was a proximate cause of the collision.

It is well settled that a plaintiff must make out his case *secundum allegata*. His recovery, if any, must be on the cause of action alleged in the complaint. *Nix v. English*, 254 N.C. 414, 421, 119 S.E. 2d 220, and cases cited: *Howell v. Smith*, 258 N.C. 150, 154, 128 S.E. 2d 144.

Plaintiff testified and alleged (as we construe her complaint) that both Mitchell and Jarrett had been and were proceeding in the east lane when they entered the zone where passing was permitted, the Jarrett car directly behind the Mitchell truck. Nothing in plaintiff's allegations or testimony indicates Jarrett by reason of excessive speed collided with the rear of the Mitchell truck. According to the facts alleged by plaintiff and according to her testimony, the collision was proximately caused by the act of each defendant in turning from a direct line of traffic, not because Jarrett or Mitchell was driving at excessive speed. Hence, the extended instructions as to statutory provisions relating to speed and speed zones were inapplicable to the factual situation set forth in plaintiff's allegations and testimony. Under these circumstances, we are constrained to hold that such instructions were erroneous and prejudicial. *Powell v. Clark,* 255 N.C. 707, 711, 122 S.E. 2d 706, and cases cited.

True, if Mitchell's testimony were accepted, namely, testimony to the effect that Jarrett overtook and struck the rear of the Mitchell truck as it was proceeding straight in the center lane and alongside a station wagon (in the east lane) the Mitchell truck was passing, testimony as to excessive speed on the part of Jarrett would be relevant. However, this is not the case against Jarrett set forth in plaintiff's allegations and testimony. Obviously, the plaintiff cannot predicate her case against Mitchell on one basic factual situation and her case against Jarrett on a different and inconsistent basic factual situation.

In view of the foregoing, the verdict and judgment, as between plaintiff and defendant Jarrett, are vacated; and, as between plaintiff and Jarrett, there must be a new trial.

As to defendant Mitchell, no error.

As to defendant Jarrett, new trial.

WILLIAM G. CHAPPELL v. KENNETH WAYNE DEAN, N. K. DEAN, INDIVIDUALLY, AND N. K. DEAN, EXECUTOR OF THE ESTATE OF WILL AUTRY, AND JOSEPH W. CARROLL.

(Filed 11 January 1963.)

1. Automobiles § 55—

Evidence that the father had the possession and control of a motor vehicle which he kept at his residence, that he permitted his minor son, who lived in the household, to drive the vehicle, and exercised control over the occasions when and the manner in which the son operated the vehicle, is sufficient to be submitted to the jury on the question of the father's

liability under the family purpose doctrine, notwithstanding that the father was not the owner of the vehicle.

2. Same—

An instruction under the family purpose doctrine that the parent would be liable under the doctrine even if the parent actually forbade use of the truck by the son on the occasion in question, is prejudicial error, since there can be no liability under the doctrine in the absence of the parent's consent, express or implied.

3. Same; Automobiles § 46; Trial § 33—

An instruction on the family purpose doctrine that the principal would be liable for the acts of his agent within the real or apparent scope of the agent's employment, even if the principal had actually forbidden the use of the vehicle on the occasion in question, must be held for prejudicial error even though the court was speaking of the principle of *respondeat superior* in the abstract, since it is error for the court to charge upon an abstract principle of law not presented by the evidence.

4. Appeal and Error § 40—

Where the issues are inter-related so that the answer to one issue affects the answer to the other, a new trial must be awarded as to both issues for prejudicial error relating to one, even though appellant is not in a position to press his exceptions relating to the other.

5. Automobiles § 54f—

Proof of registration of a vehicle constitutes *prima facie* evidence of agency but raises no presumption and does not shift the burden of proof. G.S. 20-71.1.

6. Appeal and Error §§ 42, 44—

An erroneous instruction embodied in a party's prayer for instructions is invited error and cannot entitle such party to a new trial even though the party be represented by different counsel on the appeal.

7. Automobiles § 54g—

Where the registered owner is sought to be held liable solely under the provisions of G.S. 20-71.1, and all the evidence is to the effect that the operator of the vehicle was on a purely personal mission and not on business for the registered owner, it is the duty of the trial judge, even if there is evidence that the registered owner gave the operator permission to use the vehicle, to instruct the jury that if they believe all of the evidence to answer the issue of agency in the negative, even in the absence of a request for special instructions.

8. Automobiles § 54h—

The issue of liability under the doctrine of *respondeat superior* should be directed to the question of agency and not whether plaintiff was injured as a result of the alleged principal's negligence.

9. Same—

The vehicle in question was registered in the name of a deceased owner and was in the possession and control of the executor. The accident oc-

curred while the vehicle was being operated by the executor's son. The executor was sought to be held liable individually under the family purpose doctrine and in his representative capacity. The evidence disclosed that at the time of the accident the son was on a single mission. *Held:* The executor could not be liable in both his representative and individual capacities, and the court should instruct the jury that they might answer both issues in the negative, or either one in the affirmative and the other in the negative.

APPEAL by defendants (except Joseph W. Carroll) from *Walker, S.J.*, April 9, 1962, Civil Term of WAKE.

Action to recover damages for personal injuries suffered by plaintiff in an accident allegedly caused by the actionable negligence of defendants in the operation of a motor vehicle.

About 7:30 P.M. on 11 January 1961 plaintiff was riding as a guest passenger in a pickup truck driven by defendant Kenneth Wayne Dean, age 17. They were proceeding southwardly along a rural unpaved road in Wake County, known as Penny Road. They were going to some rabbit boxes which had been set in an area about ten miles from their homes. As the pickup, at a speed of 35 to 40 miles per hour, rounded a curve bearing to the right, it came upon the automobile of Joseph W. Carroll which he had parked in the road without lights. Kenneth applied brakes and turned sharply to the left. The vehicle skidded into a ditch on the left side of the road and turned over. Plaintiff was injured.

At the close of plaintiff's evidence the motion of Joseph W. Carroll for nonsuit was sustained. There was no appeal from this ruling.

Issues were submitted to and answered by the jury as follows:

"Issue No. 1. Was the plaintiff injured as a result of negligence on the part of the defendant, Kenneth Wayne Dean? Answer: Yes.

"Issue No. 2. Was the plaintiff injured as a result of negligence on the part of N. K. Dean, individually? Answer: Yes.

"Issue No. 3. Was the plaintiff injured as a result of negligence on the part of N. K. Dean, executor of the estate of Will Autry? Answer: Yes.

"Issue No. 4. Did the plaintiff by his own negligence contribute to his injuries as alleged in the defendants' answer? Answer: No.

"Issue No. 5. In what amount is the plaintiff entitled to recover on account of his injuries? Answer: $3,500.00"

The court entered judgment for plaintiff and against defendants, Kenneth Wayne Dean, N. K. Dean, individually, and N. K. Dean, Executor, jointly and severally, in the amount of $3500.00. Defendants assign errors.

Howard F. Twiggs and Ellis Nassif for plaintiff.
Blanchard and Farmer for defendants.

MOORE, J. The pickup truck was registered in the name of Will Autry. Will Autry had died testate prior to 11 January 1961, date of the accident. In his will he bequeathed the pickup truck to N. K. Dean. N. K. Dean was the qualified and acting executor of Autry's estate at the time of the accident. The estate had not been settled. Kenneth Wayne Dean is the son of N. K. Dean and is a member of the latter's household.

Plaintiff alleges that at the time of the accident Kenneth was the agent of N. K. Dean, individually, under the family purpose doctrine, and was also agent and about the business of N. K. Dean, Executor.

N. K. Dean, individually, contends that there is not sufficient evidence to justify submission of the case to the jury under the family purpose doctrine and his motion for nonsuit should have been allowed. He also contends that the court erred in its instructions to the jury on the second issue.

There is evidence tending to show that the pickup truck was in the possession and under the control of N. K. Dean, he kept it at his residence, plaintiff had previously ridden in the truck while Kenneth was operating it on trips to the rabbit boxes, to drag strip races and for making collections on N. K. Dean's paper route. Kenneth had been seen driving it on many occasions, and on the night in question N. K. Dean, knowing that plaintiff and Kenneth were going to the rabbit boxes, "made a statement to him about not driving the truck fast, for some mechanical reason. . .," and "Mr. Dean did not tell Kenneth not to take the truck on this occasion." This evidence makes out a *prima facie* case of agency under the family purpose doctrine. *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754; *Grindstaff v. Watts,* 254 N.C. 568, 119 S.E. 2d 784; *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427. Under the family purpose doctrine the vehicle must be subject to the control of the person on whom liability is sought to be imposed. "The test is not who owns the vehicle but control or the right to control. Since the ownership presumptively indicates the right of control, it is frequently stated as one of the elements necessary for the application of the doctrine. But one may in fact exercise control and direct the use of property without in fact being the owner." *Griffin v. Pancoast,* 257 N.C. 52, 55, 125 S.E. 2d 310.

In charging on the second issue with respect to the family purpose doctrine the court told the jury: "The family purpose doctrine is based on the relationship of what we call in law 'respondeat superior,' which means let the master respond. Of course, if the . . . master . . . authoriz-

ed or ratified the . . . alleged wrongful act, that is, the taking of the pick-up truck and the wreck, or participated in it himself, he would be liable for damages occasioned by it; but if he did not authorize it or did not ratify it he would still be liable if it was done within the real or apparent course or scope of his agent, servant or employee, and this being so, . . . even if he had actually been forbidden the use of the truck."

This instruction is erroneous and entitles N. K. Dean, individually, to a new trial. The family purpose doctrine is an extension of the principle of *respondeat superior*, and involves a novel application of the principle. *Grindstaff v. Watts, supra.* Permission and consent by the owner (or one having the control) is an essential element of the family purpose doctrine. Plaintiff must show by a preponderance of the evidence the consent, knowledge and approval of the owner. This may of course be shown by circumstantial evidence, that is, implied from circumstances, such as the habitual or customary use of the car by the member of the family. *Grier v. Woodside,* 200 N.C. 759, 158 S.E. 491. But if there is no permission and consent, and the use of the vehicle has been forbidden, the owner cannot be held liable under the doctrine. *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603.

If, as plaintiff suggests, the court was speaking of the principle of *respondeat superior* in the abstract, and did not intend to apply this instruction to the evidence in the case or to make it a rule for the jury's guidance in considering the family purpose doctrine, it is still prejudicial and is calculated to mislead the jury. It is error for the court to charge upon an abstract principle of law which is not presented by the evidence in the case. *Carswell v. Lackey,* 253 N.C. 387, 393, 117 S.E. 2d 51.

Since there must be a new trial on the second issue, it is our opinion, for reasons hereinafter stated, that there should also be a new trial on the third issue. Justice requires that the jury consider these issues, each in relation to the other.

The pickup truck was registered in the name of Will Autry, who had died prior to the accident. N. K. Dean, executor of Autry's will, had not assigned the title to himself, it having been willed to him. The estate had not been settled. Under the provisions of G.S. 20-71.1 proof of the registration of the vehicle in the name of Will Autry is *prima facie* evidence of the ownership of the vehicle by Will Autry's estate, and that it was being operated by a person for whose conduct Autry's estate was legally responsible, and that it was being operated for the estate's benefit and within the scope and course of the operator's employment or agency. *Travis v. Duckworth,* 237 N.C. 471, 473, 75 S.E. 2d 309.

The trial judge instructed the jury that proof of registration constitutes such *prima facie* evidence, and then stated: ". . . . (T)hat is a rebuttable presumption and . . . the defendant has the right and it is his duty to rebut this presumption, the burden being upon the defendant to rebut this presumption of law." The quoted portion of the instruction is, of course, erroneous. The statute creates no presumption of law, and it does not shift the burden of the issue from plaintiff to defendant. In fairness to the learned judge, we must explain that the error, oddly enough, was invited. Defendant in apt time and in writing requested this instruction. We hasten to add that distinguished counsel, who signed the brief and appeared for defendant in Supreme Court, did not represent defendant at the trial below. Even so, we ordinarily hold that a party is bound by his written prayer for instructions. *Carruthers v. R.R.*, 218 N.C. 377, 11 S.E. 2d 157. Since there must be a new trial, we call attention to the erroneous instruction to guard against a repetition when the case is retried.

"The statute (G.S. 20-71.1) was designated to create a rule of evidence. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. It does not have, and was not intended to have, any further force or effect." *Hartley v. Smith*, 239 N.C. 170, 177, 79 S.E. 2d 767. See also *Knight v. Associated Transport*, 255 N.C. 462, 122 S.E. 2d 64. The statute makes out a *prima facie* case of agency which will support, but does not compel, a verdict against defendant upon the principle of *respondeat superior*. *Elliott v. Killian*, 242 N.C. 471, 475, 87 S.E. 2d 903. The statute does not relieve plaintiff of the duty to allege and the burden of proving agency. *Osborne v. Gilreath*, 241 N.C. 685, 86 S.E. 2d 462.

There is no evidence in the record on appeal from which the jury might have found that N. K. Dean, Executor, was negligent apart from the negligence of Kenneth Wayne Dean. And, other than the rule of evidence established by G.S. 20-71.1, all the evidence in the case tends to show that the operator, Kenneth Wayne Dean, at the time of the accident was on a purely personal mission and not on or about any business of the Will Autry estate — unless we assume without proof, or even suggestion, that the Autry estate was in the business of trapping rabbits, an assumption we are unwilling to make on this record. In any case in which a plaintiff, as against the registered owner of a motor vehicle, relies solely upon G.S. 20-71.1 to prove the agency of nonowner operator, and in which all of the positive evidence in the case is to the effect that the operator was on a mission of his own and not on any business for the registered owner, it is the duty of the

trial judge, even if there is evidence that the registered owner gave the operator permission to use the vehicle, to instruct the jury that, if they believe the evidence and find the facts to be as the evidence tends to show, that is, that the operator was on a mission of his own, they will answer the agency issue in the negative. And it is prejudicial error for the court, in such circumstances, to fail to so instruct the jury, even if there is no special request therefor. *Whiteside v. McCarson,* 250 N.C. 673, 679, 110 S.E. 2d 295. In the case at bar, an explanation of the rule of evidence presented by G.S. 20-71.1 is all that plaintiff was entitled to, on the third issue. But as to the defendant N. K. Dean, Executor, he was entitled to have the court instruct the jury that, if they believed the evidence and found the facts to be as the evidence tends to show, that is, that Kenneth Wayne Dean, either with or without the permission of N. K. Dean, Executor, operated the vehicle at the time in question on a mission of his own, to go to rabbit boxes, it would be their duty to answer the third issue "No." *Whiteside v. McCarson, supra; Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644; *Travis v. Duckworth, supra; Spencer v. Motor Co.,* 236 N.C. 239, 72 S.E. 2d 598. A master is not responsible for the tortious conduct of his servant when the servant is not acting in the course of his employment and is not at the time about the master's business. *Hinson v. Chemical Corp.,* 230 N.C. 476, 53 S.E. 2d 448.

Appellants do not bring forward or discuss in their brief any exceptions or assignments of error affecting the first, fourth and fifth issues, and the verdict and judgment with respect to these issues will not be disturbed. There will be a new trial only on the second and third (agency) issues. *Godwin v. Vinson,* 254 N.C. 582, 119 S.E. 2d 616.

We cannot now determine whether the pleadings and evidence at the retrial will be the same as on this record, and we are loathe to chart the course of future trials, but we think it not amiss to call attention to two matters which may be of some assistance to the trial judge in bringing about a final determination of the issues.

While no exact formula is prescribed for the settlement of issues (*Whiteside v. McCarson, supra*), we think the agency issues might be reformed so as to make their meaning clearer in relation to the pleadings and evidence. The second and third issues as they appear in the present record to negligence on the part of N. K. Dean, not to agency. The issues would more clearly present the crux of the case in respect to the liability, if any, of N. K. Dean (individually or as executor) if they inquired as to the alleged agencies — as to one, presenting the elements of the family purpose doctrine, and, as to the other, inquiring whether Kenneth Wayne Dean was agent and about the business of the Will Autry estate at the time of the accident.

Notwithstanding the applicability to the respective issues of the family purpose doctrine and the rule of evidence prescribed by G.S. 20-71.1, the evidence in this record definitely shows that Kenneth Wayne Dean was on a single mission at the time of the accident, and with respect thereto could not have been the agent of both N. K. Dean, individually, and N. K. Dean, Executor, if of either. The evidence does not justify a judgment against both. On the evidence presented, if the mission was a family purpose it could not have been the business of the estate, and if it was estate business it could not have been a family purpose. Conceivably a person might be on a single mission or on several missions at once for two or more principals, but this is not the case here. On the issues as framed, one only of the following verdicts is permissible: (1) negative answers to both issues, or (2) affirmative answer to the second and negative answer to the third, or (3) negative answer to the second and affirmative answer to the third. The court should have instructed the jury not to consider the third issue if the second was answered "Yes," and to consider and answer the third issue only in the event the second issue was answered "No."

Of course, in framing issues and instructing the jury at the retrial of the cause the court must be guided by the pleadings and evidence then presented.

There was no error in the trial of the first, fourth and fifth issues, but there will be a retrial of the agency issues. Therefore, we order a partial

New trial.

WALTER BRAY v. NORTH CAROLINA POLICE VOLUNTARY BENEFIT ASSOCIATION (AN UNINCORPORATED ASSOCIATION.)

(Filed 11 January 1963.)

1. Associations § 3—

The relationship between a member and a beneficial association in regard to benefits is that of insured and insurer, and the constitution, by-laws, rules and regulations of the association operate as a contract in regard to such benefits and are to be construed in the light most favorable to members to effecuate the purposes of the association and the intent of the parties, and against forfeiture.

2. Same—

The rules of defendent beneficial association provided that in order to be entitled to retirement benefits a member must have had twenty years service, the last ten of which must have been continuous, and that no

member should receive retirement benefits until a specified date five years subsequent to its organization. Plaintiff met all of the conditions for benefits upon his retirement prior to the date specified. *Held:* Plaintiff was not required to have had continuous service for the ten years prior to the date specified, since the rules do not prevent a member from qualifying for such benefits before that date, but only that he should not receive benefits until then.

3. Same—

The rules of defendant beneficial association provided that when a member left the full-time service he should not be eligible for continued membership, and that only members could apply for and receive retirement benefits. Plaintiff appeared before the board of directors and advised the board of change of his status from that of a full-time employee effective a specified date, and the board permitted plaintiff to continue his membership, continued to carry him on its rolls, and continued to assesse him in the same manner as others in his classification. *Held:* The board waived forfeiture of the membership provision and acted in a manner inconsistent with an intention to enforce it.

4. Insurance § 5—

Insurer may waive provisions inserted in the contract for its benefit, and a course of action on its part, with knowledge of the existence of the grounds for forfeiture, which lead insurer honestly to believe that forfeiture would not be invoked, together with the continued payment of the premiums in reliance thereon, will estop insurer from insisting on the forfeiture.

5. Associations § 3—

An amendment to the rules of a beneficial association requiring that a notice of change in employment status should be given in writing can have no retroactive effect, and when the status of a member does not change subsequent to the adoption of the amendment, he cannot be under duty to give written notice.

6. Same—

Plaintiff member was entitled to have defendant association assess its members on a particular date for retirement benefits. *Held:* The Superior Court, in adjudging that plaintiff was entitled to the benefits, should order the association to forthwith assess all of its presently assessable members who were subject to the assessment on the date the assessment should have been made, and should order that ensuing annual assessment should include a sufficient sum to pay any deficiency arising from the non-assessability of such members because of death, retirement, or disability.

APPEAL by defendant from *Olive, J.,* July 23, 1962, Civil Term of RICHMOND.

This is an action to recover retirement benefits.

Defendant, North Carolina Police Voluntary Benefit Association, an unincorporated association, was organized on 1 July 1955. It is

governed by a board of directors. Its purpose is to provide death, total disability and retirement benefits for law enforcement officers.

Such of its rules, adopted by its board of directors, as are pertinent on this appeal are in substance, except where set out verbatim, as follows (numbering ours):

(1) The board of directors are "empowered to make, alter, and amend all rules and regulations incident to the administration of the business of the Association."

(2) Members of State police, sheriffs' departments and certain other police organizations, who are "on a full-time basis" are eligible for membership. When an Association member ceases to be such law enforcement officer, "he shall not be eligible to continue membership."

(3) Annual membership fees are assessed to defray administrative expenses and to "carry on the functions of the Association."

(4) "On retirement of a member of this Association all other members shall be assessed the sum of One Dollar payable to the Treasurer of the Association; provided, however, that any member who has reached the age of fifty at the time of becoming a member of this Association shall pay the sum of Five Dollars for each assessment. All sums collected for this assessment shall be paid to the retiring member. To be eligible to retire and receive benefits of an assessment in this Association a member must have had twenty years service as a law enforcement officer, the last ten years of which must be continuous, service, and have reached the age of fifty. No member shall receive retirement benefits until July 1, 1960."

(5) Membership is forfeited if assessments are not paid.

On 8 October 1959 the board of directors adopted an amendment to the rules, as follows: "Failure on the part of a member to notify the Association in writing of any change in employment status, such change making him ineligible for membership, shall relieve the Association of any liability for claims made on account of . . . service retirement . . . or for other cause; and such member shall forfeit any claim for refund of assessments or annual dues paid by him during his period of eligibility."

Plaintiff applied for and was admitted to membership in the Association 29 June 1956. At that time he was 66 years of age and had been continuously a law enforcement officer "on a full-time basis" for more than 21 years, serving as a game protector in the employment of the North Carolina Wildlife Resources Commission (formerly the Division of Game and Inland Fisheries of the North Carolina Department of Conservation and Development). There was no change of status in plaintiff's employment until 1 March 1957. At that time his

classification was changed to "farm foreman" and he was paid on an hourly basis. On 21 February 1957 he appeared before the board of directors of the Association to explain his change of status and determine if it would affect his membership. The directors adopted a motion that plaintiff "be permitted to continue his membership in the Association, subject to reconsideration by the Board of his or any other case which may come up later if there is any change in employment status." Plaintiff was employed on an hourly, but full-time, basis by the Commission until April 1958. Plaintiff again appeared before the board of directors of the Association on 28 March 1958 and informed the board "that effective March 1, 1957, he resigned as a game protector, on straight salary basis, withdrew his contributions from the Teachers' and State Employees' Retirement System and since that date has (sic) been employed on a 'certified temporary' basis." The directors took no action in consequence of this information. After April 1958 plaintiff received no compensation from the Wildlife Commission except for two periods, January 1959 to April 1959 and from January 1960 to May 1960, during which periods he was employed as a temporary farm game worker on an hourly basis. On 15 April 1958 plaintiff became a deputy sheriff of Richmond County, and from time to time served as such without compensation. He at all times retained his game protector's badge and from time to time served in the capacity of game protector without compensation except as hereinbefore stated.

Plaintiff was regularly assessed as a member of the Association from the time he joined, 29 June 1956, until 6 July 1960, and in each instance paid the sum assessed. He was subject to $5 assessment because of his age. On 6 July 1960 he applied in due form for retirement benefits. At that time the Association had 1807 members assessable at $1 each, and 153 members assessable at $5 each. The Secretary to the board of directors ruled that plaintiff was not eligible for retirement benefits and declined to make an assessment for him. The board of directors later approved this ruling. On 19 October 1960 plaintiff instituted this action to require an assessment in his behalf and to recover retirement benefits.

Jury trial was waived and the case was heard upon stipulation of facts and oral and documentary evidence. The facts developed are in substance as stated above. The court concluded that plaintiff was entitled to retirement benefits, and adjudged: ". . . that the plaintiff be, and he is hereby declared to be a member of the defendant Association as of July 6, 1960, and entitled to the retirement benefit assessment of the Association. It is ordered that the defendant Association forthwith assess each person who was a member of the said Association on July 6, 1960, and under 50 years of age at $1 each, and each person who was

a member as of July 6, 1960, and was over 50 years of age at $5.00 each and pay the sum collected from this assessment over to the plaintiff."

Defendant appeals.

Page & Page for plaintiff.
Bynum & Bynum for defendant.

MOORE, J. The trial judge concluded, as a matter of law, that plaintiff was entitled to retirement benefits under the rules and regulations of defendant Association pertaining to retirement.

The relationship of defendant Association and plaintiff is that of insurer and insured. *Williams v. Order of Heptasophs,* 172 N.C. 787, 789, 90 S.E. 888. The constitution, by-laws, rules and regulations of a beneficial association operate as a contract and should be reasonably and liberally construed to effectuate the benevolent purpose of the association and the manifest intention of the parties. That construction must be put on the by-laws and rules of the association, taken as a whole, which is most favorable to the members. When the rights of members are involved the by-laws and rules declaring a forfeiture are to be construed so as to prevent a forfeiture if they are reasonably susceptible of such construction. 10 C.J.S., Beneficial Associations, s. 28, p. 269; 18 Appleman: Insurance Law and Practice (1945), s. 10267, p. 575.

The rules of defendant Association provide that "to be eligible to retire and receive benefits of an assessment . . . a member must have had twenty years service as a law enforcement officer, the last ten of which must be continuous service, and have reached the age of fifty." At the time, 1 March 1957, that plaintiff resigned as a game protector on a straight salary basis, withdrew his contributions from the Teachers' and State Employees' Retirement System, and was placed on a "certified temporary" basis at an hourly wage, he had met all of the requirements for retirement benefits. He was 67 years of age and had served continuously for more than twenty-two years as a full-time game protector. But defendant insists that the last ten years of continuous service, to make plaintiff eligible under the rules, must extend to the date of application for retirement benefits. The rules provide that "No member shall *receive* benefits until July 1, 1960." (emphasis ours) We do not agree with defendant's construction of this provision. It merely provides that retirement benefits may not be *received* before July 1, 1960. There is nothing in the rule respecting "Retirement" which prevented a member from qualifying for the assessment and benefits before that date. It is obvious that the date was fix-

ed to assure a five-year waiting period from the date the Association was organized so that there would not be such number of retirements and assessments in the early stages of the Association's existence as would discourage younger officers in seeking and maintaining membership.

But defendant contends that only members could apply for and receive retirement benefits, and that on 6 July 1960 plaintiff was not eligible for membership and was not a member. Defendant relies on the rule that "when any member ceases to be a (full-time) law enforcement officer . . . he shall not be eligible to continue membership. . . ." For the purposes of this appeal we assume, but do not decide, that under ordinary circumstances this provision would bar plaintiff's right. It must be conceded that plaintiff was not a full-time law enforcement officer after April 1958, and perhaps not after February 1957. However, the trial court ruled that defendant had waived this eligibility rule and was "estopped to deny that (plaintiff) was a member of the Association on July 6, 1960" — the date he applied for retirement benefits.

An insurer may waive provisions inserted in the insurance contract for its benefit. *Sudan Temple v. Umphlett,* 246 N.C. 555, 99 S.E. 2d 791. The pertinent law with respect to waiver is stated in *Hicks v. Insurance Co.,* 226 N.C. 614, 617, 39 S.E. 2d 914, as follows: "Waiver of the forfeiture provision in a policy of insurance is predicated on knowledge on the part of the insurer of the pertinent facts and conduct thereafter inconsistent with an intention to enforce the condition. In *Coile v. Com. Travelers,* 161 N.C. 104, 76 S.E. 622, quoted in *Paul v. Ins. Co.,* 183 N.C. 159, 162, and in *Arrington v. Ins. Co.,* 193 N.C. 344, it is said: 'A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.' *Ins. Co. v. Eggleston,* 26 U.S. 577; *Ins. Co. v. Norton,* 96 U.S., 234."

Plaintiff personally appeared before the board of directors of the Association on 21 February 1957 and the board was advised that the employment status of plaintiff would change, effective 1 March 1957, from a permanent salaried employee to an hourly basis. The board permitted plaintiff to continue his membership, subject to reconsideration. The record does not disclose any further action by the board with respect to this matter. Again, on 28 March 1958, plaintiff appeared before and informed the board that "effective March 1, 1957, he resigned as a game protector, on a straight salary basis, withdrew his

contributions from the Teachers' and State Employees' Retirement System and since that date has been employed on a 'certified temporary' basis." The directors took no action to terminate his membership, but, on the contrary, the Association continued to carry him on its rolls and assessed him in the same manner other senior members were assessed. This continued until he applied for retirement benefits on 6 July 1960. He promptly paid all assessments. These facts are sufficient to support the conclusion that defendant, with knowledge of plaintiff's employment status, waived the forfeiture of membership provision and acted in a manner inconsistent with an intention to enforce the provision.

Defendant further contends that plaintiff forfeited his right to retirement benefits by failing "to notify the Association *in writing* of any change in employment status." The contention is not sustained. The rule relied on is incorporated in an amendment adopted by the board of directors on 8 October 1959, and set out in full in the factual statement. It is doubtful that this amendment is binding in any way on plaintiff since it was adopted without his knowledge and consent, after he became a member, and was not submitted to and approved by a majority of the members of the Association. *Bragaw v. Supreme Lodge,* 128 N.C. 354, 38 S.E. 905. But assuming that it was binding on plaintiff after its adoption, it had no retroactive effect and the employment status of plaintiff did not change after its adoption. He could not have been under any duty to give a written notice.

The judgment below orders the Association to assess each person who was a member of the Association on 6 July 1960 and pay the sum collected to the plaintiff. It is probable that some of those who were members on that date have since died, retired, become disabled, or otherwise terminated their membership, and are not now subject to assessment. According to facts stipulated, the Association on 1 July 1960 had "1807 members who were assessable at $1 each, and 153 members who were assessable at $5 each." Plaintiff was therefore entitled to receive $2572. The superior court should order the Association: (1) to forthwith assess all of its presently assessable members who were subject to assessment on 6 July 1960, and pay over the amount collected from the assessments to plaintiff to be credited by him on the amount to which he was and is entitled; (2) to order the Association in its ensuing annual assessment of fees to include a sufficient sum to pay plaintiff the balance due him, under the authority conferred upon the board of directors to assess annual fees for "whatever it considers necessary to carry on the functions of the Association," and to pay such

balance to plaintiff when thus collected. The cause is remanded in order that the judgment may be modified in accordance with the foregoing directives.

Modified and affirmed.

PITTSBURGH PLATE GLASS COMPANY v. THOMAS C. FORBES AND WIFE EVELYN B. FORBES, TR. AS TOWN HOUSE MOTEL.

(Filed 11 January 1963.)

1. Bankruptcy § 5; Laborers' and Materialmen's Liens § 6—

Perfected liens for labor and materials are not impaired by the fact that the owner of the property is adjudged bankrupt within four months thereafter. G.S. 1-339.68(b).

2. Execution § 13; Judicial Sales § 5—

A purchaser at a judicial sale acquires the property subject to liens having priority over the judgment under which the sale is held.

3. Same—

Prior to confirmation, the purchaser at a judicial sale acquires no title or rights, and neither the judgment debtor nor the judgment creditor, or those claiming under them, may seek to compel him to comply with his bid.

4. Execution § 13; Judicial Sales § 4—

While *caveat emptor* applies to a judicial sale, the court has the power in its equity jurisdiction to protect the purchaser from imposition because of fraud or mistake, and may relieve him of his obligation when the ends of justice so require.

5. Same—

A prospective purchaser at an execution sale was advised by counsel for the judgment debtor, to the judgment debtor's knowledge, that the purchase price would be used to pay off prior liens and that he would obtain the property free of encumbrances. Upon learning the facts, the purchaser procured a resale and meanwhile purchased the judgment and had it assigned to himself, and directed the sheriff to return the execution with notation that it had been withdrawn, all before time for confirmation. *Held:* The court in its equity jurisdiction had authority to relieve the bidder of his obligation to comply with his bid and to direct the refund of the deposit for the resale.

APPEAL by movant from *Walker, S.J.*, May 1962 Civil Term of LEE.

This is an appeal from an order refusing to require Carl Meares and Clarence Tart (hereafter respondents) to purchase and pay for real

estate sold under execution issued in the captioned cause. Jimmy Love, trustee in bankruptcy (hereafter movant), by motion sought an order compelling respondents to comply with their bid.

The parties stipulated the facts, which so far as pertinent are summarized as follows: Defendants Forbes, in August 1958, purchased a lot in Lee County. During 1960 they constructed a motel on this property known as Town House Motel. Plaintiff's labor and material went into the construction of the motel. In apt time it filed its notice and claim of lien in the office of the Superior Court of Lee County. In due time it instituted this action to enforce the statutory lien. On 7 June 1961 the clerk of the Superior Court of Lee County, with the consent of the individual defendants and their counsel, entered judgment fixing the sum owing plaintiff by defendants at $6,249.95. It was also declared a specific lien against the property described in the complaint (the land now in controversy) securing payment of said sum. The fair market value of the property was $126,000. Plaintiff's lien was subordinate to the lien of a mortgage securing the principal sum of $35,000 and judgments aggregating $43,801.88. Plaintiff's judgment had priority over judgments subsequently rendered against defendants Forbes aggregating several thousand dollars. In addition to the debts secured by liens, defendants Forbes owed unsecured creditors an amount in excess of $40,000. Plaintiff caused execution to issue on its judgment. Acting pursuant thereto, the sheriff advertised for sale land on which plaintiff had a specific lien for labor and material. The auction was held on 20 September 1961. W. H. Johnson and Carl Meares were the high bidders in the sum of $120,000. Before placing a bid on the property, respondent Meares made inquiry of defendants and their counsel about the property. He was informed of the prior liens (mortgage and judgment) approximating $80,000. Counsel for defendants "advised, counseled and represented to the said Meares that if the amount bid at the execution sale, under the judgment rendered in this cause, was as much or more than the amount of the older judgments and deed of trust, that the proceeds of the sale would be applied in discharge of those judgments and deed of trust and that the purchaser would receive a good free and unencumbered title to said property." This statement was made with the expectation that Meares would rely on it. He did rely on it when he bid $120,000 for the property on 20 September. On 29 September 1961 Meares received a telephone call from counsel for defendants informing Meares that defendants were preparing to file voluntary petition in bankruptcy, it would be better for Meares to purchase the property in the bankruptcy proceeding, and that the property could be purchased cheaper in the bankruptcy proceeding than at the execution sale. It was suggested that Meares should file an upset

bid. "Acting in response to the request of the defendant Forbes and Mr. Gavin to file an upset bid and acting in reliance upon the representations of Mr. Gavin (defendants' attorney) that a bankruptcy proceeding would be filed which would avoid the entire execution sale in Lee County, and also acting in further reliance upon the representations of Mr. Gavin that respondent Meares would have obtained a good and unencumbered title to the property of defendants if the sale was not avoided, respondent Meares caused the respondent Tart to send to the office of Mr. Gavin funds for a deposit on an upset bid. . ." The $6,050 necessary to secure a resale was deposited with the clerk, whereupon he ordered a resale, and the sheriff readvertised the property for sale on 20 October 1961. The sheriff received no other bid. He declared Tart the high bidder and so reported to the clerk. Tart, in making the deposit and request for a resale, was acting as agent for respondent Meares. Before the time expired for consummation of the bid at the auction held 20 October 1961, Meares learned that the sheriff would have no authority to use the purchase money in discharging prior liens, and the purchaser would take title subject to the prior liens. When so informed, Meares promptly consulted counsel in his effort to be relieved of the bid made for him by Tart. He purchased plaintiff's judgment and took an assignment. He then notified the sheriff and court officials that he desired to withdraw the execution under which the sales were made. He paid the sheriff and other officials their fees. The sheriff returned the executions, noting the fact that they were withdrawn at the request of plaintiff's assignee. Thereupon Meares requested the clerk to refund him the deposit made to increase the bid. The clerk, being dubious as to the course he should pursue, referred the matter to Judge Williams, resident judge of the district. He issued an order directing the clerk to refund the deposit. The clerk complied with Judge Williams' order. The direction to return the execution as unsatisfied and the refund of the deposit were within the ten-day period permitted for the filing of increased bids and before the bid of 20 October 1961 could be accepted and conveyance directed.

On 5 October 1961 defendants filed a voluntary petition and were adjudged bankrupts by the United States District Court for the Middle District of North Carolina. On 6 October 1961 the United States Court appointed S. Ray Byerly as receiver with directions to take possession of the bankrupts' properties. He complied with the court order, took possession of the property here in controversy, operated it as a motel, and appointed defendants as his agents to operate it. He collected the rents and profits. His possession antedated the auction of 20 October 1961 by several days.

On 19 December 1961 movant applied to the clerk of the Superior Court of Lee County for an order accepting the upset bid made by

Tart of $126,050 and for a further order requiring the sheriff to tender respondents a deed for the property subject to all liens having priority over the lien adjudged in this action. The clerk denied the motion. Movant appealed to the Superior Court in term. It denied the motion. Movant excepted and appealed.

Booth, Osteen, Upchurch and Fish and W. D. Sabiston, Jr., by W. D. Sabiston, Jr., for movant Love.

Smith, Moore, Smith, Schell & Hunter by McNeill Smith and Richmon G. Bernhardt, Jr., for respondent appellees.

RODMAN, J. The fact that defendants were adjudged bankrupts within four months from the date the amount owing and the liens securing payment were judicially declared did not impair plaintiff's lien. Sec. 67b of the National Bankruptcy Act, 11 USCA 107b. What effect, if any, the actual possession of the property by the receiver appointed by the bankruptcy court had on the right of the sheriff to make a valid offer of sale on 20 October 1961 need not be determined since we think the judgment should be affirmed for the reasons hereafter stated.

A sheriff, acting pursuant to an execution, can only sell the rights and estate of the judgment debtor as they existed when the lien pursuant to which he acts became effective. G.S. 1-339.68(b). Our statutes regulating such sales, G.S. 1-339.51 *et. seq.* contemplate a sale at which the thing sold will bring its fair value. The high bidder at the auction acquires no right until his bid is accepted and the sale confirmed. G.S. 1-339.67. If competitive bidding is stifled, resulting in a bid less than the fair value of the property sold, the clerk may decline to confirm the sale. *Federated Textiles v. Shirt Corp.*, 206 N.C. 471, 174 S.E. 290; *Beckwith v. Mining Co.*, 87 N.C. 155.

Courts are as diligent in protecting purchasers from imposition because of fraud or mistake as they are in protecting judgment debtors in similar situations. While the doctrine of caveat emptor applies to purchasers at execution sales, it does not tie the hands of a court to prevent a manifest injustice not due to the fault or neglect of the purchaser. The limitation on the rule is well illustrated in *Clayton v. Glover*, 56 N.C. 371. There a slave was sold under execution. Defendant Glover bid $1,000 for the slave but refused to comply with his bid. The slave had defective vision. His fair value was only $500. The sheriff, in reporting the sale, said: "At the time of the sale, and in the hearing of all persons present, the undersigned made known that there was a defect in each of said slave's eyes, and called up the said slave so near the stand that all persons present could see the said defect, which was patent." Glover testified that he was not present when the

announcement was made by the sheriff and had no knowledge of the defect. He sought to withdraw his bid. His motion was denied for the reason there was no warranty of soundness. This Court reversed the lower court. Battle, J., said: "The court of equity has, undoubtedly, the power to set aside a judicial sale made in pursuance of its order whenever the owner of the property, or those who act for him, can show that the price bid is inadequate, and it would seem that in fairness, the court ought to have the corresponding power to relieve a purchaser whenever from fraud and mistake he has bid too much for the property; and such, from the authorities, we find to be the case. (Citing authorities) The sale being made under its authority, the Court will see that justice shall be done to both vendor and purchaser upon the fairest principles of equity and good conscience."

Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287, is factually similar to the case under consideration. There plaintiff, sheriff, brought suit to recover the amount bid by defendant for land sold under execution. There one Ryer, judgment creditor at whose instance the sale was made, informed defendant that his judgment was the first lien on the property. That statement was not correct. Defendant bid for the property, relying upon the statement so made. Murray, C.J., said: "In this view of the case, it is immaterial whether Ryer made such representations, knowing them to be false, or whether he was ignorant of the facts altogether: 1 Story's Eq. Jur., sec. 193. It is sufficient if they were untrue, and at the same time a material inducement to the purchase, and that the defendant acted on the faith of them, which is indubitably true. It is said that the maxim caveat emptor applies to judicial sales, and that the defendant cannot avail himself of the misrepresentations of the plaintiff, as he had access to the records of the county, and might have informed himself on the subject. Grant that the maxim caveat emptor applies to sheriffs' sales, it has never been carried to the extent that such a sale could not be impeached on the ground of fraud or misrepresentation. The maxim only applies thus far, that the purchaser is supposed to know what he is buying, and does so at his own risk. But this presumption may be overcome by actual evidence of fraud, or it may be shown that in fact the party did not know the condition of the thing purchased, and was induced to buy upon the faith of the representations made by those who by their peculiar relations to the subject, were supposed to be thoroughly acquainted with it. The fact that the defendant might have examined the public records does not alter the case."

The principles announced in those cases have been applied to many different factual situations. *Nash v. Hospital Co.,* 180 N.C. 59, 104 S.E. 33; *Davis v. Keen,* 142 N.C. 496; *McDowell v. Simms,* 41 N.C.

278; *Woods v. Hall,* 16 N.C. 411; *Smith v. Greenlee,* 13 N.C. 126; *Hayes v. Stiger,* 29 N.J. Eq. 196; *Paulett v. Peabody,* 3 Neb. 196; *Fisher v. Hershey,* 17 Hun. 370 (N.Y.); *Masson v. Bovet,* 1 Denio 69 (N.Y.), 43 Am. Dec. 651; *Veazie v. Williams,* 8 Howard 148, 12 L. ed. 1018; *Hayward v. Wemple,* 136 N.Y.S. 625; *Lane v. Chantilly Corp.,* 167 N.E. 578, 68 A.L.R. 653. The general subject of the doctrine of caveat emptor as applied to purchasers at judicial sales is the subject of an annotation in 68 A.L.R. 659.

Respondents' bid represents the fair value of the property rights which Meares was told he would acquire if the high bidder. It is now insisted that he must increase his bid by 65% ($80,000) to get what he was led to believe he would acquire. He was induced to make this bid by statements by counsel for and with the knowledge of the judgment debtor. When informed the amount bid would not be applied to pay prior liens, he was diligent in seeking relief. He acquired the judgment under which the sale was made. He then directed the sheriff to return the execution with the notation that it had been withdrawn at his request as assignee of the judgment creditor. This was done. All of these steps were taken before the court confirmed the sale. Meares then sought a refund of the deposit which he had made. The court was informed of the reasons which prompted respondents to act. The clerk, dubious of his authority, referred the matter to the judge of the Superior Court. It is unnecessary to inquire whether the clerk lacked authority to act. Unquestionably the judge of the Superior Court did have such authority, when the clerk referred the matter to him. The order directing a refund of the deposit to obtain a resale discharged respondents of any obligation to purchase the property at that price.

Until the sale was confirmed, neither the judgment debtor nor those claiming under him acquired any rights by virtue of the auction. It is not now necessary to determine whether a judgment creditor who has made an upset bid causing a resale may, without the consent of the court, relieve himself of his obligation by ordering the execution returned "unsatisfied." The admitted facts justified the court in relieving respondents of the obligation assumed when they sought a resale. The judgment is

Affirmed.

CHARLES R. KING v.
NATIONAL UNION FIRE INSURANCE COMPANY.

(Filed 11 January 1963.)

1. Insurance § 68—

A person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against.

2. Same— Evidence held sufficient to support finding that plaintiff had insurable interest in property destroyed by fire.

Evidence to the effect that the owner of property advised insurer's agent that he was giving the property in question to his son and to change the insurance so as to name his son the insured, that the owner thereafter died and the son remained in exclusive possession of the property and continued the insurance in force, *is held* sufficient to support the conclusion that the son had an insurable interest in the property so as to be entitled to recover on the policy, even though the owner died leaving a number of children without transferring title to the property, and insurer's contention that the son wilfully misrepresented to it that he was the sole owner or concealed that he owned merely an undivided interest in the property, is untenable, fraud not being pleaded and there being no evidence that insurer was misled, but to the contrary that it assumed the risk it intended when it issued the policy.

3. Appeal and Error § 41—

The exception to the admission of evidence over objection is waived when thereafter the witness testifies to the same import without objection.

4. Insurance § 80—

The knowledge of insurer's agent at the time of the application for a policy as to ownership of the property is imputed to the insurer.

5. Evidence § 11—

In an action on a policy of insurance by the son of the deceased owner, testimony of insurer's agent that prior to his death the owner directed him to transfer the policy to the owner's son because the owner was giving the land to his son, *is held* not precluded by G.S. 8-51.

6. Appeal and Error § 49—

A judgment by the court on findings of fact will not be disturbed because a particular finding was not supported by evidence when such finding is immaterial to the ultimate rights of the parties, or because of a conclusion of the court which does not affect the result.

APPEAL by defendant from *McKinnon, J.*, Regular February Civil Term 1962 of BRUNSWICK.

Suit on a standard fire insurance policy.

Pursuant to the provisions of G.S. 1-184 *et. seq.* the parties waived a trial by jury. This is a summary of the court's essential findings of fact:

Elroy King, father of plaintiff, owned in fee and was in possession of a tract of land on which was situate a one-story frame dwelling house. During the year 1952 Elroy King vacated the property, and plaintiff went into possession of it, and remained in continuous possession of it until 30 December 1960. While plaintiff was in possession, he made extensive repairs and improvements to the dwelling house thereon, and used the property adversely to all others.

On 18 September 1956 Elroy King informed W. F. Floyd, general agent for defendant, he was giving the property to his son, the plaintiff, and instructed him to place an endorsement on the fire insurance policy, which he, Elroy King, had on the dwelling house, changing the ownership from him to plaintiff. Pursuant to such instructions, W. F. Floyd placed an endorsement on the policy changing the name of the owner from Elroy King to plaintiff.

A short time thereafter Elroy King died without having conveyed the property to plaintiff. Thereafter, on 7 September 1958, defendant through its agent, W. F. Floyd, in consideration of the premium paid by plaintiff executed and delivered to plaintiff that certain policy of fire insurance Number 2218996 in and by which it insured the dwelling house and the household and kitchen furniture therein against all direct loss or damage by fire in an amount not exceeding its actual cash value, or $4,000.00 on the dwelling house and $1,500.00 on the furniture therein. (The findings of fact state the policy was introduced in evidence as plaintiff's Exhibit 1. The parties stipulated it is not necessary on this appeal to set forth the policy in the record, for the reason that it is a Standard Fire Insurance Policy for North Carolina, as set forth in G.S. 58-176.)

At the time W. F. Floyd, defendant's agent, issued the policy he knew Elroy King had told him he was giving the property to plaintiff, and knew Elroy King was dead, but he made no inquiry to learn as to whether or not Elroy Kind had conveyed the property to plaintiff, and, under such circumstances, collected from plantiff the premium due on the policy covering a period of three years, and issued to him the policy here. Thereafter, on 30 December 1960, and within the period covered by the policy, the dwelling house and its contents insured by the policy were destroyed by fire. When destroyed by fire, the dwelling house was valued at $5,000.00, and the furniture therein was valued in excess of $1,500.00. Plaintiff gave defendant notice of the loss of the insured property by fire, and duly and properly filed proof of claim within apt time. Plaintiff instituted this suit on 7 September 1961.

Plaintiff has had the exclusive use, possession, and enjoyment of the dwelling house and property under claim of right from 18 September 1956, and was the beneficial and equitable owner of it, and was the unconditional and sole owner of it, without assertion of adverse title by any other persons.

Based on the facts found the court concluded that plaintiff was "the beneficial and equitable, unconditional sole owner" of the property, and that defendant is indebted to him in the sum of $4,000.00 for the destruction of the dwelling house by fire, and in the sum of $1,500.00 for the destruction by fire of the furniture therein, with interest from 30 December 1960 until paid.

Whereupon, the court adjudged and decreed that plaintiff have and recover from defendant the sum of $5,500.00, with interest until paid.

From the judgment, defendant appeals.

Kirby Sullivan for defendant appellant.
S. B. Frink for plaintiff appellee.

PARKER, J. Defendant in its answer made the following admissions: One. "On or about September 7, 1958, the defendant, through it duly appointed and constituted agent, Floyd Barkley Agency, Whiteville, North Carolina, made, executed and delivered to the plaintiff that certain policy of fire insurance, being Policy Number 2218996, wherein and whereby said defendant insured the plaintiff's interest in a dwelling house and household and kitchen furniture* * * from all direct loss or damage by fire* * *in an amount not exceeding actual cash value of the property at the time of loss, and not in excess of $4,000.00 on the dwelling, and $1,500.00 on the household and kitchen furniture therein, nor in any event for more than the interest of the insured therein, for a period of three years from September 7, 1958 to September 7, 1961." Two. "On December 30, 1960, a dwelling house located on land substantially as described in paragraph 6 of the complaint and the household and kitchen furniture therein, were destroyed and rendered worthless by fire.* * *The dwelling house* * *at the time of the loss and destruction thereof was valued at approximately $5,000.00, and that the household and kitchen furniture in said dwelling at the time of the loss and destruction thereof was valued at approximately $1,500.00.* * *The defendant has not paid any sum to the plaintiff."

In general, it is well-settled law that a person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury

by the happening of the event insured against. *Grabbs v. Insurance Co.*, 125 N.C. 389, 34 S.E. 503; *Gerringer v. Insurance Co.*, 133 N.C. 407, 45 S.E. 773; *Batts v. Sullivan*, 182 N.C. 129, 108 S.E. 511; *Shores v. Rabon*, 251 N.C. 790, 794, 112 S.E. 2d 556, 559; *Harrison v. Fortlage*, 161 U.S. 57, 40 L. Ed. 616; 44 C.J.S., Insurance, sec. 175, p. 870.

This Court said in *Houck v. Insurance Co.*, 198 N.C. 303, 151 S.E. 628: "It has been held by this Court that a person owning only an equitable interest in property has an interest therein which is insurable against loss or damage by fire. *Gerringer v. Ins. Co.*, 133 N.C. 407, 45 S.E. 773." In the *Gerringer* case the agent of the company knew that it was an equitable interest.

We do not have before us fire insurance policy Number 2218996 issued by defendant to plaintiff, and which was in force on the day the property insured therein was destroyed by fire. The parties stipulated it is a Standard Fire Insurance Policy for North Carolina, as set forth in G.S. 58-176, and such a policy, according to G.S. 58-176, provides, "this Company* * *does insure—blank space for name of insured— * * *to the extent of the actual cash value of the property at the time of loss* * *, nor in any event for more than the interest of the insured against all direct loss by fire* * *."

Plaintiff offered evidence: defendant did not. Defendant assigns as error the denial by the court of its motion for judgment of compulsory nonsuit made at the close of plaintiff's evidence.

Plaintiff testified: "My father died in 1956. Elroy King left surviving him heirs at law. He left a widow, Smithy King. He left six children. I am the oldest.* * *I have three brothers and sisters under 21 years of age."

Defendant contends its motion for judgment of nonsuit should have been allowed for the reason that plaintiff wilfully misrepresented to it that he was the sole owner of the dwelling house, or concealed from it that he owned merely a one-sixth interest therein, subject to the widow's dower. This contention is untenable. First, defendant has not pleaded fraud as a defense to the action upon the policy, 29A Am. Jur., Insurance, sec. 1831, and second, there is no evidence of fraud. The court properly overruled the defendant's motion for judgment of nonsuit.

Based on the facts found by the trial court, and the admissions in defendant's answer, it is manifest that plaintiff is entitled to recover from defendant on his policy of fire insurance the sum of $1,500.00 for the complete destruction of his household and kitchen furniture by fire on 30 December 1960.

W. F. Floyd, a witness for plaintiff, testified: "On September 7, 1958, I issued a renewal insurance policy on the property in question.

I have a copy of that policy with me. That policy is No. 2218996 of the National Union Fire Insurance Company. I was their duly constituted and appointed agent at that time." He was then asked: "What information did you have of the ownership of this property before you insured it?" A. "I was notified sometime prior to September 17, 1956, by the owner at that time, Elroy King." Defendant objected, the objection was overruled, and defendant excepted. Then the witness continued: "I was notified by Elroy King to transfer the policy over to his son Charles King; he said, 'I am giving that place to him' ". Defendant assigns the admission of this evidence over its objection as error, contending it is hearsay and irrelevant.

Immediately thereafter, W. F. Floyd testified without objection: "I transferred the policy at that time, from Elroy King to the plaintiff. I did not make any further inquiry to ascertain whether or not that had been done when I issued the policy on September 7, 1958. In other words, I issued this policy on September 7, 1958, according to information from Elroy King that he was giving him the property. I made no investigation or anything to determine whether or not this had been done. I knew that Mr. King was living there and I knew that he paid the premiums to me after 1956. After I issued the policy, Mr. King paid the premiums."

Plaintiff testified: "I purchased this insurance from Mr. Bill Floyd and have paid the premium."

The challenged testimony of W. F. Floyd explains why the name of the insured in the fire insurance policy then in force was changed in 1956 from Elroy King to plaintiff and why plaintiff was named as the sole insured in the policy upon which this suit is brought. There is no allegation in the answer that there was any fraud or collusion between the insured or Elroy King and defendant's agent, W. F. Floyd, nor is there any evidence of such in the record. Such being the case, the knowledge of W. F. Floyd of the state of plaintiff's interest in the insured dwelling house, acting within the scope of the powers entrusted to him by defendant, is imputed to the company. *Insurance Co. v. Grady,* 185 N.C. 348, 117 S.E. 289. G.S. 8-51 does not prohibit the admission of this evidence. *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542. It is our opinion this challenged evidence is relevant and competent, and the court properly admitted it.

In *Home Ins. Co. v. Mendenhall,* 164 Ill. 458, 45 N.E. 1078, 36 L.R.A. 374, the Court held that a son placed in possession of land, on which was situate two dwelling houses, by his father who bought it for him, and who tells him he has made a will devising it to him, has an insurable interest in the two dwelling houses, although the father bought the land at a master's sale in partition, and the master's deed has not yet

been issued to him because the time for confirmation of the report has not elapsed.

When the fire insurance policy here was issued, and prior thereto, and at the time the dwelling house was destroyed by fire, plaintiff was in the use and enjoyment of this dwelling house under claim of right. There is nothing in the record to show an assertion of title to the dwelling house by another or others. Plaintiff derived pecuniary benefit or advantage while it existed, and suffered pecuniary loss or damage by its destruction by fire. It is manifest he had an insurable interest in the dwelling house. In issuing the policy sued on, defendant has not been misled, and it assumed the risk it intended when it issued this policy.

In *Grabbs v. Insurance Co., supra,* the Court said:

> "In the well-considered case of *Berry v. Ins. Co.,* 132 N.Y. 49, the Court says: 'The rule is well settled that it is not necessary to support an insurance that the assured should have an interest, legal or equitable, in the property destroyed. It is enough if he is so situated with reference to it that he would be liable to loss if it is destroyed or injured by the peril insured against.' In this case the legal title to the property was in the son of the assured, with whom the assured had a *verbal* agreement whereby he was to occupy the premises during his life, and in consideration thereof to keep the building insured and in repair, and to pay the taxes. It was held that the insured could recover even if his verbal agreement with his son were void."

This Court said in *Roberts v. Insurance Company,* 212 N.C. 1, 192 S.E. 873:

> "It is held by courts of recognized authority, and our own decisions point in the same direction, that where one is in the exclusive use and enjoyment of the entire estate, under claim of right, without assertion of adverse title by another, his interest is properly described as sole and unconditional ownership, within the meaning of a policy of insurance containing such provision, although his title may be defective in some particular. *Modlin v. Ins. Co., supra* (151 N.C. 35, 65 S.E. 605); *Jordan v. Ins. Co.,* 151 N.C. 341, 66 S.E. 206; *Lancaster v. Ins. Co.,* 153 N.C. 285, 69 S.E. 214; *Western Assur. Co. v. Hughes,* 179 Okla. 254, 66 Pac. (2d) 1056; 14 R.C.L. 1052, *et seq.* See annotation, L.R.A., 1918 E, 375.
>
> "In *Hankins v. Williamsburg City Fire Ins. Co.,* 96 Kan. 706, 153 Pac. 491, L.R.A. 1918 E, 373, Ann. Cas., 1918 C, 135, it was

held (as stated in syllabus, which accurately digests opinion): 'A fire insurance policy upon a building, containing a stipulation that the policy "shall be void . . . if the interest of the insured be other than unconditional and sole ownership," is not invalidated because of an outstanding naked legal title in another where the insured has the equitable title, the entire beneficial ownership of the property, and is in undisputed possession of the same.'

"Again, in *American Basket Co. v. Farmville Ins. Co.*, 1 Fed. Cas. No. 290, p. 618, it appeared that the beneficial title was in the insured, a foreign corporation, but that the legal title was carried in the name of one of its officers because of a statute forbidding the ownership of realty by a foreign corporation: *Held,* the requirement of 'entire, unqualified, and sole' ownership for insured's 'own use and benefit' satisfied, notwithstanding naked legal title in another."

The *Roberts* case was decided at the Fall Term 1937. At that time the Standard Fire Insurance Policy for North Carolina as prescribed by C.S. 6437 required on the part of the insured "unconditional and sole ownership." The General Assembly at its 1945 Session, Chapter 378, amended the form of the Standard Fire Insurance Policy for North Carolina by extinguishing the requirement of "unconditional and sole ownership" and such a policy now requires only that the insurance shall be not "in any event for more than the interest of the insured." G.S. 58-176, as amended.

There is nothing in the record to show what was done with Elroy King's estate after his death in 1956, prior to the issuance of the policy here sued upon, or since. Based upon the crucial facts found by Judge McKinnon, as against defendant, it seems proper to say plaintiff was the sole, beneficial and equitable owner of the dwelling house when the policy was issued and when it was destroyed by fire. Such, it seems, was plaintiff's understanding when he took out the insurance and paid the premium, and he alone, so far as the record shows, has suffered loss by its destruction, and defendant has not been deceived.

Houck v. Insurance Co., supra, is distinguishable. Evidence offered by the plaintiffs tended to show that at the time the policy was issued to N. F. Houck and at the time it was subsequently transferred from him to M. V. Houck, the said N. F. Houck informed the agent of the defendant company of the true conditions of the title to said land and house, and requested said agent to issue a policy which would protect all persons who were interested in said house, in the event the same should be destroyed or damaged by fire.

Ingold v. Assurance Co., 230 N.C. 142, 52 S.E. 2d 366, is also distinguishable. In that case the lessor and lessee were jointly insured in a fire policy.

Defendant assigns as error that the finding of fact to the effect that while plaintiff was in possession he made extensive repairs and improvements to the dwelling house is not supported by the evidence. This assignment of error is good, but it is not prejudicial, because the recovery for the destruction of the dwelling house by fire was $4,000.00, and defendant admits in its answer "the dwelling house* * *at the time of the loss and destruction thereof was valued at approximately $5,000.00."

Defendant assigns as error the judge's finding to the effect that plaintiff used the property adversely to all others, for the reason it is not supported by the evidence. This is not a finding of fact, but a conclusion. This conclusion does not seem prejudicial, for plaintiff to recover here is not required to show legal title absolutely good against the world. *Houck v. Insurance Co., supra; Roberts v. Insurance Co., supra.*

Defendant's assignments of error are overruled. Based upon the crucial findings of fact, which are supported by competent evidence, and upon the admissions in defendant's answer, Judge McKinnon properly entered judgment that plaintiff should recover from defendant on his fire insurance policy for the complete destruction of the dwelling house by fire the sum of $4,000.00.

The judgment below is

Affirmed.

MOORE, J., dissents.

RODMAN, J., concurs in result.

INTERNATIONAL PAPER COMPANY v.
MANLEY JACOBS AND WIFE, GENEVA JACOBS.

(Filed 11 January 1963.)

1. Trespass to Try Title § 3—

It is not sufficient for plaintiff, in an action for trespass in which title to a specific area is in dispute, to introduce evidence of good paper title, but he must show also that the area claimed is embraced within the descriptions in his instruments.

2. Trespass to Try Title § 5—

Where plaintiff introduces some evidence that the disputed area was embraced within the description in the instruments constituting his chain

of title, the question is properly submitted to the jury, and the jury's negative answer to the issue is conclusive in the absence of error of law.

3. Same—

Where plaintiff claims under good paper title and also that it had obtained title by adverse possession, instructions that plaintiff had shown a good paper title, and further that plaintiff's instruments constituted color of title, with a correct definition of color of title, are not erroneous as inferring that plaintiff's instruments were in fact defective, since if the descriptions in plaintiff's instruments do not embrace the area in dispute, as to such area they could be only color of title.

4. Adverse Possession § 23—

Evidence of defendants' actual hostile, open, and notorious adverse possession of the area in dispute by themselves and those in privity with them, in subjecting the land to its reasonable uses in the character of owner, *held* sufficient to take the issue to the jury.

5. Adverse Possession § 6—

The possession of the ancestor may be tacked to the possession of the heir where there is no *hiatus* or interruption in the possession.

6. Same—

The possession of the husband of an heir and the possession of a widower of an heir, when not adverse to the heir but in recognition of the heir's right, inures to the benefit of subsequent heirs and prevents a *hiatus*, since their possession is in privity with them.

APPEAL by plaintiff from *McKinnon, J.*, March 1962 Term of BLADIN.

This action was begun 8 May 1957 to determine ownership of a tract of land in Bladen County on which defendant had cut timber. Plaintiff alleges it is the owner of 4924 acres conveyed to it on 20 June 1949 by West Virginia Pulp & Paper Co., and that the timber cut was worth $300. It prays that it be adjudged the owner of the land specifically described in the complaint and for $600 for the trespass.

Defendants denied the allegations of ownership and trespass. Additionally defendants asserted ownership of a tract containing 126 acres conveyed to them by Rena Graham Freeman *et al.* by deed dated 29 March 1957.

The court, to determine the controversy, submitted four issues, answered by the jury as follows:

"1. Is the plaintiff the owner of the lands described in the Complaint, and entitled to the immediate possession of same, excluding Church lot?

"ANSWER: NO.

"2. Did the defendant, Manley Jacobs, trespass upon the lands of the plaintiff and cut and remove therefrom, as alleged in the Complaint?

"ANSWER. NO.

"3. What amount, if any, is plaintiff entitled to recover of the defendant, Manley Jacobs, by reason of said trespass and cutting of timber?

"ANSWER: NONE.

"4. Are defendants the owners of and entitled to the immediate possession of the lands described in the Answer, excluding Church lot?

"ANSWER: YES."

Judgment was entered adjudging defendants owners of the land specifically described in the answer. Plaintiff excepted and appealed.

Clark, Clark & Grady for plaintiff appellant.

Hester and Hester and J. B. Eure by Worth H. Hester for defendant appellees.

RODMAN, J. Notwithstanding plaintiff's allegation that it owned 4924 acres and defendants' denial of that allegation, the parties at the trial narrowed the dispute to the question of ownership of the land specifically described in the answer.

Plaintiff, to recover, had the burden of establishing it owned this area. Unless some error was made in the trial relating to plaintiff's title, errors, if any, with respect to defendants' title would not seem prejudicial. Nevertheless, we have considered each of the exceptions enumerated in plaintiff's brief.

Plaintiff contends it has established good title to the area in dispute by paper title or by adverse possession for the requisite period of time.

To support its claim of paper title, it offered a grant dated 3 December 1806 for 200 acres to Shadrick Jacobs. It then offered sundry deeds which it contends vested title to this 200 acres in Eric Norden; a deed from Norden to Cooper River Timber Corporation dated 18 February 1931 for 4924 acres as described in the complaint; a deed from Cooper River Timber Corporation to West Virginia Pulp & Paper Co., dated 19 November 1935, describing 6811 acres, which includes the 4924 acres conveyed by Norden to Cooper River Timber Corporation; and a deed from West Virginia Pulp & Paper Co. to plaintiff for the identical 4924 acres described in the complaint.

Where title to a specific area is in dispute, ownership is not established by merely offering a grant for a larger area and subsequent conveyances transferring the title of the patentee to claimant. Claimant must go further and show the area claimed lies within the area described in the grant and subsequent conveyances. *Day v. Godwin*, post, 465.

Here defendants maintained throughout the trial that the Jacobs grant and the deeds under which Norden asserted title did not cover the land in controversy. Their evidence tended to show that when Norden had the 4924 acres surveyed, he excluded the lands claimed by defendants.

It may be doubted if the description in some of the instruments under which plaintiff asserts title are adequate to convey anything, *Massey v. Belisle*, 24 N.C. 170, *Mann v. Taylor*, 49 N.C. 272, but the court nevertheless treated the instruments as legally sufficient and specifically charged the jury that plaintiff had good title to the land if in fact the disputed area was within the boundaries given in those instruments. Since the jury answered the first issue "no," the jury necessarily concluded the descriptions in the deed under which Norden claimed did not embrace the land in controversy.

Plaintiff's witnesses fixed the location of the lines of the deed by Norden and the subsequent conveyances so as to embrace the land in dispute; but it offered no witness who testified to having surveyed the boundaries set out in the several deeds under which Norden claimed. It did not attempt to establish any of the corners called for in those instruments. The surveyor testified he merely plotted the lines on his map. If it be conceded there was any competent evidence locating the lands described in the deeds under which Norden claimed, *Day v. Godwin, supra*, the question of location was properly left to the jury.

Plaintiff did not rely solely on its paper title. The court charged the jury: "I instruct you that under the law an instrument constitutes color of title if it purports to be a conveyance of title and is defective or void for matters outside the record, and if one takes a deed which purports to describe a tract of land which reasons outside of the record is defective or which fails to connect with a good title, and if a person holds the land described in that deed under the deed in question then I instruct you that such a deed is color of title, although not true title in itself. If a person has such a deed of record then adverse possession is not required for more than seven years and he may perfect title to that land by adverse possession under color of title for that period. I instruct you that the deeds offered from Eric Norden to Cooper River Timber Company and from Cooper River Timber Company to West Virginia Pulp & Paper Company and from West Virginia Pulp & Paper Company to the plaintiff are such instruments as constitute color of title within the meaning of this law."

Plaintiff assigns the quoted portion of the charge as error. It argues that the jury should infer from this charge that the instruments under which Nordan claimed were in fact defective and conveyed no title. The contention is without merit. The court had previously expressly

told the jury that plaintiff had good paper title if the deeds under which Norden claimed covered the land in controversy. This made it necessary for him to draw a distinction between good paper title and title acquired by adverse possession under color and to explain the meaning of color of title. He not only defined color but specifically told the jury the Norden and subsequent deeds were color of title. They could not be more than color if the deeds to Norden did not cover the disputed area.

The court told the jury in language not subject to misinterpretation to answer the first issue in the affirmative (1) if the conveyances to Norden covered the land in controversy; or (2) if these instruments did not embrace the land in controversy, the answer would, nevertheless, be "yes" if plaintiff or its predecessors in title, West Virginia Pulp & Paper Co. or Cooper River Timber Corporation, had seven years' continuous possession, because the conveyances to them were color of title.

The court defined the term "possession" and informed the jury that possession of any part of the area described in the color would be constructively extended to the outer boundaries of the color except for such part, if any, as might be in the actual possession of another. Plaintiff does not challenge the correctness of these portions of the charge relating to its title.

Defendants make no pretense of having a good paper title or title by possession under color. They say their grantors and those in privity with them have been in actual possession for more than twenty years, which possession has been both continuous and exclusive under a claim of right. Their evidence is sufficient for a jury to find these facts: Eli Jacobs, prior to 1900, pointed out the boundaries of the land claimed by him. These boundaries were indicated by old marked trees. The boundaries of the tract claimed were obvious. When Norden surveyed his land, he placed concrete monuments at the corners claimed by Jacobs but did not claim the land in controversy. Eli Jacobs had a child, Susannah, who married Bill Graham. They had two children, Rena, who married W. J. Freeman, and Lonnie, who married D. J. Jacobs. (The record does not disclose dates of death of Eli Jacobs, Susannah Graham, or Bill Graham, husband of Susannah.) Lonnie, wife of D. J. Jacobs, is still living. D. J. Jacobs, one of defendants' grantors, testified: "During the time Eli Jacobs was alive he was in possession of this tract of land that is in dispute. After his death Bill Graham and the heirs were in possession of it. That is the same Bill Graham that I said married Eli Jacobs' daughter. William Graham and Susannah Graham are both dead. Susannah died first; he died later on. . .After Susannah Graham died Bill Graham was in possession of this tract of land. After Bill Graham died his heirs were in pos-

session. . . .Since the death of Bill Graham and up until the present time W. J. (Freeman) and the heirs have been in possession of this tract of land. Bill Graham's heirs." He testified he started working on the land as early as 1901. Other portions of his testimony place Eli Jacobs in possession as early as 1893. W. J. Freeman testified he took possession in 1900.

Witnesses testified that those claiming under Eli Jacobs had planted tobacco beds on the land for several years, had cut crossties and timber, had a sawmill on the land, and had otherwise utilized the land as any owner would. These various acts of possession, according to the testimony, extended to the outer boundaries. Defendants' assertion of title was well known in the community. It was reputed to be their land. This possession had been continuous at least from 1900 or thereabouts until Jacobs, Freeman, and their wives, children of Susannah Graham and grandchildren of Eli Jacobs, conveyed to defendants.

The court properly refused to direct a verdict in plaintiff's favor or to nonsuit defendants' claim for affirmative relief. The evidence was sufficient to permit the jury to find that defendants' grantors and those in privity with them had had actual possession of the disputed area for more than twenty consecutive years—a possession marked by visible lines and boundaries, notorious and adverse to all others.

To establish possession for the requisite twenty years, it was, as the court charged, permissible to tie the possession of an ancestor to that of the heir when there was no hiatus or interruption in the possession. As said by Johnson, J., in *Newkirk v. Porter,* 237 N.C. 115 (120), 74 S.E. 2d 235: ". . .the adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession." *Alexander v. Gibbon,* 118 N.C. 796; *Atwell v. Shook,* 133 N.C. 387; *Ramsey v. Ramsey,* 224 N.C. 110, 29 S.E. 2d 340; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Taylor v. Scott,* 255 N.C. 484, 122 S.E. 2d 57.

Plaintiff contends the evidence is not sufficient to establish twenty years continuous possession by defendants' grantors. This contention is based on the assertion there was no privity between Bill Graham and his father-in-law, Eli Jacobs, nor was there privity between W. J. Freeman and D. J. Jacobs and their mother-in-law, Susannah Graham. The contention would merit consideration if it appeared the husbands were claiming adversely to their respective wives, since it does not affirmatively appear that the wives had physical possession of the land; but the evidence does not show that the sons-in-law were claiming adversely to their spouses. Freeman's testimony, "I came into possession of land by marriage in 1900," at least carries the implication

that he was acting in behalf of his wife and not adversely to her. Nor was Bill Graham's possession adverse to the estate of his deceased wife. He was tenant by curtesy consummate and entitled to possession. *Stockton v. Maney*, 212 N.C. 231, 193 S.E. 137; 15 Am. Jur. 270. His possession inured to the benefit of his and Susannah's children. *Ramsey v. Ramsey, supra.*

We have examined carefully each of the assignments on which plaintiff relies. We find no prejudicial error. The learned trial judge clearly and accurately stated the law which the jury should apply as they might find the facts on the conflicting testimony. The jury has resolved this conflict adversely to plaintiff. We have no authority to review its determination of the factual questions.

No. error.

C. H. BUNN v. MARJORIE D. BUNN.

(Filed 11 January 1963.)

Divorce and Alimony § 22; Habeas Corpus § 3—

Where both the husband's suit for divorce from bed and board, G.S. 50-7, and the wife's cross action for alimony without divorce, G.S. 50-16, put in issue the right to the custody and support of the minor son of the marriage, and both the action and cross action are properly dismissed upon the verdict of the jury, the court in its equity jurisdiction may proceed to hear evidence and determine the question of custody and support of the child, and need not remit the parties to proceedings in *habeas corpus*. G.S. 17-39.1.

APPEAL by plaintiff from *Clark (Edward B.), S.J.*, April 1962 Term of DURHAM.

Suit for divorce from bed and board and for a determination of the proper custody of a thirteen-year-old son born of the marriage between the parties. G.S. 50-7.

Defendant in her answer denied the material allegations of the complaint, asked for the custody of their son, and set up a cross action praying for reasonable subsistence for herself and their son and counsel fees. G.S. 50-16.

On 21 October 1959, Judge C. W. Hall presiding over the superior court of Durham County entered an order awarding defendant subsistence for support of herself and their son and counsel fees *pendente lite*. For subsistence for defendant and the son of the parties Judge Hall decreed that defendant shall have the exclusive use and posses-

sion of the house in which she is now living located at 1613 Bunn Terrace, that plaintiff shall pay all reasonable expenses, including utilities, for the upkeep of the house, and shall pay into the office of the Durham County Welfare Department for the use and benefit of defendant and their minor son the sum of $25.00 per week. Judge Hall found as a fact that it is for the best interests of the son of the parties that he remain in the custody of defendant pending the final determination of the suit, and awarded her his custody, but provided for reasonable hours and times of visitation by plaintiff. Plaintiff did not object to Judge Hall's order, and did not appeal therefrom.

When the suit came on to be heard before Judge Clark at the April 1962 Term, the following issues were submitted to the jury and answered as indicated:

"1. Were the plaintiff and the defendant lawfully married as alleged in the complaint?

"Answer: Yes.

"2. Has the plaintiff or the defendant been a bona fide resident of the State of North Carolina for six months next preceding the bringing of this action?

"Answer: Yes.

"3. Has the defendant without adequate provocation offered such indignities to the person of the plaintiff as to render his condition intolerable and life burdensome, as alleged in the complaint?

"Answer: No.

"4. Has the plaintiff without adequate provocation offered such indignities to the person of the defendant as to render her condition intolerable and life burdensome, as alleged in the Answer?

"Answer: No.

"5. Has the plaintiff separated himself from his wife and failed to provide her and the child of the marriage with necessary subsistence according to his means and condition in life?

"Answer: No."

After the jury's verdict was returned, Judge Clark entered into a hearing in respect to the custody and support of the son of the parties, who then was sixteen years of age.

Judge Clark entered judgment dismissing plaintiff's action and defendant's cross action for alimony without divorce, granting custody of the son of the parties to defendant, with rights of visitation by plantiff, decreeing plaintiff shall pay into the office of the Durham County Welfare Department $25.00 a week for the support of his minor son, and his son and defendant shall have the use and possession of the dwelling

house at 1613 Bunn Terrace, and plaintiff shall pay all reasonable expenses, including utilities, connected with the maintenance of the dwelling house, and shall pay defendant's counsel a substantial fee.

From the judgment, plaintiff appeals.

Wade H. Penny, Jr. for plaintiff appellant.

Bryant, Lipton, Bryant & Battle by F. Gordon Battle and Alfred S. Bryant for defendant appellee.

PARKER, J. Plaintiff has one assignment of error: "Based on the issues submitted to and as found by the jury, the judgment signed and entered by the court in this cause is in error." Plaintiff states in his brief: "The plaintiff appellant's exception to the judgment is limited to that portion of the judgment which awards custody of the minor child of the marriage to defendant appellee, and decrees that the plaintiff make certain support and maintenance payments for said minor child." The record contains none of the evidence presented at the trial and at the hearing before Judge Clark.

Plaintiff's contention is that when Judge Clark in his judgment, in accordance with the verdict, dismissed plaintiff's suit and defendant's cross action, he was without jurisdiction to enter that portion of the judgment awarding the custody of the minor son of the parties and requiring subsistence to be furnished by plaintiff for his benefit, and that portion of his judgment is null and void. That under the law of this State when the parents of a minor child are living separate and apart, as shown by the pleadings here, the proper procedure for determining custody of a child, except as now provided by G.S. 50-16, is by a proceeding in the nature of a writ of habeas corpus pursuant to G.S. 17-39. In support of this contention he cites *In re McCormick*, 240 N.C. 468, 82 S.E. 2d 406.

G.S. 50-13 provides: "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper* * *."

Therefore, when the plaintiff instituted his action for divorce from bed and board in the superior court of Durham County, in which he specifically prayed "that the court determine the proper custody for the aforesaid minor child of the plaintiff and defendant," that court became vested in his suit with exclusive jurisdiction to enter orders respecting the care, custody and maintenance of this child. *Cox v. Cox*, 246 N.C. 528, 98 S.E. 2d 879.

Defendant in her answer prayed that the custody of their son be granted her, and that an order be entered requiring plaintiff to provide for him reasonable subsistence.

G.S. 50-16, as amended, gives a wife the right to set up an action for subsistence without divorce "as a cross action in any suit for divorce, either absolute or from bed and board." This the defendant did here. This statute further provides: "The court may enter orders in a proceeding under this section relating to the support and maintenance of the children of the plaintiff and the defendant in the same manner as such orders are entered by the court in an action for divorce, irrespective of what may be the rights of the wife and the husband as between themselves in such proceeding."

This Court held in *In re McCormick* (1954), *supra*, G.S. 17-39 provides a proceeding in the nature of habeas corpus by which a controversy respecting the custody of minor children may be determined as between husband and wife, living in a state of separation without divorce.

In the case of *In re Biggers*, 226 N.C. 647, 39 S.E. 2d 805, the Court after stating the provisions of G.S. 17-39 said:

> "Such a proceeding is at Chambers, and notwithstanding the fact that it is statutory, the jurisdiction of the court in the premises is unquestionably equitable, has long been so regarded in practice, and that principle has not been questioned in this jurisdiction."

G.S. 17-39.1 (enacted in 1957) provides:

> "* * *any superior court judge having authority to determine matters in chambers in the district may, in his discretion, issue a writ of habeas corpus requiring that the body of any minor child whose custody is in dispute be brought before him or any other qualified judge. Upon the return of said writ the judge may award the charge or custody of the child to such person, organization, agency or institution for such time, under such regulations and restrictions, and with such provisions and directions, as will, in the opinion of the judge, best promote the interest and welfare of said child."

By virtue of G.S. 17-39.1, "The marital status of parents is not now a factor in determining the procedure to obtain custody of a child." *Cleeland v. Cleeland*, 249 N.C. 16, 105 S.E. 2d 114.

It seems perfectly clear that Judge Clark, by the express provisions of G.S. 17-39.1, had jurisdiction and power, after the return of the verdict in the instant case, to determine matters relating to the custody and support of the minor son of the parties here by issuing a writ of habeas corpus, apart from his jurisdiction of the divorce suit, so that

custody and maintenance of such child is and was more than a mere incident of the divorce proceedings.

In the case of *Horton v. Horton,* 75 Ark. 22, 86 S.W. 824, 5 Ann. Cas. 91, the petition for divorce also asked the custody and support of the children. There was no cross petition. The divorce was denied, but custody of the children was granted to plaintiff, and an order for the support of the children was made. The court asked: "Can a chancery court, when it denies a divorce, award custody of the children of the parties to the suit?" In answering the question in the affirmative, the Court said:

> "This question has been answered negatively in New York and Georgia (*Davis v. Davis,* 75 N.Y. 221; *Keppel v. Keppel* [Ga.] 17 S.E. 976), and affirmatively in other states (*Luck v. Luck,* 92 Cal. 653, 28 Pac. 787; *Cornelius v. Cornelius,* 31 Ala. 479; 2 Nelson on Marriage and Divorce, § 979; 2 Bishop on Marriage and Divorce, § 1185). A learned writer on the subject of marriage and divorce points out that in those States holding that custody of children cannot be awarded, under the divorce statute, when the divorce is denied, on habeas corpus proceedings the order could be made, and that there is no reason why it should not be made in the divorce case when all the parties are before it, instead of remitting the parties to the other remedy. Nelson on Marriage and Divorce, § 979. This reasoning commends itself to the court. While it looks beyond the authority of the chancery court in divorce suits where no divorce is granted to award the custody of the children, yet it cannot be questioned that the chancellor of that court is invested with full power to award custody of minor children for their best interests on habeas corpus proceedings. It seems idle to turn parties out of court and invite them into the chancellor's chambers for the same relief sought in court. There is no separation of the family here brought about by the court in making this order. The court merely recognized and found the facts existing, and then made an order for the well-being of the children, preserving the right of each parent to alternate custody and at all times to visitation."

The Arkansas Supreme Court quoted from its decision in the *Horton* case *in extenso,* and followed it in *Adams v. Adams,* 224 Ark. 550, 274 S.W. 2d 771.

The *Horton* case has been cited with approval in *Mollring v. Mollring,* 184 Iowa 464, 167 N.W. 524; *Jacobs v. Jacobs,* 136 Minn. 190, 161 N.W. 525, L.R.A. 1917D, 971; *In re Badger,* 286 Mo. 139, 226

S.W. 936, 14 A.L.R. 286, where many cases of like import are cited; and in *Urbach v. Urbach,* 52 Wyo. 207, 73 P. 2d 953, 113 A.L.R. 889.

In the case of *Power v. Power,* 65 N.J. Eq. 93, 97, 55 A. 111, 113, Vice-Chancellor Pitney, subsequently a member of the Supreme Court of the United States, stated: "I said at the hearing, and I am still of the opinion, notwithstanding what has been argued with so much power . . . that it was competent for this court in the wife's suit to have awarded to her the custody of that child . . . and refused her the decree for divorce. I see no incongruity whatever between the two results in such a case, where a husband and wife are living separately, for one of them to sue the other for divorce, and also for the custody of the children, and to fail to get the divorce and to recover the children in that petition."

Stetson v. Stetson, 103 N.H. 290, 171 A. 2d 28, was a proceeding on libel for divorce. The superior court approved master's recommendation that motion to dismiss libel be granted, but that case be continued for hearing on petition for custody and support of minor children born of the marriage. The Court quoted RSA 458:35: "Support of Children. In cases where husband and wife are living apart the court, upon petition of either party, may make such order as to the custody and maintenance of the children as justice may require; and all appropriate provisions of this chapter shall apply to such proceedings." In its opinion the Court said:

> "In the present case it is clear that the wife was a resident of this state, that she is living apart from her husband, that the children are within the jurisdiction of this state and under RSA 458:35 the court has authority to make orders for custody and support of the children even though the divorce is denied or the proceedings temporarily halted. Annotation 151 A.L.R. 1380; 2 Nelson, Divorce and Annulment (2d ed. 1960 supp.) s. 14.35, p. 220. See *Walker v. Van Der Haas,* 102 N.H. 166, 169, 152 A. 2d 612."
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> "In 27B C.J.S., Divorce, sec. 307, it is said:
>
> Where the divorce court, whether by express statute or through its inherent equitable powers, has the power to determine matters relating to the custody or support of children apart from its jurisdiction of the divorce suit, so that custody or maintenance of the children of the marriage is more than a mere incident to the divorce proceedings, the court, although it denies a divorce, may make such provision as it deems necessary for the custody and

maintenance of the children, and may, pursuant to such power, retain the cause on the docket for future action with respect to their custody and support.

* * * * * * * * *

"On the other hand, where an award of custody is incidental to the divorce proceedings, the court, on denying a divorce, may make no provision for the custody or support of the children, unless the case is within a statute permitting custody to be awarded if the facts warrant the granting of a divorce, or there are special circumstances; and the attempt of the court to reserve jurisdiction as to the custody and maintenance of the children, while denying the petition for divorce, although not dismissing it, is ineffective to give the court such jurisdiction."

Many cases are cited in the notes which support the text.

In 17A Am. Jur., Divorce and Separation, sec. 827, it is said:

"A question which frequently arises is whether the divorce court has jurisdiction to award the custody of children where neither party is granted a decree of divorce. The authorities upon this question are not in accord. In some jurisdictions the view is taken that court of equity, though denying a divorce, may nevertheless make an order awarding the custody of children to one of the spouses, and that, having jurisdiction of the parties in the divorce proceeding, the court, in doing so, need not remit the parties to other proceedings. In other jurisdictions the power of the court to award the custody of the children in divorce proceedings is regarded as solely dependent upon the statutes, and such relief is regarded as entirely incident to the main relief sought and dependent alone upon the divorce proceedings. Under this rule, where a divorce is denied, the court is without authority to award the children to either party, unless the power exists by virtue of statutes expressly conferring it."

Many cases and annotations from A.L.R., L.R.A., and Annotated Cases are cited in support of the text.

The diversity of opinion as to the power of a court which denies a divorce to award custody and maintenance of a minor child born of the marriage is set forth in an elaborate and scholarly opinion in *Urbach v. Urbach, supra;* and in Annotations in 113 A.L.R. 901 *et seq.*, and in 151 A.L.R. 1380; and in 2 Nelson, Divorce and Annulment, 2d ed., 1961 Revised Volume, sec. 15.34. In the *Urbach* case the Court held, as set forth in the first headnote in 113 A.L.R. 889:

"1. A court which has the powers of a court of equity to determine the custody of a minor, and statutory jurisdiction to entertain a proceeding by a wife to compel her husband to support their minor child and to grant such order therein as might be granted in a divorce suit, may make a decree in regard to the custody and support of a child of the marriage in a divorce suit in which a divorce has been refused."

In its opinion the Court said:

"If the pleadings are sufficient to sustain the judgment—as they should be: see 33 C.J. 1139 and 34 C.J. 153—and the parties have litigated the points, then no good reason is perceived why they should be turned out of court merely to commence another proceeding, and thus relitigate the matter."

The question of the custody and support of the minor son born of the marriage between the parties was put at issue by the pleadings here. After the verdict was returned, Judge Clark, without any objection by the parties, entered into a hearing in respect to the custody and support of the minor son born of the marriage between the parties. According to admissions in the pleadings, both plaintiff and defendant are residents of North Carolina and their minor son is a resident of North Carolina and is within the jurisdiction of the court. We can perceive of no reason why Judge Clark, after the return of the verdict, should have turned the parties here out of court on the question of custody and support of their minor son, and then brought them back on a writ of habeas corpus by virtue of G.S. 17-39.1 to relitigate the matter. It is our opinion, and we so hold, that after plaintiff's suit for divorce from bed and board and defendant's cross action for alimony without divorce had both been denied, Judge Clark had jurisdiction and power to enter the challenged portion of the judgment awarding custody of the minor son of the parties to defendant and providing for his maintenance and support.

Plaintiff makes no contention that the amount decreed for the support and maintenance of his minor child is excessive or not reasonable. The record contains none of the evidence heard by Judge Clark. The amount decreed is identical with the amount awarded by Judge Hall in October 1959 for subsistence of defendant and the child *pendente lite*. According to the record, plaintiff did not object to Judge Hall's order, and it would seem he complied with it: at least there is nothing in the record to the contrary. Plaintiff does not contend in his brief that the use and possession of the dwelling house located at 1613 Bunn Terrace by defendant and the child is a provision for the wife's

support. It would seem that the defendant's use and possession of this house is primarily for the benefit of the minor of the parties.

Plaintiff's assignment of error is overruled, and the judgment below is

Affirmed.

STATE v. JAMES MONROE FOUST.

(Filed 11 January 1963.)

1. Criminal Law § 38; Homicide § 14—

Where defendant contends that his gun accidentally fired during playful scuffling between him and deceased, testimony of a nonexpert of firearms as to experiments he made with the gun and that the gun could not be fired unless the hammer was pulled completely back and the trigger pulled, *is held* incompetent in the absence of evidence that his experiments were carried out under substantially similar circumstances as those which surrounded the firing of the gun when deceased was killed.

2. Homicide § 5—

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.

3. Same—

Malice as an essential element of murder in the second degree may be either express or implied, and need not amount to hatred, ill-will, or spite, but is sufficient if there is an intentional taking of the life of another without just cause, excuse, or justification.

4. Homicide § 20— Evidence of malice held insufficient to be submitted to the jury.

Where the sole and uncontradicted evidence relating to the actual killing is defendant's testimony that his gun accidentally fired and that he killed deceased through misadventure, testimony of declarations theretofore made by the sixteen-year-old defendant to the effect that if deceased went with anyone else he would kill her, which declarations were made under circumtances disclosing the absence of anger or heated passion and amounted only to "a sort of sweetheart" talk on social dates, *is held* insufficient to be submitted to the jury on the essential element of malice, even though there is evidence that shortly before the killing deceased had dated another boy, and defendant's motion to nonsuit the charge of murder in the second degree should have been allowed.

5. Homicide § 6—

Manslaughter is the unlawful killing of a human being without intention to kill or inflict serious bodily injury, and without malice, either express or implied, and with few exceptions every unintentional killing of

a human being proximately caused by a wanton or reckless use of firearms amounts to involuntary manslaughter, at least.

6. Homicide § 20—

Evidence tending to show that defendant and deceased were playfully scuffling with defendant's loaded gun when the gun accidentally fired, inflicting mortal injury, *held* sufficient to be submitted to the jury on the question of defendant's guilt of involuntary manslaughter.

7. Homicide § 6; Negligence § 32—

Contributory negligence, as such, is no defense to a charge of manslaughter, but defendant is entitled to show, if he can, that deceased met her death wholly as a result of her own negligence or misconduct.

8. Homicide § 19—

Defendant having admitted that deceased died as a result of a wound from his gun, the admission of ten color photographs of the body of deceased would seem excessive.

APPEAL by defendant from *Bickett, J.*, March 1962 Regular Criminal Term of ALAMANCE.

Criminal prosecution tried upon an indictment charging the defendant with the murder of Sylvia Elaine Bull. G.S. 15-144.

When the case was called for trial, the solicitor announced that the State would not insist upon 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 evidence might disclose.

Plea: Not Guilty. Verdict: Guilty of murder in the second degree.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Clarence Ross and B. F. Wood for defendant appellant.

PARKER, J. The State's evidence presents these facts:

On the morning of 5 January 1962 defendant, James Monroe Foust, a boy about sixteen years of age, had been hunting in the woods near the Bull home with a 22-410 combination rifle and shotgun, with the rifle barrel on top and the shotgun barrel on the bottom. Sylvia Elaine Bull, a sixteen-year-old girl with whom he had been going, gave him this rifle and gun combination as a 1961 Christmas present. About noon he went to the Bull home. He knocked, was admitted by Tomaka Bull, and went into the "den-kitchen" where Sylvia was asleep on a little bed or cot. She had on a white blouse and blue slacks, but no stockings or shoes. He waked her up, and took a seat on the bed beside

her. Sylvia, Tomaka, and defendant were the only persons in the house. A radio by the bed was playing loud.

Tomaka was in the kitchen washing dishes, and could not see Sylvia and defendant from where she was. She heard them talking, but did not know what they said. She heard no fuss between them. About half an hour after defendant's arrival, while she was trying to get milk out of the ice box, she heard a gun fire. She turned around, saw blood and a gun lying across the bed beside Sylvia, but did not see the defendant. She ran out of the house to a neighbor's house across the street.

In response to a call Lewis Strickland, Jr., coroner of Alamance County, arrived at the Bull home about 1:20 p.m. Upon arrival he saw defendant in the front yard, who told him "a girl had been shot* * * he did it, but that it was an accident," and he carried him to where the girl was. The coroner found Sylvia Elaine Bull in the "den-kitchen" lying dead on a little bed. She was stretched out full length, with her hands folded across her chest, cover partially on her, and with a quantity of blood around her chin. She had a wound about one-fourth of an inch wide and about three-eights of an inch long in her chin about halfway between her right ear and the right corner of her mouth. Around the wound was a powder burn area about two inches square. There was a cigarette between her index and middle fingers which had burned into the flesh. He found the gun in the living room next to the room where Sylvia's body was. There was an empty shell in the shotgun barrel. The rifle barrel had an unfired cartridge in it. The defendant said "he had moved the gun himself from the floor beside the cot to the position in which I found it."

The coroner testified that the defendant told him this is what occurred when he entered the Bull home: "He went to where Sylvia was asleep on the little bed. That he woke her up and they started cutting up playfully, and she grabbed the gun and he said that he had the gun across his knees, and that after they began to cut up, you know, play, that she grabbed the gun and she jerked it back, and if I recall correctly, the first time this happened nothing happened, and they continued playing and she grabbed the gun again and he jerked it back and he said it went off, and he went to call the officers. * * *He later stated at the police department in Gibsonville that he thought the gun was unloaded when he went into the house. He said he did not know how the gun fired."

M. W. Millikan, chief of police of Gibsonville, testified on direct examination as follows: "I asked [defendant] what happened and he stated he had been out hunting that morning and come into the house and sat down on the side of the bed by Sylvia and got to playing or picking at one another, as he put it, and she grabbed for the gun on

two different occasions and the second time it went off. I asked him if he had shot the gun previously that day and he said, as I recall, that he had shot the gun once or twice. * * * Defendant stated that the girl was shot with the 410 gauge barrel, and that he had shot this barrel at least twice that morning. * * * He said he thought he unloaded it." Defendant also told Millikan the following: "He was sitting on the bed with her head to his left and that he was sitting about half ways of the bed with the gun laying on his knees, about like this (indicating). He said he was sitting right close to her and that she took hold of the gun—the first time she grabbed it under the breach part here, and he said he got it away from her, and she got it again near the end of the barrel, and that is when the gun went off."

The defendant told Millikan "he had been dating Sylvia for a few months, and that she had started going with another boy by the name of Junior Atkinson." Millikan asked him if he was mad about this, and he replied "he wasn't mad, but he did not like it." On cross-examination Millikan testified, "he told me that he did not move the girl in any manner, but that he opened her eye."

Marie Bull Wyrick, a sister of Sylvia, in response to a call went home, and found there the coroner, Millikan, the defendant, and some neighbors. She testified: "I asked James what happened and he said he come in from hunting and he sat down on the bed beside Sylvia and said Sylvia tickled him and he moved his (sic) like that and hit the gun and it went off, and I said, 'What, was the gun loaded?' I said, 'What did you go in the house with a loaded gun for,' and he said that he unloaded the gun before he went in."

Mrs. Roy Bull, mother of Sylvia, testified in substance: She has known defendant since he was a little boy: his family lived in their community. Sylvia would spend several days at the time at the home of defendant's mother, would come home, and go back again. Defendant and Sylvia had been dating for about six months. Sylvia dated the Atkinson boy after Christmas. Defendant occasionally stayed with his relatives across the street from their home.

Allen Barbee testified for the State in substance: He lives near the Bull home. Defendant and Sylvia visited his home often. Sylvia had given defendant a gun for Christmas. She wanted to buy it back, and defendant said "he would see her dead before she would get it back." They argued with each other sometime as kids will. They argued about her going with another boy. He said, "that if he couldn't have her nobody else would."

Matthew Atkinson, Jr., a witness for the State, testified he and Bobby Jean had double dated with Sylvia and defendant in his car. On one occasion Sylvia and defendant were sitting in the back seat of

his car in front of Bobby Jean's home. He testified on cross-examination: "They [defendant and Sylvia] were not arguing, just talking, and out of the bue sky he said, 'if you go with anybody else, I will kill you.' I did not know she was going with anyone else at the time. It was just sort of sweetheart talk."

Defendant assigns as errors that Chief Millikan was permitted by the court, over his objections and exceptions, to testify as to experiments he made with the gun whose firing killed Sylvia. He testified in substance: The gun had been in his possession continuously since the death of Sylvia. The gun could not be fired by pulling the hammer part way back and turning it loose without pulling the trigger. The hammer had to be pulled back "in gauge position" before he could fire it. The "safety gauge" makes it necessary that the hammer be pulled back all the way. For the gun to fire it had to be cocked and the trigger pulled. He used shells of the same make as the empty shell he found in the 410 shotgun barrel. He has had no instruction or schooling to qualify as an expert in the mechanism of a gun of this type. He does not know the pressure needed to cause the shell to explode.

There is no other evidence in the record as to how the safety device on this gun operates. There is no evidence in the record as to whether the safety device on the gun was on or off when it fired and killed Sylvia, or as to whether at that time it was cocked or not. There is no evidence in the record that when Millikan made his experiments the gun was in substantially the same condition as on the day Sylvia was killed. Defendant's defense is that the shooting of the gun resulting in Sylvia's death was by accident or misadventure. In our opinion the experimental evidence given by Millikan should have been rejected, because it does not appear from the evidence before us that his experiments were carried out under substantially similar circumstances to those which surrounded the firing of the gun when Sylvia was killed. *S. v. Phillips*, 228 N.C. 595, 46 S.E. 2d 720.

Defendant offered no evidence.

Defendant assigns as error the denial by the court of his motion for judgment of involuntary nonsuit as to the charge against him of murder in the second degree. The court in its charge stated that the jury could return one of three verdicts: Guilty of murder in the second degree, Guilty of involuntary manslaughter, or Not Guilty. The court in its charge instructed the jury in substance that if they found from the evidence, and beyond a reasonable doubt, that on 5 January 1962 defendant feloniously and intentionally shot and killed Sylvia Elaine Bull, and that he did so with malice, as that term had been defined to them, it would be their duty to return a verdict of guilty of murder in the second degree. The jury convicted the defendant of murder in the second degree.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *S. v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *S. v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402; *S. v. Benson,* 183 N.C. 795, 111 S.E. 869.

Malice as an essential characteristic of the crime of murder in the second degree may be either express or implied. 40 C.J.S., Homicide, sec. 16, p. 862; 26 Am. Jur., Homicide, sec. 41, p. 185. This Court said in *S. v. Benson, supra*:

> "Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. *S. v. Banks,* 143 N.C. 652. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the killing with a deadly weapon; and a pistol or a gun is a deadly weapon. *S. v. Lane,* 166 N.C. 333."

The statements of defendant to the effect that if Sylvia went with anyone else, he would kill her, that if he couldn't have her, nobody else would, and his arguing with her about going with another boy, considered under the circumstances and in the setting when uttered, and in the light of all of the State's evidence, are, in our opinion, as a witness said, a "just sort of sweetheart talk" by this sixteen-year-old boy, and do not permit a legitimate inference that defendant killed Sylvia with express malice, or intentionally, or with implied malice. The facts in respect to the firing of the gun resulting in Sylvia's death rest upon statements coming from the defendant, in none of which is it said that the killing was intentional, and in none of which is anything said that shows or would permit the reasonable inference that the killing was done with malice, express or implied. Considering the evidence in the light most favorable to the State, there is nothing in the evidence to show that Sylvia was killed with malice, either express or implied, and to support a verdict of guilty of murder in the second degree. The court committed prejudicial error in submitting the question of second degree murder to the jury.

Defendant's assignment of error that the court erred in overruling his motion for judgment of compulsory nonsuit as to the charge against him of involuntary manslaughter is untenable.

This Court said in *S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564:

> "* * *Where one engages in an unlawful and dangerous act, such as 'fooling with an old gun,' *i.e.,* using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills

the other by accident, he would be guilty of an unlawful homicide or manslaughter. G.S. 14-34; *S. v. Vines,* 93 N.C. 493; *S. v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *S. v. Limerick,* 146 N.C. 649, 61 S.E. 568.

"Involuntary manslaughter has been defined to be, 'Where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done.' [Citing authority.]"

To constitute involuntary manslaughter, the homicide must have been without intention to kill or inflict serious bodily injury, and without either express or implied malice. *S. v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485; *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155; 40 C.J.S., Homicide, sec. 56.

It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. *S. v. Vines,* 93 N.C. 493, 53 Am. Rep. 466; *S. v. Turnage,* 138 N.C. 566, 49 S.E. 913; *S. v. Stitt,* 146 N.C. 643, 61 S.E. 566; *S. v. Bryant,* 180 N.C. 690, 104 S.E. 369; *S. v. Hovis, supra;* 26 Am. Jur., Homicide, sec. 212; 40 C.J.S., Homicide, sec. 59.

Considering the State's evidence in the light most favorable to it, it shows that defendant, carrying a 22-410 combination rifle and shotgun with both barrels loaded, went to the little bed or cot where Sylvia was asleep, waked her up, had the gun with him by the little bed, that he and Sylvia began pranking with this gun and the shotgun barrel fired killing Sylvia. In our opinion, the State's evidence was sufficient to carry the case to the jury on the question of involuntary manslaughter. Defendant's statements, particularly that it was an accident, do not exculpate him.

Contributory negligence as such has no place in the law of crimes. *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Ward,* 258, N.C. 330, 128 S.E. 2d 673. But the defendant is entitled to show, if he can, that Sylvia met her death wholly as a result of her own conduct, and not because of any wanton or reckless use of firearms on his part. *S. v. Eldridge,* 197 N.C. 626, 150 S.E. 125; *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132.

Of course, nothing said herein militates in any way against the doctrine upheld in *S v. Horton,* 139 N.C. 588, 51 S.E. 945; *S. v. Satterfield, supra; S. v. Honeycutt, supra,* and other cases, of a misadventurous homicide.

The State offered in evidence ten gory photographs in color of the dead body of Sylvia, and had the coroner to explain his testimony as to the death wound in her chin in respect to each photograph in detail. Defendant excepted to the use of the ten photographs, stating that he would stipulate that Sylvia died as a result of the gunshot wound which came from the weapon in the State's possession. We have held the fact that an authenticated photograph is gory, or gruesome, and may tend to arouse prejudice will not not alone render it incompent to be so used *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824. However, under the circumstances here it seems there was an excessive use of these ten photographs by the State.

For the prejudicial errors pointed out above, defendant is entitled to a new trial on the issue of whether he is guilty of involuntary manslaughter or not guilty, and it is so ordered.

New trial.

THOMAS H. LACKEY, ELI A. LACKEY, JOHN C. LACKEY AND WIFE, HELEN LACKEY, ANNIE LOUISE LACKEY, AND RICHARD F. LACKEY v. THE HAMLET CITY BOARD OF EDUCATION AND THE TOWN OF HAMLET.

(Filed 11 January 1963.)

1. Deeds § 12—

A deed must be construed to ascertain the intent of the grantor as gathered from the whole instrument without regard to its technical divisions, and every part must be given effect unless it cannot be reconciled, is contrary to public policy, or runs counter to some rule of law.

2. Deeds § 15—

Immediately following the description in the deed in question was inserted a paragraph stipulating that in the event the property should not be used for school purposes it should revert to the grantors or their heirs, and the *habendum* stipulated that the grantees and their successors and assigns should hold the property to their only use and behoof forever, "for school purposes." *Held:* The reverter clause and the *habendum* are not repugnant, and the deed conveys a fee upon special limitation, it being apparent that grantors intended to convey an estate of less dignity than the fee simple absolute. G.S. 39-1.

APPEAL by defendent Hamlet City Board of Education from *Olive, J.,* 23 July Civil Term 1962 of RICHMOND.

This is an action to determine the present ownership of a certain lot

of land described in the complaint, said lot having been conveyed by deed dated 27 June 1903 by E. A. Lackey and wife, Ella M. Lackey, to J. M. Jameson, D. McNair, J. S. Bishop, M. C. Freeman and Dr. H. F. Kinsman, School Trustees for the Town of Hamlet, and their successors, of Richmond County and the State of North Carolina.

The consideration named in the deed was ten dollars.

Immediately following the description, the deed contains this paragraph:

"It is also made a part of this deed that in the event of the school's disbandonment (failure) that this lot of land shall revert to the original owners, to wit: The said E. A. Lackey and wife, Ella M. Lackey, or their legitimate heirs, but it is also agreed that any and all improvements therein shall remain the property of the town of Hamlet, N. C."

The *habendum* clause in the deed reads as follows:

"TO HAVE AND TO HOLD the aforesaid lot of or parcel of land, and all privileges and appurtenances thereto belonging, to the said parties of the second part, their successors and assigns, to their only use and behoof forever, for school purposes."

It was stipulated in the court below that the plaintiffs are the surviving heirs at law and their spouses of grantors in the above deed; that the Hamlet City Board of Education is successor to and the owner of whatever interest the school trustees of the Town of Hamlet acquired in the parcel of land conveyed by said deed.

Soon after the delivery of the aforesaid deed, a school building was erected on said lot and a public school conducted therein until about 1951, at which time a new school building was erected at a different location, and no school has been conducted in the building or on said lot since said date. However, the old building was used by the School Board for storing school property until March 1961 when the School Board declared the property to be a liability and authorized the sale of the same and soon thereafter removed from the building all school property and completely abandoned said property for school purposes and pursuant thereto offered the same for sale and still proposes to sell the property and convey an absolute title thereto.

All parties to this action waived trial by jury and agreed that the trial judge should decide the matter upon the pleadings and upon facts stipulated by the parties. The parties further agreed that the court might make its conclusions of law and enter judgment in or out of term and in or out of the district. All parties reserved the right to except to the conclusions of law and judgment and further reserved the right to appeal therefrom to the Supreme Court.

The court below held and entered judgment to the effect that the reverter clause contained in the deed became operative when the

Hamlet City Board of Education ceased to use the property for any school purposes and that the title thereto reverted to the plaintiffs; that the empty building is the only improvement remaining on the lot; that the defendant Hamlet City Board of Education shall have the right to remove the building from the premises provided the same is removed by said defendant, its agents or assigns within the time provided in the stipulations entered into by the parties to this action and filed as a part of the record along with the judgment.

The defendant Hamlet City Board of Education appeals, assigning error.

Jones & Jones for plaintiff appellees.
A. A. Reaves, Bynum & Bynum fer defendant appellant.

DENNY, C.J. The question for determination is this: Does the defendant Hamlet City Board of Education now own the lot in controversy in fee absolute, or did title thereto revert to the plaintiffs when the aforesaid Board of Education abandoned the property for school purposes and ordered it to be sold at public auction?

In the interpretation of a deed, the intention of the grantor or grantors must be gathered from the whole instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable or a provision which is contrary to public policy or runs counter to some rule of law. *Cannon v. Baker,* 252 N.C. 111, 113 S.E. 2d 44; *Griffin v. Springer,* 244 N.C. 95, 92 S.E. 2d 682; *Dull v. Dull,* 232 N.C. 482, 61 S.E. 2d 255; *Ellis v. Barnes,* 231 N.C. 543, 57 S.E. 2d 772; *Willis v. Trust Co.,* 183 N.C. 267, 111 S.E. 163; *Springs v. Hopkins,* 171 N.C. 486, 88 S.E. 774; 16 Am. Jur., Deeds, sections 171, 172 and 173, page 534, *et seq.*

In the case of *Triplett v. Williams,* 149 N.C. 394, 63 S.E. 79, this Court said: "We concede all that is contended for as to the common law rule of construction, and that it has been followed in this State. But this doctrine, which regarded the granting clause and the *habendum* and *tenendum* as separate and independant portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor, and does not regard as very material the part of the deed in which such intention is manifested."

In *Willis v. Trust Co., supra,* Adams, J., speaking for the Court, said: "The rigid technicalities of the common law have gradually yield-

ed to the demand for a more rational mode of expounding deeds. Hence, to discover the intention of the parties is now regarded as the chief essential in the construction of conveyances. The intention must be gathered from the whole instrument in conformity with established principles, and the division of the deed into formal parts is not permitted to prevail against such intention; for substance, not form, is the object sought. If possible, effect must be given to every part of a deed, and no clause, if reasonable intendment can be found shall be construed as meaningless. *Springs v. Hopkins,* 171 N.C. 486 (88 S.E. 774); *Jones v. Sandlin,* 160 N.C. 155 (75 S.E. 1075); *Eason v. Eason,* 159 N.C. 539 (75 S.E. 797); *Acker v. Pridgen,* 158 N.C. 337 (74 S.E. 335); *Real Estate Co. v. Bland,* 152 N.C. 225 (67 S.E. 483); *Featherston v. Merrimon,* 148 N.C. 199 (61 S.E. 675); *Gudger v. White,* 141 N.C. 507 (54 S.E. 386)."

It is provided in G.S. 39-1 as follows: "When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word 'heir' is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance *or some part thereof,* that the grantor meant to convey an estate of less dignity." (Emphasis added.)

This Court has repeatedly held that when the granting clause, the *habendum,* and the warranty in a deed are clear and unambiguous, and fully sufficient to pass immediately a fee simple estate to the grantee or grantees, that a paragraph inserted between the description and the *habendum* in which the grantor seeks to reserve a life estate in himself or another, or to otherwise limit the estate conveyed, will be rejected as repugnant to the estate and interest therein conveyed. *Oxendine v. Lewis,* 252 N.C. 669, 114 S.E. 2d 706; *Edwards v. Butler,* 244 N.C. 205, 92 S.E. 2d 922; *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783; *Kennedy v. Kennedy,* 236 N.C. 419, 72 S.E. 2d 869; *Swaim v. Swaim,* 235 N.C. 277, 69 S.E. 2d 534; *Pilley v. Smith,* 230 N.C. 62, 51 S.E. 2d 923; *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228.

In our opinion, the facts disclosed by the contents of the deed under consideration are not controlled by the rule of construction laid down and followed in the foregoing decisions.

In the instant case, there can be no doubt about the intent of the grantors. The conveyance was made for a nominal consideration, and while the reverter clause was inartfully drawn and inserted immediately following the description in the deed, it must be construed to mean that the grantors intended that the land conveyed should revert to the grantors or their heirs if the property should be abandoned for school purposes. Moreover, the deed further provided that if and when the property reverted to the grantors or their heirs "that any and all im-

provements therein (thereon) shall remain the property of the town of Hamlet, N. C. (or its successors)." The grantors did not confine the expression of their intent alone to this reverter clause but in the habendum the grantees were "TO HAVE AND TO HOLD the aforesaid lot of or parcel of land, and all privileges and appurtenances thereto belonging, to the said parties of the second part, their successors and assigns, to their only use and behoof forever, *for school purposes.*" (Emphasis added.)

In the case of *Recreation Commission v. Barringer,* 242 N.C. 311, 88 S.E. 2d 114, *Parker, J.,* speaking for the Court, quoted with approval from Tiffany: Law of Real Property, 3rd Ed., Section 220, as follows: "An estate in fee simple determinable, sometimes referred to as a base or a qualified fee, is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event * * *. No set formula is necessary for the creation of the limitation, any words expressive of the grantor's intent that the estate shall terminate on the occurrence of the event being sufficient * * *. So, when land is granted for certain purposes, as for a schoolhouse, a church, a public building, or the like, and it is evidently the grantor's intention that it shall be used for such purposes only, and that, on the cessation of such use, the estate shall end, without any re-entry by the grantor, an estate of the kind now under consideration is created. It is necessary, it has been said, that the event named as terminating the estate be such that it may by possibility never happen at all, since it is an essential characteristic of a fee that it may possibly endure forever."

In *Willis v. Trust Co., supra,* Joseph S. J. Regan, for a consideration of $1,000, conveyed to Mary Regan and her bodily heirs a tract of land in Robeson County, "To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, to the said Mary Regan and her bodily heirs, and to their use and behoof forever.

"And the said J. S. J. Regan covenants that he is seized of said premises in fee and hath the right to convey the same in fee simple; that the same are free from all encumbrances, and that he will warrant and defend the said title to the same against the claims of all persons whatsoever, to his daughter, Mary Regan, and the heirs of her body and if no heirs, said lands shall go back to my estate."

On 1 October 1914, Mary Regan conveyed said land to Joe Willis, reserving a life estate, and on 3 December 1921, these two entered into a writtn agreement to convey to the defendant fifty acres of the land at a price of $3,400. The defendant refused to accept the deed tendered

on the ground that the grantors could not convey the premises in fee simple. Mary Regan at the time was more than seventy years of age and had never married. The court below held that the grantors could convey a good title to the premises. On appeal to this Court, among other things, the Court said: " * * * (W)e conclude that the deed should be construed as if it read 'To Mary Regan and the heirs of her body (a fee simple, C.S., 1734 (now G.S. 41-1)), and if she should die not having such heirs or issue living at the time of her death, then to the heirs of the grantor.' " The Court then held that "* * * Mary Regan acquired, under the deed of her grantor, a fee simple, determinable upon her dying without having heirs of her body or issue living at the time of her death, and that she and her coplaintiff cannot convey to the defendant an indefeasible estate in fee."

We hold that the grantors conveyed to the grantees and their successors a fee simple title to the premises described in said deed, determinable upon the abandonment of the premises for school purposes. We further hold that the reverter clause and the purposes for which the property was to be held as expressed in the *habendum,* are not irreconcilable with or repugnant to the granting clause. Hence, the judgment of the court below is

Affirmed.

NERE E. DAY v. E. P. GODWIN AND J. W. BLANCHARD.

AND

NERE E. DAY v. INTERNATIONAL PAPER COMPANY.

AND

NERE E. DAY v. J. W. BLANCHARD AND E. P. GODWIN.

(Filed 11 January 1963.)

1. Trespass to Try Title § 2—

In an action involving land, defendants denial of plaintiff's title places the burden upon plaintiff to establish his title by one of the methods recognized by law.

2. Boundaries § 5—

Where a grant or deed calls for the lines and corners of senior grant or deed, the senior instrument controls, and the correct boundaries can be established only by surveying the senior conveyance.

3. Trespass to Try Title § 4—

In an action involving title to land plaintiff must fit the descriptions in his chain of title to the land claimed, and show that the land is em-

braced within the descriptions, and in the absence of competent evidence on this aspect nonsuit is properly entered.

4. Deeds § 24—

Judgment in a proceeding under the Torrens Act cannot have the effect of adjudicating the respective boundaries of the defendants *inter se*, there being no adversary position in the proceeding between defendants, actually or by privity.

5. Judgments § 29—

Ordinarily a judgment does not bar the rights of plaintiffs or of the defendants *inter se* when there is no hostile or conflicting claim brought in issue as between the co-parties.

6. Boundaries § 8—

Neither a party nor his surveyor may testify as to the location of a line or boundary solely from a map or aerial photograph when neither has made an actual survey or gone upon the ground, and therefore has no actual knowledge of the facts testified to.

7. Trespass to Try Title § 4—

A jury may not be allowed to locate a boundary upon mere hypothetical evidence.

MOORE, J., took no part in the hearing or disposition of this case.

APPEALS by plaintiff from *Parker, J.*, April 1962 Civil Term, CARTERET Superior Court.

The plaintiff instituted three civil actions, as entitled above, in the Superior Court of Onslow County on February 27, 1958. The complaint in each action alleges the plaintiff is the owner of a tract of land, giving the boundaries by course and distance. In the case against Godwin and Blanchard, the complaint alleges the defendants have trespassed upon the described lands, claiming title thereto under a purported deed from S. G. Blake. The plaintiff prays that he be declared to be the owner of the land and that he recover damages for the trespass; and that the Blake deed be removed as a cloud upon his title.

In the case against International Paper Company, the complaint alleges the defendant claims an interest in the land by reason of a purported deed through Mead and Manucy which constitutes a cloud upon his title. Plaintiff prays that he be declared to be the owner and that the cloud be removed from his title.

In the case against Blanchard and Godwin, the complaint alleges the defendants have wrongfully entered upon the same tract involved in the *International Paper Company* case, trespassed thereon by setting up a sawmill, cutting and removing timber of the value of $11,000.00. The plaintiff prays that he be declared to be the owner of

the land and that he recover double damages because of the trespass thereon.

All the defendants, by answer, denied both title in the plaintiff and the trespass upon any of his lands. At the January Term, 1959, the court, upon motion of the defendants, removed the cases to Carteret County for trial. At the May Term, 1960, (Carteret County) Judge Paul entered an order consolidating the three cases for trial. At that term the parties entered into the following stipulations:

"1. Plaintiff's position and contention in these suits are that he is the owner of the lands described in his complaint, his title dating back to the Allison Grant of 1795; that the Western boundary of the lands described in the petition is the true boundary between Pender (New Hanover) and Onslow Counties, as of 1795; that the western boundary of plaintiff's lands is as shown by the Line A-C on the map attached to that certain judgment entered in the Superior Court of Sampson County in 1938, in an action entitled *'Nathan O'Berry, Trustee, against William Pierce, et al.'*;

"2. The defendants' positions and contentions are that they are the owners of lands in Pender County, their title dating back to the Daniel Wheaton Grant of 1794, and that the Eastern boundary of their lands is the true boundary between New Hanover (now Pender) and Onslow Counties as it existed in 1794; that the line A-C as shown on the map referred to in the judgment entered in 1938 in the Sampson County Superior Court in the suit entitled *'Nathan O'Berry, Trustee, v. William Pierce, et al.,'* does not correctly locate the true boundary line of Pender (New Hanover) and Onslow Counties as of 1794.

* * *

"4. That in these three actions, the lands claimed by plaintiff and out of which these actions arise, lie East of the line marked A-C as such line appears on the map forming a part of the judgment roll of the Sampson County Superior Court case in 1938.

"5. It is stipulated and agreed:

(a) That the photostatic copy of the petition entitled *'Nathan O'Berry, Trustee, against William Pierce,'* initialed 'J. E.,' is a copy of the petition in the said cause as captioned and may be admitted in evidence as if it were an original pleading:

(b) That the map captioned 'Holly Shelter Area,' showing lands of North Carolina State Board of Education, *et. al.*, made by G. B. Cooper and L. E. Wooten, dated June 1928 on which certain red markings appear, is the map or a copy of said map referred to in

the judgment referred to in stipulations aforementioned; that the lands described in the petition in the registered proceeding, *'Nathan O'Berry against William Pierce, et al.,' does not embrace the lands described in the complaints in these causes."* (emphasis added)

At the June Term, 1960, Judge Paul, upon his own motion, entered an order of compulsory reference, designating Hon. Oliver Carter, Jr., as referee. All parties excepted to the order of reference and demanded a jury trial.

The referee, after long and tedious hearing, made detailed findings of fact, among which are the following: "Plaintiff failed to locate the beginning point of the David Allison Grant, 'a cypress near Sages in the county line, a corner of James Carroway and Daniel Wheaton's land.' He did not offer any evidence tending to locate the cypress. He did not offer any substantive evidence tending to locate James Carroway's or Daniel Wheaton's corner. The plaintiff did not locate the second corner of the David Allison Grant, 'the 12-mile post on the road from Snead's Ferry to Sages.'

"Plaintiff did not offer evidence sufficient to locate and establish definitely any corner of the Allison Grant land from which the lines could be run with certainty forward or from which a survey in reverse would make certain the forward running of any of the lines.

"The line A-C . . . the 'Judgment County Line' in the Torrens Proceeding . . . is not the county line called for in the Allison grant description as the western line thereof."

From the findings of fact, the referee concluded as a matter of law: (1) The plaintiff has failed to show the lands described in his complaint are embraced in the Allison Grant. (2) He has failed to show title in himself either by adverse possession or by estoppel. The referee filed his report together with a transcript of the evidence taken before him, and upon the basis thereof recommended that the plaintiff be nonsuited and his three actions dismissed. The plaintiff filed exceptions to the referee's report and demanded a jury trial.

Judge Parker, after hearing, overruled the exceptions, confirmed the report, entered a consolidated judgment of nonsuit, and dismissed each action. The plaintiff excepted and appealed.

Ellis, Godwin & Hooper; Poisson, Marshall, Barnhill & Williams; Hamilton, Hamilton & Phillips and Paul G. Sylvester for plaintiff appellant.

Wyatt E. Blake, E. E. Butler, and C. R. Wheatly, Jr., for defendants, appellees.

HIGGINS, J. The consolidated judgment dismissed the plaintiff's three actions because of his failure to prove title to any of the lands described in his pleadings. In actions involving land, a denial places upon the claimant the burden of establishing his title by one of the methods recognized by law. *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142; *Paper Co. v. Cedar Works,* 239 N.C. 627, 80 S.E. 2d 665; *Meeker v. Wheeler,* 236 N.C. 172, 72 S.E. 2d 214; *Keen v Parker,* 217 N.C. 378, 8 S.E. 2d 209.

In these cases the plaintiff stipulated that his title had its source in Grant No. 732 for 78,115 acres issued by the State in 1795 to David Allison. Plaintiff introduced in evidence a photostatic copy of the Grant, to which was attached the surveyor's plat showing all perimeter lines and corners: "Beginning at a cypress near Sages in the county line, a corner of James Carroway's and Daniel Wheaton's land on said county line, and runs South 49 East 480 poles to the 12-mile post on the road from Snead's Ferry to Sages." Then follow 26 calls, many of which are for corners of adjoining lands. The three closing calls are: "South 75 West 540 poles to a stake in Joshua Howard's line; then West to New Hanover County line and with said line South to the Beginning."

The defendants stipulate their titles have their source in a grant issued to Daniel Wheaton in 1794. The Wheaton Grant was not introduced in evidence.

It is apparent from the stipulations and the calls of the Allison Grant that the two grants cover contiguous lands, Allison on the east and Wheaton on the west. Consequently the senior grant (Wheaton) controls in case of conflict. The junior, regardless of the call, must stop at the Wheaton line. The plaintiff has made the mistake of attempting to locate the western line of the Allison Grant by surveying, or attempting to survey, the calls of that grant. He may locate the line only by surveying the Wheaton line for which the Allison Grant calls. "A description contained in a junior conveyance cannot be used to locate the lines called for in a prior conveyance." *Carney v. Edwards,* 256 N.C. 20, 122 S.E. 2d 786; *Harris v. Raleigh,* 251 N.C. 313, 111 S.E. 2d 329; *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326. Resort may not be had to a junior conveyance for the purpose of locating a call in a senior deed. *Bostic v. Blanton,* 232 N.C. 441, 61 S.E. 2d 443.

As pointed out in the referee's report, the plaintiff was unable to establish the calls in the Allison Grant and hence was unable to identify his source of title as covering the land he claims. ". . . a plaintiff must offer evidence which fits the description contained in his deed to the land claimed. . . . If one or more of his deeds convey less than the whole, he must show that the land conveyed thereby is within the

bounds, and forms a part, of the *locus in quo.*" *Skipper v. Yow,* 238 N.C. 659, 78 S.E. 2d 600; *Parsons v. Lumber Co.,* 214 N.C. 459, 199 S.E. 626. "Whether relying on their deed as proof of title or color of title, they were required to locate the land fitting the description in the deeds to the earth's surface." *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786; *Batson v. Bell,* 249 N.C. 718, 107 S.E. 2d 562.

For the reasons assigned by the referee the defendants are not estopped by the Torrens judgment. The petition does not cover the lands in dispute. Neither the plaintiff nor the defendants, actually or by privity, occupied adversary positions in the proceeding. Their rights, as among themselves, were not placed in issue by their pleadings. On the issues raised in this case the Torrens judgment is not an estoppel. "A judgment ordinarily settles nothing as to the relative rights and liabilities of the coplaintiffs or codefendants *inter se,* unless their hostile or conflicting claims were actually brought in issue, litigated and determined." *Gunter v. Winders,* 253 N.C. 782, 117 S.E. 2d 787, citing many authorities.

Plaintiff's testimony that the lands in dispute are within the Allison Grant is rendered without probative force by his lack of knowledge as to the location of the lines of that Grant, one of which is the Onslow-New Hanover (now Pender) County line. When counsel for defendants cross-examined plaintiff with respect to the county line as fixed by the Legislature, he testified: "Those are the boundaries defined by the originial act setting up the county in 1734. . . . That is the only legislative description that has ever been made of the county. It has since been changed by the sentiment of the people in the area not covered by the description at all."

Neither plaintiff nor his surveyor has ever attempted to survey the Allison Grant or the Wheaton Grant, the latter of which controls as the prior conveyance. Therefore, plaintiff cannot testify that his land is within the Allison Grant. *Etheridge v. Wescott,* 244 N.C. 637, 94 S.E. 2d 846.

Instead of making an actual survey of the Allison Grant, the plaintiff's surveyor attempted to superimpose the plat attached to the grant upon an aerial photograph of the section of Onslow and Pender Counties involved. Having failed to locate the crucial corners and lines upon the ground, he does not explain and the record does not disclose how he may be able to do better on a picture or a drawing. "It is error to allow a jury on no evidence, or only on hypothetical evidence, to locate the lands described in a deed." *Skipper v. Yow, supra.*

The plaintiff has failed to show that he holds title to the lands in dispute. The consolidated judgment entered in the superior court is Affirmed.

MOORE, J., having participated in one of the hearings while he was Superior Court Judge, does not take part in the hearing and disposition in this Court.

SAFIE BROTHERS COMPANY, INC. v. SEABOARD AIR LINE RAILROAD COMPANY, R. H. McDOUGALD, AND W. C. DIGGS.

(Filed 11 January 1963.)

1. Railroads § 12—

Employees of a railroad company in charge of the operation of its trains are under duty to keep a careful and continuous lookout along the track and will be held to the duty of seeing that which they should see in the exercise of ordinary care in the performance of this duty.

2. Same—

A ramp connecting plaintiff's building over a spur track was so constructed that it had to be raised several feet by electric hoists to provide clearance for defendant's engines, and this situation had existed for several years to defendant's knowledge. On a clear day while the ramp was down, defendant's brakeman flagged defendant's engine forward and the engineer drove the engine into the ramp, resulting in the damage in suit. *Held:* The members of defendant's crew should have seen that the ramp was not raised for clearance, and the railroad company is liable for their negligence in this respect under the doctrine of *respondeat superior.*

3. Same—

The contract between plaintiff and defendant railroad required plaintiff to provide 22 feet clearance above a spur track. Plaintiff constructed a ramp over the track which had to be raised several feet by electric hoists to provide the required clearance, and this condition had existed for a number of years to the railroad's knowledge. Defendant's train was driven against the ramp while it was in the lowered position. *Held:* Plaintiff cannot be held contributorily negligent as a matter of law in failing to maintain the required clearance at all times, since defendant knew of the condition and could have avoided damaging the ramp in the exercise of due diligence.

APPEAL by plaintiff from *Gambill, J.,* 12 February 1962 Term of RICHMOND.

Civil action to recover damages to a ramp connecting two buildings of plaintiff's manufacturing plant, allegedly caused by defendants' negligence.

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

Pittman, Pittman & Pittman by W. G. Pittman for plaintiff appellant.

Henry & Henry by Ozmer L. Henry for defendant appellees.

PARKER, J. Plaintiff offered evidence to this effect:

Plaintiff owns a large manufacturing plant in East Rockingham. Two of its buildings are about 45 feet apart. A ramp built of steel and lumber connected the two buildings for the purpose of facilitating the passage of persons, goods, and supplies. The corporate defendant operates an extensive railroad system, the main line of which passes by plaintiff's plant. A spur track branches off its main line, and passes onto plaintiff's premises and between plaintiff's two buildings connected by the ramp and under the ramp to serve the shipping needs of plaintiff, and before plaintiff of its predecessor in title. The ramp was across the railroad tracks in 1926, and has been since, and during that time engines and cars of the corporate defendant passed under it.

The first floor or story of the ramp had a passageway from the first floor of one building to the other, and was swung open manually to clear the spur track so an engine and cars of the corporate defendant could pass through. The second floor or story of the ramp connecting the No. 2 mill and the weave shed was remodeled after 1954, so that its floor could be raised 3½ or 4 feet by two electric hoists for an engine and cars of the corporate defendant to pass under it, and also lowered.

Prior to 7 December 1957 plaintiff had a supply clerk, who, when an engine and cars of the railroad came on the spur track, went out and operated the electric hoists to raise the second floor of the ramp for the railroad's engine and cars to pass under it. In December 1957 plaintiff closed its plant. After the closing of the mill, W. L. Adcock, superintendent and general manager of plaintiff's plant, showed the corporate defendant's trainmen how to operate the electric hoists. After December 1957 an engine and cars of the corporate defendant came on plaintiff's premises and under the ramp some weeks two or three times, sometimes once a week, and sometimes four times a week.

On 14 October 1960 an engine and cars of the corporate defendant, with R. H. McDougald as engineer and W. C. Diggs as flagman, entered the spur track and plaintiff's premises. The second floor of the ramp

was down—not raised. The engine operated by the engineer in attempting to pass under the ramp hit it and went through it about a foot causing it substantial damage. When the engine stopped, the steel, wood, and all the middle section of the part of the ramp, that raised for the engine and cars to pass under, was lying down on the front of the engine.

W. L. Adcock was called to the scene. It was about 11:00 a.m., and the weather was fair. He testified, without objection by defendants: "I had a conversation that morning with Mr. Diggs in the presence of Mr. McDougald. We were talking there in front of the engine and talking about what happended and he said he either stepped down off the train or stopped the train before he entered under the ramp. He said he thought it was up and he run in and just knocked it out. He flagged the Engineer on under the ramp. Mr. Diggs made the statement that he just thought it was raised up and it wasn't and that he just flagged the Engineer on under it and hit it and knocked it down, run on in."

Defendants elicited from W. L. Adcock on cross-examination evidence in substance: He read in the contract between plaintiff and the railroad company that in respect to structures over the track, the shipper will provide a vertical clearance of 22 feet above the top of the rail. When the platform of the second story of the ramp was down, there was not a 22-foot clearance, and the train could not go under it. A fence enclosed the mill. There was a gate at the spur track, and the contract provided the gate would be kept locked, and the railroad had a key and plaintiff had a key.

Plaintiff alleges in substance in its complaint that Diggs, the flagman, failed to exercise ordinary care to see that the second floor of the ramp was down, and, without exercising such ordinary care, negligently and carelessly flagged the engineer to go forward, that McDougald, the engineer, negligently drove his engine forward and through the ramp, when in the exercise of ordinary care he could have seen the second floor of the ramp was down, and that such negligence on the part of the corporate defendant's agents in the performance of their duties in the operation of the engine caused the engine to run into and hit the ramp, thereby proximately causing the damage complained of.

Defendants in their joint answer denied negligence, and conditionally pleaded as a bar to any recovery by plaintiff that it was guilty of negligence in not providing as required by contract a vertical clearance of 22 feet above the top of the rails of the track, thereby contributing proximately to the damage to its ramp.

In *Sawyer v. R.R.*, 145 N.C. 24, 58 S.E. 598, the Court said: "And it is well established that the employees of a railroad company engaged in operating its trains are required to keep a careful and continuous

outlook along the track, and the company is responsible for injuries resulting as the proximate consequences of their negligence in the performance of this duty. *Bullock v. R.R.*, 105 N.C. 180; *Deans v. R.R.*, 107 N.C. 686; *Pickett v. R.R.*, 117 N.C. 616."

In *Tippite v. R.R.*, 234 N.C. 641, 68 S.E. 2d 285, the Court said: "It was, therefore, the duty of the defendant to exercise reasonable care and diligence and to keep a proper and sufficient lookout along its tracks in front of these residences so as to avoid injuring the children of its tenants. On this question the Court has said: 'In *Pickett v. R.R.*, 117 N.C. 634; *Lloyd v. R.R.*, 118 N.C. 1012, and a long line of similar cases, it is held that it is the duty of the *defendant* to keep a proper lookout. It is not held anywhere that such lookout as the engineer may be incidentally able to give, will relieve the company, if that lookout is not a proper lookout.' *Arrowood v. R.R.*, 126 N.C. 629, 36 S.E. 151; *Jeffries v. R.R.*, 129 N.C. 236, 39 S.E. 836."

In *Wall v. Bain*, 222 N.C. 375, 23 S.E 2d 330, the Court said: "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."

In *Tibbetts v. Harbach*, 135 Me. 397, 198 A. 610, the Supreme Judicial Court of Maine tersely and accurately said: "An automobile driver is bound to use his eyes, and to see seasonably that which is open and apparent and govern himself suitably."

In our opinion, and we so hold, the duty required in this jurisdiction of the employees of a railroad company engaged in operating its trains to keep a careful and continuous lookout along the track holds these employees to the duty of seeing what in the exercise of ordinary care they ought to have seen, or, to use the language of the Maine Court, they are bound to use their eyes, and to see seasonably that which is open and apparent and govern themselves suitably.

Under the facts shown by plaintiff's evidence, which we accept as true in considering the motion for judgment of compulsory nonsuit, *Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184, the defendants knew that the second floor of the ramp, when it was down, did not give 22 feet of clearance above the top of the rails of the spur track, and that since 1954 the second floor of the ramp had to be raised by electric hoists for an engine and cars of the railroad company to pass under it in safety, and that since 1954 the railroad company constantly had entered the spur track and gone under the ramp after its second floor was raised by electric hoists, and consequently, they could not assume, and act on the assumption, that the ramp was constructed so as to provide a 22-foot clearance above the rails of the spur track. *Weavil v. Myers*, 243 N.C. 386, 391, 90 S.E. 2d 733, 737. Considering plaintiff's

evidence in the light most favorable to it, and giving it the benefit of every reasonable inference to be drawn therefrom, it would permit a jury to find that McDougald and Diggs, engineer and flagman respectively of the corporate defendant's engine and cars, negligently failed to keep a proper lookout in operating its engine and cars on the spur track, that by reason of such negligence any ordinarily prudent man should have foreseen that consequences of a generally injurious nature should have been expected, that because of their negligent failure to keep a proper lookout they did not see in plain and open view on a fair day that the second floor of the ramp was down, that under those circumstances the engine and cars went ahead and hit and tore down the middle part of the second floor of the ramp, that such negligence on their part was the proximate cause of damage to the ramp, and that the railroad company is responsible for their actionable negligence under the doctrine of *respondeat superior.*

Defendants contend that even if they were negligent, which they deny, then plaintiff was guilty of contributory negligence barring any recovery by it on the ground that plaintiff in breach of its contract constructed and maintained its ramp without providing a 22-foot clearance above the rails of the spur track, and that this is shown by the testimony of plaintiff's witness Adcock on cross-examination, and by the pleadings.

West Construction Co. v. R.R., 185 N.C. 43, 116 S.E. 3, is in point. The fourth headnote in our Reports states:

> "Defendant railroad company put a spur track on plaintiff's land, to be used in supplying the latter's plant with material for manufacture, under a written agreement that plaintiff would not erect a building nearer than a certain distance from the defendant's track, etc. There was evidence tending to show that the defendant continued to operate on this spur track, and knew or should have known that a certain building was nearer the track than the contract permitted, with further evidence that by the exercise of proper care the defendant's employees could have avoided running a box car across the end of the rails, and injuring the building, for which damages are sought in the action: *Held,* it was for the jury to determine whether the negligence of the plaintiff was such contributory negligence as would bar his recovery, and defendant's motion as of nonsuit was properly overruled."

In the opinion the Court said: "Again, even if the plaintiff was negligent in constructing the buildings in breach of the contract, still if the defendant, with knowledge of the danger, could have avoided the injury by the exercise of ordinary care, and failed to use such care, the

negligence of the defendant and not that of the plaintiff would be deemed the proximate cause."

Even if plaintiff was negligent in constructing and maintaining the ramp without providing a 22-foot clearance above the rails of the spur track required, as defendants contend, by the contract, still according to plaintiff's evidence the defendants had full knowledge of such contended breach, and under the law as stated in the *West Construction Co.* case, defendants would not be entitled to a judgment of involuntary nonsuit on the ground of contributory negligence of plaintiff. Surely, plaintiff has not proved itself out of court on the ground of contributory negligence. *Lincoln v. R.R.*, 207 N.C. 787, 178 S.E. 601.

Plaintiff's evidence makes out a case for the jury as to all the defendants. The judgment of compulsory nonsuit below is

Reversed.

A. L. JARRELL v.
BOARD OF ADJUSTMENT FOR CITY OF HIGH POINT.

(Filed 11 January 1963.)

1. Municipal Corporations § 26; Administrative Law § 4—

Provisions for review of decision of a municipal board of adjustment denying petitioner's claim of right as a matter of law to continue a nonconforming use under the provisions of the municipal zoning ordinance, G.S. 160-178, must be equal to that provided by G.S. 143-307 in order to constitute adequate provision for judicial review.

2. Municipal Corporations § 25; Administrative Law § 3—

While a hearing of a municipal administrative board in determining a claim of legal right upon controverted questions of fact may be informal, such hearing must be governed by established rules of procedure applicable generally to administrative tribunals, and no essential element of a fair trial can be dispensed with, and the board may not over the objection of petitioner base its findings upon hearsay evidence or the unsworn statements of witnesses.

3. Municipal Corporations § 26; Administrative Law § 4—

Where the findings of fact of an administrative board in a hearing upon a claim of right to use property for certain purposes under the zoning ordinance of a city are not based on competent evidence, the proceedings must be remanded.

APPEAL by petitioner from *Crissman, J.*, April 30, 1962 Civil Term of GUILFORD, High Point Division.

Miss Annie Lee Jarrell, referred to herein as petitioner, applied for and obtained a writ of *certiorari* to review a decision of the High Point Zoning Board of Adjustment (hereafter referred to as Board) with reference to her property at 709 Centennial Avenue, High Point, within the area zoned as Residence A-2 District. The hearing before Judge Crissman was on a record of the proceedings before the Board as certified by the "Director of Planning," who, as "Executive Secretary," signed (along with the chairman) the minutes of the meetings of the Board.

The record shows the Building Inspector, under date of August 22, 1961, wrote Charles Jarrell as follows:

> "On August 4, 1961, you secured a permit from this office in the name of Miss Annie Lee Jarrell, to make certain alterations and add a bathroom at 709 Centennial Avenue. You stated at that time your intention to rent this house to two (2) families and further stated that it had been rented as a two (2) family residence almost continuously for twenty-five (25) years. It is true there are two (2) sinks and according to information two (2) families has (*sic*) occupied this house at one time or another in the past.
>
> "The matter has been brought before this office in the form of signed affidavits that in the more recent years this house has been occupied by only one family. According to Section 22-24, Subsection (E) of the High Point Zoning Ordinance, states that when the non-conforming use of a building has been discontinued for one year, such non-conforming use shall not be re-established. On the basis of these affidavits and the information that has come to me, in my opinion to re-establish this house as a two (2) family residence, it would be in violation of the Zoning Ordinance, and such use could not be permitted.
>
> "Under Section 22-58, Sub-section (N), the Board of Adjustment has the authority to permit the resumption of the non-conforming use, and I would suggest that you exercise your right in appealing my decision to the Board of Adjustment for further clarification of this matter. I respectfully solicit your cooperation in this matter."

The record shows that, under date of December 1, 1961, petitioner, by Harriss H. Jarrell, her attorney, gave notice of appeal from said ruling of the Building Inspector.

The record consists largely of the minutes of the meetings of the Board of Adjustment held December 14, 1961, December 28, 1961,

January 11, 1962, and January 25, 1962. A brief narrative of the gist of statements of several persons who appeared before the Board of Adjustment, including counsel for petitioner and counsel for protestants, is included in the minutes. In addition, certain affidavits are included in the record. The said statements and affidavits relate principally to (1) the original room arrangement of the six-room dwelling, (2) recent structural alterations, and (3) by whom and under what arrangement the house had been occupied from time to time across the years.

In said meetings, B. C. Denning, who resided at 711 Centennial Avenue, and (apparently) others, herein referred to as protestants, appearing in person and by counsel, opposed petitioner's asserted right to use her property as a two-family residence.

The minutes of the January 25, 1962, meeting of the Board conclude as follows:

> "The Board of Adjustment, having heard evidence in the form of verbal testimony, affidavits, letters and records, over a period of four sessions, felt that it was time to make a determination on this matter. The Board has permitted contending sides to introduce voluminous records and testimony without attempting to place any restriction of the basic law of evidence upon what they wanted to present to the Board. Much of the evidence which has been placed into the record is conflicting. The Board was of the opinion that the one basic question to be determined was 'What was the existing use of the premises on 18 November 1947 when the present Zoning Ordinance went into effect?' When this question was determined, the Board would proceed with the question of whether or not the Board under Section 22.58(n) was to determine whether the non-conforming use would be resumed.
>
> "The Board found as a fact: (1) that from the evidence and testimony relating to the use of property by Mr. E. N. Collins, the property was being used and occupied as a single-family unit by him in a single-family area when the present Zoning Ordinance was enacted on 18 November 1947 and was so occupied during the years 1946, 1947 and 1948 and (2) having found the property was not occupied by a non-conforming use when the ordinance went into effect, the Board was without power to grant a non-conforming use of the property as a two-family house in a one-family residential area."

The judgment of Judge Crissman recites, *inter alia*, that the court, after "having reviewed thoroughly the record of the Board of Adjust-

ment," found the evidence sufficient to support its findings, "and having concluded that said Board of Adjustment, as a quasi judicial body, has not acted arbitrarily, oppressively, or with abuse, and that said Board of Adjustment could have found the facts as contended by the petitioner or contrary to the petitioner's contention, thus making such findings conclusive"; and thereupon it was "ORDERED, ADJUDGED AND DECREED THAT the findings of fact in the order of the Board of Adjustment of the City of High Point be and the same are hereby sustained."

Petitioner excepted and appealed.

Harriss H. Jarrell for petitioner appellant.
J. W. Clontz and W. Edmund Lowe for respondent appellee.

BOBBITT, J. We cannot determine to what extent, if any, a provision identifiable as "Section 22.58(n)" of a zoning ordinance is relevant. No ordinance provision so identified appears in the record.

The record contains references to the "original Zoning Ordinance" of March 18, 1926, and to the Zoning Ordinance of November 18, 1947; but these ordinances, with the exception hereafter noted, do not appear in the record. The only ordinance provisions in the record are two excerpts, each relating solely to "nonconforming uses," one apparently from an ordinance adopted in November, 1947, and the other apparently from an ordinance adopted October 7, 1958.

It may be implied that an ordinance prohibits a duplex or two-family residence in the area designated therein as "Residence A-2 District" unless permitted as "a nonconforming use." However, no such ordinance provision appears in the record. Absent evidence of its exact terms, it would be inappropriate to base decision on such ordinance provision.

The Board found as a fact that petitioner's property was being used and occupied as a single-family unit in a single-family area by E. N. Collins "when the present Zoning Ordinance was enacted on 18 November 1947 and was so occupied during the years 1946, 1947 and 1948"; and the Board's decision is based wholly on said finding of fact. In the petition for writ of *certiorari*, and also by exceptions to the court's judgment, petitioner has challenged and now challenges said finding of fact as unsupported by competent evidence.

It is noted that the court recognized that the evidence offered in her behalf, if accepted, would have supported a finding of fact in favor of petitioner.

"The duties of the building inspector being administrative, appeals from him to the board of adjustment present controverted questions of

fact—not issues of fact. Hence it is that the findings of the board, when made in good faith and supported by evidence, are final. *Little v. Raleigh,* 195 N.C. 793. Such findings of fact are not subject to review by the courts." *In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1; *In re Appeal of Hasting,* 252 N.C. 327, 113 S.E. 2d 433.

G.S. 160-178, in part, provides: "Every decision of such board shall, however, be subject to review by proceedings in the nature of certiorari." "The writ of *certiorari,* as permitted by the zoning ordinance statute, is a writ to bring the matter before the court, upon the evidence presented by the record itself." *In re Pine Hill Cemeteries, supra; Chambers v. Board of Adjustment,* 250 N.C. 194, 199, 108 S.E. 2d 211.

G.S. 143-307, in part, provides: "Any person who is aggrieved by a final administrative decision, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute." While G.S. 160-178 provides expressly for a review "by proceedings in the nature of certiorari," this is an "adequate procedure for judicial review" only if the scope of review is equal to that under G.S. Chapter 143, Article 33, 143-306 *et seq.*

The Board based its decision solely upon its finding that Collins used and occupied the property as a single family unit during 1946, 1947 and 1948. Our inquiry is to ascertain the evidential basis, if any, for this finding.

Whether the pertinent High Point Zoning Ordinance prescribes the procedure for the conduct of hearings by the Board does not appear. If not, the hearings must be governed by established rules of procedure applicable generally to administrative tribunals. *Flick v. Gately (Ill.),* 65 N.E. 2d 137.

The persons who made statements at meetings of the Board were not sworn. References in the unsworn statements of certain of these persons as to when and under what circumstances the property was occupied by Collins are brief and vague. However, the Board considered the following: (1) An affidavit that Collins was listed in the High Point City Directory for the years 1944-1948, inclusive, as residing at 709 Centennial Avenue; (2) an affidavit of Mr. Clontz, counsel for protestants, to the effect that Mr. and Mrs. Collins had advised him by telephone that some other people lived with them at 709 Centennial Avenue "at various times from 1941 until 1946, but that during the years 1946, 1947, and through May of 1948, they were the only family in said dwelling house"; and (3) a letter dated January 1, 1962, from Collins to W. Edmund Lowe, counsel for protestants, which was read

by the Chairman of the Board at the January 25, 1962, meeting. Petitioner excepted to the admission and consideration of the Clontz affidavit and the Collins letter.

"While a hearing of this nature may be more or less informal, and technical legal rules of evidence and procedure may be disregarded, no essential element of a fair trial can be dispensed with. The party whose rights are being determined must be given the opportunity to cross-examine witnesses, inspect documents and offer evidence in explanation and rebuttal." *Branch v. Board of Trustees,* 141 N.Y.S. 2d 477; 101 C.J.S., Zoning § 213.

The conclusion reached is that the finding of fact upon which the Board based its decision is "(u)nsupported by *competent,* material, and *substantial* evidence in view of the entire record as submitted." (Our italics) G.S. 143-315(5). Obviously, the Clontz affidavit and the Collins letter were incompetent. Moreover, mindful that "(t)he right to a nonconforming use is a property right," *Brown v. Gerhardt (Ill.),* 125 N.E. 2d 53, 56, it is our opinion, and we so hold, that, absent stipulations or waiver, a board of adjustment may not base critical findings of fact *as to the existence or nonexistence of a nonconforming use* on unsworn statements. *Flick v. Gately, supra.*

We are not presently concerned with questions as to what procedures are appropriate or essential at a hearing for consideration of a petition addressed to the discretion of a board of adjustment. Here, petitioner asserts *a legal right* to a nonconforming use. Whether she has such legal right depends upon factual findings. In our view, in the determination of such factual findings unsworn statements may not be considered either competent or substantial. Absent statutory provision authorizing the chairman or other official of the board of adjustment to administer oaths to witnesses, this must be done by an authorized official.

As to the form and contents of administrative findings, see 42 Am. Jur., Public Administrative Law § 151.

For the reasons stated, the judgment of the court below is vacated; and the cause is remanded for entry of an order setting aside the findings of fact and conclusions of law made by the Board at its January 25, 1962, meeting and directing that a further hearing be held by the Board for a determination, on competent and substantial evidence, of petitioner's asserted rights.

Error and remanded.

WACHOVIA BANK AND TRUST COMPANY, TRUSTEE UNDER THE WILL OF W. C. BEAVANS, v. W. R. BRYANT, ANCILLARY ADMINISTRATOR D.B.N. OF J. RUSSEL BEAVANS, RAYMOND T. BEAVANS, WALTER ANDREW BEAVANS, ELIZABETH BEAVANS SHEPPARD, EUGENE BEAVANS, W. CARY BEAVANS, ANNETTE BEAVANS HARDISON, JOHN D. BEAVANS, SAMUEL C. BEAVANS AND WALTER TRAVIS, GUARDIAN AD LITEM FOR OTHER HEIRS OF W. C. BEAVANS IN POSSE OR IN ESSE, AND ANY OTHER PERSON CLAIMING INTEREST IN THE PROPERTY OR ESTATE OF W. C. BEAVANS, AND W. B. VOLIVA, ASSIGNEE.

(Filed 11 January 1963.)

1. Wills § 27—

The objective of construction of a will is to ascertain testator's intent.

2. Wills § 43—

A devise or bequest to a class requires a *per capita* and not *per stirpes* distribution unless a contrary intent appears from the will construed as a whole.

3. Same—

The will in suit bequeathed property, after a life estate, to testator's nephews and nieces, with further provision that 'the child or children of any deceased nephew or niece to recieve the share the parent would have taken, the said distribution to be *per stirpes* and not *per capita.*" *Held:* Testator's nephews and nieces take *per capita*, there being no reference in the will to testator's deceased brothers, and the provision for *per stirpes* distribution relates solely to children of nephews and nieces.

RODMAN, J., dissenting.
HIGGINS, J., joins in dissent.

APPEAL by the defendants, Elizabeth Beavans Sheppard, Eugene Beavans, W. Cary Beavans, Annette Beavans Hardison, John D. Beavans, Samuel C. Beavans and by the plaintiff, Wachovia Bank and Trust Company, Trustee, from *Crissman, J.*, February 19, 1962 Term of GUILFORD, (High Point Division).

This action was instituted by the executor-trustee pursuant to the Declaratory Judgment Act for the construction of the will of W. C. Beavans who died March 18, 1932, a resident of Guilford County. His will, dated March 14, 1932, was probated March 22, 1932. The Wachovia Bank and Trust Company, the plaintiff, qualified as executor and trustee as provided in the will. The testator was survived by his wife, Julia Beavans, the sole beneficiary of the estate during her lifetime, and the following nine nephews and nieces, all of whom survived his wife: J. Russell Beavans, child of E. R. Beavans, deceased brother of testator; Raymond T. Beavans and Walter Andrew Beavans, children of W. A. Beavans, deceased brother of testator; Mrs.

Elizabeth Beavans Sheppard, Eugene Beavans, Mrs. Annette Beavans Hardison, John D. Beavans and Samuel C. Beavans, children of W. E. Beavans, deceased brother of testator.

On October 6, 1936, Raymond T. Beavans signed and acknowledged before a notary public an instrument whereby he purported to "assign, transfer and set over unto W. B. Voliva of High Point, North Carolina, his heirs and assigns, all of the right, title and interest," which he then had or to which he might thereafter become entitled, in the estate of his uncle, W. C. Beavans, under and by the terms of his will. This instrument was under seal and recited a valuable consideration. Notice of the assignment was accepted by the plaintiff executor-trustee on October 18, 1936. After the death of Julia Beavans, Raymond T. Beavans attempted to repudiate this assignment. J. Russell Beavans died after this action was instituted and his personal representative has been made a party.

In its petition, the executor-trustee has requested the court to pass upon the legality of the assignment executed by Raymond T. Beavans and to instruct it whether the following paragraph of the will required a distribution of the estate to the nephews and nieces per capita or per stirpes:

> "FIFTH: All the rest, residue and remainder of my property of whatsoever kind and wheresoever situate of which I may die seized and possessed, I give, devise and bequeath to my Executor hereinafter named to be held by it as Trustee and to be by it sold and converted into cash as soon as convenient after my decease, and to set apart to itself as Trustee the proceeds of said sale to invest and reinvest the same from time to time, if necessary, and to pay the income arising therefrom, deducting an amount sufficient to meet all expenses, to my said wife, JULIA BEAVANS, every six months, or oftener if it shall deem it best, and upon her decease, to convey and transfer the entire principal sum, with accumulations, if any, discharged of all trust, to my nephews and nieces, the child or children of any deceased nephew and niece to receive the share the parent would have taken, the said distribution to be per stirpes and not per capita."

On March 17, 1933, when the executor-trustee filed its inheritance and estate tax inventory and collected the North Carolina inheritance tax from each of the nephews and nieces, it construed the will to require a distribution per capita. In the brief which it filed with the Court on this appeal, the executor-trustee now contends that the distribution should be per stirpes. The children of W. E. Beavans contend that the distribution between the nephews and nieces should be per capita; W.

B. Voliva contends that it should be per stirpes; the administrators of J. Russell Beavans and W. A. Beavans merely request "a ruling and decision upon the questions set forth in the petition."

The trial judge ruled that Raymond T. Beavans had validly assigned his interest in the estate to W. B. Voliva and that the distribution should be per stirpes and not per capita. The appealing defendants are the children of testator's brother, W. E. Beavans, who would each take a one-ninth share of the estate if distribution is per capita; a one-eighteenth share, if per stirpes. Raymond T. Beavans did not appeal.

Roberson, Haworth & Reese for plaintiff appellee.

Branch and Hux for Samuel C. Beavans, John D. Beavans, Mrs. Annette Beavans Hardison, W. Cary Beavans, Eugene Beavans, and Mrs. Elizabeth Beavans Sheppard, defendant appellants.

John A. Wilkinson for W. B. Voliva, defendant appellee.

SHARP, J. The basic rule of construction, and the refrain of every opinion which seeks to comprehend a testamentary plan, is that "(t)he intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777. Courts have had considerable difficulty in determining whether a testator meant his beneficiaries to take per capita or per stirpes but, out of judicial experience, certain rules have devolved to help solve this perplexity. *Burton v. Cahill,* 192 N.C. 505, 135 S.E. 332.

The general rule, which has been stated and restated innumerable times is that where the devise or bequest is to a class, such as nephews and nieces, the devisees take share and share alike unless it clearly appears that the testator intended a different division. *In re Battle,* 227 N.C. 672, 44 S.E. 2d 212. In an annotation in 16 A.L.R., Wills—Per Stripes or Per Capita, we find the following statement on page 55: "The decisions warrant the generalization that under a bequest to 'nephews and nieces,' as such, no implication arises from the nature of the relationship that they are to take by families." Subsequent annotations will be found at 78 A.L.R. 1403; 126 A.L.R. 174; 13 A.L.R. 2d 1052.

However, appellant Voliva contends that in this case rules of punctuation should override general rules of testamentary construction. The bequest which we construe here is "to my nephews and nieces, the child or children of any deceased nephew and niece to receive the share the parent would have taken, the said distribution to be per stirpes and not per capita." Voliva argues that the last clause modifies nephews and nieces rather than the immediately preceding clause "the child or children of any deceased nephew and niece to receive the share

the parent would have taken"; that the quoted clause, set off by commas, is a parenthetical expression which adds nothing to the provisions since the child or children of a deceased legatee would have taken his share without its inclusion. With this contention or construction we do not agree. Where it is necessary to effectuate the intention of a testator the court may disregard or supply punctuation, *Coppedge v. Coppedge, supra,* but we think the testamentary intent emerges here with the punctuation left as it is.

When a personal pronoun appears in a written passage the identity of the person to whom it refers must often be ascertained by referring back to its antecedent. The rules of English grammer proscribe the use of a pronoun if there can be any doubt about its antecedent. If there is doubt, and no antecedent is mentioned in the passage, it is obvious that evidence *aliunde* would have to be obtained to identify the person represented by the pronoun. In this case, if we were to hold that the nephews and nieces themselves take per stirpes, we would find ourselves looking for the antecedents (the stirpes) outside the will. *Stirp or stirps* means the root or trunk, a person from whom a branch of a family is descended. The term "per stirpes" denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living. *Walsh v. Friedman,* 219 N.C. 151, 13 S.E. 2d 250.

We think the last clause in the provision under consideration modifies the one immediately preceding it and that the testator intended a per capita distribution among the nephews and nieces, the child or children of any deceased nephew or niece to take per stirpes. The testator's gift was to a class, nephews and nieces. He made them the primary legatees after the life estate of his wife — not because they represented a particular brother of his but because they were his nephews and nieces. Not once did he refer to them as children of his deceased brothers nor did he mention his brothers anywhere in the will. No suggestion that they were to take according to stock or root immediately followed the designation of the nephews and nieces as beneficiaries. That direction followed the designation of those who would take if a nephew or niece died before the date for distribution. Testator recognized the nephews and nieces as the stirpes and not their fathers. The names of the fathers, the testator's deceased brothers, and their children first appeared in paragraph five of the plaintiff's petition or instrument. Interpreting this will from its four corners the only person who could take by representation would be "the child or children of any deceased nephew or niece."

We think the intent of the testator is clear from the will itself but, if resort to canons of construction is required, one rule says that dis-

tribution should be per capita unless the entire will discloses a contrary intent. *Burton v. Cahill, supra.*

Punctuation and sentence structure are as individual as the writer himself. Formal writers are likely to follow the tradition of "close" punctuation while the general preference of today is for "open" punctuation in which fewer commas are used. The draftsman of this will, writing a formal document, was undoubtedly following the tradition of "close" punctuation. It would have saved litigation had he written "to my nephews and nieces share and share alike (per capita), the child or children of any deceased nephew or niece to receive his share (per stirpes)"; nevertheless, we think that is what the testator intended.

In the instant case, as stated by Clark, C.J., in *Leggett v. Simpson,* 176 N.C. 3, 96 S.E. 638, and quoted by Stacy, C.J., in *Tillman v. O'Briant,* 220 N.C. 714, 18 S.E. 2d 131: "There is nothing in the will which impairs the usual rule of construction that where a devise is to a class collectively, and not by name to various devisees in the class, all the members of the class take *per capita* and not *per stirpes.*"

The appeal of the plaintiff is dismissed under the authority of *Ferrell v. Basnight,* 257 N.C. 643, 127 S.E. 2d 219.

That portion of the judgment of the lower court directing that distribution among the nephews and nieces of W. C. Beavans shall be per stirpes is reversed. The case is remanded with directions to the Superior Court to enter an order requiring distribution among the nephews and nieces per capita.

Reversed.

RODMAN, J., dissenting: As I read the will, testator intended to provide for a distribution of the trust at his wife's death among his nephews and nieces. By express language he directed "said distribution to be per stirpes and not per capita." The conclusion reached by the majority is, I think, contrary to the testator's intent. Hence my vote is to affirm.

HIGGINS, J., joins in this dissent.

HILDA CALAHAN GILLISPIE v. GOODYEAR SERVICE STORES, A DIVISION OF THE GOODYEAR TIRE & RUBBER COMPANY, AND THE GOODYEAR TIRE & RUBBER COMPANY, A CORPORATION, AND O. J. HARTSELL, ROBERT E. HARDEN, MELVIN WRENN, AND ARTHUR JONES.

(Filed 11 January 1963.)

1. Assault and Battery § 3; Trespass § 5—

An action for an assault and for a trespass arising out of a single transaction together with all parties sought to be held liable therefor may be joined in a single action.

2. Pleadings § 2—

While a complaint should state in a plain and concise manner only the ultimate and issuable facts determinative of plaintiff's right to relief, the complaint must state the ultimate facts with sufficient particularity to disclose the basis and nature of the cause of action, and allegations merely to the effect that defendants committed a trespass and assaulted plaintiff state conclusions of law and not the predicate facts upon which such causes of action may be maintained, and are therefore insufficient to withstand demurrer. G.S. 1-122.

3. Pleadings § 12—

A demurrer does not admit the pleader's conclusion of law.

APPEAL by plaintiff from *Mintz, J.*, July 16, 1962 Civil Term of ALAMANCE.

The hearing below was on demurrers to the complaint.

Plaintiff alleges she and each of the four individual defendants are citizens and residents of Alamance County, North Carolina; that defendant Goodyear Tire & Rubber Company is a corporation doing business in North Carolina and having a place of business and store in Burlington, North Carolina; and that Goodyear Service Stores is a division of defendant Goodyear Tire & Rubber Company.

The remaining allegations of the complaint and the prayer for relief are as follows:

> "4. On or about May 5, 1959, and May 6, 1959, the defendants, without cause or just excuse and maliciously came upon and trespassed upon the premises occupied by the plaintiff as a residence, and by the use of harsh and threatening language and physical force directed against the plaintiff assaulted the plaintiff and placed her in great fear, and humiliated and embarrassed her by subjecting her to public scorn and ridicule, and caused her to be seized and exhibited to the public as a prisoner, and to be confined in a public jail, all to her great humiliation, embarrassment and harm.

"5. By reason of the defendants' malicious and intentional assault against and humiliation of the plaintiff, the plaintiff was and has been damaged and injured in the amount of $25,000.00

"6. The acts of the defendants as aforesaid were deliberate, malicious, and with the deliberate intention of harming the plaintiff, and the plaintiff is entitled to recover her actual damages as well as punitive damages from the defendants and each of them.

"THEREFORE, the plaintiff prays that she have and recover of the defendants the sum of $25,000.00 as damages and $10,000.00 in addition thereto as punitive damages, and that she have such other and further relief as may be just and proper."

Separate demurrers were filed by: (1) defendants Goodyear Tire & Rubber Company, Goodyear Service Stores, a division of Goodyear Tire & Rubber Company, and O. J. Hartsell; (2) defendant Robert E. Harden; (3) defendant Melvin Wrenn; (4) defendant Arthur Jones. Although different in phraseology, each demurrer specifies two grounds of objection to the complaint, namely, (1) that the complaint does not state facts sufficient to constitute a cause of action, and (2) that there is a misjoinder of parties and causes of action.

The court entered a separate judgment with reference to each of said four demurrers. In each judgment, after a recital of the said grounds on which the demurrer was based and a recital that the court was of the opinion "that said demurrer should be sustained," it was "ORDERED, ADJUDGED and DECREED that said demurrer be and the same is hereby sustained and the court, in its discretion, grants unto said plaintiff thirty (30) days within which to file amended complaint."

Plaintiff excepted to each of said four judgments and appealed.

Robert S. Cahoon for plaintiff appellant.

McLendon, Brim, Holderness & Brooks for defendant appellees Goodyear Service Stores, Goodyear Tire & Rubber Company and O. J. Hartsell.

Allen & Allen for defendant appellees Robert E. Harden and Melvin Wrenn.

Spencer B. Ennis, Long, Ridge, Harris & Walker and Herbert F. Pierce for defendant appellee Arthur Jones.

BOBBITT, J. Where there is a misjoinder of parties and causes of action, a judgment sustaining a demurrer to the complaint *on that ground* necessitates a dismissal of the action. *Tart v. Byrne,* 243 N.C. 409, 90 S.E. 2d 692; *Snotherly v. Jenrette,* 232 N.C. 605, 61 S.E. 2d 708, and cases cited.

The judgments now under consideration do not specify the ground on which the demurrers were sustained. However, the fact the court did not dismiss the action but granted plaintiff leave to file an amended complaint indicates the court sustained the demurrers on the ground the complaint did not state facts sufficient to constitute a cause of action. Be that as it may the allegations of the complaint do not disclose a misjoinder of parties and causes of action. If it be assumed that plaintiff has alleged more than one cause of action, all defendants, under plaintiff's allegations, are parties to all such causes of action.

Does the complaint state *facts* sufficient to constitute *any* cause of action?

A complaint must contain "(a) plain and concise statement of the facts constituting a cause of action . . ." G.S. 1-122. "The cardinal requirement of this statute . . . is that the facts constituting a cause of action, rather than the conclusions of the pleader, must be set out in the complaint, so as to disclose the issuable facts determinative of the plaintiff's right to relief." *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193. The cause of action consists of the facts alleged. *Lassiter v. R.R.,* 136 N.C. 89, 48 S.E. 642; *Skipper v. Cheatham,* 249 N.C. 706, 709, 107 S.E. 2d 625; *Wyatt v. Equipment Co.,* 253 N.C. 355, 361, 117 S.E. 2d 21. The statutory requirement is that a complaint must allege the material, essential and ultimate facts upon which plaintiff's right of action is based. *Chason v. Marley,* 223 N.C. 738, 28 S.E. 2d 223, and cases cited. "The law is presumed to be known, but the facts to which the law is to be applied are not known until properly presented by the pleading and established by evidence." McIntosh, North Carolina Practice and Procedure, § 379.

The facts alleged, but not the pleader's legal conclusions, are deemed admitted when the sufficiency of the complaint is tested by demurrer. *Stamey v. Membership Corp.,* 247 N.C. 640, 645, 101 S.E. 2d 814. "Where the complaint merely alleges conclusions and not facts, it fails to state a cause of action and is demurrable. G.S. 1-127(6)"; *Broadway v. Asheboro,* 250 N.C. 232, 233, 108 S.E. 2d 441. However, it is well settled that a complaint must be fatally defective before it will be rejected as insufficient, and "if any portion of it or to any extent it presents *facts* sufficient to constitute a cause of action the pleading will stand." (Our italics) *Snotherly v. Jenrette, supra,* p. 608; *Buchanan v. Smawley,* 246 N.C. 592, 595, 99 S.E. 2d 787.

When a complaint alleges defendant is indebted to plaintiff in a certain amount and such debt is due, but does not allege in what manner or for what cause defendant became indebted to plaintiff, it is demurrable for failure to state facts sufficient to constitute a cause of action. *Moore v. Hobbs,* 79 N.C. 535; *Griggs v. Griggs,* 213 N.C. 624, 627, 197 S.E. 165.

"The liability for tort grows out of the violation of some legal duty by the defendant, not arising out of contract, and the complaint should state facts sufficient to show such legal duty and its violation, resulting in injury to the plaintiff. What these facts are must depend upon the elements which go to make up the particular tort complained of, under the substantive law." McIntosh, North Carolina Practice and Procedure, § 388, where, with reference to various tort actions, the requirement that the facts be alleged is discussed.

"In an action or defense based upon negligence, it is not sufficient to allege the mere happening of an event of an injurious nature and call it negligence on the part of the party sought to be charged. This is necessarily so because negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged." *Shives v. Sample, supra; Stamey v. Membership Corp., supra; Skipper v. Cheatham, supra; Wyatt v. Equipment Co., supra; Myrtle Apartments v. Casualty Co.*, 258 N.C. 49, 127 S.E. 2d 759. In each of these cases, the complaint was held demurrable for failure to state facts sufficient to constitute a cause of action.

In *Letterman v. Mica Co.*, 249 N.C. 769, 107 S.E. 2d 753, a demurrer was sustained on the ground the facts alleged were insufficient to support the plaintiff's allegation that the injury they sustained was proximately caused by wrongful conduct of the defendants.

As stated by Barnhill, J. (later C.J.), in *Parker v. White*, 237 N.C. 607, 610, 75 S.E. 2d 615: "The competency of evidence, the form of the issues, and the charge of the court are all controlled in very large measure by the nature of the cause of action alleged by plaintiff. Hence, the trial judge, as well as the defendant, must know the exact right plaintiff seeks to assert or the legal wrong for which he seeks redress before there can be any intelligent trial under the rules of procedure which govern our system of jurisprudence."

Plaintiff alleges, in a single sentence, that defendant, "without cause or just excuse and maliciously," trespassed upon premises occupied by her as a residence, assaulted her and caused her to be seized and confined as a prisoner. The complaint states no facts upon which these legal conclusions may be predicated. Plaintiff's allegations do not disclose *what* occurred, *when* it occurred, *where* it occurred, *who* did *what*, the relationships between defendants and plaintiff or of defendants *inter se*, or any other factual data that might identify the occasion or describe the circumstances of the alleged wrongful conduct of defendants.

A plaintiff must make out his case *secundum allegata. Lucas v. White*, 248 N.C. 38, 42, 102 S.E. 2d 387. There can be no recovery ex-

cept on the case made by his pleadings. *Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786. Here, there is no factual basis to which the court could apply the law. When considered in the light most favorable to plaintiff, this complaint, in our opinion, falls short of minimum requirements.

In *Stivers v. Baker* (Ky.), 9 S.W. 491, it was held that a petition alleging the defendant unlawfully assaulted the plaintiff, thereby putting him in great fear, but not stating how the assault was made, stated a mere conclusion of law and was demurrable as not stating facts constituting a cause of action as required by the Kentucky statute. The court, in opinion by Holt, J., points out that a statement of the facts constituting a cause of action "is not only necessary to enable the opposite party to form an issue, and to inform him of what his adversary intends to prove, but to enable the court to declare the law upon the facts stated. It cannot do so if a mere legal conclusion is stated. The term 'assault' has a legal meaning; as much so as the word 'trespass.'" In *Shapiro v. Michelson*, 47 S.W. 746, the Court of Civil Appeals of Texas, in opinion by Fisher, C.J., said: "The use of the expression 'assaulted' is not the averment of a fact, but is simply a statement which expresses the conclusion of the pleader."

The judgments sustaining the demurrers are affirmed on the ground the complaint does not state facts sufficient to constitute any cause of action. It would seem appropriate that plaintiff, in accordance with leave granted in the judgments from which she appealed, now file an amended complaint and therein allege the facts upon which she bases her right to recover.

Affirmed.

STATE v. LOUISE LONG LANGLOIS.

(Filed 11 January 1963.)

1. Criminal Law § 101—

The burden is on the State in a criminal prosecution to prove the *corpus delicti* and that defendant is the person who committed the offense.

2. Same—

In order to be sufficient to overrule nonsuit, the State's evidence must raise more than a conjecture of defendant's guilt, and evidence which merely establishes the possibility that defendant committed the offense is insufficient.

3. Homicide § 20—

Evidence that defendant's child died from peritonitis caused by some sharp or severe blow to the abdomen, that defendant had been seen on several occasions to punish the child severely, that the body of the child was covered with bruises and lacerations, with some evidence of defendant's silence in the face of accusations with respect to mistreatment of the child, but no evidence of any accusations made in the presence of defendant that defendant struck the particular blow causing the death, *is held* insufficient to be submitted to the jury, since it raises a mere conjecture as to whether defendant is the person who committed the offense.

APPEAL by defendant from *Shaw, J.*, 30 May Regular Criminal Term 1962 of IREDELL.

The defendant Louise Long Langlois and her husband Joseph E. Langlois were indicted at the Fall Term 1962 by the Grand Jury in Iredell Superior Court and charged in the same bill of indictment with the murder of Thomas Morris Langlois on 27 October 1961, with malice aforethought.

When the case was called for trial the solicitor announced that the State would not ask for a verdict of murder in the first degree but would seek a verdict of murder in the second degree or manslaughter, as the evidence in the case might warrant.

The State's evidence tends to establish these facts:

(1) Thomas Morris Langlois, son of the defendants, a child about three and one half years of age, died on 27 October 1961 as the result of extensive peritonitis, caused by the rupture of the small intestine;

(2) That the rupture in the small intestine had existed for 24 to 48 hours prior to the child's death;

(3) That the perforation or small hole in the small intestine was caused by an extremely hard blow to the abdomen which caused infection which in turn caused death;

(4) That the body of the child was virtually covered with bruises and lacerations, approximately 150 of them. Most of the lacerations were superficial, that is, not entirely through the skin. There were approximately a dozen or more lacerations which were through the skin which would have required suturing or sewing up had the child lived. The laceration on the abdomen of the child was approximately three eights to one half inch deep.

Dr. L. B. McBrayer, who was found to be a medical expert specializing in pediatrics, performed an autopsy on the deceased child. Dr. McBrayer, with respect to the lacerations and bruises found on the body of the child immediately after death, testified: "It is my opinion

that those lacerations and bruises were traumatic in nature, that is, caused by blows to his body not self-inflicted."

Other evidence of the State tends to show that sometime during the Spring of 1961, the *feme* defendant was observed hitting this child after she had placed him in a car at a supermarket; that she hit the child in the head several times with her fist. Other evidence tends to show that the defendant mother, the latter part of August 1961, hit the child a number of times with the tongue of a child's wagon. On another occasion in August 1961 the mother was seen whipping the child in the yard of the home with a switch.

The evidence also tends to show that the deceased child had been suffering from anemia most of his life; that he was clumsy and fell often. He was treated by Dr. McBrayer on occasions for bruises and lacerations on his body. He was hospitalized for an evaluation of his condition and was found to be free of any disease of the blood except for the presence of anemia. Dr. McBrayer further testified: "Yes, some of the lacerations that I have mentioned as being on the body could be classified as scratches. I am not sure that I was the only one who ever treated this child * * *. I have seen it off and on since it was about a month old. From time to time he has had scratches and bruises on him since the time that he started crawling. * * * I would not classify this child as any more clumsy than any anemic baby of his age. One of the histories that his mother gave me was that he fell frequently and was clumsy. The other story she gave me was that this older sister (who was about two years older than the deceased child) was rough on the child. * * * I said that the bruises that I found on the body were caused by trauma, that is, some external force, but I do not know what that was."

Sheriff Rumple talked with Mrs. Langlois about the bruises on the child's body and, according to the Sheriff's testimony, she made several statements. First, she told him the child fell off his tricycle; then she made the statement that he fell out the back door of the home and then she changed and said he had fallen out the front door; later she made another statement that he fell off a pile of wood in the back yard. The Sheriff testified that he made an investigation and that he found no wood in the yard at all. There was other testimony tending to show that the mother had at other times mistreated the deceased child, but no dates as to the time of such mistreatment were disclosed.

At the conclusion of the State's evidence a motion for judgment as of nonsuit as to both defendants was made and allowed as to defendant Joseph E. Langlois and denied as to defendant Louise Long Langlois.

The jury returned a verdict of guilty of manslaughter. Sentence was imposed, and the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General G. A. Jones, Jr., for the State.

W. R. Battley; Jay F. Frank; Deal, Hutchins and Minor; Ed T. Pullen for defendant.

DENNY, C.J. The defendant assigns as error the refusal of the court below to sustain her motion for judgment as of nonsuit at the close of all the evidence.

We think the real question involved in this appeal is simply this: Who inflicted the injury to Thomas Morris Langlois that ruptured his small intestine which caused the infection which in turn caused his death?

It is fundamental law that the proof of a charge in a criminal case involves the proof of two distinct propositions: (1) That the act complained of was done, and (2) that it was done by the person or persons charged and by none other. Proof of both is a prerequisite to a conviction. *S. v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533; *S. v. Edwards,* 224 N.C. 577, 31 S.E. 2d 762; *S. v. Bass,* 253 N.C. 318, 116 S.E. 2d 772.

The State's evidence, in our opinion, was sufficient to show the following: (1) That the defendant had been seen on several occasions to punish the deceased child rather severely, the last incident being some two months before the child's death. (2) That the child died from peritonitis due to some sharp or severe blow to the abdomen which punctured his small intestine. (3) That the body of the child was covered with bruises and lacerations. (4) That certain accusations were made in the presence of the defendant which would ordinarily call for some sort of denial by the defendant, but none was made. However, the persons purported to have made the accusations took the stand at the trial and denied having made the accusations. Even so, the accusations with respect to mistreatment of the child on the part of the defendant do not tend to show that the defendant struck the blow that caused the peritonitis which in turn caused the death of the child.

In the case of *S. v. Prince,* 182 N.C. 788, 108 S.E. 330, Walker, J., speaking for the Court, said: "We may say generally that evidence should raise more than a mere conjecture as to the existence of the fact to be proved. The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court, the last within that of the jury. Applying the maxim, *de minimis non curat lex,* when we say that there is no evidence to go to the jury, we do not mean that there is literally and absolutely none, for as to this there could be no room for any controversy, but there is none which ought reason-

ably to satisfy the jury that the fact sought to be proved is established, though there is no practical or logical difference between no evidence and evidence without legal weight or probative force. The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. * * *" *S. v. Simpson*, 244 N.C. 325, 93 S.E. 2d 425; *S. v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904; *S. v. Grainger*, 238 N.C. 739, 78 S.E. 2d 769; *S. v. Minton*, 228 N.C. 518, 46 S.E 2d 296.

In the last cited case it is said: "It is an established principle of the administration of criminal law that circumstantial evidence is insufficient to sustain a conviction unless the circumstantial facts shown on the hearing are 'of such a nature and so connected or related as to to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis.' *S. v. Harvey*, 228 N.C. 62, 44 S.E. 2d 472." See also *S. v. Coffey*, 228 N.C. 119, 44 S.E. 2d 886 and *S. v. Madden*, 212 N.C. 56, 192 S.E. 859.

Likewise, "the guilt of an accused is not to be inferred merely from facts consistent with his guilt, but they must be inconsistent with his innocence. *S. v. Massey*, 86 N.C. 658. 'Evidence which merely shows it possible for the facts in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury.' *S. v. Vinson*, 63 N.C. 335." *S. v. Harvey, supra*, and cited cases.

This assignment of error will be upheld.

Reversed.

STATE v. JAY VANN COVINGTON.

(Filed 11 January 1963.)

1. Indictment and Warrant § 14—

Where defendant, before plea, moves to quash the indictments on the ground that members of his race were excluded from the grand jury solely because of race, the motion is made in apt time and must be determined in accordance with due process of law. G.S. 9-26.

2. Grand Jury § 1; Constitutional Law § 29—

An indictment returned by a grand jury from which members of defendant's race are intentionally excluded solely because of race is a denial of defendant's right to the equal protection of the law, under both the Federal and State Constitutions. Fourteenth Amendment to the Constitution of the United States; Article I, § 17 of the Constitution of North Carolina.

3. Constitutional Law § 30—

Due process of law is secured against State action by the Fourteenth Amendment to the United States Constitution.

4. Grand Jury § 1; Constitutional Law § 29—

The burden of proof is upon defendant to establish his assertion of racial discrimination in the selection of the grand jury.

5. Same; Constitutional Law § 31—

Where defendant aptly moves to quash the indictments on the ground that members of his race were intentionally excluded from the grand jury, and moves that process issue to require certain named officials to appear and testify with respect to selection of the grand jury and to bring with them pertinent books and records, the act of the court in finding the facts and denying the motions amounts to a denial of defendant's constitutional right to an opportunity to procure evidence, if he can, in support of his motion to quash.

6. Same—

On defendant's motion to quash the indictments for the intentional exclusion of members of his race from the grand jury which returned the indictments, the court's finding that a Negro served on the grand jury which returned the indictments is not conclusive, the question being whether any person was intentionally excluded from the grand jury because of race.

7. Indictment and Warrant § 16—

The quashal of indictments on the ground that defendant was denied his right to an opportunity to procure evidence of racial discrimination in the selection of the grand jury does not entitle defendant to his discharge, but defendant should be held until indictments against him can be found by an unexceptionable grand jury.

APPEAL by defendant from *Gambill, J.*, May Criminal Term 1962 of UNION.

Criminal prosecution upon two indictments. The first indictment charges J. D. Blount, Curtis Osborne, and defendant with an unlawful and felonious conspiracy to feloniously break and enter a building with intent to commit larceny of the personal property kept therein. The second indictment charges defendant alone with a felonious breaking and entry, larceny, and receiving stolen property knowing it to have been stolen.

When these two cases were called for trial the solicitor for the State moved that they be consolidated for trial, which motion the court granted. Prior to pleading to the two indictments defendant, who is a Negro, moved in writing to quash both indictments on the ground that the grand jury, which returned both indictments, in violation of his rights under Article I, section 17, of the North Carolina Constitution, and under the due process and equal protection clauses of section 1 of the 14th Amendment to the United States Constitution, was illegally impanelled and composed, because Negroes solely by reason of their race were intentionally excluded from service upon the said grand jury. Defendant in his written motion further moved that the court grant defendant's counsel, who do not live in Union County, reasonable time and opportunity to inquire into the facts relative to the alleged intentional exclusion of Negroes by reason of their race from the grand juries of Union County, and from the grand jury which returned the indictments here, that the court issue process to require certain named officials of Union County to appear before it and testify in respect to the selection of grand juries for Union County and to bring with them all books, documents, and records pertinent to the inquiry, and that the court set a date to have a hearing on his motion. Defendant's motion was supported by an affidavit of one of his counsel, whose allegations are based upon information and belief.

The court denied defendant's motion to quash the two indictments, denied his motion to set a hearing on the motion to quash the two indictments, and denied his motion to cause process to issue, to which three rulings defendant excepted. After the denial of these motions the record shows the following:

> "The court finds that there has been no evidence offered as a basis to quash the Bills of Indictment in this case. The court further finds that the defendant was charged in a warrant drawn on March 9, 1962, which was served on the 9th of March, 1962 charging the violation which is included in the Bill of Indictment (sic) under which the defendant now stands indicted. The court further finds that at the February, 1962 term of Superior Court for Union County that a Grand Jury was drawn from a panel of fifty-four persons, and the Grand Jury was drawn by a child, Gene Lathan, five years of age, son of Kenneth Lathan, and that the following persons were drawn as the Grand Jury: [Then follows the names of the 18 members of the Grand Jury.]
>
> "Among the Grand Jury one person was a colored person. The court further finds as a fact that from the panel of fifty-four persons drawn for the February, 1962 Term of Superior Court,

two of those persons were colored persons. The court further finding as a fact that at the May, 1962 Term of Superior Court for Union County the trial panel drawn from which jurors were drawn for the trial of this cause, four of those number were colored; one of those persons was excused by statute as being a minister, another person was excused by the court under a doctor's certificate that he was physically unable to serve as a juror. The court further finds as a fact there are two colored people now on the jury from which the jurors to be drawn for the trial of this defendant.

"COURT: Now, do you want to challenge that?

"MR. WITT: We do challenge those findings. Our position is that they are insufficient as a matter of law to sustain the overruling of our motion. We except to the denial for the hearing and of these witnesses.

"COURT: Well, I am going to let the case go to the jury on those findings.

"EXCEPTION NO. 4."

Defendant, after a denial of his motions, entered a plea of Not Guilty as to both indictments. The jury returned for its verdict that defendant was Guilty of conspiring to commit a felony, as charged in the indictment, and Guilty of a felonious breaking and entry and larceny, as charged in the other indictment. The record states, "The charge of receiving was dropped by the State."

From a judgment that defendant be imprisoned in the State's prison for a term of not less than seven years nor more than ten years, he appeals.

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

Samuel S. Mitchell and Scupi & Witt for defendant appellant.

PARKER, J. Defendant assigns as errors the denial of his motion to quash the indictments on the alleged ground that Negroes by reason of their race were intentionally excluded from service on the grand jury which returned the indictments against him here, the denial of his motion to set a time to hear his motion to quash the indictments, after his counsel had had a reasonable time to investigate the facts relative to the alleged intentional exclusion of Negroes by reason of their race from the grand jury which returned the indictments here, and to the denial of his motion to cause process to issue requiring certain named

officials of Union County to appear and give evidence relative to the drawing of the jury panel and the drawing of the grand jury which returned the indictments here from the jury panel. Defendant further assigns as error the court's making findings without holding a hearing or giving him adequate opportunity to present evidence.

Defendant's motion to quash the indictments was made in apt time, before pleading to the indictments. G.S. 9-26; *S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *S. v. Gardner,* 104 N.C. 739, 10 S.E. 146.

The Supreme Court of the United States in an unbroken line of cases stretching back for eighty years has held that the indictment of a Negro defendant by a grand jury in a state court from which members of his race have been intentionally excluded solely because of their race is a denial of his rights to the equal protection of the laws as guaranteed by the 14th Amendment to the United States Constitution. *S. v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *Miller v. State, supra; Eubanks v. Louisiana,* 356 U.S. 584, 2 L. Ed. 2d 991; *Reece v. Georgia,* 350 U.S. 85, 100 L. Ed. 77.

A like conclusion is reached in North Carolina by virtue of our decisions on "the law of the land" clause embodied in the Declaration of Rights, Article I, section 17, of the North Carolina Constitution, and we have consistently so held since 1902. *S. v. Peoples,* 131 N.C. 784, 42 S.E. 814; *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537; *Miller v. State, supra; S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *S. v. Perry,* 250 N.C. 119, 108 S.E. 2d 447.

Due process of law is secured against state action by the words of the 14th Amendment to the United States Constitution. *Betts v. Brady,* 316 U.S. 455, 86 L. Ed. 1595.

The court said in *Holden v. Hardy,* 169 U.S. 366, 389, 42 L. Ed. 780, 790: "This Court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

The burden of proof is upon the defendant to establish the racial discrimination alleged in his motion to quash the indictments. *S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *Miller v. State, supra; Akins v. Texas,* 325 U.S. 398, 89 L. Ed 1692; *Fay v. New York,* 332 U.S. 261, 91 L. Ed. 2043.

The court in its findings states "there has been no evidence offered as a basis to quash the Bills of Indictment in this case." When the

court denied defendant's motion to require process to issue for certain named officials of Union County to appear and give evidence relative to the preparation of the jury list of Union County, and the drawing of a jury panel and grand jury for the February Term 1962, and denied his motion for a reasonable time to inquire into alleged facts in respect to the intentional exclusion of Negroes by reason of their race from the grand jury which returned the indictments here, it would seem that defendant was denied a reasonable opportunity to produce evidence, if any such evidence exists as he contends. It is true the court made findings relative to a Negro serving on the grand jury which returned the indictments here, and to two Negroes serving on the jury panel from which this grand jury was drawn, and to Negroes drawn on the jury panel for the May Term 1962, but even so, due process of law requires that "no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense," and that opportunity has been denied defendant here. Whether he can establish his contention or not, he must have his day in court on his motion to quash the indictments.

What we said in *S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404, in a similar situation from Union County, is controlling here:

> "Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a grand jury panel must be determined from the facts in each particular case. After a careful examination of all the facts in the instant case, it is our opinion that the trial court denied the defendant a reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegations of racial discrimination as to the grand jury set forth in the motion to quash and in the supporting affidavit of Samuel S. Mitchell. Whether the defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have, unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any."

The judgment and verdict below are reversed, and the case is remanded for further proceedings. In the superior court the defendant must be granted the right to have process to issue for such witnesses and documents as he desires, and to present evidence that he may have, if any, as to the alleged racial discrimination in the grand jury panel which found the indictments against him. If a trial court at such hearing then finds there was no racial discrimination, the court will proceed

to trial on the present indictments. If the trial judge then finds there was racial discrimination in the grand jury panel, and quashes the indictments, the defendant is not to be discharged. He will be held until indictments against him can be found by an unexceptionable grand jury. *S. v. Perry*, 248 N.C. 334, 103 S.E. 2d 404, *S. v. Speller, supra; Hill v. Texas*, 316 U.S. 400, 86 L. Ed. 1559; *Eubanks v. Louisiana, supra.*

Reversed.

STATE v. JAY VANN COVINGTON.

(Filed 11 January 1963.)

1. Constitutional Law § 28; Criminal Law § 13—

A valid warrant or indictment returned by a legally constituted grand jury is an essential of jurisdiction.

2. Constitutional Law § 37—

Every reasonable presumption will be indulged against a waiver by defendant in a criminal prosecution of fundamental constitutional rights.

3. Same; Constitutional Law § 29; Grand Jury § 1—

Where a defendant aptly moves to quash the indictments on the ground that they were returned by a grand jury from which members of his race were intentionally excluded, defendant's subsequent pleas of guilty, standing alone, are insufficient to constitute a waiver of his rights to have the motion to quash duly heard.

APPEAL by defendant from *Gambill, J.*, May Criminal Term 1962 of UNION.

One opinion in three criminal cases, in each of which there is a separate record, because the questions presented for decision in each case are identical. In case number 438 the indictment charges the defendant with a malicious assault in a secret manner with a deadly weapon on H. D. Eller, a violation of G.S. 14-31. In case number 439 the indictment charges the defendant with resisting, delaying, and obstructing two police officers of the city of Monroe while they were discharging and attempting to discharge a duty of their office, a violation of G.S. 14-223. In case number 440 the indictment charges the defendant with unlawfully attempting to break out of and escape from the common jail of Union County, he being lawfully confined therein, by assaulting the jailer H. D. Eller with a deadly weapon, to-wit, a board or stick.

In each case when it was called for trial the defendant, who is a Negro, before pleading to the indictment, made a written motion to quash the indictment in the identical language as in case number 437, *S. v. Covington, ante,* 495, ... S.E. 2d ..... Each motion was supported by the affidavit of one of defendant's counsel in the identical language as a like affidavit in case number 437. In each of the three cases the court denied the motion in the identical words as it denied a like motion in case number 437, and in each of the three cases defendant's exceptions to the denial of his motion are identical with his exceptions to a denial of a like motion in case number 437. In each of the three cases the court made findings in the identical words as it did in case number 437, and in each of the three cases the defendant excepted in the same language as he did in case number 437. It would be supererogatory to repeat here in fuller detail what is set forth at length in case number 437, which immediately precedes this opinion.

Defendant, after a denial of his motion to quash the indictment in each of the three cases, in case number 438 entered a plea of guilty of assault with a deadly weapon, which was accepted by the State; in case number 439 entered a plea of guilty as charged in the indictment; in case number 440 entered a plea of guilty of an attempt to break jail as charged in the indictment.

From a sentence of imprisonment in each of the three cases, defendant appeals.

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

Samuel S. Mitchell and Scupi & Witt for defendant appellant.

PARKER, J. In each of the three cases here numbers 438-440 defendant's exceptions and assignments of error are identical with his exceptions and assignments of error in case number 437, *S. v. Covington, ante,* 495, ... S.E. 2d ..... In all four of these cases defendant is represented by the same counsel. In these four cases, cases numbers 437-440, defendant has filed one brief, and the State by its Attorney General has done likewise.

In each of these three cases defendant's motion to quash the indictment was made before pleading to the indictment, and therefore in apt time. G.S. 9-26; *S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *S. v. Gardner,* 104 N.C. 739, 10 S.E. 146.

S. v. Covington, supra, decides the identical questions presented for decision hereby defendant's assignments of error, and is controlling

unless the defendant waived any objection to the grand jury which indicted him by his plea of guilty in each of the three cases.

The Court speaking by Ervin, J., stated in *Miller v. State, supra*: "The right of a Negro defendant to object to a grand or petit jury upon the ground of discrimination against members of his race in the selection of such jury is waived by failing to pursue the proper remedy." Here the defendant pursued in apt time the proper remedy to challenge the legality of the grand jury that indicted him.

In *S. v. Covington, supra,* the Court said:

> "The Supreme Court of the United States in an unbroken line of cases stretching back for eighty years has held that the indictment of a Negro defendant by a grand jury in a state court from which members of his race have been intentionally excluded solely because of their race is a denial of his rights to the equal protection of the laws as guaranteed by the 14th Amendment to the United States Constitution. *S. v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *Miller v. State, supra; Eubanks v Louisiana,* 356 U.S. 584, 2 L. Ed. 2d 991; *Reece v. Georgia,* 350 U.S. 85, 100 L. Ed. 77.
>
> "A like conclusion is reached in North Carolina by virtue of our decisions on 'the law of the land' clause embodied in the Declaration of Rights, Article I, section 17, of the North Carolina Constitution, and we have consistently so held since 1902. *S. v. Peoples,* 131 N.C. 784, 42 S.E. 814; *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537; *Miller v. State, supra; S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; S. v. Perry, 250 N.C. 119, 108 S.E. 2d 447."

Therefore, it necessarily follows that the indictment of a Negro defendant by a grand jury in a state court from which members of his race have been intentionally excluded solely because of their race is not good, for the reason that as to such Negro defendant it is not a legal grand jury, and defendant pursued the proper remedy, motions to quash the indictments here in apt time under our practice, to object to the legality of the grand jury that indicted him.

"A valid warrant or indictment is an essential of jurisdiction." *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

In *Gibbons v. Territory,* Crim. Court of Appeals of Oklahoma, 115 P. 129, the Court said: "A valid indictment returned by a legally constituted grand jury is a jurisdictional requirement."

There is abundant authority that a plea of guilty does not waive a jurisdictional defect. *Weir v. United States,* 7th Cir., 92 F. 2d 634, 114 A.L.R. 481; *People v. Green,* 368 Ill. 242, 13 N.E. 2d 278, 115 A.L.R.

348; *Berg v. United States,* 9th Cir., 176 F. 2d 122; 22 C.J.S., Criminal Law, sec. 424 (7); *ibid,* sec. 162; 4 Wharton's Criminal Law and Procedure, by Ronald A. Anderson, sec. 1901, p. 770. See *People v. Green,* 329 Ill. 576, 161 N.E. 83. In *People v. Kelly,* 104 N.Y.S. 2d 385, 198 Misc. 1119, the Court said: "A plea of guilty standing alone does not constitute a waiver of fundamental constitutional rights in the protection of which every reasonable presumption is indulged. *Bojinoff v. People, supra* (299 N.Y. 145, 85 N.E. 2d 909); *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680."

Courts indulge every reasonable presumption against a waiver by a defendant charged with crime of fundamental constitutional rights, and do not presume acquiescence in their loss. *Glasser v. United States,* 315 U.S. 60, 86 L. Ed. 680; *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 146 A.L.R. 357; *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 81 L. Ed. 1177; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 81 L. Ed. 1093.

In *Johnson v. Zerbst, supra,* the Court said, "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

In each of the three cases here, before pleading to the indictments, the defendant, a Negro, made a written motion to quash the indictment in each case on the ground that the grand jury which returned the indictments against him, in violation of his rights under Article I, section 17, of the North Carolina Constitution, and under the due process and equal protection clauses of section 1 of the 14th Amendment to the United States Constitution, was illegally impanelled and composed because Negroes solely by reason of their race were intentionally excluded from service upon the said grand jury. Defendant in his written motion further moved that the court grant defendant's counsel reasonable time and opportunity to inquire into the facts relative to the alleged intentional exclusion of Negroes solely by reason of their race from service upon the grand juries of Union County, and from the grand jury which returned the indictments against him, and that the court issue process to require certain named officials of Union County to appear before it and testify in respect to the selection of grand juries for Union County, and to bring with them all books, documents, and records pertinent to the inquiry, and that the court set a date to have a hearing on the motion. The court denied his motions to quash the indictments, denied his motions to set a hearing on the motions, and denied his motions to cause process to issue, to which three rulings in all three cases defendant excepted. Defendant has assigned these rulings as error in each case, and has perfected his appeal in each case. Under these circumstances, it is our opinion, and we so hold, defendant,

by his subsequent pleas of guilty in each case, has not waived his objection to the grand jury which indicted him on the ground that it was illegally impanelled and composed in violation of his fundamental constitutional rights, and on the ground that because of a fundamental constitutional prohibition the grand jury was without jurisdiction to find valid indictments against him, a Negro.

What is said further in *S. v. Covington, supra,* which immediately precedes this case in our Reports, need not be repeated here. Upon authority of that case the pleas of guilty in the three cases here and the judgments in the three cases here are reversed, and the three cases are remanded for further proceedings as set forth in detail in that case.

Reversed in all three cases.

HOMER WIRTH v. STEWART MONROE BRACEY.

AND

MYRTLE L. WIRTH v. STEWART MONROE BRACEY.

(Filed 11 January 1963.)

1. Abatement and Revival § 8; States § 5a—

The pendency of a claim under the State Tort Claims Act to recover for injuries resulting from the negligence of a State employee in the performance of his duties, is not ground for abatement of an action later instituted by the injured party against the State employee in his individual capacity to recover for injuries resulting from the same act of negligence, since the requisite identity of parties does not exist. G.S. 1-127(3).

2. Election of Remedies § 12—

There is no inconsistency between proceedings under the State Tort Claims Act to recover damages inflicted as a result of negligence of a State employee and an action at common law against the employee individually to recover damages resulting from the same act of negligence, and therefore the doctrine of election of remedies does not apply.

APPEALS by defendant from *Hall, J.,* May Term 1962 of JOHNSTON.

These two civil actions grow out of a collision that occurred March 27, 1959, on U.S. Highway 301, in Johnston County, between a southbound 1957 Cadillac and a northbound 1958 Ford. Plaintiff Homer Wirth was operating the Cadillac, and his wife, plaintiff Myrtle L. Wirth, the owner of the Cadillac, was a passenger. Defendant, in the course of his employment as a member of the North Carolina Highway Patrol, was operating the Ford.

Homer Wirth's action is to recover damages on account of personal injuries. Mrs. Wirth's action is to recover damages on account of per-

sonal injuries and on account of the damage to her car. Each alleged the collision and his (her) injuries and damage were proximately caused by the negligence of defendant.

In each action, before answering the allegations of the complaint, defendant asserted (1) a first defense and plea in abatement, and (2) a second defense and plea in bar. These pleas were overruled by Judge Hall in orders dated April 12, 1962.

Thereafter, upon trial, the jury, in each action, answered the issues of negligence, contributory negligence and damages, raised by defendant's answer to the allegations of the complaint, in favor of the plaintiff. Homer Wirth was awarded damages in the amount of $5,000.00. Mrs. Wirth was awarded damages in the amount of $10.000.00.

In each case, a judgment for plaintiff, in accordance with the verdict, was entered, and defendant excepted and appealed.

Robert A. Spence and Thomas Turner for plaintiff appellees.
Smith, Leach, Anderson & Dorsett for defendant appellant.

BOBBITT, J. Defendant's assignments of error are based on his exceptions to the orders entered by Judge Hall on April 12, 1962, prior to jury trial. Defendant does not attack the manner in which the jury trial was conducted. Indeed, neither the evidence nor the court's charge is in the record on appeal.

The sole question presented by each appeal is whether the court erred in overruling defendant's said pleas in abatement and in bar. The (admitted) facts relevant to this question are: These actions were instituted July 21, 1960. Prior thereto, to wit, on or about June 10, 1960, as authorized by the Tort Claims Act, G.S. Chapter 143, Article 31, each plaintiff had filed with the North Carolina Industrial Commission a claim against the North Carolina Highway Commission to recover on account of injuries and damages sustained in said collision of March 27, 1959, on account of the alleged negligence of Bracey, defendant herein. Based on these facts, defendant pleaded, in abatement of the present action, the filing and pendency of plaintiffs' said claims with the Industrial Commission; and defendant pleaded, in bar of the present actions, that the filing of plaintiffs' said claims with the Industrial Commission constituted (a) an election of remedies and (b) a waiver and estoppel of their rights to institute the present actions.

When defendant's said pleas were heard by Judge Hall on or about April 12, 1962, and when these actions were tried in May, 1962, there had been no decision or hearing by the Industrial Commission with reference to plaintiffs' said claims. Nor does it appear that the In-

dustrial Commission has at any time acted thereon. Questions as to the legal effect, if any, if there had been a hearing and decision by the Industrial Commission prior to the trial of these actions are not presented. Nor does this appeal present questions as to the legal effect, if any, of the judgments herein upon the claims filed by plaintiffs with the Industrial Commission. Here, the fact the said claims had been filed and were pending when these actions were instituted is the basis of defendant's plea in abatement.

The rules applicable when considering a plea in abatement on the ground "(t)here is another action pending between the same parties for the same cause" (G.S. 1-127(3)) are stated, with full citation of authority, by Ervin, J., in *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860, and by *Winborne, J.* (later C.J.), in *Dwiggins v. Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892. Later decisions are cited in *Perry v. Owens,* 257 N.C. 98, 125 S.E. 2d 287. Our decisions, beginning with *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545, relate primarily to a factual situation where the plaintiff in the second action is the defendant in the first and the defendant in the second action is the plaintiff in the first. Here, a different factual situation is involved.

In our opinion, and we so hold, the claim filed by (each) plaintiff with the Industrial Commission did not constitute *another action* pending *between the same parties* for the same cause within the meaning of G.S. 1-127(3).

"Another action," as used in G.S. 1-127(3), would seem to refer to an action of like nature, that is, a civil action instituted under and subject to the provisions of the Code of Civil Procedure. The procedure under the Tort Claims Act is *sui generis.*

Fundamental differences (apart from differences in procedure) between a claim under the Tort Claims Act and a common law action to recover damages on account of negligence include the following: The maximum amount recoverable under the Tort Claims Act is $10,000.00. G.S. 143-291. Controverted factual issues (questions) are resolved by the findings of the Industrial Commission, not by jury trial or, upon waiver of jury trial, by the court. There is no provision for the assertion of a counterclaim or cross action.

"The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796; *Pittman v. Pittman,* 248 N.C. 738, 104 S.E. 2d 880.

The only claim authorized by the Tort Claims Act is a claim against the State agency. True, recovery, if any, must be based upon the

actionable negligence of an employee of such agency while acting within the scope of his employment. However, recovery, if any, against the alleged negligent employee must be by common law action. Plaintiffs could obtain no relief against Bracey, defendant herein, under the Tort Claims Act. Compare *Perry v. Owens, supra.* Thus, even if the *claims* filed by plaintiffs against the Highway Commission under the Tort Claims Act were considered *actions* within the meaning of G.S. 1-127(3), such claims and these actions, were not, nor could they be, *between the same parties.* Hence, defendant's plea in abatement was properly overruled.

"The decisions generally are to the effect that in an action *ex delicto,* where the doctrine of *respondeat superior* is, or may be, invoked, the injured party may sue the servant alone or the master alone, or may bring a single action against both." *Bullock v. Crouch,* 243 N.C. 40, 42, 89 S.E. 2d 749; *Bullard v. Oil Co.,* 254 N.C. 756, 758, 119 S.E. 2d 910.

Prior to the enactment of the Tort Claims Act the Highway Commission, as an agency or instrumentality of the State, enjoyed immunity to liability for injury or loss caused by the negligence of its employees. Even so, then as now, an employee of such agency was personally liable for his own actionable negligence. *Miller v. Jones,* 224 N.C. 783, 32 S.E. 2d 594; *Hansley v. Tilton,* 234 N.C. 3, 65 S.E. 2d 300; *Smith v. Hefner,* 235 N.C. 1, 7, 68 S.E. 2d 783. The Tort Claims Act, waiving governmental immunity to that extent, permitted recovery against the State agency as therein provided. *Alliance Co. v. State Hospital,* 241 N.C. 329, 85 S.E. 2d 386. The obvious intention of the General Assembly in enacting the Tort Claims Act was to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment.

"The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other." Quoted by Hoke, J. (later C.J.), in *Machine Co. v. Owings,* 140 N.C. 503, 53 S.E. 345, this statement expresses succinctly the well established rule in this jurisdiction. *Surratt v. Insurance Agency,* 244 N.C. 121, 93 S.E. 2d 72, and cases cited; *Thomas v. College,* 248 N.C. 609, 616, 104 S.E. 2d 175.

There is no inconsistency in respect of plaintiff's claims against the Highway Commission and their actions against Bracey. Both are grounded on the actionable negligence of Bracey. The remedies available to plaintiffs are not inconsistent. On the contrary, they are cumulative and consistent. Moreover, no sound reason appears why the filing of said claims should be considered a waiver or estoppel of

plaintiffs' rights to institute the present actions. Hence, defendant's pleas in bar were properly overruled.

Of course, plaintiffs may not recover from all sources an amount in excess of the damages they sustained. *Ramsey v. Camp,* 254 N.C. 443, 119 S.E. 2d 209; *McGill v. Freight,* 245 N.C. 469, 477, 96 S.E. 2d 438; *Holland v. Utilities Co.,* 208 N.C. 289, 180 S.E. 592.

Having reached the conclusion that Judge Hall, by his orders of April 12, 1962, correctly overruled defendant's said pleas in abatement and in bar, and no error having been assigned in respect of any other phase of the cases, the judgments of the court below are affirmed.

Affirmed.

MRS. R. J. HINNANT v. R. J. HINNANT.

(Filed 11 January 1963.)

1. Attorney and Client § 3; Divorce and Alimony §§ 21, 23—

Where consent judgment for separation and support of the wife and children of the marriage is entered after personal service upon the husband, service of a subsequent motion in the cause relating to support may be made upon the attorney of record for the husband.

2. Divorce and Alimony §§ 21, 23—

Where judgment for divorce *a mensa et thoro* provides for the payment of subsistence to the wife and children of the marriage and retains the cause for further orders, jurisdiction of the court continues and the action remains pending as to the wife until the death of the husband or wife and as to the children until their majority, and the court may properly restrain the husband from removing specifically described property from this State until he should give security for the continued compliance with the order for support.

APPEAL by defendant from *McKinnon, J.,* June 30, 1962, ROBESON Superior Court.

This civil action was instituted by the plaintiff on July 21, 1953, in the Superior Court of Robeson County. According to the allegations in the complaint both parties were residents of North Carolina. They were married on September 29, 1942. Two children were born of the marriage: Gladys Cherry on May 4, 1945, and Vickie Pearle on January 1, 1953. The defendant, without excuse, abandoned plaintiff on August 11, 1952.

The defendant is a member of the United States Air Corps stationed at Shaw Field, Sumter, South Carolina. Beginning in August, 1952,

he made an allotment through the Air Corps of $176.90 per month for the benefit of the plaintiff and the minor children. Of the amount allotted, $80.00 per month was deducted from the defendant's service pay and $96.90 per month was contributed by the Government. The plaintiff prayed that she be granted a divorce *a mensa et thoro,* and that the defendant be required to furnish her and the two minor children with adequate alimony and support.

Summons and complaint were served on the defendant. At the August Term, 1953, Judge Nimocks, by consent, entered the following judgment:

> "This cause coming on to be heard at this term of Court, and being heard; and it appearing to the Court that the plaintiff and the defendant have agreed upon the terms of the Judgment to be entered herein, and it is, therefore, upon a motion of F. D. Hackett, Attorney for the plaintiff, and with the consent of McLean and Stacy, Attorneys for the defendant, ordered, adjudged and decreed as follows:
>
> "1. That from and after this date the plaintiff and the defendant shall live separate and apart from each other as fully and completely as though they had never been married, and each party shall have the right to buy, sell and own property and to execute, deeds or mortgages without the joinder of the other, and this judgment shall operate as a separation agreement between the parties.
>
> "2. That the defendant shall forthwith pay into the Court the sum of $175.00 for the use and benefit of the plaintiff in the support of herself and her two minor children, the same being for the month of August, 1953.
>
> "3. That the said defendant shall forthwith reinstate with the United States Government the allotment heretofore made to the plaintiff for the support of herself and her two children, to wit, Gladys Cherry Hinnant and Vickie Pearle Hinnant, at the present time being in the sum of $176.90 and shall retain the government allotment for a wife and two children in force so long as he shall remain a member of the United States Armed Forces.
>
> "4. That the said defendant shall have the right at reasonable intervals to visit his children and upon such occasion must present himself in a peaceful, sober and orderly manner and conduct himself properly in all respects and the said defendant shall have the further right at reasonable intervals to take Gladys Cherry Hinnant to visit in the home of the defendant's parents provided, however, that such visits shall not interfere with the said child's attendance of school.

"5. The defendant will pay the cost of this action, including the sum of $100.00, Attorney's fees for the use and benefit of F. D. Hackett, attorney for the plaintiff.

"6. In the event the defendant shall separate himself from the military service, he shall not be excused from making payments for alimony and support as herein provided, but he may apply to the Court for an adjustment of the same according to his then status.

"The custody of the children of said marriage, to wit, Gladys Cherry Hinnant and Vickie Pearle Hinnant, is hereby committed to the plaintiff, Mrs. R. J. Hinnant, who is found by the Court to be a fit and proper person to have such care, custody and control.

"This cause is retained upon the docket for such further orders as may hereafter be proper and necessary with respect to the custody and control of the two minor children of the parties hereto.

"/s/ Q. K. Nimocks, Jr., Judge Presiding.

"CONSENT:
Mrs. R. J. Hinnant /s/
F. D. Hackett /s/
Attorney for the Plaintiff

Raymond J. Hinnant /s/
Defendant
McLean & Stacy /s/
Attorneys for the Defendant."

On November 8, 1961, the plaintiff filed a verified motion in the cause alleging the defendant, R. J. Hinnant, had separated himself from the service and that he intended to defeat the judgment entered in the cause by Judge Nimocks; that he has recently come into possession of property located in Wilson County which he intended to remove from the State in order to defeat the plaintiff's claim, including support for her minor children. Plaintiff moved for a restraining order against the removal of the property until security be given for the obligations fixed by the consent judgment.

Service of motion was made upon Dickson McLean, Jr., counsel of record for the defendant. Judge Mallard issued a temporary restraining order. The defendant made a motion to dismiss upon two grounds: (1) The service on counsel of record did not give the court jurisdiction over the defendant. (2) The defendant had obtained an absolute divorce from the plaintiff in the Superior Court of Wilson County.

After hearing, Judge McKinnon made detailed findings of fact, including a finding that defendant, through his counsel, had assured the plaintiff that his proposed divorce action in Wilson County based on two years separation would not interfere with the judgment entered by Judge Nimocks in the original action. The court also found that the defendant had threatened to remove all of his property from North Carolina for the purpose of defeating his obligation under the Nimocks judgment. The court made the restraining order permanent, to be discharged upon a deposit of $6,500.00 with the Clerk Superior Court of Robeson County, or by the execution of a justified bond in that amount conditioned upon compliance with the judgment. The defendant excepted and appealed.

Henry & Henry by Ozmer L. Henry, Ellis E. Pope for plaintiff appellee.

McLean & Stacy, Lumberton, N. C., Gardner, Connor & Lee, Wilson, N. C., by Cyrus F. Lee for defendant appellant.

HIGGINS, J. The defendant was personally served with summons in the original action instituted in 1953 in Robeson County. He and his counsel of record signed the consent judgment which, by its express terms, retained the cause on the docket. Thereafter service upon the attorney of record was sufficient. "The relation of the attorney of record to the action, nothing else appearing, continues so long as the opposing party has the right by statute or otherwise to enter a motion therein or to apply to the court for further relief." *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71; *Henderson v. Henderson,* 232 N.C. 1, 59 S.E. 2d 227. The defendant's objection that service was made upon his attorney of record, is not sustained.

In the plaintiff's action for limited divorce, for alimony, custody and support for the children, the court acquired jurisdiction of the parties and the children. That jurisdiction continues and the action is still pending. "Jurisdiction rests in this court (superior) so long as the action is pending and it is pending for this purpose until the death of one of the parties, or the youngest child born of the marriage reaches the age of maturity, whichever event shall first occur." *Weddington v. Weddington, supra,* citing many cases.

Under the facts in this case as found by Judge McKinnon and supported by the record, the Superior Court of Robeson County has the continuing authority to require compliance with the Nimocks judgment. The defendant has threatened to defeat the continuing terms of that judgment by removing from the State specifically described property now in its jurisdiction. The equitable power inherent in the

superior court is amply sufficient to warrant the restraint imposed by the judgment from which this appeal is taken. *Porter v. Bank,* 251 N.C. 573, 111 S.E. 2d 904; *Lambeth v. Lambeth,* 249 N.C. 315, 106 S.E. 2d 491; *Perkins v. Perkins,* 232 N.C. 91, 59 S.E. 2d 356; *Walker v. Walker,* 204 N.C. 210, 167 S.E. 818.

We have examined all the defendant's assignments of error and find them without merit. The judgment of the Superior Court of Robeson County is

Affirmed.

HOWARD G. THOMAS, T/A THOMAS' FOOD STORE v. STATE BOARD OF ALCOHOLIC CONTROL, WILLIAM S. HUNT, CHAIRMAN AND CLEON W. GOODWIN AND CLAUDE J. MABRY, MEMBERS.

(Filed 11 January 1963.)

1. Intoxicating Liquor § 2; Administrative Law § 3—

Testimony of officers that a person who had bought beer from licensee had declared he was under 18 years of age is incompetent as hearsay, and a certified copy of a birth certificate without testimony of any person having knowledge thereof that it was the record of the purchaser of the beer is incompetent to prove the age of such purchaser, and therefore such evidence is insufficient to support findings by the Alcoholic Beverage Control Board that the licensee sold beer to a person under 18 years of age or that he failed to give the licensed premises proper supervision, G.S. 18-78.1; G.S. 18-90.1, and the Board's order of suspension of license based on such findings is properly vacated in the Superior Court.

2. Evidence § 24—

A public record is proof only of the facts therein contained.

APPEAL by respondents from *Edward B. Clark, S.J.,* May 1962 "A" Civil Term of WAKE.

Attorney General Bruton and Staff Attorney Sanders for Respondent Appellants.

Samuel S. Mitchell for Petitioner Appellee.

MOORE, J. Howard G. Thomas (licensee), trading as Thomas' Food Store, was granted permits in 1949 by the State Board of Alcoholic Control (Board) to sell beer and wine for consumption on and off licensee's business premises at 508 South Boundary Street in Raleigh. On 19 May 1961 the Board notified licensee that it had information

that he had violated the Alcoholic Beverage Control Act (G.S., Ch. 18, Art. 4) on 13 May 1961 by (1) "knowingly selling . . . or allowing the sale of beer to Lawrence Reid," a person under 18 years of age, in violation of G.S. 18-78.1 and G.S. 18-90.1, and (2) "failing to give licensed premises proper supervision," contrary to G.S. 18-78. Licensee was directed to appear before a Hearing Officer on 6 June 1961 and show cause why his permits should not be revoked or suspended.

Licensee appeared at the hearing and was represented by counsel. The evidence adduced at the hearing tends to show: Two ABC inspectors visited licensee's establishment about 9:35 P.M. on Saturday night 13 May 1961. The business is a self-service grocery store. Thomas was not in the store. Billy White, the only employee present, was serving as cashier. There were five or six customers making purchases. The inspectors observed a customer, Lawrence Reid, paying the cashier for a can of beer. White put the beer in a bag and Reid started to leave the store. White did not ask Reid for any identification. Reid was approximately 5 feet 11 inches, or 6 feet, in height, he weighed 190 to 200 pounds. According to the inspectors he looked too young to be buying beer. They stopped and questioned him, out of earshot of White. He stated that he was born 7 February 1945. (Licensee objected to the inspectors' testimony of their conversation with Reid. The objection was sustained.) Reid had on his person a card from Ligon High School — it did not state his age. Thomas, the owner, entered the store about five minutes after Reid left. When told by the inspectors that beer had been sold to a minor, Thomas reprimanded White severely. There was introduced in evidence a birth certificate for one, Lawrence Christopher Reid, which had been obtained from the State Board of Health. It purported to show that subject was born 7 February 1946. (Licensee objected to the certificate on the ground that it had "not been properly connected with this case.") Neither Reid nor his parents were present or gave testimony at the hearing. The inspectors were the only witnesses for the Board. White, the cashier, testified that he sold the beer to Reid, did not ask for any identification, and that he thought Reid was 18 or 19 years old. He stated that he had seen Reid before but had never talked to him. White knew the inspectors were in the store at the time. This was the first "hearing" offense against licensee's establishment.

The Hearing Officer found as a fact that licensee "did allow the sale of beer to a minor (person under 18 years of age) on his licensed premises on May 13, 1961, in violation of G.S. 18-78.1(1) and G.S. 18-90.1" and "did fail to give his licensed premises proper supervision on May 13, 1961, in violation of G.S. 18-78." Hearing Officer recom-

mended that licensee's permits be suspended for 60 days. The Board adopted the findings and suspended the permits for a period of 60 days, effective 21 July 1961.

Pursuant to G.S. 143-309, 310, licensee filed a petition for review in the Superior Court of Wake County. A stay order was entered. G.S. 143-312. Judge Clark reviewed the record and entered judgment declaring: ". . . (T)here is no competent evidence to sustain the order complained of . . . and . . . there is no competent evidence to show that petitioner's employee knowingly sold beer to a minor. . . ." It was adjudged "that the order of suspension . . . is hereby stricken and vacated." The Board appeals.

In its brief the Board assumes that there is competent evidence to support its findings that beer was sold to a minor, under 18 years of age, at licensee's establishment as alleged, and that licensee failed to give the licensed premises proper supervision, and argues as a matter of law that knowledge of the purchaser's minority on the part of White, the cashier, is not a prerequisite for violation of G.S. 18-90.1, and the findings of fact are sufficient predicate for suspension of licensee's permits. We do not reach the legal question emphasized by the Board. The findings of fact are not supported by competent evidence.

In the judicial review of decisions of administrative agencies (G.S., Ch. 143, Art. 22) "The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . Unsupported by competent, material, and substantial evidence in view of the entire record as submitted. . . ." G.S. 143-315.

There is no competent evidence that the purchaser of the beer, Lawrence Reid, was a person under 18 years of age. Neither Reid, nor anyone else having knowledge of his age and identity, was called as a witness. The testimony by the inspectors of Reid's statement to them was heresay and was properly excluded by the Hearing Officer. The birth certificate of Lawrence Christopher Reid, while in due form and properly certified by the State Board of Health, was not shown to be, by any person having knowledge thereof, the record of the birth of the Lawrence Reid who purchased the beer. Furthermore, the person referred to in the certificate was born in Johnston County. Licensee moved that the certificate be excluded. The motion should have been allowed. A public record "is proof only of the facts therein contained." 2 Strong: N. C. Index, Evidence, § 24, p. 268. The certificate of birth in this record is only proof that a child, Lawrence Christopher Reid,

was born 7 February 1946 in Johnston County of the parents therein named. Absent competent evidence of the age of the Lawrence Reid who purchased the beer in question, neither of the findings of fact is supported.

The judgment of the Superior Court is

Affirmed.

LOIS FAIRCLOTH v. WILLIAM ADAMS BENNETT, A MINOR APPEARING HEREIN BY HIS GUARDIAN AD LITEM, JOHN WEBB, AND V. B. BENNETT, ORIGINAL DEFENDANTS; AND D. W. FAIRCLOTH, ADDITIONAL DEFENDANT.

(Filed 11 January 1963.)

1. Automobiles § 48—

If a passenger in a vehicle is injured as a result of concurring negligence on the part of both drivers involved in the collision, the passenger may recover from either one or both.

2. Automobiles §§ 17, 46—

A motorist faced with a green traffic signal does not have the unqualified right-of-way but remains under duty to maintain a proper lookout and may be negligent in striking another car entering the intersection in disobedience of the signal if he could and should have seen such other car in time to have avoided the collision, or if he enters the intersection at excessive speed in consideration of his obstructed view and the attendant circumstances, and when the evidence presents the question of negligence in these respects an instruction to the effect that the green light gave the driver the right to proceed in a lawful manner in his direction of travel, without qualification, must be held for prejudicial error.

3. Automobiles § 46—

Where there is no evidence that either driver stopped, an instruction that, if either was confronted by an emergency created by the stopping of the other, the driver confronted with the emergency should not be held to the prudence ordinarily required, must be held for prejudicial error as tending to confuse the jury by instructions on a principle of law not presented by the evidence.

APPEAL by the plaintiff from *Copeland, S.J.*, March 1962 Civil Term of WILSON.

Plaintiff, a passenger in the Buick automobile owned and operated by her husband, the additional defendant D. W. Faircloth, seeks to recover damages from the original defendants, William Adams Bennett and V. B. Bennett, for injuries she suffered when the Plymouth automobile owned by V. B. Bennett for family purposes and operated by

her seventeen-year-old son, W. A. Bennett, collided with the Faircloth Buick within an intersection in Nashville, North Carolina, about 9:00 a.m. on April 24, 1960. Upon appropriate allegations and motion by the original defendants, D. W. Faircloth was made an additional party defendant for contribution pursuant to G.S. 1-240. He answered and asserted a counterclaim for damages to his automobile. V. B. Bennett answered the counterclaim and set up a cross action against D. W. Faircloth for damages to her station wagon. The judge, *ex mero motu*, severed the plaintiff's action for damages from the counterclaims which the defendants asserted against each other. This appeal involves only the plaintiff's suit.

North Carolina Highways Nos. 58 and 64 intersect at right angles in the town of Nashville. The intersection is controlled by an electrically-operated traffic light which is green for one highway when red for the other. The Faircloth automobile, traveling north on Highway No. 58, and the Bennett automobile, traveling west on Highway No. 64, approached the intersection at approximately the same time. Each driver's view of the other's approach was partially obstructed by a large residence in the southeast corner of the intersection. This house was forty to fifty feet from Highway No. 58, and somewhat closer to Highway No. 64. Some large trees and shrubbery grew in front of the house. The posted speed limit for the area was thirty-five miles per hour.

The front of the Bennett automobile collided with the right rear of the Faircloth vehicle in the northeast quadrant of the intersection when the front of the Faircloth car was out of the intersection. The debris was approximately five to six feet from the northeast corner of the intersection. The additional defendant Faircloth testified that he entered the intersection at a speed of about twenty-five miles per hour and that he never saw the car which hit him. William Adams Bennett testified that he first saw the Faircloth car the instant before he hit it. He said he was going "maybe 25 or 30, 25 — something like that, between 20 and 30 miles an hour." The collision turned the Faircloth Buick back in the direction from which it had come. The Bennett Plymouth stopped about a car's length west of the debris after it had made twenty-seven feet of solid black skid marks east of the debris. Each driver strenuously contended that a green light faced him when he entered the intersection and that the other "ran the red light."

The jury's answer was NO to the first issue: Was plaintiff Lois Faircloth damaged by the negligence of the defendant William Adams Bennett, as alleged in the complaint? The issues pertaining to damage and the negligence of the additional defendant were not answered. From a judgment dismissing her action, the plaintiff appealed assigning errors in the court's charge to the jury.

Gardner, Connor & Lee by Raymond M. Taylor for plaintiff, appellant.

Lucas, Rand and Rose for defendant, appellees.

SHARP, J. Plaintiff's first assignment of error is to the following portion of the charge enclosed within parentheses:

> "And the plaintiff also alleges that the defendant failed to yield the right-of-way to the Faircloth automobile. (And in connection with the word 'right-of-way,' the Court charges you as follows: that in this case the vehicle that had the green light with it had the right-of-way. And the term 'right-of-way' as used means the vehicle having the right-of-way had the right to proceed uninterrupted, in a lawful manner, in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path.)"

Plaintiff argues that, while this instruction may be correct as far as it goes, it is incomplete and oversimplified as applies to the facts of her case. Plaintiff was a guest passenger, injured in a two-car collison. She has not been charged with contributory negligence. If the negligence of both drivers proximately contributed to her injuries she may recover from either or both. *White v. Realty Co.*, 182 N.C. 536, 109 S.E. 564; *Darroch v. Johnson*, 250 N.C. 307, 108 S.E. 2d 589. However, she herself has sued only the defendants Bennett.

The collision in question occurred when the Faircloth vehicle was leaving the intersection. Each party offered evidence that at the time the vehicle in which he was riding entered the interesection the light facing it was green. Each offered evidence that his vehicle was traveling within the posted speed limit. Each driver testified that his view of the approach of the other was obstructed. As *Rodman, J.* said with reference to a similar factual situation in *Norris v. Johnson*, 246 N.C. 179, 97 S.E. 2d 773: "The jury might find from the evidence that one of the vehicles negligently entered the intersection when warned not to do so by a red light, but the operator of the other vehicle, by exercising a proper lookout, could and should have seen the disobedience to the signal command in time to avoid the collision." In addition, in the instant case, the jury might have found that the defendant's speed, as he approached the intersection, was greater than was reasonable and prudent considering the obstructed view to his left and that, had his speed been reasonable, he could and should have avoided the collision even though the Faircloth Buick entered the intersection on a red light.

In attempting to resolve the conflicting evidence in this case the jury could have found that the negligence of both Faircloth and Bennett contributed to the collision and plaintiff's injuries.

The judge, in his charge on the first issue, nowhere specifically applied the law to this aspect of the case. He charged the jury generally that if the defendant failed to keep a proper lookout, or failed to drive at a rate of speed which was reasonable under the conditions existing, or if he failed to use due care to avoid colliding with the Faircloth vehicle and such failure was one of the proximate causes of the collison, it would answer the first issue YES. However, he never related these instructions specifically to the hypothesis that the defendant entered the intersection on a green light. He likewise never told the jury that if it found that the negligence of the original defendants and the additional defendant contributed to plaintiff's injuries it would answer the first issue YES. We think that the unqualified instruction quoted above may have lead the jury into the erroneous belief that the driver facing the green light had the unqualified right of way. *Hyder v. Battery Co.*, 242 N.C. 553, 89 S.E. 2d 124. Plaintiff's first assignment of error must be sustained.

The evidence was that neither the Buick nor the Plymouth stopped before the collision. Nevertheless, the judge charged the jury as follows:

> "The Court instructs that if either of the drivers was confronted by an emergency created by the negligence of another in suddenly stopping, if that be found by you, that person isn't held to the prudence required ordinarily."

The court gave no further explanation of the doctrine of sudden emergency which, indeed, was not applicable to the evidence in this record. We think this isolated instruction, unsupported by any evidence, must have been confusing to the jury.

The other assignments of error relate to issues which the jury did not answer and require no discussion.

On the second trial of plaintiff's case the judge may see fit to submit to the jury the defendants' counterclaims. In the event the jury should find that the plaintiff was injured by the negligence of defendant Bennett and that the negligence of additional defendant Faircloth concurred, neither Bennett nor Faircloth could recover damages from the other. In the event the jury found that plaintiff was injured by the sole negligence of Bennett, Faircloth would be entitled to recover damages for the injury to his automobile. In the event the jury should again answer the first issue NO, for either Faircloth or Bennett to recover from the other, he would have to satisfy the jury by the greater

weight of the evidence that the negligence of the other was the sole proximate cause of the collision.

New trial.

JAMES B. ROUSE v. GRACE R. ROUSE.

(Filed 11 January 1963.)

Divorce and Alimony § 13—

Decree awarding the wife alimony without divorce, G.S. 50-16, legalizes the separation even though the decree is based on the wrongful act of the husband in abandoning the wife, and the husband is entitled to a divorce under G.S. 50-6 when the parties have lived separate and apart for two years subsequent to the date of the decree for alimony without divorce.

APPEAL by defendant from *Bundy, J.*, May 28, 1962, Civil Term of LENOIR.

This action for divorce on the grounds of two years' separation was instituted March 1, 1962. The facts, developed by plaintiff's evidence, are not in dispute. The defendant offered no evidence.

Plaintiff and defendant were married in November, 1949. On January 26, 1957, the plaintiff wilfully abandoned the defendant and the children of their marriage. Thereafter the defendant-wife instituted a suit against him for alimony without divorce under G.S. 50-16. On May 30, 1957, the Superior Court of Lenoir County, by a final judgment, adjudicated that the plaintiff had wilfully abandoned his wife and ordered him to pay her alimony. Defendant plead this judgment in bar of plaintiff's action for divorce.

The court sustained the plaintiff's demurrer to the plea in bar and overruled defendant's motions for judgment of nonsuit. These rulings are the subject of assignments of error 1, 2 and 3.

The usual three issues were submitted to the jury and answered in favor of the plaintiff. On the issue of separation the judge charged the jury that the separation between plaintiff and defendant prior to the entry of the judgment on May 30, 1957, could not be counted as a part of the two years' separation required for a divorce under G.S. 50-6, but that the judgment began a new period of separation. He told the jury that if the plaintiff and defendant had lived continuously separate and apart from each other for two years prior to the institution of the action and after the signing of the judgment on May 30, 1957, it would be its duty to answer the issue YES. The exceptions to this charge constitute defendant's assignment of error No. 4.

From a judgment entered on the verdict decreeing an absolute divorce defendant appealed.

J. Harvey Turner for plaintiff appellee.
H. Frank Owens for defendant appellant.

SHARP, J. Each of defendant's assignments of error presents this question: Does a judgment in an action instituted under G.S. 50-16 decreeing that the husband has wilfully abandoned the wife and awarding her support and maintenance constitute a judicial separation which, two years thereafter, will permit the husband to obtain an absolute divorce? The answer is YES.

As pointed out by *Bobbitt, J.*, in *Richardson v. Richardson,* 257 N.C. 705, 127 S.E. 2d 525: "According to our decisions, the effect of a divorce *a mensa et thoro,* obtained by the wife on the ground her husband abandoned her, is to legalize their separation from the date of such judgment; and in such case the husband, after two years from the date of such judgment, may proceed to an absolute divorce. *Lockhart v. Lockhart,* 223 N.C. 559, 27 S.E. 2d 444; *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296; *Sears v. Sears,* 253 N.C. 415, 117 S.E. 2d 7."

In *Schlagel v. Schlagel,* 253 N.C. 787, 117 S.E. 2d 790 (a case which decided only that the Clerk of the Superior Court had no authority to enter a judgment by default and inquiry in a suit for alimony without divorce under G.S. 50-16) we find the following assertion: "A divorce from bed and board is nothing more than a judicial separation; that is, an authorized separation of the husband and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond. . .This is *precisely the effect of an action under G.S. 50-16,* except that it is only available to the wife." (Emphasis added and citations omitted). We affirm this statement as the law.

The law does not require a man to live with his wife. It does, however, force him to support her in the absence of some compelling reason to the contrary. When the law, by civil judgment, has secured to the wife reasonable support and maintenance after a husband has wrongfully separated himself from her, it has required him to perform his legal obligation and can do no more. The separation is legalized from then on unless marital relations are resumed thereafter. A resumption of marital relations would likewise invalidate a divorce *a mensa et thoro.*

The defendant argues that this action should have been dismissed upon the authority of *Taylor v. Taylor,* 257 N.C. 130, 125 S.E. 2d 373. This contention results from a failure to distinguish the facts

of that case from those of this one. Taylor's action for an absolute divorce under G.S. 50-6 was not based upon a judicial separation but upon a criminal abandonment for which he had been convicted. After Taylor separated himself from his wife on June 18, 1958, they did not again live together. On September 3, 1958, he was convicted of abandonment and nonsupport of his wife and children. Thereafter no civil action was instituted by either party against the other. There was no judgment decreeing either a divorce *a mensa et thoro* or alimony without divorce to interrupt the original criminal abandonment and start a new period of separation. Taylor could not base his action on his own criminal conduct. *Byers v. Byers*, 223 N.C. 85, 25 S.E. 2d 466; *Pruett v. Pruett*, 247 N.C. 13, 100 S.E. 2d 296.

In the instant case, as the judge correctly charged the jury, plaintiff began a new period of separation on the date the judgment was entered in the action instituted by the wife under G.S. 50-16. Two years thereafter he was legally entitled to institute his action for divorce. Defendant's assignments of error are overruled.

No error.

STATE v. WILLIAM ED GAMMONS.

(Filed 11 January 1963.)

1. Criminal Law § 34; Rape § 18—

In a prosecution for assault with intent to commit rape, evidence that defendant committed a like offense approximately two years prior to the offense charged is incompetent and its admission is prejudicial error, there being no connection between the two offenses.

2. Criminal Law § 107—

Where defendant introduces evidence of an alibi, it is prejudicial error for the court to fail to charge the law applicable thereto.

APPEAL by defendant from *Armstrong, J.*, April Term 1962 of SURRY.

This is a criminal action wherein the defendant William Ed Gammons was tried on a bill of indictment charging him with the assault on a female with intent to commit rape. The defendant entered a plea of not guilty.

The State's evidence tends to show that the assault on the prosecutrix with intent to commit rape took place in a basement bedroom of the defendant's home; that this room had been used on previous occasions for conferences by the defendant with members of his church.

Defendant is a Holiness preacher and was the pastor of the Faith and Gospel Tabernacle Church of which the prosecutrix was a member at the time of the alleged assault.

The jury returned a verdict of guilty as charged. From the judgment imposed on the verdict the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General James F. Bullock for the State.

Blalock & Swanson for defendant.

DENNY, C.J. The appellant made a motion for judgment as of nonsuit when the State rested. The motion was denied. The defendant thereafter offered evidence and the State offered additional evidence in rebuttal. The defendant did not renew his motion for judgment as of nonsuit and, therefore, does not contend on this appeal that the State's evidence was not sufficient to take the case to the jury.

The defendant assigns as error the admission over objection by the defendant of the testimony of Caroleta Garner, a witness for the State, to the effect that approximately two years before the trial of this case she was in the home of the defendant in the basement bedroom; that she was a member of the defendant's church at the time and that the defendant told her if she didn't let him do what he wanted to, that she was going to be deathly sick and that something terrible was going to happen to her, and that she let him have sexual intercourse with her.

" * * * (W)here the nature of the offense is such that proof of its commission as charged carries with it an implication or presumption of criminal intent, evidence of the perpetration or attempted perpetration of other like offenses is inadmissible." *S. v. Beam*, 184 N.C. 730, 115 S.E. 176.

In North Carolina Law of Evidence by Stansbury, section 91, it is said: "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged: * * *. The commission of a certain act is never directly evidential of the commission of a similar act at some other time. There is always some intermediate step in the reasoning. If there is no other connection between the two acts, it is argued that the doing of the first act shows a disposition to indulge in that kind of conduct, and from this disposition the probability of the second act is inferred. But to reason thus from one crime to another is a clear violation of the character rule; hence if the first act has no other relevancy than that, it may not be proved."

In *S. v. Graham*, 121 N.C. 623, 28 S.E. 409, this Court said: "Evidence of a distinct, substantive offense cannot be admitted in support

of another offense, as a general rule. * * *

"It is when the transactions are so connected or contemporaneous as to form a continuing action that evidence of the collateral offense will be heard to prove the *intent* of the offense charged."

In the case of *S. v. Smith,* 204 N.C. 638, 169 S.E. 230, it is said: "It is undoubtedly the general rule of law that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other."

There are certain exceptions to the general rule, but in our opinion the challenged testimony does not fall within any of the exceptions. *S. v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Smith, supra.*

This assignment of error is sustained.

Moreover, the defendant's chief defense on which he relied in the trial below was an alibi. If the evidence of the defendant and his witnesses is believed, neither the prosecutrix nor the defendant were in the room where the offense is alleged to have taken place at the time charged.

The defendant assigns as error the failure of the court below to charge and apply the law to the defendant's evidence with respect to his alibi. In this connection the State concedes error and cites *S. v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175.

Since there must be a new trial, we deem it unnecessary to consider and discuss the remaining assignments of error. They may not arise on another hearing.

New trial.

ULYSES WHITAKER AND WIFE, RITA E. WHITAKER v. J. G. WOOD AND WIFE, CLARICE N. WOOD.

(Filed 11 January 1963.)

1. Fraud § 11—

In this action to recover the difference in value of the land as conveyed and its value if it had been as represented, based upon misrepresentation as to the amount of tobacco allotment which would be transferred with the land, the evidence *is held* sufficient to overrule nonsuit.

2. Fraud § 5—

Evidence that plaintiff knew nothing of the details of the tobacco allotment program, that the male defendant stated his lands had a tobacco

allotment in a large amount and that an allotment in a specified amount would be transferred with the part of the land plaintiffs were buying, *held* to raise a question for the jury as to whether plaintiffs reasonably relied upon such representation without making inquiry in the ASC office as to whether defendant could legally transfer the amount of tobacco allotment represented.

APPEAL by plaintiffs from *Crissman, J.*, July Term 1962 of SURRY.

Plaintiff's action is to recover damages on account of alleged false and fraudulent representations with reference to the tobacco allotment on land sold by defendants to plaintiffs.

On or about November 4, 1957, plaintiffs agreed to purchase from defendants a farm in Surry County consisting of two (contiguous) tracts, namely, the Marvin Whitaker tract of 103.65 acres and the Syon Wood tract of 50.1 acres, at the price of $12,000.00. Later in November, 1957, defendants conveyed the land to plaintiffs; and, as agreed, plaintiffs paid $1,000.00 cash and executed (secured) balance purchase price notes aggregating $11,000.00.

Plaintiffs alleged defendants represented and guaranteed "that said two tracts of land which made up the tobacco farm had four (4) acres of tobacco allotment and that the four (4) acre tobacco allotment went with the farm, was on the farm, and would be transferred with the land as a specific part of the consideration for the purchase price of $12,000.00"; that plaintiffs were induced to purchase said farm by reason of defendants' said representations; that in fact, as plaintiffs were advised in the Spring of 1958, the tobacco allotment on the farm was 1.67 acres instead of 4 acres and the reasonable market value of the farm was $4,660.00 less because the tobacco allotment was 2.33 acres less than represented by defendants; and that defendants' said representations were false, made with knowledge of their falsity, made with intent to deceive and did deceive plaintiffs and were reasonably relied upon by plaintiffs in their purchase of said farm.

Answering, defendants admitted the sale and conveyance of the land described in deed dated November 5, 1957, by J. G. Wood and wife, Clarice N. Wood, to Ulyses Whitaker and wife, Rita E. Whitaker, upon the terms alleged by plaintiffs; and that the ASC Office of Surry County allotted to this land for 1958 a tobacco acreage of 1.67 acres. Except as stated, defendants denied all essential allegations of the amended complaint; and thereafter defendants alleged, separately stated, five further answers and defenses.

At the conclusion of plaintiffs' evidence, the court, allowing defendants' motion therefor, entered judgment of involuntary nonsuit and dismissed the action.

Plaintiffs excepted and appealed.

Blalock & Swanson and C. Orville Light for plaintiff appellants.
Barber & Gardner for defendant appellees.

BOBBITT, J. The essential elements of actionable fraud are well established and need not be restated. See *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131; *Roberson v. Williams,* 240 N.C. 696, 83 S.E. 2d 811; *Keith v. Wilder,* 241 N.C. 672, 86 S.E. 2d 444.

Since there must be a new trial, we refrain from a discussion of the evidence presently before us. *Tucker v. Moorefield,* 250 N.C. 340, 342, 108 S.E. 2d 637, and cases cited. Suffice to say, this Court is of opinion that, applying the principles of law stated in the cited (*Cofield, Roberson* and *Keith*) cases, the evidence, particularly the testimony of *feme* plaintiff, when considered in the light most favorable to plaintiffs, was sufficient to require submission of the case to the jury.

Citing *Calloway v. Wyatt,* 246 N.C. 129, 97 S.E. 2d 881, defendants contend, assuming they made positive representations as alleged, the action is barred because of plaintiffs' negligent failure to make inquiry at the ASC Office of Surry County as to whether defendants, incident to the conveyance of the farm for which plaintiffs were negotiating, could legally transfer to plaintiffs a tobacco allotment of four acres. According to their testimony, plaintiffs knew nothing of the details of the tobacco allotment program. *Feme* plaintiff testified defendant J. G. Wood told her he had altogether, with his other farms, a tobacco allotment of "around 17 acres"; that his tobacco allotment was not subdivided but was under one farm program; that "he would take four acres out and let it go with this farm"; and that "(h)e kept insisting and telling (her) that on both occasions that (she) met him at the farm, and at the office." In view of this and other testimony, we are of opinion and hold that whether plaintiffs reasonably relied upon defendants' representations was a question for jury determination.

Although inferences may be drawn from the evidence sufficient to support a finding that *feme* defendant owned some interest in the land conveyed, what interest, if any, was owned by *feme* defendant does not clearly appear. The evidence presently before us, while it tends to show she was present when certain representations were made by her husband, fails to show any of the alleged representations were made by her. Hence, at the next trial it is appropriate that evidence as to what interest in the land, if any, was owned by *feme* defendant be fully and clearly developed.

The judgment of involuntary nonsuit is reversed.

Reversed.

FOSTER HATCHER v. WILLIAM WILSON GWALTNEY, FREDERICK PARKER SMITH, JR., AND FREDERICK PARKER SMITH, SR.

(Filed 11 January 1963.)

Automobiles § 45—

Evidence that plaintiff turned his vehicle to the left to enter a filling station on his left side of the highway when defendant's oncoming car was some 100 feet distant, but that when the cars were approximately 60 feet apart plaintiff stopped his car, blocking defendant's lane of travel, and that defendant did not then have time to avoid collision, *is held* not to raise the issue of last clear chance, since this doctrine arises only when there is a sufficient time for defendant to avoid the accident after defendant should have discovered plaintiff's perilous position.

APPEAL by plaintiff from *Olive, J.*, April Term 1962 of RANDOLPH.

The plaintiff instituted this action on 27 February 1961 to recover for personal injuries and property damages allegedly sustained in a motor vehicle collision which occurred on 20 January 1961 on Highway No. 64 about three miles east of Asheboro in Randolph County, North Carolina.

The defendants, in answering the plaintiff's complaint, denied negligence, alleged contributory negligence, and denied agency between the defendant William Wilson Gwaltney and the defendant owner Frederick Parker Smith, Sr., who was not present. The defendants Smith, Jr. and Smith, Sr. set up counterclaims against the plaintiff for their damages. By way of reply, the plaintiff alleged that the defendants had the last clear chance to avoid the collision.

Prior to the time of the trial the two counterclaims were settled and a sum of money was paid to defendant Smith, Jr. for his personal injuries and to defendant Smith, Sr. for property damages. The two counterclaims were dismissed as of voluntary nonsuit by judgment entered in the Superior Court of Randolph County on 27 November 1961.

The plaintiff's evidence tends to show that about 10:30. p.m on 20 January 1961 the plaintiff was going from his home to Boone's Service Station for gas; that he entered Highway No. 64 from the Cedar Falls Road; that before entering, he stopped and saw no traffic approaching from the east on said highway but observed several cars approaching from the west about two-tenths of a mile away; that he put his car in low gear, entered the highway, and kept his car in low gear and traveled westwardly for a distance of about 150 feet to the entrance to Boone's Service Station, located to his left. That the three cars approaching from the west had on bright lights; he testified he "patted the button for their dimmers" but the front car did not dim its lights;

that the lights blinded him and he stopped; that he "knew" he was on his side of the road, but just before the collision he saw his "front wheel was on the line."

On cross-examination, the plaintiff admitted that he was mistaken about stopping on his side of the road; he admitted that the wheel of his car was some 14 inches over in the east lane of traffic.

The Highway Patrolman who investigated the accident immediately after it occurred testified that the collision occurred in the east lane of traffic; that the car the defendant Gwaltney was driving skidded some 51 feet before the collision and that all skid marks and the debris were in Gwaltney's lane of traffic. The patrolman further testified that the plaintiff told him he "started to make his left turn, and he saw the cars approaching and saw he couldn't make his turn, and that he then stopped. He said he stopped because he didn't have time to make his turn. He did not say anything about being blinded by any lights. Yes, he said that he had a beer to drink. I questioned him because he had the odor of some intoxicant on his breath. He said he had one or two beers."

The defendants' evidence tends to show that defendant Smith, Jr. and defendant Gwaltney had been to Atlanta to attend a school for mechanics. Smith, Jr. is a married man and maintains his own home in Virginia. He had borrowed his father's car for the purpose of making the trip to Atlanta. His own car was not in good running order. Smith, Jr. was not a member of the household of Smith, Sr., nor was he his employee or on an errand for or on behalf of his father.

The defendant Gwaltney testified that he was driving at the time of the collision; that he was traveling about 45 miles per hour; that he observed the plaintiff's car traveling west when they were about 250 feet apart; that the plaintiff, without giving any signal, turned to the left when the two cars were from 100 to 115 feet apart; that when he saw the plaintiff start across his lane of traffic, he took his foot off the accelerator, but when the cars were approximately 60 to 65 feet apart, the plaintiff stopped his car when he was about half way across his, defendant Gwaltney's, lane of travel; that he applied his brakes and did everything he could to avoid the collision.

The Presiding Judge declined to submit the issue of last clear chance.

The jury found that the defendant Gwaltney was not operating the automobile owned by defendant Smith, Sr. as the agent of Smith, Sr.; that Gwaltney was negligent and that the plaintiff was contributorily negligent.

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

H. Wade Yates for plaintiff.

Smith, Moore, Smith, Schell & Hunter; Stephen Millikin for defendants.

PER CURIAM. A careful examination of the exceptions and assignments of error does not reveal any prejudicial error in the trial below that would justify a new trial. Moreover, the plaintiff in his brief cites no authority in support of any argument on any assignment of error except as to the refusal of the court below to submit the issue of last clear chance.

In our opinion, the evidence adduced in the trial below did not warrant submission of the issue on the question of last clear chance.

The last clear chance doctrine contemplates "a last 'clear' chance, not a last 'possible' chance, to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively. * * * The application of the last clear chance doctrine is invoked only where there was a sufficient interval of time between the plaintiff's negligence and his injury during which the defendant, by the exercise of reasonable care could or should have discovered the perilous position of the plaintiff in time to avoid injuring him.

"The original or primary negligence of a defendant, which would warrant answering the first issue in the affirmative, cannot be relied upon by the plaintiff to recover under the last clear chance doctrine. A recovery on the original negligence is barred in such cases by the plaintiff's contributory negligence. The plaintiff's right to recover, notwithstanding his own negligence, must arise out of a factual situation which gave the defendant an opportunity, through the exercise of reasonable care, to have avoided the injury to him, but failed to do so." *Aydlett v. Keim*, 232 N.C. 367, 61 S.E. 2d 109; *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337; 38 Am. Jur., Negligence, sec. 218, page 903, *et seq.*

In the trial below, we find

No error.

STATE v. DONOVAN HARRINGTON, BOBBY NICHOLS AND JAMES CHRISCO.

(Filed 11 January 1963.)

Burglary and Unlawful Breakings § 4; Larceny § 7—

Evidence tending to show that a grocery store was broken into and certain articles stolen therefrom, together with evidence that defendants

broke into and robbed a filling station, without evidence connecting the two, either as to time or place, is insufficient to be submitted to the jury.

APPEAL by defendant James Chrisco from *Fountain,* Special Judge, February Term 1962 of CHATHAM.

This is a criminal action in which the defendant James Chrisco and others were tried on a two-count bill of indictment charging breaking and entering the premises of Roy Holt on 2 November 1960, with intent to steal, and charging larceny of certain merchandise.

Roy Holt testified, "I am in the grocery business which is operated by my sister at Merry Oaks. I went to the store on the morning of November 3, 1960. The window was out. The glass was busted out and all my tires were gone. * * * I missed tires, socks, stockings * * *. Articles not present when I opened up were, six auto tires, a rack of men's socks and ladies' hose, a little bit of anti-freeze and a few cigarettes. * * * I have never seen any of the merchandise again."

Robert Samuels, State Highway Patrolman, testified that he saw the defendants Bobby Nichols and James Chrisco about 10 o'clock on the night of 7 November 1960; that he found in the trunk of Bobby Nichols' 1955 Ford: "Rod and reel, guitar, drop cord, razor, 22 rifle, typewriter, box of socks, dynamite caps, some canned fruit, shot gun shells, 22 rifle bullets, some cigarettes"; that the car belonged to the Nichols boy and not to James Chrisco; that Chrisco said he did not know anything was in the back of the car. "I took one box of men's socks into custody that night. * * * I personally did not move the box of socks from the car. The next time I saw the box it was in the Sheriff's Office at Carthage. There were no tires in the trunk, no ladies' hose, no anti-freeze * * *. I turned everything over to the Sheriff."

J. W. Emerson, Sheriff of Chatham County, testified that he made an investigation of this case; that he went to Holt's store and saw Mr. Holt's sister there. "I found the finger prints of Donovan Harrington. I went to Carthage on the 8th or 9th of November, 1960. I got the box of socks out of the Sheriff's office at Carthage. * * * I identified the box by Mr. Holt's price mark. I don't actually know where the socks came from. I got the box of socks from Sheriff's office in Moore County. This is all I know about it. The room was full of stuff at the Sheriff's office * * *. Out of the whole room the socks were the only thing I could identify."

Mrs. Blanche Holt testified, "I am sister of Roy Holt and run store, Missing from store were 6 tires, 4 boxes men's socks, not full, 4 dozen ladies' hose, two gallons anti-freeze, two cartons cigarettes, one Dan River sport shirt. * * * This box of socks looks like some of ours. I can't vouch whether they all came from store or not. I think I made the marking on the box."

The defendant Harrington testified as a State's witness that he and the other defendants rode around for a while. "I know about the filling station and church. Had never been there before and have not been back since. We went up to the filling station, James knocked out the glass, I pulled the window frame out and Bobby went in, I started in and they told me to go get the car. They threw the stuff out and I put it in the trunk and in the back seat. I had never seen the store before."

The jury returned a verdict of guilty as charged. From the judgment imposed on the verdict, the defendant James Chrisco appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Harry W. McGalliard for the State.

H. F. Seawell, Jr., for defendant Chrisco.

PER CURIAM. The State's evidence reveals that Roy Holt's grocery store at Merry Oaks was broken into on the night of 2 November 1960 and that certain merchandise was stolen therefrom. However, there is no evidence tending to show that the filling station which the defendant Harrington testified that he and the other defendants broke into and robbed was located at Merry Oaks, or that the filling station referred to and Holt's grocery store were one and the same. Neither did Harrington identify or describe any of the merchandise taken from the filling station or store by him and the other defendants. Furthermore, there is nothing in the State's evidence to the effect that the breaking and entering and the theft about which the defendant Harrington testified occurred on the night of 2 November 1960.

While the evidence tends to show that the defendants broke into and robbed a filling station somewhere, at sometime, it does not connect the appellant herein with the breaking and entering and the theft of merchandise from Holt's grocery store at Merry Oaks on the night of 2 November 1960.

In our opinion, the State's evidence adduced in the trial below was insufficient to support the verdict returned against the appellant. The defendant Chrisco's motion for judgment as of nonsuit, interposed at the close of the State's evidence and renewed at the close of all the evidence, should have been allowed.

Reversed.

STATE v. ERVIN V. KING.

(Filed 11 January 1963.)

Criminal Law § 101—

Testimony that a witness for the State had made statements prior to the trial at variance in certain respects with the testimony of the witness, does not justify nonsuit, since such conflicts and discrepancies bear only upon the credibility of the witness and to the weight the jury should give his testimony.

APPEAL by defendant from *Carr, J.*, June 1962 Criminal Term of ALAMANCE.

Criminal prosecution on bill of indictment charging that defendant, on February 2, 1961, unlawfully, wilfully and feloniously committed the abominable and detestable crime against nature by forcing Tommy Dawson, a six-year-old child, to have unnatural sexual relations with him in the manner set forth in said bill.

Defendant pleaded not guilty. Upon trial, evidence was offered by the State and by defendant; and the jury returned a verdict of "Guilty as Charged in the Bill of Indictment." Judgment, that defendant be imprisoned "for not less than twelve or more than fifteen years," was pronounced. Defendant excepted and appealed.

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

Ross & Wood and Dalton, Long & Latham for defendant appellant.

PER CURIAM. Defendant was first tried and convicted at August Criminal Term, 1961; but, upon his appeal from the judgment of imprisonment then pronounced, this Court awarded a new trial. *S. v. King,* 256 N.C. 236, 123 S.E. 2d 486.

The State's evidence consists principally of the testimony of Tommy Dawson, the alleged victim, and of witnesses whose testimony (offered for the purpose of corroboration) relates to statements made by Tommy Dawson prior to defendant's arrest. According to the testimony of these witnesses, there were, in certain respects, conflicts and discrepancies between Tommy Dawson's prior statements and his testimony at trial. However, such conflicts and discrepancies go to the credibility of Tommy Dawson and to the weight, if any, the jury should give his testimony.

The evidence, when considered in the light most favorable to the State, was sufficient to require submission to the jury and to support the verdict; and careful consideration of each of defendant's assignments of error fails to disclose any error of law for which a new trial

should be awarded. The determinative issue was one of fact; and, after a trial free from prejudicial error, the jury, upon conflicting evidence, resolved the crucial issue against defendant.

No error.

STATE OF NORTH CAROLINA v. PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH, ROBERT M. BURCH, GEORGE MASEFIELD, MARTIN J. HAMILTON, WALTER SCHOENFELDT, PFAFF & KENDALL, A CORPORATION, TRAFFIC AND STREET SIGN COMPANY, A CORPORATION.

(Filed 1 February 1963.)

1. Master and Servant § 13.1; Criminal Law § 4—

The misdemeanor of violating G.S. 14-353 is not a malicious misdemeanor.

2. Conspiracy § 3—

A conspiracy to commit a misdemeanor is a misdemeanor.

3. Master and Servant § 13.1; Criminal Law § 8; Conspiracy § 3—

Even though the offense of conspiracy is complete upon the formation of the illegal agreement, such offense continues until the conspiracy is consummated or abandoned, and therefore where the State's evidence tends to show that the conspiracy was formed more than two years prior to the indictment but also that overt acts in furtherance of the illegal design were committed less than two years prior to the indictment, defendants' motion to quash on the ground that the prosecution was barred by G.S. 15-1, is untenable.

4. Indictment and Warrant § 15—

The constitutionality of a statute under which defendants are prosecuted may be challenged by motion to quash.

5. Criminal Law § 1—

The General Assembly, except as limited by provisions of the Federal or State Constitutions, has inherent power to provide that the commission of any specified act should be a crime, and a statute creating a criminal offense will be upheld, subject to such limitations, provided it has some substantial relation to the evils sought to be suppressed and defines the proscribed acts with sufficient certainty and definiteness to apprize a person of ordinary intelligence of the conduct forbidden.

6. Constitutional Law § 30; Master and Servant § 13.1—

The provisions of G.S. 14-353 making it a misdemeanor for a person to offer, give or promise to an agent, employee, or servant of another any gift or gratuity with intent to influence such agent's, employee's, or ser-

vant's actions in relation to his superior, define the proscribed conduct with definiteness and certainty and constitute the corrupt intent an essential element of the offense, and therefore the contention that the statute is so vague and uncertain that a prosecution thereunder deprives defendants of due process of law is untenable. Constitution of North Carolina, Art. I, § 17; Fourteenth Amendment to the Constitution of the United States.

7. Same—

The provisions of G.S. 14-353 that any agent, employee, or servant who requests or accepts a gift or gratuity or a promise thereof under an agreement or with an understanding that he should act in any particular manner in relation to his superior's business, should be guilty of a misdemeanor, define the proscribed conduct with definiteness and certainty and constitute the agreement or understanding an essential element of the offense, and therefore the contention that the statute is so vague and uncertain that a prosecution thereunder deprives defendants of due process of law is untenable. Constitution of North Carolina, Art. I, § 17; Fourteenth Amendment to the Constitution of the United States.

8. Constitutional Law § 14; Master and Servant § 13.1—

G.S. 14-353 making it a misdemeanor for a person to offer an employee a gift or gratuity with intent to influence such employee's conduct in relation to his employer's business, and making it a misdemeanor for an employee to accept such gift or gratuity with the understanding that he would act in a certain manner in respect to his employer's business, is a valid exercise of the police power of the State for the purpose of suppressing "commercial bribery."

9. Conspiracy § 3—

A conspiracy to do an unlawful act or to do a lawful act in an unlawful manner is a distinct and separate offense from the criminal acts committed pursuant to the unlawful design.

10. Same; Master and Servant § 13.1—

Conviction of one defendant of an overt act in violation of G.S. 14-353 is not inconsistent with the acquittal of such defendant of the conspiracy to violate the statute, of which other defendants were convicted, since such defendant may be guilty of the overt act without being guilty of the conspiracy to commit the act.

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

APPEAL by defendants Pierce Oliver Kidd Brewer, Robert A. Burch, and Robert M. Burch from *Mallard, J.*, June 1962 Term of WAKE.

Criminal prosecution tried upon an indictment containing twelve counts, and taking thirty-six pages of the record to reproduce it.

The first count in the indictment reads:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT THAT Pierce Oliver Kidd Brewer, Robert A. Burch,

Robert M. Burch, George Masefield, Martin J. Hamilton, Walter Schoenfeldt, Pfaff & Kendall, a corporation, acting through its officers, agents and employees and Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, late of the County of Wake, on or about the 1st day of August, 1957, as well before as after said date, and continuing from said date until on or about the 1st day of February, 1962, with force and arms, at and in the County aforesaid, unlawfully and willfully and with common design and set purpose and in a secret manner, did combine, confederate, scheme, agree and conspire together and with each other and with divers other persons to unite for the common object and purpose of willfully and unlawfully violating the provisions of the General Statutes of North Carolina, Chapter 14, Section 353, in that the said Pierce Oliver Kidd Brewer, individually and as agent and employee of Pfaff & Kendall, a corporation, and as agent and employee of Traffic and Street Sign Co., a corporation, the said Robert A. Burch, the said Robert M. Burch, the said George Masefield, individually and as agent, employee and Division Sales Manager of Pfaff & Kendall, a corporation, the said Martin J. Hamilton, individually and as agent, employee, officer and Vice President of Pfaff & Kendall, a corporation, and as agent, employee, officer and Vice President of Traffic and Street Sign Co., a corporation, the said Walter Schoenfeldt, individually and as agent, employee and General Manager of Traffic and Street Sign Co., a corporation, the said Pfaff & Kendall, a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, George Masefield, Martin J. Hamilton and others and the said Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, Martin J. Hamilton, Walter Schoenfeldt and others willfully and unlawfully agreed and conspired together and with each other, in a secret manner, that the said Pierce Oliver Kidd Brewer, Robert M. Burch, George Masefield, Martin J. Hamilton, Walter Schoenfeldt, Pfaff & Kendall, a corporation, acting through its officers, agents and employees and Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, willfully and unlawfully would promise, offer and give, and thereupon did willfully and unlawfully promise and offer, in a secret manner, to Robert A. Burch, an agent and employee, to wit: the Traffic Engineer, of the State Highway Commission, an agency of the State of North Carolina, money, gifts, gratuities and other

things of value with the intent and for the purpose of influencing the actions of the said Robert A. Burch in relation to his employer's business, i.e, to influence the said Robert A. Burch, who as Traffic Engineer for the State Highway Commission was responsible for and in charge of the writing of specifications and the drawing of plans for the procurement and erection of highway signs for the highways in North Carolina, to write and have written such specifications and to draw and have drawn such plans in a manner so as to favor the products of Pfaff & Kendall, a corporation, and to favor the products of Traffic and Street Sign Co., a corporation, and the said named defendants, Pierce Oliver Kidd Brewer, Robert A. Burch, Robert M. Burch, George Masefield, Martin J. Hamilton, Walter Schoenfeldt, Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, further willfully and unlawfully agreed and conspired together and with each other that the said Robert A. Burch, as agent and employee, to wit: the Traffic Engineer, of the State Highway Commission, an agency of the State of North Carolina, would willfully and unlawfully accept money, gifts, gratuities and other things of value under an agreement and with an understanding, which said agreement and understanding was thereupon entered into, that the said Robert A. Burch willfully and unlawfully would, in relation to his employer's business, write and have written specifications and draw and have drawn plans for the procurement and erection of highway signs in such a manner so as to favor the products of Pfaff & Kendall, a corporation, and to favor the products of Traffic and Street Sign Co., a corporation, against the form of the Statute in such case made and provided and against the peace and dignity of the State."

The other eleven counts in the indictment charge the defendants Brewer and the two Burches with specific overt acts in violation of G.S. 14-353 and in furtherance of the conspiracy alleged in count one of the indictment. All of the other defendants charged in the first count in the indictment are similarly charged in most, but not all, of the eleven counts in the indictment.

Plea: Not Guilty by all the defendants.

At the end of the State's evidence the court allowed motions for judgments of nonsuit on all counts in the indictment as to all the defendants except appellants Brewer and the two Burches, and allowed motions for judgments of nonsuit on the second, third and fourth counts in the indictment as to the appellants Brewer and the two Burches. Defendants offered no evidence.

Verdict as to Pierce Oliver Kidd Brewer: Guilty of counts one, five, six, seven, eight, nine, ten and eleven as charged in the indictment; and Not Guilty of count twelve as charged in the indictment.

Verdict as to Robert A. Burch: Guilty of counts one, five, six, seven, eight, nine, ten and eleven as charged in the indictment; and Not Guilty of count twelve as charged in the indictment.

Verdict as to Robert M. Burch: Not Guilty of counts one, five, six and twelve as charged in the indictment, and Guilty of counts seven, eight, nine, ten and eleven as charged in the indictment.

From the judgments entered against them separately, Pierce Oliver Kidd Brewer, Robert A. Burch and Robert M. Burch appeal.

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

Seawell and Harrell by Bernard A. Harrell for defendant appellant Brewer.

William T. Hatch and Elbert Richard Jones, Jr., for defendant appellants Robert A. Burch and Robert M. Burch.

PARKER, J. All the defendants, except the corporate defendants, charged in the indictment, prior to pleading to the indictment, filed a joint written motion to quash the indictment, and each and every count therein. The motion to quash covers more than fourteen pages in the record. The motion to quash avers that the first count in the indictment should be quashed for the following reasons: One. It shows on its face the offense charged is a misdemeanor which it alleges occurred on or about 1 August 1957, and therefore the prosecution is barred by the two-year Statute of Limitations, G.S. 15-1. Two. It "contains within one count three separate and distinct averments of conspiracy: (a) a conspiracy to violate G.S. 14-353; (b) a conspiracy that the defendants, with the exception of Robert A. Burch, conspired to offer and promise money to Robert A. Burch, with the intent and purpose of influencing his activities in relation to his employer's business; (c) the defendants, other than Robert A. Burch, conspired that Robert A. Burch would accept money or other gratuities." This is duplicity and a failure to comply with the requirements of G.S. 15-152. Three. It fails to comply with the requirements of G.S. 15-153. Four. G.S. 14-353, upon which the indictment is based, is unconstitutional and repugnant to the "due process of law" clause of section one of the 14th Amendment to the United States Constitution, and to "the law of the land" clause of Article I, section 17, of the North Carolina Constitution, in that the

statute is so vague and indefinite, it is void for uncertainty, and further the statute constitutes an arbitrary, capricious and unreasonable exercise of the police power of the State. The motion to quash alleges that the remaining eleven counts in the indictment should be quashed for substantially the same reasons as the first count in the indictment should be quashed.

The court denied the joint motion to quash the indictment and each and every count therein, and the defendants who made the motion excepted. Whereupon, all the defendants entered pleas of Not Guilty. Defendants Brewer and the two Burches assign as errors the denial to quash the counts in the indictment upon which they were convicted.

Defendant Brewer has filed a brief. The defendants Burch have filed a joint brief. In the two briefs the first question presented for decision is whether or not the prosecution of the first count in the indictment is barred by G.S. 15-1. Defendant Robert M. Burch was acquitted on the first count.

The part of the statute relevant to appellants' contention is: "* * * all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards* * *." The statute has a proviso, which is not applicable here.

A violation of G.S. 14-353 is explicitly stated by the statute to be a misdemeanor. The State makes no contention that a violation of G.S. 14-353 is a malicious misdemeanor. In fact, a violation of this statute is not a malicious misdemeanor. *S. v. Frisbee,* 142 N.C. 671, 55 S.E. 722.

In this jurisdiction a conspiracy to commit a misdemeanor is a misdemeanor. *S. v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25.

"As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *S. v. Knotts,* 168 N.C. 173, 188, 83 S.E. 972, 979. "No overt act is necessary to complete the crime of conspiracy," *S. v. Davenport,* 227 N.C. 475, 494, 42 S.E. 2d 686, 699, or as stated in *S. v. Whiteside,* 204 N.C. 710, 169 S.E. 711, "the conspiracy is the crime and not its execution."

The indictment was found at the April Assigned Term 1962 of Wake County superior court, and the trial term was the June 1962 Term of said court. The first count in the indictment charges that all the defendants "on or about the 1st day of August, 1957, as well before as after said date, and continuing from said date until on or about the 1st day of February, 1962* * *unlawfully and willfully and with common design and set purpose and in a secret manner, did combine, confederate, scheme, agree and conspire together and with each other* * *."

Appellants argue that in North Carolina a criminal conspiracy is a completed crime as soon as the union of wills for the unlawful purpose is perfected, that no overt act is necessary to complete the crime of conspiracy, that count one in the indictment alleges that the conspiracy existed and was completed on or about "the 1st day of August 1957," that the indictment was found at the April Assigned Term 1962, and, therefore, the prosecution on the first count in the indictment is barred by G.S. 15-1.

Defendant Brewer and defendant Robert A. Burch were convicted on the fifth, sixth, seventh, eighth, ninth, tenth and eleventh counts in the indictment, all of which charge overt acts in furtherance of the conspiracy charged in the first count of the indictment on the following dates respectively: Fifth count, on or about 1 June 1960; sixth count, on or about 16 June 1960; seventh count, on or about 23 August 1960; eighth count, on or about 23 August 1960; ninth count, on or about 1 February 1961; tenth count, on or about 1 February 1961; eleventh count, on or about 1 June 1961. Defendant Robert M. Burch was acquitted on counts five and six.

In *United States v. Kissel,* 218 U.S. 601, 54 L. Ed. 1168, the first count of the indictment alleges "that the defendants in error and others named, on December 30, 1903, and from that day until the day of presenting the indictment (July 1, 1909), have engaged in an unlawful conspiracy in restraint of trade in refined sugar among the several states of the Union* * *. It then sets forth, at length, the means by which the alleged purpose was to be accomplished, and what are put forward as overt acts done in pursuance of the plan." Mr. Justice Oliver Wendell Holmes, speaking for the Court, said in replying to a contention of the defendants in error similar to the contention made here:

> "The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded, and a plea is proper to show that the statute of limitations has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts, or that the results of a successful conspiracy endure to a much later date, does not affect the character of the crime.
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> "The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agree-

ment is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U.S. 450, 25 L. Ed. 193, 3 Am. Crim. Rep. 334. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

* * * * * * * *

"To sum up and repeat: The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise, more than three years before July 1, 1909, will be open and unaffected by what we now decide."

In substantial accord with the *Kissel* case, see *Hyde v. United States*, 225 U.S. 347, 56 L. Ed. 1114; *Brown v. Elliott*, 225 U.S. 392, 56 L. Ed. 1136.

In *Pinkerton v. United States,* 145 F. 2d 252, W. Daniel Pinkerton and Walter G. Pinkerton were indicted with three others on a conspiracy charge to violate certain specified sections of the Internal Revenue Code of the United States. The indictment contained only one count, and charged that the conspiracy set forth had existed continuously from the 12th day of August, 1938, until the 27th day of June, 1943, and within three years of the finding of the indictment which was returned by the grand jury on February 19, 1944. There were nineteen overt acts charged in the indictment, the first six of which, it is without dispute, were committed more than three years before the return of the indictment. The two Pinkertons were convicted and appealed. The Court in its opinion said:

> "The indictment was in all respects free from error. The court, however, failed to correctly define the charge of conspiracy as laid in the indictment and to point out to the jury what evidence was necessary to keep the conspiracy alive and bring it within the statute of limitations, and also to limit the evidence as to the overt acts committed before the three year statute ran. The charge was further confusing, we think, for failure to fully instruct the jury that the guilt of the defendants could only be predicated on one or more overt acts proved to have been committed within the three year limit of the statute.
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> " 'Where the conspiracy contemplates various overt acts and the consequent continuance of the conspiracy beyond the commission of the first act, each overt act thereafter gives a new, separate, and distinct effect to the conspiracy, and constitutes another agreement, so that a prosecution is not barred by the statute of limitations until three years after the commission of the last overt act alleged and proved.' *Hedderly v. United States,* 9 Cir., 193 F. 561, 569; *United States v. Kissel,* 218 U.S. 601, 31 S. Ct. 124, 54 L. Ed. 1168.
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> "A conspiracy and overt acts may be charged in the indictment which are not within the three year period of the statute of limitations, but they must be limited to show only the conspiracy and its continuation. Such overt acts beyond the three year limit of the statute are not relevant to show guilt. To convict, an overt act must be alleged and proved which occurred within the three year statute of limitations."

In *Scarlett v. State,* 201 Md. 310, 93 A. 2d 753, Scarlett, Harry Gross and Horace B. Cann were tried in December 1951 on an in-

dictment charging that on 1 January 1947, and thence continually until 20 August 1951, they unlawfully conspired together and with certain other persons to violate the lottery laws of the State of Maryland. The jury found Scarlett and Gross guilty, and Cann not guilty. In February 1952, the Supreme Bench of Baltimore City granted them a new trial. At the second trial in March 1952, the jury found Scarlett guilty, and Gross not guilty. From a sentence of imprisonment Scarlett appealed. In affirming the judgment below, the Court, so far as relevant here, said:

> "Appellant also attacks the indictment on the ground that the object of the conspiracy, alleged to have continued nearly five years, from January 1, 1947, to August 20, 1951, was in fact not inherently continuous. He claims that any participant in the conspiracy could withdraw from it at any time. He also suggests that Edgar Wilkes testified that he participated only in 1949 and 1950, while Cann testified that he participated only a few months prior to his arrest on June 29, 1951. The argument seems to be that the conspiracy was complete on the day defendants were charged to have first conspired, January 1, 1947, and that a conspiracy is not a continuing offense in such a sense that each overt act will remove the bar of the statute of limitations against the original conspiracy, and in order to avoid the bar the indictment must charge a conspiracy and an overt act within the limitation period.
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> "It is true that in Maryland all prosecutions for the crime of conspiracy must be commenced within two years after the commission of the offense. Code 1951, art. 27, sec. 46. However, where a conspiracy contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, such continuous co-operation is a single conspiracy, rather than a series of distinct conspiracies.
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> "In *United States v. Kissel*, 218 U.S. 601, 31 S. Ct. 124, 126, 54 L. Ed. 1168, where the indictment charged an unlawful conspiracy in restraint of trade in refined sugar on December 30, 1903, and continuing from that day until July 1, 1909, the defendants argued that the alleged conspiracy was a completed crime as soon as it was formed, and that a plea was proper to show that the statute of limitations had run. In rejecting that argument, Justice Holmes, speaking for the Court, said: [We omit a long quotation from what Mr. Justice Holmes said, because we have quoted it above.]

"In *Archer v. State,* 145 Md. 128, 147, 125 A. 744, the Court of Appeals, in accord with the view expressed by the Supreme Court, held that, although the crime of conspiracy is completed when the unlawful agreement is reached, it is not then exhausted in the sense that the statute of limitations cannot be tolled by the commission of a subsequent overt act. We reaffirm that proposition."

The authorities are in conflict as to when the Statute of Limitations operates to bar a prosecution for conspiracy. Some Courts take the view that a conspiracy is not a continuing offense in the sense that each overt act will remove the bar of the Statute of Limitations against the original conspiracy. Other Courts take the view, and this seems to be in accord with the weight of later authorities, and in our opinion is the better view, that a conspiracy may be a continuing crime and that it is a continuing offense until its abandonment or success, or as long as any concerted action pursuant to the conspiracy continues, or as long as there is a course of conduct in violation of law to effectuate its purpose, or when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, as long as there is such continuous co-operation pursuant to the conspiracy. In brief, that the conspiracy is a continuing offense so that the Statute of Limitations is tolled as to the original conspiracy each time an overt act is committed in furtherance of the purpose and design of the conspiracy. Annotation 97 A.L.R. 137; 22 C.J.S., Criminal Law, sec. 227 (3), p. 592; 11 Am. Jur., Conspiracy, sec. 25. In all three of these works many cases are cited which support the texts.

The criminal offense of conspiracy is complete in North Carolina, as we have stated above, and at common law, as soon as the confederacy or combination is formed. In many jurisdictions, however, the common law rule is modified by statutes requiring that to constitute the crime of conspiracy there must be an unlawful agreement and an overt act to effect the object of the agreement. This is true of the crime of conspiracy as defined in the Federal Criminal Code. Annotation 62 A.L.R. 2d 1369. In this annotation on p. 1372 it is said:

"Generally speaking, however, the recent cases pay scant attention to any possible differences with respect to the running of limitations as between statutory and common-law conspiracies. The cases warrant the conclusion that, as to conspirators who have not withdrawn from the conspiracy, limitations against a prosecution for conspiracy run from the time the last overt act in furtherance of the conspiracy was committed. It is believed that

none of the recent cases are inconsistent with this view; as affirmatively supporting it, see the following cases: [Many cases in support of the text are cited.]"

S. v. Christianbury, 44 N.C. 46, cited and relied upon by defendant Brewer in his brief, is clearly distinguishable. In that case, "the acts which are charged in the indictment, as constituting the offense, took place more than two years before the prosecution was commenced." In the instant case count one in the indictment charges the conspiracy as continuing from on or about 1 August 1957 until on or about 1 February 1962, and in other counts in the indictment overt acts in furtherance of the purpose and design of the conspiracy and in effectuating its unlawful purpose are charged as having been committed by the alleged conspirators on or about 1 June 1960, 16 June 1960, 23 August 1960, 1 February 1961, and 1 June 1961, all within two years of the finding of the indictment as a true bill by the grand jury at the April Assigned Term 1962 of Wake County superior court.

Defendants have not seen fit to bring up any of the evidence at the trial or the charge of the court. We decide here that a conspiracy may have a continuance in time, and count one and the indictment here allege that the conspiracy did so continue with the commission of overt acts by the alleged conspirators in furtherance of the conspiracy and to effectuate its unlaw purpose within two years of the finding of the indictment. The trial court correctly overruled defendants' motion to quash the first count in the indictment on the ground that a prosecution on such count was barred by G.S. 15-1.

In the two briefs of appellants the second question presented for decision is: Did the trial court err in refusing to quash the indictment on the ground that G.S. 14-353, upon which the indictment is based, is unconstitutional and repugnant to the "due process of law" clause of section one of the 14th Amendment to the United States Constitution, and to "the law of the land" clause of Article I, section 17, of the North Carolina Constitution, in that the statute is so vague and indefinite, it is void for uncertainty, and on the further ground that the statute constitutes an arbitrary, capricious and unreasonable exercise of the police power of the State?

The General Assembly at its 1913 Session enacted Chapter 190 of the Public Laws of North Carolina, which is entitled "An act to prohibit influencing agents, employees and servants." Section one of this act is codified as G.S. 14-353, and section two of this act is codified as G.S. 14-354.

G.S. 14-353 reads:

"INFLUENCING AGENTS AND SERVANTS IN VIOLATING DUTIES OWED EMPLOYERS.—Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court."

G.S. 14-354 provides that a witness may be required to give self-criminating evidence in respect to the crime denounced in G.S. 14-353, but, if he does, no suit or prosecution can be based thereon, except for perjury committed in so testifying.

Appellants may challenge the constitutionality of G.S. 14-353 by a motion to quash the indictment, which charges a violation of this statute. *S. v. Glidden Co.*, 228 N.C. 664, 46 S.E. 2d 860; 16 C.J.S., Constitutional Law, pp. 343-4

The General Assembly of North Carolina, unless it is limited by constitutional provisions imposed by the State or Federal Constitution, has the inherent power to define and punish any act as a crime, because it is indisputably a part of the police power of the State. The expediency of making any such enactment is a matter of which the General Assembly is the proper judge. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, if such be enacted, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution and the laws of the State. However, the act of the General Assembly declaring what shall constitute a crime must have some substantial relation to the ends sought to be accomplished. *S. v. Yarboro*, 194 N.C. 498, 140 S.E. 216; *People v. Belcastro*, 356 Ill. 144, 190 N.E.

301, 92 A.L.R. 1223; 22 C.J.S., Criminal Law, sec. 13; 14 Am. Jur., Criminal Law, secs. 16 and 22; Wharton's Criminal Law and Procedure, 1957, Vol. I, sec. 16.

In passing upon the constitutionality of G.S. 14-353, we start with the presumption that it is constitutional, and it must be so held by this Court, unless it is in conflict with some constitutional provision of the State or Federal Constitution. *S. v. Warren*, 252 N.C. 690, 114 S.E. 2d 660; *S. v. Lueders*, 214 N.C. 558, 200 S.E. 22. "We cannot overturn a statute because we do not like it, for our likes and dislikes affect us as citizens, not as judges." *Wright v. Hart*, 182 N.Y. 330, 353, 75 N.E. 404, 412, 2 L.R.A. (N.S.) 338, 350, 3 Ann. Cas. 263, 271.

The books are filled with statements by the Courts of the rule that a crime must be defined in a penal statute with appropriate certainty and definiteness. In *Connally v. General Construction Co.*, 269 U.S. 385, 70 L. Ed. 322, the Court said:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

This is said in *Boyce Motor Lines v. United States*, 342 U.S. 337, 96 L. Ed. 367:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

This Court said in *S. v. Hales*, 256 N.C. 27, 122 S.E. 2d 768, quoting from Wharton's Criminal Law and Procedure, 1957, Vol. I, sec. 18:

> " 'While a penal statute must be sufficiently definite to apprise a person of ordinary intelligence of the conduct which is prohibited, it is not necessary that the forbidden conduct be described with mathematical precision or absolute certainty. . . . A statute is not unconstitutional as indefinite because it employs general terms, when such terms convey to a person of ordinary understanding and intelligence an adequate description of the prohibited act, for impossible standards of certainty are not required. Reasonable certainty is sufficient.' "

To the same effect, 22 C.J.S., Criminal Law, sec. 24(2)a; 14 Am. Jur., Criminal Law, sec. 19. See also, *S. v. Partlow,* 91 N.C. 550; *S. v. Morrison,* 210 N.C. 117, 185 S.E. 674; *S v. Coal Co.,* 210 N.C. 742, 188 S.E. 412.

So far as known, after a diligent search by us, by the Attorney General and his staff, and by learned counsel who appear for appellants, no case involving the provisions of G.S. 14-353 and 14-354 has been before this Court.

Twelve states have statutes prohibiting the general practice of bribery in commercial relationships or influencing agents, employees and servants in commercial relationships, analogous to our statute codified as G.S. 14-353 and 14-354: Connecticut, Louisiana, Massachusetts, Michigan, Nebraska, New York, Pennsylvania, Rhode Island, South Carolina, Virginia, Washington and Wisconsin. In addition to statutes of this general type, there are seventeen states which have statutes making it a crime to bribe a particular type of employee, notably agents or employees in charge of purchasing or hiring: Arizona, California, Connecticut, Indiana, Kentucky, Maine, Michigan, Montana, Navada, New Jersey, New York, Oregon, Tennessee, Texas, Utah, Washington and Wisconsin. CONTROL OF NONGOVERNMENTAL CORRUPTION BY CRIMINAL LEGISLATION, University of Pennsylvania Law Review, Vol. 108, p. 848, (1960), where on pp. 864 and 866 a chart gives the names of the states and sets forth the specific statutes. Incidentally, North Carolina has statutes making athletic corruption a crime. G.S. 14-373, 14-374, 14-375, 14-376, and 14-377.

The New York statute outlaws the corruption of employees, agents and servants and of purchasing and hiring agents in particular. The University of Pennsylvania Law Review, Vol. 108, p. 852, states: "Since this statute [New York] is broadest in scope, has been more widely enforced than any other, and has served as a prototype for the legislation of several other states, it will be dealt with in some

detail." In note 29 to this sentence it states that Connecticut, Massachusetts, Michigan, Nebraska, North Carolina, South Carolina, Virginia, and Wisconsin, all have statutes similar to New York's. The note specifies the statute of each state, and gives G.S. 14-353 for North Carolina.

So far as the briefs of counsel and our research disclose, none of these statutes substantially similar to G.S. 14-353 has been challenged on constitutional grounds, except the New York statute in *People v. Davis* (Court of Special Sessions, New York County), 160 N.Y.S. 769. The New York statute, New York Penal Law, sec. 439, reads:

> "CORRUPT INFLUENCING OF AGENTS, EMPLOYEES OR SERVANTS.—1. A person who gives, offers or promises to an agent, employee or servant of another, any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence such agent's, employee's or servant's action in relation to his principal's, employer's or master's business; or an agent, employee or servant who without the knowledge and consent of his principal, employer or master, requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself or to another, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business, or receives a reward for having so acted; or an agent, employee or servant, who, being authorized to procure materials, supplies or other merchandise either by purchase or contract for or on account or the credit of his principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount, gift, gratiuty or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other merchandise, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus; and any person, corporation, partnership or other organization who shall use or give to an agent, employee or servant of another, or any agent, employee or servant who shall use, approve, or certify, with intent to deceive the principal, employer or master, any receipt, account, invoice or other document in respect of which the principal, employer or master is interested, which contains any statement which is wilfully false or erroneous in any material particular or which omits to state

fully the fact of any commission, money, property or other valuable thing having been given or agreed to be given to such agent, employee or servant, is guilty of a misdemeanor and shall be punished* * *."

The second section of the statute is substantially similar to G.S. 14-354 in respect to a person required to give self-criminating evidence.

The information in the *Davis* case charged that on 21 April 1914, in violation of section 439 of the Penal Code, Albert Davis—

"unlawfully gave and offered to Sheridan Gorton, Jr., who was then agent, employe, and servant of the association called R. H. Macy & Co., and who was then authorized to procure materials, supplies and other articles by contract for his said principal and employer, the sum of $10 in lawful money of the United States of America, as a commission, discount, and bonus from the said defendant, who then and there made and had made a sale of certain sponges to the said association, and a contract for the sale of certain sponges to the said association, and furnished the said sponges to the said association* * *."

The defendant demurred to the information, upon the ground that it fails to state facts sufficient to constitute a crime, and urged that the last clause of section 439 of the Penal Law, under which the information in this case was drawn, is repugnant to Article I, section 10, of the Constitution of the United States, and to the 14th Amendment thereto, and is therefore null and void, and that said clause is likewise repugnant to Article I, sections 1 and 6, of the Constitution of the State of New York. Article I, section 1, of the Constitution of the State of New York provides:

"No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

Section 6 of the same Article reads:

"No person shall be* * *deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Court in an opinion by Russell, C.J., concurred in by Collins and O'Keefe, JJ., said:

"Section 439 of the Penal Law is divisible into two parts. The first forbids a gratuity to an employe of another in respect to his

work or employment under certain conditions, 'without the knowledge and consent of the employers.' With this part of the statute we have nothing to do. The information was drawn under the wording of the second division, follows the words of the statute, and is therefore sufficient."

The Court rejected all three assertions of unconstitutionality: (1) No violation of equal protection was found because the statute "affects alike all persons similarly situated"; (2) constitutional freedom of contract may be limited by police power; and (3) as to the propriety of the exercise of the police power in this situation, the Court said:

"Without such a statute, under the fierce competition of modern life, purchasing agents and agents to employ labor can be lured all too readily into the service of hopelessly conflicting interests.* * *Sound public policy, commercial honor, and the good faith of fiduciaries and trusted employes imperatively demand some such measure in the written law.

"The statute in the case at bar divests no property and harms no vested right.* * *Such customs of trade as are denounced by this statute are demoralizing to society. Acts harmful to morals are not, as contended by defendant, limited to sexual impurity and obscene publications. Bribery of purchasing agents is incompatible with commercial honor. A bonus or commission, secretly given, is nothing short of a bribe to betray one's employer. The only possible object of this bad custom is to take money from the principal and give it to his agent. No lawful business is forbidden by this act.* * *

"This discussion has been prolonged, because, so far as known, the courts have not passed upon the exact question raised in this case. We conclude that section 439 of the Penal Law is constitutional."

The State of New York in the trial court convicted a basketball referee and a union official on a charge of violating Penal Law, section 439. These convictions were upset on appeal because the acts committed by the defendants did not fall within the class of persons at which the statute was directed. *People v. Levy,* 128 N.Y.S. 2d 275, (1954); *People v. Graff,* 24 N.Y.S. 2d 683. In the *Levy* case, it is stated:

"* * *Penal Law, §439, subd. 1, is not applicable to bribery of a referee in games or sports. That section, found in Penal Law

> Article 40 entitled 'Business and Trade,' covers commercial fraud practiced by an employee against the financial or business interest of his employer. It has been on the books for upwards of fifty years* * *."

In *People v. Jacobs,* 309 N.Y. 315, 130 N.E. 2d 636, (1955), a professional photographer who had been convicted for giving money to a ship's purser to get a list of incoming passengers on an information charging a violation of Penal Law, section 439, secured a reversal on appeal, because the State failed to show that the interest of the purser's employer was involved. The Court said:

> "In order to be guilty, these moneys must have been paid to the purser to influence his action concerning a matter affecting his employer's interest. A common illustration of such a criminal act would be payment of money to a purchasing agent, to cause him to buy goods for his employer from one vendor rather than from another."

In these three cases it seems no question was raised as to the constitutionality of Penal Law, section 439; if so, it does not appear in the reported cases.

Use of the New York statute in civil proceedings has been more frequent. *Sirkin v. Fourteenth St. Store,* 108 N.Y.S. 830, involved a fact situation which is typical. The plaintiff sold and delivered a quantity of goods to the defendant and, upon failure of payment for the goods, brought an action for the price. Defendant sought dismissal on the grounds that the contract of sale was the result of a bribe which had passed between plaintiff and defendant's purchasing agent in violation of the Penal Code, section 384r, in respect to corrupt influencing of agents, employees or servants, which is substantially similar to the present New York Penal Law, section 439. Defendant buyer admitted that he suffered no injury because of the bribe but insisted that the Court should refuse to enforce the contract of sale on "broad moral grounds." The Court agreed, holding that if a buyer can show that the bribe and the contract of sale were parts of the same transaction the sale will be considered void and the Court will leave the parties as it finds them. The Court said:

> "* * *the defendant should have been permitted to prove the facts pleaded as a separate defense, and that, if they be established, the plaintiff will then be shown to have committed a crime in obtaining the very contracts which he asked the aid of the Court to enforce, and should be denied assistance."

The rule of Sirkin, that a contract of sale entered into as the result of bribing an employee will not be enforced against the buyer, has become well established in New York. *Kraus v. H. Pacter & Co.,* 234 N.Y.S. 687; *Bolotin v. Jefferson,* 163 N.Y.S. 59; *General Tire Repair Co. v. Price,* 115 N.Y.S. 171.

Stone v. Freeman, 298 N.Y. 268, 82 N.E. 2d 571, was a broker's action for commissions earned in arranging sale of clothing to French Purchasing Mission by defendant, in which counterclaims were filed alleging defendant's agreement to pay and payment of certain sums to plaintiff on his agreement to divide them with purchaser's representative, and praying return to defendant of unpaid part of such representative's agreed share. The counterclaims plainly allege a conspiracy to violate section 439 of the Penal Law of the State of New York. The Court held that the motion to dismiss the counterclaims in the amended answer should be granted. In its opinion the Court said: "For no court should be required to serve as paymaster of the wages of crime, or referee between thieves."

In *Donemar, Inc. v. Molloy,* 252 N.Y. 360, 169 N.E. 610, it was held that where a seller of merchandise entered into a corrupt bargain with employee of purchaser for the payment of secret commissions in effecting a settlement, the purchaser was entitled to recover amount of secret commissions, regardless of whether there was disparity between value of goods received and consideration paid in settlement of claim. The Court said:

> "Penal Law (Consol. Laws, c. 40) § 439, makes it a misdemeanor to give or receive money for the corrupt influencing of agents, employees, or servants. It would be a strange miscarriage of justice if the corrupting vendor and the corrupted agent of the vendee could retain the fruits of their crime and say that because the settlement was a fair one, the vendee sustained only nominal damages or no damages."

G.S. 14-353 is divisible into four parts. First, it provides that "any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever *with intent to influence his action in relation to his principal's, employer's or master's business*" shall be guilty of a misdemeanor. (Emphasis supplied.) The intent specified is an essential element of the offense. The acts prohibited are stated in words sufficiently explicit, clear and definite to inform any man of ordinary intelligence what conduct on his part will render him liable to its penalities. If a person does the prohibited act or acts specified in this part of the statute with the intent explicitly stated therein, he

is guilty of what is commonly called "commercial bribery." In *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F. 2d 582, the Court said: "The vice of conduct labeled 'commercial bribery,' as related to unfair trade practices, is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers." Surely a violation of this part of G.S. 14-353 is related to unfair trade practices, and is an unfair method of competition. The contention of defendants that the language of this part of the statute is so broad as to prohibit the customary habit of tipping is untenable. Customary tipping is in obedience to custom or in appreciation of service, and is done with no intent to influence the action of the person receiving the tip in relation to his or her employer's business, and as to tipping done in such a manner the statute is not applicable. However, it is possible that a person by tipping an agent, servant or employee with the intent specified in this part of the statute could bring himself within its penalties: e.g., by giving substantial amounts or considerations and calling them tips.

The second part of the statute provides that "any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, *under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business*" shall be guilty of a misdemeanor. (Emphasis supplied.) The agreement or understanding in the words emphasized is an essential element of the offense. Although this part of the statute employs general terms, the words used are sufficiently explicit and definite to convey to any man of ordinary intelligence and understanding an adequate description of the prohibited act or acts, and to inform him of what conduct on his part will render him liable to its penalties. The plain intent and purpose of this part of G.S. 14-353 is to prohibit any agent, employee or servant from being disloyal and unfaithful to his principal, employer or master. The Holy Bible in the New Testament, St. Matthew, chapter 6, verse 24, (King James Version), says: "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." A statement of an eternal truth.

The third and fourth parts of G.S. 14-353 refer to a commission, discount or bonus received by any agent, employee or servant under the circumstances therein specified, and to any person who gives or offers such an agent, employee, or servant such commission, discount or bonus.

The indictment charges the defendants with a violation of the first two parts of G.S. 14-353. It is so stated in defendants' briefs.

We are here concerned with the first two parts of G.S. 14-353, which are divisible and separable from the remainder of the statute.

In our opinion, and we so hold, the first two parts of G.S. 14-353, which the indictment charges the defendants violated, are not repugnant to the "due process of law" clause of section one of the 14th Amendment to the United States Constitution, and to "the law of the land" clause of Article I, section 17, of the North Carolina Constitution, and are a reasonable and proper exercise of the police power of the State.

The activities necessary to accomplish the offenses prohibited by G.S. 14-353, and similar statutes, require no violence, embody no traces in lasting form, and frequently, if not almost entirely, have no witnesses other than persons implicated or potentially implicated. Once completed, they leave few persons, if any, aware of being damaged. The enforcement problems, which arise from the very nature of the offenses, are extremely difficult, because of lack of evidence. This is probably the prime reason why so few persons have been prosecuted for violating these statutes.

In view of the structure of modern business organizations and the demands made upon the individual by present-day business, both the opportunities, and the practice of bribing or unlawfully influencing the agents and employees of others seem to be increasing. There is general agreement that where an agent or employee receives money or other considerations from a person in return for the agent's or employee's efforts to further that person's interest in business dealings between him and the principal or employer, such an act or acts on the part of the agent or employee and on the part of the person who gives the money or other consideration to the agent or employee should be prohibited. For articles in respect to the acts prohibited by G.S. 14-353, and similar statutes, and "commercial bribery" and influencing of employees, see: Minnesota Law Review, Vol. 46, p. 599, (1961-2), "Commercial Bribery: The Need for Legislation in Minnesota"; University of Pennsylvania Law Review, Vol. 108, p. 848, (1960), "Control of Nongovernmental Corruption by Criminal Legislation"; Harvard Law Review, Vol. 45, p. 1248, (1931-2), "Bribery in Commercial Relationships"; Columbia Law Review, Vol. 28, p. 799, (1928), "Commercial Bribery." In the Minnesota Law Review Article, p. 630, there is set forth a Proposed Commercial Bribery Statute. We set forth section 1, subdivisions 1 and 2, of the Proposed Statute because of its similarity with the first two parts of G.S. 14-353:

"The following persons shall be guilty of commercial bribery:

"Section 1. subdivision (1) Any person who gives, offers or promises, directly or indirectly, any gift or gratuity to any agent without the knowledge and consent of his principal and with the intent to influence the agent's action in relation to his principal's affairs; or

"subd. (2) Any agent who requests or accepts, directly or indirectly, any gift or gratuity or a promise to make a gift under an agreement or understanding that he act in any particular manner in connection with his principal's affairs, or receives a reward for having so acted;"

Defendant Robert M. Burch assigns as error the denial by the trial court of his motion to set aside the verdict against him of guilty of counts seven, eight, nine, ten and eleven as charged in the indictment, on the ground that the jury found him not guilty of count one in the indictment, and therefore the verdict is inconsistent. Counts seven, eight, nine, ten and eleven in the indictment are set forth in thirteen pages in the record. All of these counts charge the defendants Brewer and Robert A. Burch and Robert M. Burch and others with specific substantive offenses in violation of G.S. 14-353 and with overt acts in furtherance of the conspiracy alleged in the first count in the indictment.

Count seven in the indictment is typical of counts two through twelve, both inclusive, in the indictment. The jury's verdict was that defendant Brewer "is guilty of violation of G.S. 14-353 as charged in the 7th count in the bill of indictment." The jury returned an identical verdict on the seventh count in the indictment against defendant Robert A. Burch and also against defendant Robert M. Burch. Count seven is as follows:

"AND THE JURORS AFORESAID, UPON THEIR OATH, DO FURTHER PRESENT THAT Pierce Oliver Kidd Brewer, Robert A. Burch, Robert M. Burch, George Masefield, Martin J. Hamilton, Walter Schoenfeldt, Pfaff & Kendall, a corporation, acting through its officers, agents and employees and Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, late of the County of Wake, on or about the 23rd day of August, 1960, as well before as after said date, with force and arms, at and in the county aforesaid, in furtherance of the unlawful conspiracy set out in the first count, unlawfully and willfully did violate the provisions of the General Statutes of North Carolina, Chapter 14 Section 353, in that the said Pierce

Oliver Kidd Brewer, individually and as agent and employee of Pfaff & Kendall, a corporation, and as agent and employee of Traffic and Street Sign Co., a corporation, the said Robert M. Burch, the said George Masefield, individually and as agent, employee and Division Sales Manager of Pfaff & Kendall, a corporation, the said Martin J. Hamilton, individually and as agent, employee, officer and Vice President of Pfaff & Kendall, a corporation, and as agent, employee, officer and Vice President of Traffic and Street Sign Co., a corporation, the said Walter Schoenfeldt, individually and as agent, employee, and General Manager of Traffic and Street Sign Co., a corporation, the said Pfaff & Kendall, a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, George Masefield, Martin J. Hamilton and others and the said Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, Martin J. Hamilton, Walter Schoenfeldt and others, in furtherance of the unlawful conspiracy set out in the first count, unlawfully and willfully did offer and promise money, gifts, gratuities and other things of value to Robert A. Burch, an agent and employee, to wit: the Traffic Engineer of the State Highway Commission, an agency of the State of North Carolina, with the intent and for the purpose of influencing the actions of the said Robert A. Burch in relation to his employer's business, i.e., to influence the said Robert A. Burch, who, as Traffic Engineer for the State Highway Commission, was responsible for and in charge of the writing of specifications and the drawing of plans for the procurement and erection of highway signs for the State Highway Commission, to write and have written and to draw and have drawn specifications and plans for the procurement and erection of highway signs to be erected in Davie and Forsyth Counties in connection with Project 8.17415 and in Orange and Durham Counties in connection with Project 8.14573 and in Forsyth County in connection with Projects 8.17446 and 8.17484, in a manner so as to favor the products of Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, and the said Robert A. Burch, an agent and employee, to wit: the Traffic Engineer, of the State Highway Commission, an agency of the State of North Carolina, willfully and unlawfully, and in furtherance of the unlawful conspiracy set out in the first count, did accept the aforesaid offer and promise of money, gifts, gratuities and other things of value under an agreement and with the understanding

that he would act in a particular manner in relation to his employer's business, i.e., that he, the said Robert A. Burch, would write and have written and draw and have drawn specifications and plans for the procurement and erection of highway signs to be erected in Davie and Forsyth Counties in connection with Project 8.17415 and in Orange and Durham Counties in connection with Project 8.14573 and in Forsyth County in connection with Projects 8.17446 and 8.17484, in a manner so as to favor the products of Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, and thereafter the said Robert A. Burch, an agent and employee, to wit: the Traffic Engineer, of the State Highway Commission, an agency of the State of North Carolina, in furtherance of the unlawful conspiracy set out in the first count, unlawfully and willfully and with the intent to favor the products of Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, wrote and had written and drew and had drawn specifications and plans for the procurement and erection of highway signs to be erected in Davie and Forsyth Counties in connection with Project 8.17415 and in Orange and Durham Counties in connection with Project 8.14573 and in Forsyth County in connection with Projects 8.17446 and 8.17484, in a manner so as to favor the products of Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, and at various times thereafter, the said Pierce Oliver Kidd Brewer, individually and as agent and employee of Pfaff & Kendall, a corporation, and as agent and employee of Traffic and Street Sign Co., a corporation, the said Robert M. Burch, the said George Masefield, individually and as agent, employee and Division Sales Manager of Pfaff & Kendall, a corporation, the said Martin J. Hamilton, individually and as agent, employee, officer and Vice President of Pfaff & Kendall, a corporation, and as agent, employee, officer and Vice President of Traffic and Street Sign Co., a corporation, the said Walter Schoenfeldt, individually and as agent, employee, and General Manager of Traffic and Street Sign Co., a corporation, the said Pfaff & Kendall, a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, George Masefield, Martin J. Hamilton and others and the said Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, Martin J. Hamilton, Walter Schoenfeldt and others, in furtherance of the unlawful conspiracy set out in the first count, unlawfully and willfully and in a secret

manner by covertly channeling funds and monies through Interstate Services, Inc., a corporation, Robert M. Burch and various other corporations and individuals did give to the said Robert A. Burch, an employee of the State Highway Commission, as aforesaid, money, gifts, gratuities and other things of value as had theretofore been promised him to influence his action in relation to his employer's business, and the said Robert A. Burch, an employee of the State Highway Commission, as aforesaid, in furtherance of the conspiracy set out in the first count, did at various times, unlawfully, and willfully and in a secret manner accept money, gifts, gratuities and other things of value as had theretofore been offered and promised him to influence his actions in relation to his employer's business against the form of the Statute in such case made and provided and against the peace and dignity of the State."

There is an obvious and substantial distinction between count one in the indictment and the other eleven counts in the indictment, in that the gist of the first count is the alleged conspiracy to violate G.S. 14-353 and not the acts done in pursuance thereof *(S. v. Christianbury, supra; Williamson v. United States,* 207 U.S. 425, 447, 52 L. Ed. 278, 290; *Heike v. United States,* 227 U.S. 131, 57 L. Ed. 450; *United States v. Rabinowich,* 238 U.S. 78, 59 L. Ed. 1211; Wharton's Criminal Law and Procedure, Anderson Ed., 1957, Vol. I, Conspiracy, section 87, where many cases from the states are cited in support of the text), and the gist of the eleven other counts is the alleged specific substantive acts done by the defendants in violation of G.S. 14-353 (*Pinkerton v. United States,* 328 U.S. 640, 90 L. Ed. 1489; *Kelly v. United States,* 258 F. 392, *certiorari* denied 249 U.S. 616, 63 L. Ed. 803). As stated above, in North Carolina "no overt act is necessary to complete the crime of conspiracy" *(S. v. Davenport, supra),* and "the conspiracy is the crime and not its execution" *(S. v. Whiteside, supra).* It is perfectly plain that two distinct offenses were alleged, and one may be convicted both of the substantive offenses which were the object of the conspiracy, and of the conspiracy, even though the substantive offenses were alleged as the overt acts necessary to convict for conspiracy. *Pinkerton v. United States,* 328 U.S. 640, 90 L. Ed. 1489.

In the *Pinkerton* case in the Supreme Court a single conspiracy was charged and proved. Some of the overt acts charged in the conspiracy count were the same acts charged in the substantive counts. Each of the substantive offenses found was committed pursuant to

the conspiracy. Petitioners therefore contend that the substantive counts became merged in the conspiracy count, and that only a single sentence not exceeding the maximum two-year penalty provided by the conspiracy statute could be imposed. To state the matter differently, they contended that each of the substantive counts became a separate conspiracy count but, since only a single conspiracy was charged and proved, only a single sentence for conspiracy could be imposed. The Court in rejecting their contention said:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. [Citing authority.] Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime. [Citing authority.] But those exceptions are of a limited character. The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. [Citing authority.] A conviction for the conspiracy may be had though the substantive offense was completed. [Citing authority.] And the plea of double jeopardy is no defense to a conviction for both offenses. [Citing authority.] A conspiracy is a partnership in crime. [Citing authority.] It has ingredients, as well as implications, distinct from the completion of the unlawful project. As stated in *United States v. Rabinowich*, 238 U.S. 78, 88, 59 L. ed. 1211, 1215, 35 S. Ct. 682, 42 Am. Bankr. Rep. 255:
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> " 'For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and

adding to the importance of punishing it when discovered.' [Citing authority.]

"Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed v. United States, supra* ((CCA 5th) 298 F. p 913), 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

This is said in Annotation 37 A.L.R. 778:

"The rule appears to be well settled in most jurisdictions that a conspiracy to commit a crime is not merged in the commission of the completed offense, but is a distinct offense of itself and punishable as such, notwithstanding its object, the attempted crime, has been accomplished."(A legion of cases is cited to support the text.) See also Annotation 75 A.L.R. 1411.

Conspiracy alleged may fail in proof, as well as proven conspiracy may fail in execution. Failure, then, to prove the existence of a conspiracy alleged to have been formed to commit a particular character of crime cannot affect the right of the State, regardless of conspiracy, to prove that a crime of the same character was actually committed. This is well within settled rules of the doctrine of conspiracy. *S. v. McCullough,* 244 N.C. 11, 92 S.E. 2d 389; *Pinkerton v. United States,* 328 U.S. 640, 90 L. Ed. 1489; *Kelly v. United States, supra*; 15 C. J. S., Conspiracy, section 90, p. 1135. The offense charged in the first count and the offenses charged in the other eleven counts in the indictment are not the same in law and in fact. Although the State failed to prove that Robert M. Burch was one of the conspirators and was guilty of the conspiracy alleged against him in count one in the indictment, he could still be convicted of the substantive offenses committed by him in violation of G.S. 14-353, as charged against him in counts two through twelve, both inclusive. The State failed to convict him on counts five, six and twelve, but did convict him on counts seven, eight, nine, ten and eleven.

The verdict of the jury against Robert M. Burch is not inconsistent. In the *Kelly* case two indictments were returned: One charging a conspiracy to defraud the United States, and the other charging the commission of acts of fraud, which was the object of the alleged conspiracy. The cases were consolidated for trial. Under the conspiracy indictment there was a verdict of not guilty. Under the second in-

dictment, comprising nine counts, there was a verdict of guilty against each defendant. Sentences were pronounced, and they appealed. Defendants contended "that the conspiracy and overt acts alleged in the first indictment so far involved the frauds alleged in the second one as to require acquittal also under it, and hence that the findings and the verdict of the jury under the second indictment are in fundamental and irreconcilable conflict with the findings and verdict of the jury under the first one." The Court in rejecting the contention said:

> "Certainly there was no inconsistency in alleging the offenses severally charged in the two indictments. Can it be, then, that failure of proof as respects the controlling issue under either indictment can operate to defeat both indictments? The verdict of not guilty under the first and that of guilty under the second naturally signify that conspiracy was not proved under the former, but that fraud was proved under the latter. This derives special emphasis from the rule, just pointed out, that an effective overt act may be committed by one or more less than the entire number of those entering into a conspiracy, and need not constitute the very crime that is the object of the conspiracy, and indeed need not be of itself a criminal act. It results that the offense of which defendants were found guilty was not the same offense as the one of which they were found not guilty. This, it is true, is but another way of stating, as we have already stated, that distinct offenses were charged in the two indictments.
>
> "One of the grounds set up in the motion non obstante is that to support the charges of the second indictment, 800, the government 'relied mainly upon evidence concerning acts and facts which are specifically set out and described as overt acts' in the first indictment, 798. This was in effect a plea of autrefois acquit. Such a plea, however, is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea; thus, as Mr. Justice Harlan said (*Burton v. United States*, 202 U.S. 344, 380, 26 Sup. Ct. 688, 698 (50 L. Ed. 1057, 6 Ann. Cas. 362), in adopting language of Chief Justice Shaw, it must appear that the offense charged 'was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.' Some of the facts leading up to the application there made of this rule are helpful. The point was presented (202 U.S. 377, 26 Sup. Ct. 697, 50 L. Ed. 1057, 6 Ann. Cas. 362) whether defendant could 'legally be in-

dicted for two separate offenses, one for agreeing to receive compensation in violation of the statute, and the other for receiving such compensation.' In sustaining the view that these were separate offenses Mr. Justice Harlan said (Id.):

"'There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense; or compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated.'"

It is significant that defendant Robert M. Burch saw fit not to bring up on appeal the State's evidence of the substantive acts committed by him in violation of G.S. 14-353 in respect to counts seven, eight, nine, ten and eleven in the indictment, on which counts he was found guilty, and to contend that the State's evidence on those counts was insufficient to carry the case to the jury against him, or the charge of the court.

We have written at length, because, so far as we know, the constitutionality of statutes substantially similar to G.S. 14-353 has not been challenged, except in the New York case of *People v. Davis.* In 57 C.J.S., Master and Servant, sec. 639, entitled "Bribing Servant with Intent to Influence His Relation with Master," it is said: "The validity of such statutes has been upheld* * *." In support of the text it cites one case, the New York case of *People v. Davis,* 160 N.Y.S. 769.

Incidentally, the statutes of the following States somewhat similar to our G.S. 14-353 do not contain language like the New York statute, "without the knowledge and consent of the principal, employer or master of such agent, employee or servant": Connecticutt, Conn. Gen. Rev. Stat., sec. 53-266; Massachusetts, Mass. Ann. Laws, ch. 271, sec. 39; Michigan, Comp. Laws 1948, sec. 750.125; Rhode Island, R. I. Gen. Laws Ann., secs. 11-7-3 and 11-7-4; South Carolina, S. C. Code, sec. 16-570; Washington, Wash. Rev. Code, secs. 49.44.060 and 49.44.070; and Wisconsin, Wis. Stat. Ann., sec. 134.05.

All the assignments of error by defendant Brewer, all the assignments of error by defendant Robert A. Burch, and all the assignments of error by defendant Robert M. Burch have been considered, and all and every one of them are overruled. All the judgments entered against defendant Brewer, all the judgments entered against de-

fendant Robert A. Burch, and all the judgments entered against defendant Robert M. Burch are

Affirmed.

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

STATE OF NORTH CAROLINA v.
JESSE JAMES ARNOLD AND GEORGE DIXON.

(Filed 1 February 1963.)

1. Criminal Law §§ 29, 86—

The fact that the report of a mental hospital is made less than 30 days from the court's order of commitment of defendants for observation for a period of 30 days, does not entitle defendants to a further mental examination, and the denial of defendants' motions for a continuance and to require an examination by a private phychiatrist will not be held prejudical, especially when the court offers defendants' counsel opportunity to have their clients examined at any time during the progress of the trial.

2. Criminal Law § 86—

A motion for continuance is addressed to the sound discretion of the trial judge, and the denial of the motion will not be disturbed in the absence of a showing of abuse.

3. Grand Jury § 1; Constitutional Law § 29—

The exclusion of persons of defendants' race from the grand jury solely because of race deprives defendants of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, § 17 of the Constitution of North Carolina, but the burden is upon defendants to establish racial discrimination when relied upon by them.

4. Same—

On defendants' motion to quash the indictment on the ground of racial discrimination in the selection of the grand jury, the question presented is solely whether members of defendants' race were intentionally excluded solely because of race from serving on the particular grand jury returning the indictment, and the ratio between the races on the grand jury is not determinative of whether members of defendants' race were intentionally excluded solely because of race.

5. Same—

Where the evidence discloses that the jury was selected and drawn in strict compliance with statute, G.S. 9-2, G.S. 9-3, G.S. 9-24, and that

members of defendants' race were drawn for jury duty, and defendants offer evidence only as to the ratio between the races on the grand jury and among the inhabitants of the county, without any evidence that any person was excluded from grand jury service solely because of race, the denial of defendants' motion to quash will not be disturbed, defendants having failed to carry the burden of showing facts which would permit a reasonable inference of racial discrimination.

6. Jury §§ 2, 3—

Where a special venire is ordered and counsel for one defendant advises that he cannot be present when the jurors for the special venire are drawn, but counsel for the other defendant is present pursuant to a request by the court that he represent both of defendants, motion of counsel for the other defendant to quash on the ground that neither he nor the defendant represented by him were present when the jury was drawn is properly denied.

7. Jury § 3—

Objections that the finding of the judge as to the ratio of people of defendants' race on the trial jury was based upon the unsworn statement in open court of the sheriff, is untenable when it is made to appear that the jury panel was in the courtroom and in view of the court, counsel, and all other persons present.

8. Same—

In a prosecution for a capital crime the court has discretionary power to allow the State to challenge the jurors for cause on the ground of conscientious scruples against capital punishment.

9. Criminal Law § 159—

Exceptions and assignments of error not set out in the brief are deemed abandoned. Rule of Practice in The Supreme Court No. 28.

10. Criminal Law § 71—

Where the court finds, upon supporting evidence, that the confession of each of defendants was voluntarily made and allows the confessions to be introduced in evidence under instructions to the jury that the confession of the one was not to be considered against the other, no error is made to appear.

11. Criminal Law § 56—

It is competent for a physician found by the court to be an expert to testify from his personal examination of the deceased as to the cause of death.

12. Criminal Law § 42—

The admission in evidence of the boots of defendant, properly identified, and a gun, identified as the one connected with the commission of the crime, is not error.

13. Criminal Law § 161—

Where the court repeatedly instructs the jury that the burden was on the State to prove defendants' guilt beyond a reasonable doubt, and that

if the jury had a reasonable doubt as to their guilt the jury should acquit defendants, the fact that the court also instructs the jury that they should render a verdict which "substantially speaks the truth," though error when considered out of context, does not justify a new trial when, considering the charge as a whole, it clearly appears that the court presented the law of the case to the jury in such a manner as to leave no reasonable cause to believe that the jury was misled or misinformed by the erroneous excerpts.

14. Homicide §§ 28, 29—

Where all of the evidence tends to show that deceased was killed in the perpetration of a robbery from his person by both defendants, G.S. 14-17 there is no evidence of guilt of murder in the second degree or manslaughter, and the court properly limits the jury to a verdict of guilty as to both defendants 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 to both defendants, the court having previously charged the jury that they had the unbridled discretion in rendering their verdict to recommend that the punishment for both defendants, or either one of them, should be imprisonment for life.

APPEAL by Jesse James Arnold and George Dixon from *Burgwyn, Emergency Judge,* at 4 December 1961 Criminal Term of LENOIR.

Criminal prosecution tried upon a joint indictment charging that Jesse James Arnold and George Dixon on 10 September 1961 "unlawfully, willfully, and feloniously premeditatively and deliberately and of their malice aforethought, did kill and murder George T. McArthur, while engaged in the perpetration of the crime of robbery." G.S. 14-17; G.S. 15-144.

Each defendant is a Negro. After a denial by the court of a separate motion made in apt time (G.S. 9-26) by each defendant to quash the indictment on the ground that Negroes were intentionally excluded solely by reason of their race from the grand jury that returned the joint indictment against them, each defendant entered a plea of Not Guilty. Verdict: "The defendant George Dixon is guilty of murder in the first degree without the recommendation of mercy and that the defendant Jesse James Arnold is guilty of murder in the first degree without the recommendation of mercy, or recommendation that punishment be fixed at life imprisonment."

From a sentence of death entered on the verdict against each defendant, each defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Ralph Moody for the State.

J. Harvey Turner for defendant appellant Jesse James Arnold.

Fred W. Harrison for defendant appellant George Dixon.

PARKER, J. The State's evidence shows: George T. McArthur, a man 68 years old, and his 62-year-old wife owned and operated a little store on Highway #11 about eight miles north of the city of Kinston. It is about "a stone's throw" from the back door of the store to the house behind the store where they lived. About "dusky dark" on Sunday, 10 September 1961, George T. McArthur went to the store from his home.

About 7:00 o'clock p.m. on this night Jesse James Arnold and a tall Negro entered the McArthur store. Arnold was carrying a shotgun. Both men had on boots and brown khaki pants, but were shirtless and without hats. Three shots were heard in the store. About 15 minutes later these two men came out of the store with some big object in their hands. They went across the highway into a field. A little later they came back across the road, and went towards a hog pen. John Rouse, who lives across the highway from the McArthur store, told them, "You better look out for the hogs, those hogs might get you." One of the men replied, "How well I know, they are my daddy's hogs." The hogs were owned by Glenn Arnold, father of the defendant Arnold.

A short time after this, Ruby McArthur, wife of George T. McArthur, went to the store, as he had not returned home. The lights of the store were on, and the front and back doors were open. When she went in the back door of the store, she saw her husband lying dead on the floor in a pool of blood. Blood was spattered everywhere, all over the walls and ceiling, the back screen door, the back of the meat case, the end of the show case, and all over the freezer. The cash register was gone. Two gun shells were lying between the counter and the front door. She telephoned the sheriff's office.

Shortly after midnight on this night, John D. Edwards, an agent for the State Bureau of Investigation, talked with Jesse James Arnold in the commissioners' room in the courthouse at Kinston. Edwards made Arnold no promises, and used no force or threats. Defendant Arnold told him in substance: About 5:00 o'clock p.m. on 10 September 1961 he and defendant George Dixon were at Johnny Edwards' place (not the agent John D. Edwards). They talked about various things. Dixon said, "Where can we find some money?" He replied, "he knew an old man that he had known all of his life, that had a lot of money, and that there was not but two of them there." About 6:30 p.m. he and Dixon went to his home. There they discussed further the getting of money from George T. McArthur. He and Dixon put on boots and khaki pants, but no shirts. He got his pump gun, and gave a single barrel shotgun and two gun shells to Dixon. His wife

"tried to get him not to go do the robbing," but he and Dixon left and went to the McArthur store. When they arrived, two or three young girls were in the store. They stood outside until the girls left. Then Dixon went to the back of the store, and entered it. He heard a gun fire in the store, and immediately went in the front door. Dixon and McArthur were tussling together, and McArthur was bloody. Dixon shot McArthur, and then hit him with the stock of the gun. McArthur fell, and Dixon shot him again on the floor. He went out of the store, and Dixon came out behind him with "an adding machine" and a box. Later they beat the box open. They found no money in it. Then they threw the box and "the adding machine" in a sand hole in front of Johnny Edwards' place. He and John Rouse had words about the hogs. This is similar to the testimony of John Rouse.

The S. B. I. agent Edwards saw defendant George Dixon about 3:00 o'clock a.m. on 11 September 1961 in the sheriff's office in Kinston. At that time Dixon was so much under the influence of intoxicants in the opinion of Edwards that he did not talk to him. About 7:00 o'clock p.m. on 11 September 1961 in the commissioners' room in the courthouse at Kinston he had a conversation with Dixon. He made him no promises. He told him who he was. Dixon told him in substance: During the afternoon of 10 September 1961 he and defendant Arnold were together at various places. About 5:00 o'clock p.m. they went to Arnold's home. There Arnold said, "George, I know where there is some money at." He said to Arnold, "How are you going to get it?" Arnold replied, "We'll wait until after it gets dark and go down to the store and get the old man out, and we will get the money." He replied, "Let's don't do that, Jesse." Jesse replied, "There ain't going to be nothing to it. I'm going to carry a gun." They changed clothes, putting on boots, khaki pants, and taking off their shirts. Jesse took a shotgun off the rack, and gave him a single barrel, twelve-gauge shotgun and two shells. Jesse's gun was an automatic. They loaded the guns, and went to the store. Two white girls were in the store with the old man. When the girls left, he went in the back door of the store. The old man was standing near the counter. He was holding the shotgun back of him. He thought the old man must have seen the gun, because he ran at him, shoved him back, swung at him with a knife, and knocked him up against the building. At that time defendant Arnold came in the front door, and shot the old man. The old man fell up against the wall by the back door. Then Jesse hit the old man with his gun, and he hit the old man. Jesse shot the old man again, and he fell down on the floor on his back. He didn't move or make any noise, and Jesse and he knew he was dead. Jesse searched

the old man, and found no money. He searched him, and found three quarters. Jesse tried unsuccessfully to open the cash register. He took Jesse's gun, and Jesse took the cash register and the adding machine, and they left. Afterwards they broke open the cash register and the adding machine, found no money in either, and threw them in a sand hole.

In the opinion of John Boyd, an agent of the State Bureau of Investigation, assigned to the ballistics department, the gun shells found in the McArthur store were fired by the pump gun, which was the gun Arnold had.

The body of George T. McArthur had a jagged wound on the top of the skull, a gunshot wound through his left arm about the size of a silver dollar that penetrated his chest, and other wounds. In the opinion of Dr. C. E. Cling, who examined the dead body, George T. McArthur was killed by a shotgun blast at close range.

The record shows that Ruby McArthur identified during the trial the cash register, which she observed was missing when she entered the store. This cash register was marked as State Exhibit 1. The record shows that on the morning of 11 September 1961 Paul Horace Dawson went to a sand hole near Johnny Edwards' place and found in it the adding machine, identified as State Exhibit 1. It was in about a foot of water. He brought it back and turned it over to S. B. I. Agent Edwards. Why State Exhibit 1 was called a cash register by Mrs. McArthur, and why the same exhibit was called an adding machine by Paul Horace Dawson the record does not disclose.

The defendants offered no evidence.

Each defendant assigns as error the overruling of his motion for a continuance and to the denial by the court of his request for an order requiring a mental examination of him by a private practicing psychiatrist and psychologist. In denying this request the court said: "The court now offers to counsel an opportunity to get any private psychiatrist they desire and have their clients examined, at any time during the progress of this trial." These assignments of error are overruled.

On 16 September 1961 Albert W. Cowper, resident judge of the 8th judicial district, appointed J. Harvey Turner, a member of the Lenoir County bar, as counsel to represent defendant Jesse James Arnold in this case—Arnold being without means to employ counsel. Lenoir County is in the 8th judicial district. G.S. 15-4.1. On the same date for the same reason Judge Cowper appointed Fred W. Harrison, a member of the Lenoir County bar, as counsel to represent defendant George Dixon in this case. The indictment here was found by the

grand jury a true bill at the October 1961 Term of Lenoir County superior court.

On 22 October 1961 Judge Cowper, upon motion of J. Harvey Turner, attorney for defendant Jesse James Arnold, entered an order, pursuant to G.S. 122-91, committing defendant Arnold to the State Hospital for mentally disordered persons at Goldsboro, North Carolina, for a period of 30 days for observation as to his mental condition. The order further provided that the superintendent of the hospital shall file on or before 1 December 1961 a full report of the examination made at the hospital in the office of the clerk of the superior court, and furnish a copy of it to the prosecuting officer for the State and a copy to J. Harvey Turner, counsel for defendant Arnold.

Upon motion of Fred W. Harrison, counsel for defendant George Dixon, Judge Cowper entered a similar order as to defendant George Dixon.

The reports made by the State Hospital for mentally disordered persons at Goldsboro as to the mental condition of the defendants are not in the record. The separate motions for a continuance and to require a mental examination by a private practicing psychiatrist and psychologist are substantially identical. The sole reason stated in each motion for a further mental examination is because the report from the State Hospital is dated 20 November 1961, and Judge Cowper's order provided that each defendant should be kept for observation for a period of 30 days. Defendants have not shown that they were prejudiced by the refusal of their request that the court order a further mental examination. They offered no evidence during the trial.

Their motions for a continuance of the case to another term of court for trial was addressed to the sound discretion of the trial judge. There is nothing to show the judge abused his discretion in denying the motions. *S. v. Culberson,* 228 N.C. 615, 46 S.E. 2d 647.

Each defendant, a Negro, assigns as error his motion, made before pleading to the indictment, to quash the indictment on the ground that Negroes were intentionally excluded by reason of their race from serving on the grand jury which found the indictment in the instant case.

In support of the motions the defendants offered evidence as follows: In 1961 the tax records of Lenoir County showed 12,250 white persons and 4,819 Negroes; 5,583 white men were listed for poll tax and 2,499 Negro men. This was testified to by Milton Guy Williams, tax supervisor for Lenoir County. Williams was asked by the trial judge if he knew anything about the constitution of the grand jury

here this week. Williams replied he did not. The judge stated: "Well, I do. I saw it."

Defendants then called as a witness John S. Davis, clerk of the superior court of Lenoir County. He testified in substance: He has been clerk over 24 years. He remembers during that time one Negro having served a term upon the grand jury, and another Negro was placed on it but excused when it was discovered she lived in another county. Grand juries are selected at the January and August terms of court. He is furnished a list of the jurors drawn for each term of court which has jury trials. The average number of jurors drawn for jury service is from 30 to 35. On the list furnished him there are sometimes three or four Negroes, and sometimes none. At one time he saw four or five Negroes on the jury panel. When a grand jury is to be drawn, the name of each juror on the jury panel furnished him is put on a separate slip of paper in a box in open court, and a name is drawn out in open court by a child under 10 years of age. This continues until the 18 grand jurors are drawn. So far as he knows, Negroes have not been systematically excluded from serving on grand and petit juries in Lenoir County.

From this evidence offered by defendants the trial judge found as a fact that Negroes had not been systematically excluded from service on grand and petit juries in Lenoir County.

It is to be noted that counsel for defendants did not put into evidence a list of grand jurors serving in Lenoir County in the past, nor did they put into evidence the list of the grand jurors that found the present indictment—though such records were available in the office of the clerk of the court. It appears from the record that the grand jury that found the indictment at the October 1961 Term was the grand jury at the trial December 1961 Term, because the clerk testified a grand jury is drawn at the January and August Terms. The tax supervisor, when asked if he knew the constitution of the grand jury at the trial Term, replied he did not. The judge replied: "Well, I do. I saw it." The statement by the judge would seem to indicate there was a Negro or Negroes on the grand jury. Yet the solicitor for the State, if such was a fact, did not show it. Whether there was a Negro or Negroes on the grand jury that found the present indictment, we do not know from the record before us.

N. C. G.S. 9-2 provides that the jury list shall be copied on small scrolls of paper of equal size and put into the jury box. N. C. G.S. 9-3 provides that at least twenty days before a term of the Superior Court, the Board of County Commissioners shall cause to be drawn from the jury box by a child not more than ten years of age the required num-

ber of scrolls, and the persons who are inscribed on such scrolls shall serve as jurors at the term of the Superior Court next ensuing such drawing. It appears that the jury list furnished Davis, clerk of the superior court, was furnished, pursuant to these statutes, by the Board of County Commissioners of Lenoir County. Defendants have offered no evidence of any exclusion of Negroes from the jury box of Lenoir County. Their evidence affirmatively shows that sometimes three or four Negroes are drawn from the jury box of Lenoir County for service as grand and petit jurors.

It futher affirmatively appears from the testimony of defendants' witness John S. Davis that the grand jury in Lenoir County is drawn from a box containing the names of the jury panel in accordance with N. C. G.S. 9-24.

The Fourteenth Amendment to the Federal Constitution forbids any discrimination against Negroes in the selection of a grand jury, and the burden is on the defendants here to establish the discrimination against their race. *Akins v. Texas,* 325 U.S. 398, 89 L. Ed. 169; *Fay v. New York,* 332 U.S. 261, 91 L. Ed. 2043; *Cassell v. Texas,* 339 U.S. 282, 94 L. Ed. 839; *S. v. Covington,* 258 N.C. 495, 128 S.E. 2d 822; *S. v. Perry,* 248 N.C 334, 103 S.E. 2d 404; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513.

Former errors cannot invalidate future trials. Our problem is whether or not Negroes were intentionally excluded solely by reason of their race from serving on the grand jury that found the indictment against defendants in the instant case. *Brown v. Allen,* 344 U.S. 443, 97 L. Ed. 469; *Cassell v. Texas, supra.*

This Court speaking by Ervin J. (now U. S. Senator) in *Miller v. State, supra,* said:

> "The Fourteenth Amendment to the Constitution of the United States does not confer upon a Negro citizen charged with crime in a state court the right to demand that the grand or petit jury, which considers his case, shall be composed, either in whole or in part, of citizens of his own race. All he can demand is that he be indicted or tried by a jury from which Negroes have not been intentionally excluded because of their race or color. In consequence, there is no constitutional warrant for the proposition that a jury which indicts or tries a Negro must be composed of persons of each race in proportion to their respective numbers as citizens of the political unit from which the jury is summoned. [Citing numerous cases from the U. S. Supreme Court and from this Court in support of the statement.]"

This Court in an unbroken line of decisions stretching back for sixty years has held, by virtue of "the law of the land" clause embodied in the Declaration of Rights, Article I, section 17, of the North Carolina Constitution, that the indictment of a Negro defendant by a grand jury from which members of his race have been intentionally excluded solely because of their race is a denial of his rights to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and of his rights under Article I, section 17, of the North Carolina Constitution. *S. v. Peoples,* 131 N.C. 784, 42 S.E. 814; *S. v. Speller,* 229 N.C. 67, 47, S.E. 2d 537; *Miller v. State, supra; S. v. Perry,* 248 N.C. 334, 103 S.E. 2d 404; *S. v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *S. v. Covington,* 248 N.C. 495, 128 S.E. 2d 822.

Defendants' motions to quash the indictment are overruled, for the simple reason they have failed to carry the burden of showing facts which would permit a reasonable inference of intentional or purposeful racial discrimination against Negroes in drawing and selecting the grand jury which returned the indictment against them in the instant case.

After each defendant had entered a plea of not guilty, the court, upon motion of the defendants that a jury to try the case be drawn from another county in order that there might be a fair and impartial trial, which motion was consented to by the State, and acting under the provisions of N. C. G.S. 1-84 and N. C. G.S. 1-86, entered an order for 150 jurors to be drawn from the jury box of Duplin County in an adjoining judicial district, and to appear at the courthouse in Kinston on a specified date. The jury apparently was duly and properly drawn in Duplin County in the presence of Fred W. Harrison, counsel for defendant George Dixon, and others. When the jurors appeared in court, the defendant Arnold moved that the jury panel from Duplin County be quashed on the ground that defendant Arnold and his counsel, J. Harvey Turner, were not present when these jurors were drawn from the jury box in Duplin County. The trial judge found as facts that J. Harvey Turner told him he could not be present when the jurors from Duplin County were drawn; that the court requested Fred W. Harrison, counsel for defendant Dixon, to represent both defendants when these jurors were drawn from the box in Duplin County; that Harrison consented to do so, and was in fact present when these jurors were drawn from the box. Whereupon, the court denied defendant Arnold's motion. Defendant Arnold assigns this as error. This assignment of error is overruled. There is nothing in the record to indicate that defendant Arnold or his counsel objected to the drawing of

the jurors in Duplin County in the absence of either or both, until after it had been done. Under the facts here, we do not think that any of defendant Arnold's substantial rights were affected by the absence of himself and his counsel during the earlier proceedings in Duplin County. He has not shown he was prejudiced in any way by the fact that he and his counsel were not present in Duplin County when the jurors for his trial were drawn from the box. 23 C.J.S., Criminal Law, p. 890, and note 70.

When the 150 jurors drawn in Duplin County, from which panel the trial jury in the instant case was selected and impaneled, appeared in court, the trial judge found as a fact that these jurors were composed of white people and Negroes in about the ratio of 60% to 40%. Defendants assign as error the finding of the judge on the ground that it was based upon the unsworn statement in open court of the sheriff of Duplin County to the judge. The jury panel from Duplin County was in the courtroom where the defendants, their counsel, the judge, and everybody present in the courtroom could see them. Defendants have not shown how they were prejudiced in any way by the judge's finding of fact, and it is impossible to see how they were prejudiced. This assignment of error is overruled.

Each defendant assigns as error the court's allowing the State on the *voir dire* to challenge for cause a number of jurors on the jury panel on the ground that they had conscientious scruples against the infliction of capital punishment. These assignments of error are overruled, for the simple reason that the court, in its discretion, could allow the State to challenge such jurors for cause for incompetency to serve in the case and sustain the challenge, it appearing that such jurors were disqualified. *S. v. Vick,* 132 N.C. 995, 43 S.E. 626; *S. v. Vann,* 162 N.C. 534, 77 S.E. 295.

Defendants in their separate briefs make no contention that the confession of each defendant to S. B. I. Agent Edwards was incompetent in evidence. Exceptions in the record not set out in appellants' briefs, or in support of which no argument is stated or authority cited, will be taken as abandoned by them. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810, where a legion of cases applying the rule are cited; *S. v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781. However, we have carefully considered the circumstances under which each confession was made as shown in the record, and it appears each confession was made freely and voluntarily without any coercion, force, threats, rewards, or offers of reward, and each confession was properly admitted in evidence. The trial judge instructed the jury that the confession of Dixon was not evidence to be con-

sidered against Arnold, and the confession of Arnold was not evidence to be considered against Dixon. Defendants did not request fuller instructions.

The assignments of error of each defendant that Dr. C. E. Cling was permitted, over their objections, to testify as to the cause of George T. McArthur's death are overruled. Defendants stipulated Dr. C. E. Cling is a practicing medical doctor. Dr. Cling testified as to his experience in the practice, and that he holds a degree of doctor of medicine. The court held he was a medical expert. He examined the dead body of George T. McArthur in a funeral home. His testimony as to the cause of McArthur's death is competent. *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; *S. v. Messer,* 192 N.C. 80, 133 S.E. 404.

Defendant Arnold's assignment of error as to the admission in evidence against him of a pair of boots and of a pump gun marked State Exhibit 16 is overruled. This assignment of error merits no discussion.

The court instructed the jury:

> "So your duty is to consider the evidence which you have heard in this case, from the beginning of it to the final witness who testified in the case, and to glean from that evidence what you deem to be the truth of the matter, and to apply to what you deem to be the truth of the matter from the evidence in the case, the law which will be hereafter given you by the Court; (and upon that render a verdict which in your conscience and mind substantially speaks the truth.)"

Defendants assign as error the part of the charge in parentheses.

Immediately thereafter the court instructed the jury as to presumption of innocence and gave a detailed definition of a reasonable doubt. Defendants do not challenge this part of the charge. Then the court instructed the jury several times that the State must establish defendants' guilt beyond a reasonable doubt before the jury could convict the defendants, and if the jury had a reasonable doubt as to their guilt, they should acquit them.

Defendants assign as error that the court near the end of its charge instructed the jury it was their duty "to render a verdict in this case which according to the evidence in the case and the law which has been and will be given you by the court, that substantially speaks the truth." Then the court went on to charge: "The word 'verdict' comes from two Latin words, *vere* meaning truly, and *dictum* meaning to speak; therefore, let your verdict be a true saying, let your verdict speak the truth." At practically the end of the charge the court instructed the jury "to render a verdict which substantially speaks the truth." Defendants assign this as error.

Each defendant contends in his brief that the court's charge instructed the jury to return a verdict which substantially speaks the truth, which is "a strong departure from the rule which requires that the defendant in any criminal case be proven guilty and found guilty beyond a reasonable doubt by the jury."

These assignments of error are overruled. The excerpts from the charge "render a verdict which in your conscience and mind substantially speaks the truth" and "to render a verdict in this case which* * *substantially speaks the truth," when considered out of context, are erroneous in a criminal case at least, for they are susceptible of the construction that a verdict in a criminal case can be found upon a slight preponderance of the evidence, or upon a slighter degree of evidence than beyond a reasonable doubt. However, these excerpts from the charge will not be held prejudicial, even though they are erroneous when read out of context, because it is our opinion, and we so hold, that it clearly appears the charge considered as a whole presented the law of the case to the jury in such a manner as to leave no reasonable cause to believe that the jury was misled or misinformed by these erroneous excerpts, but that they must have plainly understood from the charge that the burden of proof rested upon the State to establish the guilt of the defendants from the evidence beyond a reasonable doubt, and if it had not done so, or if they had a reasonable doubt of the defendants' guilt, they should render a verdict of not guilty as to both defendants. Strong's N. C. Index, Vol. I, Appeal and Error, sec. 42, and Strong, Supplement to Vol. I of his Index, Appeal and Error, sec. 42, where in both volumes a great number of cases are cited which support the text.

Barnhill, J., speaking for the Court in *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356, said:

> "Ordinarily the presiding judge must instruct the jury extemporaneously from such notes as he may have been able to prepare during the trial. To require him to state every clause and sentence so precisely that even when lifted out of context it expresses the law applicable to the facts in the cause on trial with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the *nisi prius* judges a task impossible of performance. The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto."

N. C. G.S. 14-17 provides in part: "A murder* * *which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death." This statute has a proviso to the effect that "if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison."

The defendants assign as error this part of the charge:

> "Now there is no conspiracy expressly set out in the bill of indictment and it is not necessary that it should be so included in the bill of indictment, and it is not necessary that it should have been alleged in the bill; but if the State has satisfied you beyond a reasonable doubt from the evidence that these two defendants Dixon and Arnold prior to the time of the alleged killing of Mr. McArthur entered into a conspiracy to rob him, and pursuant to their conspiracy so entered into and while in the attempt to carry out an unlawful purpose, to wit, the robbery of Mr. McArthur, one of them shot and killed him, the other being present, the Court instructs you, Gentlemen of the Jury, that both of the defendants under these circumstances would be guilty of murder in the first degree.
>
> "I further charge you, without regard to the existence or absence of a conspiracy, it is a settled principle of law apparently applicable to the facts in this instant case, that where two persons aid and abet each other in the commission of a crime, provided you are satisfied from this evidence and beyond a reasonable doubt that they did so, both being present, both are principals and equally guilty."

This challenged part of the charge is taken practically verbatim from the case of *S. v. Donnell*, 202 N.C. 782, 164 S.E. 352, where the facts are strikingly similar to the facts in the instant case, except that in the *Donnell* case the defendant Lee testified there was no conspiracy or intention on his part to rob the deceased. This statement of law applicable to the facts in the instant case as charged by the trial court also finds support in *S. v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340; *S. v. Brooks*, 228 N.C. 68, 44 S.E. 2d 482; *S. v. Kelly*, 216 N.C. 627, 6 S.E. 2d 533; *S. v. Alston*, 215 N.C. 713, 3 S.E. 2d 11; *S. v. Stefanoff*, 206 N.C. 443, 174 S.E. 411.

It is said in *S. v. Maynard, supra*:

> "Where a murder is committed in the perpetration or attempt to perpetrate a robbery from the person, G.S. 14-17 pronounces

it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *S. v. Kelly*, 216 N.C. 627, 6 S.E. 2d 533; *S. v. Alston, supra; S. v. Donnell, supra.*"

The assignments of error to the above quoted part of the charge are overruled, for the reason that this challenged part of the judge's charge is correct and is in conformity with many decisions of this Court.

Each defendant assigns as error this part of the charge:

"As I have told you, on the evidence in this case and the law as the Court understands the law to be and as the Court has explained it to you, you will be permitted to render one of three verdicts: you may render a verdict of guilty as to both defendants of murder in the first degree, you may render a verdict as to both defendants of guilty of murder in the first degree, recommending that their punishment be fixed at life imprisonment, or you may find both defendants not guilty."

These assignments of error are overruled.

Considering the confession made by each defendant and the other evidence of the State strongly supporting the confession of each defendant, there is no evidence of murder in the second degree or of manslaughter. The confession of each defendant is to the effect that prior to the time of the killing of George T. McArthur, each defendant entered into a conspiracy to rob him, and pursuant to that conspiracy so entered into, each defendant armed himself with a shotgun and went to George T. McArthur's store, and while in an attempt to rob George T. McArthur, pursuant to the conspiracy so entered into, one of them shot and killed him. The confession of each defendant finds strong support in the testimony of other witnesses for the State. Considering all this evidence for the State—defendants offered no evidence—the only verdict based on the evidence that the jury could find was that both defendants were guilty of murder in the first degree or both were not guilty. There is no evidence tending to show that one defendant was guilty and one defendant was not guilty.

The judge carefully instructed the jury that if they found the defendants guilty of murder in the first degree they had the unbridled discretion in rendering their verdict to recommend that the punishment for both defendants, or either one of them, should be imprisonment for life in the State's prison, and if they did so recommend, the punishment would be in accordance with their recommendation. That there are no conditions, no qualifications, no limitations imposed as to their right to make such a recommendation.

The other assignments of error to the charge have been given careful consideration, and all are overruled. They do not merit discussion.

All the assignments of error of each defendant are overruled. After a careful consideration of the entire record and the brief of each defendant, we find in the trial below no error sufficient to justify a new trial.

No error.

CLAYTON COOPER, ADMINISTRATOR OF THE ESTATE OF BETTY SUE COOPER, DECEASED, v. ASHEVILLE CITIZEN-TIMES PUBLISHING COMPANY, INC., FLOYD EDWARD SUMNER AND CLAYTON COOPER, INDIVIDUALLY.

(Filed 1 February 1963.)

1. Master and Servant § 3—

A person who exercises an independent employment and contracts to do certain work according to his own judgment and method without being subject to control except as to the result of his work, is an independent contractor; if the employer has the right to control the worker with respect to the manner and method of doing the work, the worker is an employee regardless of whether the employer exercises the right of control or not.

2. Same—

The fact that the written contract between the parties designates the worker as an independent contractor is not controlling.

3. Same— Evidence held for jury on question of whether individual was employee or independent contractor.

The contract between the parties and the evidence tended to show that the individual defendant was engaged by the corporate defendant to deliver newspapers to subscribers in a definite territory, that the individual used his own truck in performing the work, selected, hired, and paid his own helper, and received as his remuneration the difference between the advertised retail price of a subscription and the lesser price per newspaper specified in the contract. The evidence further tended to show that the delivery of newspapers was a part of the regular business of the corporate defendant, that the individual was bound to sell and deliver the papers promptly to the list of subscribers, that the route and list of subscribers belonged to the corporate defendant, that the corporate defendant had the right to require the individual to meet any reasonable request of a subscriber with reference to the manner in which the newspaper was delivered, and had the right to terminate the contract *instanter* for contract violation and upon 15 days notice for any reason satis-

factory to it, etc. *Held:* In regard to the liability of the corporate defendant for negligent injury to a third person in the operation of the delivery truck, the evidence was sufficient to be submitted to the jury upon the question of whether the individual defendant was an employee or an independent contractor.

4. Automobiles § 54a—

In this action to recover for injuries sustained as a result of the alleged negligent operation of a newspaper delivery truck, the evidence *is held* sufficient to be submitted to the jury on the question of whether the person driving the truck, while engaged in the delivery of the newspapers to subscribers, was an employee or an independent contractor of the newspaper publishing company.

APPEAL by plaintiff from *Huskins, J.*, January Civil Term 1962 of BUNCOMBE.

Administrator's action to recover damages for the death of his intestate, Betty Sue Cooper, allegedly caused by the negligent operation of a truck by defendant Sumner while acting for and as agent of the corporate defendant.

About 6:15 a.m. Sunday, July 8, 1956, the intestate was a passenger in an automobile operated by her husband, Clayton Cooper, in a general easterly direction on (dominant) U. S. Highway 19-A. Approximately 1.8 miles east of Sylva, there was a collision between the Cooper car and the Sumner truck within the intersection of 19-A and (servient) Snyder Branch Road. Plaintiff's intestate died from injuries received in said collision.

In separate answers, each defendant denied plaintiff's essential allegations. The corporate defendant alleged, *inter alia,* Sumner was not its agent but an independent contractor operating his own truck in the conduct of his own business; and that the corporate defendant was not liable for the negligence, if any, of Sumner. Sumner alleged, conditionally, a cross action for contribution against Clayton Cooper and caused him to be joined as a defendant in respect of such cross action. Further discussion of the pleadings and the several issues raised thereby is unnecessary to decision of the question presented by this appeal.

Evidence pertinent to the agency issue is stated in the opinion.

At the conclusion of plaintiff's evidence, the court allowed the corporate defendant's motion for judgment of involuntary nonsuit. Thereupon, plaintiff submitted to a voluntary nonsuit as to Sumner. The court then entered judgment of involuntary nonsuit as to the corporate defendant. Plaintiff excepted and appealed.

Ward & Bennett for plaintiff appellant.

Meekins, Packer & Roberts for defendant appellee Asheville Citizen-Times Publishing Company, Inc.

BOBBITT, J. The evidence, when considered in the light most favorable to plaintiff, was sufficient to require submission of the issue as to whether the death of plaintiff's intestate was proximately caused by the negligence of Sumner. Appellee, in its brief, does not contend otherwise.

The crucial question is whether the evidence, considered in the light most favorable to plaintiff, is sufficient to support a finding that Sumner was acting for and as agent of the Publishing Company as alleged in the complaint. The Publishing Company contends plaintiff's evidence establishes that Sumner was an independent contractor.

The corporate defendant (Publishing Company) publishes two daily newspapers, "The Asheville Citizen" and "The Asheville Times," and the Sunday "Asheville Citizen-Times." When the collision occurred, Sumner was engaged in delivering the "Asheville Citizen-Times" in the territory covered by his (two) written agreements with the Publishing Company.

Pertinent to the crucial question, plaintiff offered in evidence (1) the written agreements, (2) the testimony on adverse examination prior to trial of John R. Marks who, from 1953 until his retirement January 15, 1960, was Circulation Manager of the Publishing Company, and (3) the testimony on adverse examination at trial of Sumner.

Each written agreement bears the caption "Route Agreement." In each, the Publishing Company is designated "first party" and Sumner is designated "second party."

One agreement, relating to the sale and distribution of "The Asheville Citizen" and the Sunday "Asheville Citizen-Times," provides:

"WITNESSETH: That effective on and after Feb. 19, 1956, the first party hereby agrees.

"1. To grant the second party the right to sell and distribute in a manner satisfactory to subscribers and free from control by first party, THE ASHEVILLE CITIZEN and ASHEVILLE CITIZEN-TIMES to regular subscribers, within the territory designated as 'Citizen Route No. 133.'

"2. To furnish second party a list of subscribers, with expiration dates, said list to be in regular order in which papers have been delivered by the former contractor, but order of delivery may be changed by second party.

"3. To sell to second party copies of THE ASHEVILLE CITIZEN, hereinafter known as morning at 2 1/3 cents per copy and copies of ASHEVILLE CITIZEN-TIMES, hereinafter known as Sunday, at 9 cents per copy, to be used in supplying regular subscribers only. Extra copies to be used in making single copy sales are to be sold to second party at ..... cents per copy morning and ..... cents per copy Sunday. Place of delivery shall be at, or near ..... Time of delivery shall be about 3:00 A.M. daily and ..... Sunday. The place, and time of delivery may be changed by first party upon written notice to second party.

"4. To sell second party mail subscriptions, to be sent to points outside Western North Carolina, at a discount of twenty percent from the regular published mail subscription rates, which shall be paid for by second party within three days.

"5. To sell at approximate cost standard route books, receipt blanks, receipt cards, punches, canvas bags, and similar supplies. Supply free of charge start order blanks, stop order blanks, route list blanks, promotion material and, when mutually agreed, sample copies to be used in soliciting new subscriptions.

"6. The first party represents that it maintains for the benefit of all dealers or carriers a system of handling and billing subscribers who desire to pay their subscriptions for long terms in advance. The first party hereby agrees to pay second party at the regular advertised subscription rates for all such subscriptions that are now paid in advance and continue paying said second party for these subscriptions until expiration. The manner of payments shall be by way of crediting the weekly paper bill of second party.

"7. To credit the account of the second party at the regular advertised subscription rates for all subscribers that are now paid in advance with the present or former contractor.

"8. To accept on behalf of second party new and renewal subscriptions, both cash and credit. In so doing the first party is acting as agent or trustee for second party and his subscribers. If the payment shall pay the subscription for less than one month in advance the entire amount shall then and there be credited to the account of second party. If the payment shall pay the subscription for more than one month in advance, second party shall be credited with the earned portion of said subscription and the unearned portion shall be held in trust and credited to his account weekly, as earned.

"The second party hereby agrees:

"a. To act as dealer for THE ASHEVILLE CITIZEN and ASHEVILLE CITIZEN-TIMES in the territory designated above, and to push the sale of subscriptions to same.

"b. To deliver or cause to be delivered at his own expense promptly upon receipt of his order, copies to subscribers. To pay first party the sum of 15 cents for each missed or incompleted delivery of paper to defray the cost of special delivery regardless of who may be at fault, or for any other default of the second party in his compliance with any provision of this contract.

"c. To purchase from the first party newspapers at rates stated in Paragraph 3 and to pay first party not later than Monday night of each week for all papers furnished during the preceding week. To sell these newspapers to subscribers in his own territory, in accordance with the regular advertised rates.

"d. To furnish only to first party upon request a written list giving correct names with initials and location, street and number, of each and every subscriber, in regular order in which papers are delivered on said route, so as to enable first party to comply with the rules imposed by the Audit Bureau of Circulations, of which first party is a member.

"e. To keep a record of any employees necessary in the fulfillment of this contract and fully comply with the Social Security Act, State Unemployment Compensation Act, State Labor Law and all other laws.

"f. To remit to first party the full amount of any collection that may pay a subscriber for more than one month in advance, to be handled in accordance with Paragraphs 6, 7, and 8. To remit to first party for the benefit of the preceding contractor any money collected for papers delivered by the preceding contractor. And at the termination of this contract, to remit to first party, for the benefit of the succeeding contractor, any unearned subscription payments held by second party.

"g. At the termination of this contract, to return the route together with list of subscribers in as good or better order and condition than when received without any charge or demand upon or against first party or anyone else.

"h. To furnish a cash bond of $500.00, payable $..... in cash and $5.00 weekly until fully paid, which shall serve as security for the fulfillment of this contract, and may be used by first party to pay any debts or obligations due first party or its subscribers. First party shall be under no obligations whatever to release any portion of this cash bond until thirty days have elapsed following last delivery of

papers by second party and not then provided there is apparent cause or reason for claims. The cash bond held on December 31 of any year shall bear interest at the rate of 3% per annum payable at the rate of one quarter of 1% per month for each multiple of $5.00 on hand the first of each month. Said interest money held on December 31 of any year shall be payable between January 15 and 31 of the following year.

"Both parties hereby agree:

"1-a. That first party may terminate this agreement instanter and without notice whenever second party fails to meet any stipulation in this contract, which cancellation and termination shall not affect its rights against second party for failure of performance; but failure of first party to cancel and terminate shall not constitute a waiver of its right to do so, nor estop it from so doing, in the event of any subsequent default in performance.

"2-b. Either party may terminate for any reason satisfactory to itself or himself upon 15 days' notice in writing. Regardless of how or by whom termination is made, the second party shall deliver to first party, or some one designated by it, a list of all subscribers and their addresses in regular order in which papers are delivered and shall teach his successor at no expense to first party and without causing any unnecessary delay in delivery of papers on the route; and, if for any reason the second party refuses to teach his successor, the first party shall have the right to apply, from the security furnished by the second party with the first party, guaranteeing performance of this contract, whatever amount is reasonably necessary to defray the expenses of teaching his successor said route.

"3-c. That the terms of this agreement shall not be changed, modified, altered, or supplemented except in writing, signed by the parties hereto.

Edward Sumner (Seal)

J. R. Marks Address Sylva, N. C.

For ASHEVILLE CITIZEN-TIMES COMPANY, INC.

(Seal)

"FINANCIAL GUARANTEE

"In order to further secure the ASHEVILLE CITIZEN-TIMES COMPANY against loss under the above and foregoing contract, we

hereby unconditionally guarantee on the part of Edward Sumner the prompt and faithful performance of each stipulation and hereby acknowledge ourselves severally and collectively bounden unto ASHEVILLE CITIZEN-TIMES COMPANY, Incorporated, in the sum of FIVE HUNDRED DOLLARS ($500.00) liquidated damages, jointly and severally, firmly by these presents. We waive notice of any and all defaults on his part.

"Sealed and dated this ..... day of ....., A.D. 19....

Floyd Sumner (Seal) Ray Cogdill (Seal)

Address Sylva, N. C. Address Sylva, N. C. "

The other agreement, relating to the sale and distribution of "The Asheville Times" and the Sunday "Asheville Citizen-Times" is different only in the following respects: (1) In lieu of "The Asheville Citizen" the words "The Asheville Times" appear; (2) in paragraph 1, the territory is designated "Times Route No. T-133"; (3) in paragraph 3, (a) after "Place of delivery shall be at, or near," the words "Sylva Drive-In" are written, and (b) after "Time of delivery shall be about," "2:30 P.M." is written; (4) in paragraph b, in lieu of "15 cents"—"25 cents" appears; (5) paragraph h begins as follows: "To furnish a cash bond of $300.00, payable $..... in cash and $3.00 weekly until fully paid," etc.; and (6) the "Financial Guarantee" is signed by Ray Cogdill and David Parker.

There was testimony tending to show the facts narrated below.

The territory covered by each "Route Agreement" extended along U. S. Highway No. 19-A (and certain side roads) from Balsam Gap (7-8 miles east of Sylva) to Whittier (2 miles west of Sylva) and included the town of Sylva. The route carrier's "average draw of papers was about 300 on the Times and possibly 400 on the Citizen."

Sumner was approached by G. L. Crisp to succeed one Jamison as carrier on an established newspaper route. Mr. Crisp, a full time employee, was the Publishing Company's District Supervisor. Mr. Marks testified: "The District Representative determined whether or not a certain applicant for a carrier's job would be employed or who would be given a route."

The Publishing Company (as provided in paragraph 2) furnished Sumner "a list of subscribers, with expiration dates, . . . in regular order in which papers (had) been delivered by the former contractor (Jamison)," but Sumner was free to change the "order of delivery." Before signing the agreements, Sumner made two or three trips over

the route with Jamison. It was "obvious" that the "quickest and shortest way" to deliver the newspapers was "in the order in which (the names and addresses) appeared on the route list." Sumner testified: "The most intelligent and only logical, practical way to deliver them was from house to house right down the road."

The newspapers were delivered to Sumner "in bulk, bailed *(sic)* with a wire, with *(his)* name on them and the number of papers at the two delivery points in or near Sylva." They were delivered to Sumner by a truck of Citizen Express Company, a subsidiary of the Publishing Company. Crisp told Sumner he was to pick up "The Citizen" at 3:00 a.m. at the Cannon Shell Station in Sylva; that he was to pick up "The Times" (at 2:30 p.m.) at the Sylva Drive-In Theatre; and that the newspapers were "to be delivered at the earliest possible moment in the shortest time." "(D)elivery was usually completed by 6:30 unless there was snow or bad weather of some sort." Sumner was to complete delivery "just as quick as (he) could get through."

Sumner agreed (as provided in paragraph c) to sell the newspapers "in his own territory, in accordance with the regular advertised rates," to wit, 5 cents per copy for each of the daily newspapers and 15 cents per copy for the Sunday newspaper. In this connection, it is noted that the "(w)holesale rates varied among carriers" and were "determined to some extent by the length of the route the carrier had to traverse and the difficulty of the route, the type of terrain," etc.

When Sumner received from the Publishing Company a "Start Order," indicating a new subscriber by direct contact with the Publishing Company, he was instructed by Crisp to start delivery to this subscriber immediately. When he received a "Stop Order" from the Publishing Company, he could stop delivery immediately or assume the risk by extending credit.

Sumner met with Crisp once a week, primarily "for weekly settlement." On such occasions Crisp would discuss with Sumner "problems or changes of policy on the part of the paper." Also, Crisp "would tell (Sumner) he had complaints from people on (his) route and that (he) was going to have to give them service more in line with what they desired than what (he) had been doing." Sumner testified: "Those complaints usually arose from the fact the paper would not be in the place where the customer wanted it, or would be late. When Mr. Crisp told me about these complaints and who the customers were then I attempted to improve the service as far as these customers were concerned. I knew that Mr. Crisp could terminate this contract at any time."

Sumner also received from time to time from the Publishing Company notice (on a special form) of complaints the Publishing Com-

pany had received from subscribers. Mr. Marks testified: "If a particular carrier did not pay attention to the complaint forms which we forwarded to him and continued to make the same mistakes, the result would depend—if he just simply didn't do anything about any of them why naturally we reserve the right to terminate his contract any time we saw fit; any reason satisfactory to himself or ourself, both had the same right."

Sumner was required to purchase "at approximate cost" certain supplies including receipt books bearing the name "Citizen-Times."

The Publishing Company furnished the route carriers "round yellow and black boxes" then in use in the Sylva area "bearing the name Asheville Citizen-Times," suitable for use as a depository for the newspaper upon delivery by the carrier. Many of these had been placed and were in use when Sumner took over the route from Jamison. When Mr. Crisp was explaining Sumner's duties, Jamison (in Crisp's presence) told Sumner that he "was supposed to put them (the newspapers) in the boxes." If Sumner, upon request of subscribers or otherwise, wanted additional boxes for such use, he obtained them from the Publishing Company without cost to him.

Deliveries to subscribers were made at Sumner's expense. Such deliveries required the use of an automobile or truck Sumner bought a truck for this specific purpose and paid all expenses in connection with the maintenance and operation thereof. Too, Sumner selected, hired and paid a helper. Sumner testified: " I picked him up myself and paid him out of my own pay, out of my own commissions or earnings —out of my receipts from my subscribers, let's put it." Sumner also testified: "I never missed serving my route while I was with them."

What Sumner received for his services, and all that he received, was the difference between the price he paid for the newspapers and "the regular advertised rates" at which they were sold. The number of newspapers delivered to him approximated the current number of subscribers. Sumner paid for all he received. Approximately five or six per cent of the subscribers made prepayment to the Publishing Company. Collections from the remaining subscribers were made by Sumner and any loss on account of failure to collect fell on him.

Sumner was not carried on the payroll or other records of the Publishing Company as an employee. The Publishing Company paid no withholding, social security or unemployment tax or contribution on account of Sumner. Nor was Sumner covered by the Publishing Company's workmen's compensation insurance.

"In its simplest form an independent contractor may be said to be one who exercises an independent employment and contracts to do

certain work according to his own judgment and method, without being subject to his employer except as to the result of his work. (Citation) When one undertakes to do a specific job under contract and the manner of doing it, including employment, payment and control of persons working with or under him, is left entirely to him, he will be regarded as an independent contractor unless the person for whom the work is being done has retained the right to exercise control in respect to the manner in which the work is to be executed. (Citation) The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has right of control, it is immaterial whether he actually exercises it. (Citation)" Devin, J. (later C.J.), in *McCraw v. Mills, Inc.*, 233 N.C. 524, 526, 64 S.E. 2d 658, and cases cited; *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220; *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301; *Pressley v. Turner*, 249 N.C. 102, 105 S.E. 2d 289.

In *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137, Barnhill, J. (later C.J.), sets forth a number of elements which ordinarily tend to identify an "independent contractor" as distinguished from a "servant" or "employee." He then states: "The presence of no particular one of these *indicia* is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee."

According to the written agreements, Sumner (referred to therein as "dealer") was granted the right to sell and distribute the newspapers in a manner satisfactory to subscribers, "free from control" of the Publishing Company. This "contractual declaration" is not determinative. *Watkins v. Murrow*, 253 N.C. 652, 657, 118 S.E. 2d 5. "... a master, if he actually be such, cannot exonerate himself from his legally imposed liability to a third person for injury resulting from the misconduct of a servant by the simple expedient of 'contracting' with the servant that he is to be free from the master's control." *Femling v. Star Pub. Co.* (Wash.), 81 P. 2d 293.

Factors *(indicia)* tending to support the view that Sumner was an employee, servant *or* agent of the Publishing Company include the following:

The work Sumner was engaged to do, *i.e.*, deliver newspapers to subscribers, was a "part of the regular business of the employer," to wit, the Publishing Company. Restatement, Agency § 220(2) (h). As

aptly stated by Hall, J., in *Laurel Daily Leader v. James* (Miss.), 80 So. 2d 770: "The delivery of newspapers within a reasonable time after publication is essential to the success of the newspaper business. For the greater portion of its income the paper depends on advertising, and the rates for advertising are goverened by the paper's circulation. Circulation is a necessity for success. The delivery boys are just as much an integral part of the newspaper industry as are the typesetters and pressmen or the editorial staff." When engaged in delivering the Publishing Company's newspapers to subscribers, Sumner's services were rendered in the main stream and in furtherance of the Publishing Company's business.

In *Shearman* and *Redfield* on Negligence, Revised Edition, Vol. One, § 168, this statement appears: "The true test of an 'independent contractor' would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished." In 27 Am. Jur., Independent Contractors § 2, the author states: "Examination of the definitions substantially adopted by most of the courts makes it evident that one of the basic elements of the independent contractor relationship is the fact that the contractor has an independent business or occupation." Whether the person employed "is engaged in an independant business, calling, or occupation," is recognized by this Court as a significant factor in determining whether the relationship is that of "independent contractor." *Hayes v. Elon College, supra.* Also, see Restatment, Agency, § 220 (2) (h).

Sumner was twenty years of age when he became route carrier for the Publishing Company. His distinctive prior occupation was that of brakeman on the Southern Railway. Although "cut off" by the railroad during the whole time he was working "with the paper," he retained his seniority "with the Union and with the Railroad." He was "just temporarily off and subject to being called back" and later was called back.

Whatever title Sumner may have acquired in the newspaper when delivered to him by the Publishing Company, *"he was bound by contract to sell and deliver the papers promptly to a list of subscribers which was the property of the (Publishing Company) and to repeat the process daily." Journal Pub. Co. v. State Unemployment Comp. Com'n.* (Or.), 155 P. 2d 570. Indeed he was subject to penalty(see paragraph b) if he failed to do so. The agreements recognized that the route and the list of subscribers belonged to the Publishing Company. *Hann v. Times-Dispatch Pub. Co.* (Va.), 184 S.E. 183. The Publishing

Company delivered to Sumner the list of subscribers when he became the carrier on its route. When the agreements were terminated, he was obligated to surrender the route and (current) list of subscribers to the Publishing Company and had no further interest of any kind therein.

When and how Sumner was to perform his obligations to the Publishing Company were fixed in large measure by the terms of the agreements. Delivery in a manner "satisfactory to subscribers" (as provided in paragraph 1) was required. It would seem the Publishing Company had the legal right to require that Sumner meet any reasonable request of a subscriber with reference to the manner in which he delivered the newspaper. Moreover, the possible variations in respect of the manner in which a newspaper might be delivered to the residence of a subscriber are somewhat limited. *De Monaco v. Renton* (N.J.), 113 A. 2d 782.

The Publishing Company had the legal right to terminate the agreements (1) *instanter* for contract violation, and (2) for any reason satisfactory to it "upon 15 days' notice in writing." As stated by Schenck, J., in *Lassiter v. Cline,* 222 N.C. 271, 274, 22 S.E. 2d 558: "Certainly the 'right to fire' is one of the most effective methods of control . . ." If Sumner failed to comply with whatever instructions the Publishing Company might give as to the method and manner of delivering the papers he would thereby risk termination of his agreements as route carrier.

It is noted that the services Sumner was required to render were routine in nature, requiring diligence and responsibility rather than discretion and skill. Ordinarily, the day by day sale and delivery of newspapers under a cancellable agreement of indefinite duration may not be considered "a specific job under contract" within the meaning of that phrase when used in defining an independent contractor.

The fact that Sumner had authority to select and hire and did select and hire a helper is not determinative. *Evans v. Lumber Co.,* 174 N.C. 31, 93 S.E. 430; *Lassiter v. Cline, supra.* Clark, C.J., in *Evans v. Lumber Co., supra,* said: "It is said in 14 R.C.L., 72, that it is idle and vain to assert that an employee is an independent contractor because he has the sole right to hire and discharge his help when his own employer has the unquestioned right to terminate the contractor's employment at will."

Decisions (conflicting) in other jurisdictions, bearing upon the question here presented, are discussed in 53 A.L.R. 2d 183, in an annotation entitled "Route driver or salesman as independent contractor or employee of merchandise producer or processor, for purposes of respondeat superior doctrine."

The Publishing Company stresses our decision in *Creswell v. Publishing Co.*, 204 N.C. 380, 168 S.E. 408, in which this Court held a fourteen-year old newsboy who made street sales under the arrangement therein stated was not an "employee" within the definition set forth in our Workmen's Compensation Act. Suffice to say, whether Sumner was an employee within the meaning of the Workmen's Compensation Act is not presented or decided.

Decision here is based upon our conclusion that the evidence, when considered in the light most favorable to plaintiff, is sufficient to support a finding that Sumner, *when engaged in delivering the Publishing Company's newspapers to subscribers,* was acting as the Publishing Company's agent and in furtherance of its business. Hence, the judgment of involuntary nonsuit is reversed.

Reversed.

J. BENTON THOMAS, CRAWFORD L. THOMAS AND INA THOMAS LENTZ PAULSTON v. HAROLD STANLEY THOMAS.

(Filed 1 February 1963.)

1. Wills § 42—

As a general rule, a devise in remainder to the child or children of the life tenant does not include a child adopted by the life tenant unless it appears from the instrument itself or the attendant circumstances that testator meant to include adopted children within the class.

2. Wills § 27—

The rule that a will speaks as of the time of testator's death relates to the subject matter of disposition only, and the persons who are to take under the will are to be determined in accordance with the intent of testator as ascertained from the language of the instrument considered in the light of the conditions and circumstances existing at the time the will was made.

3. Wills § 42— Adopted child does not take as member of class when there is nothing to indicate that testator so intended.

Testator devised the property in question to his son for life, remainder to the son's children, with contingent remainder over in the event the son died without surviving child or children. At the time the will was executed the son was married but childless and there was no statute providing for inheritance by an adopted child from the ancestor of the adoptive parent. After the death of testator the son adopted a child. *Held:* The adopted child does not take the remainder, there being nothing to indicate that testator intended that a child adopted by his son should

take. G.S. 48-23 is not applicable, there being a distinction between the right of an adopted child to take by devise and such right to take by inheritance.

HIGGINS, J., dissenting.
PARKER, J., joins in dissent.

APPEAL by defendant from *Carr, J.*, March Term 1962 of HOKE.

This is a civil action instituted pursuant to the provisions of our Declaratory Judgment Act, G.S. 1-253, *et seq.*, to determine the rights of the parties to the action under the provisions of the last will and testament of James C. Thomas, deceased, who died in 1926.

James C. Thomas left surviving him four children, *viz.*, William Marshall Thomas, J. Benton Thomas, Crawford L. Thomas, and Ina Thomas Lentz Paulston.

The testator, James C. Thomas, devised two farms, one consisting of 52 acres and the other 142 acres, both in Hoke County North Carolina, to his son, William Marshall Thomas, "for him to have the use of the same during his natural life, and then to his wife Agnes Thomas, for her to have the use of same during her natural life, if she should survive her husband, and then I give and devise said lands in fee simple to the children of my said son living at the time of his death and to such children of any deceased child of his as may be living at the time of his death, the grandchildren to take such shares as their deceased parent would have taken if living at the time of the death of my said son, and if there should be no such children or grandchildren, then said lands are to go in fee simple to the brothers and sister of my said son, those of the half blood to take equally with those of the whole blood * * *."

The following facts were stipulated: That on 19 May 1949, William Marshall Thomas and wife, Agnes Thomas, adopted for life Harold Stanley Thomas, who was 19 years of age at the time of the adoption; that Agnes Thomas, wife of William Marshall Thomas, died intestate on 7 June 1958, leaving surviving her husband, William Marshall Thomas, and her adopted son, Harold Stanley Thomas; that William Marshall Thomas died 2 May 1961; that there were no natural children born of the marriage of William Marshall Thomas and Agnes Thomas, and that Harold Stanley Thomas was the only adopted child.

The court below held that J. Benton Thomas, Crawford L. Thomas, and Ina Thomas Lentz Paulston, the natural children of James C. Thomas, deceased, and the surviving brothers and sister of William Marshall Thomas, deceased, are the owners as tenants in common of the real property devised in Item 2 of the last will and testament of

James C. Thomas, and that the defendant Harold Stanley Thomas has no right, title or interest therein.

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

Hostetler & McNeill; Seawall & Harrell for plaintiffs.
Simons & Simons; Clark & Braswell for defendant.

DENNY, C.J. The question for determination of this appeal is simply this: Where a testator devises real property to a son for life and then to the children of said son living at the time of his death, does a child adopted by the son after the death of the testator, take as though he had been a natural born child of the son?

If the question here were one of inheritance we think G.S. 48-23 would give us the answer. This statute in pertinent part provides: "The final order forthwith shall establish the relationship of parent and child between the petitioners and child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes of descent and distribution. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth."

However, the courts in most jurisdictions still make a distinction between devises and inheritances with respect to the right of an adopted child, even though all distinctions between natural born and adopted children have been abolished by statute.

In the case of *Smyth v. McKissick,* 222 N.C. 644, 24 S.E. 2d 621, this Court held that a child adopted after the effective date of a trust indenture, could not take thereunder. The Court said: "The general rule is that the word 'child,' standing alone, when used in a deed as referring to those to take in succession, does not include the adopted child of another, unless it appears from the instrument itself or attendant circumstances that it was so intended. There is nothing in the language of the trust indentures here to indicate that the testator intended to include any others than those of his blood, and there were no extraneous circumstances, existing at the time of or before the execution of the trust indentures, which would lend color to the suggestion that an adoption by Thomas Smyth was anticipated or contemplated."

Likewise, we pointed out in the case of *Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632, that a testamentary provision for a child or children of a named person, a child adopted by such person after the testator's death does not take. Among the authorities from other jurisdictions in accord with this view, we cite the following: *Morgan v. Keefe,* 135 Conn. 254, 63 A 2d 148; *Comer v. Comer,* 195 Ga. 79, 23 S.E. 2d 420, 144 A.L.R. 664; *Everitt v. LaSpeyre,* 195 Ga. 377, 24 S.E. 2d 381; *Belfield v. Findlay,* 389 Ill. 526, 60 N.E. 2d 403; *Orme v. Northern Trust Co.,* 29 Ill. App. 2d 75, 172 N.E. 2d 413; *Peirce v. Farmers State Bank,* 222 Ind. 116, 51 N.E. 2d 480; *Casper v. Helvie,* 83 Ind. App. 166, 146 N.E. 123; *Hutchins v. Browne,* 253 Mass. 55, 147 N.E. 899; *In re Chapple's Estate,* 338 Mich. 246, 61 N.W. 2d 37; *Melek v. Curators of University of Missouri,* 213 Mo. App. 572, 250 S.W. 614; *Parker v. Carpenter,* 77 N.H. 453, 92 A 955; *In re Graham's Will,* 73 N.Y.S. 2d 240; *In re Hall's Will,* 127 N.Y.S. 2d 445; *In re Peabody's Will,* 17 Misc. 2d 656, 185 N.Y.S. 2d 591; *Albright v. Albright,* 116 Ohio St. 668, 157 N.E. 760; *Central Trust Co. v. Hart,* 82 Ohio App. 450, 80 N.E. 2d 920; *In re Ware's Estate* (1958 Okla.), 348 P 2d 176; *In re Puterbaugh's Estate* , 261 Pa. 235, 104 A 601; *In re Holton's Estate,* 399 Pa. 241, 159 A 2d 883, 86 A.L.R. 2d 1; *Cochran v. Cochran,* 43 Tex. Civ App. 259, 95 S.W. 731; *Murphy v. Slaton,* 154 Tex. 35, 273 S.W. 2d 588; *Trueax v. Black,* 53 Wash. 2d 537, 335 P 2d 52; *Lichter v. Thiers,* 139 Wisc. 481, 121 N.W. 153; 86 A.L.R. 2d Anno: Adopted Child — Rights Under Will, page 58, *et seq.*

The minority view, permitting children adopted after the testator's death to be included when the word "children" is used to designate a class which is to take under the will, is represented by the following cases: *Dyer v. Lane,* 202 Ark. 571, 151 S.W. 2d 678; *In re Stanford's Estate,* 49 Cal. 2d 120, 315 P 2d 681; *Meek v. Ames,* 177 Kan. 565, 280 P 2d 957; *Edmands v. Tice* (1958 Ky.), 324 S.W. 2d 491; *In re Patrick's Will,* 259 Minn. 193, 106 N.W. 2d 888.

On the other hand, it seems to be the general rule that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child if he had so desired, such adopted child will be included in the word "children" when used to designate a class which is to take under the will. *Bullock v. Bullock,* 251 N.C. 559, 111 S.E. 2d 837; *Trust Co. v. Green,* 239 N.C. 612, 80 S.E. 2d 771; *Bradford v. Johnson, supra,* and cited cases.

It is further pointed out in *Trust Co. v. Green, supra*: "The dispositive provisions of a will speak as of the death of the testator.

G.S. 31-41; *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151; *Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231; *Smyth v. McKissick, supra.* However, the fact that a will speaks from the death of the testator, 'relates to the subject matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of the gift.' *Hines v. Mercer,* 125 N.C. 71, 34 S.E. 106; *Robbins v. Windley,* 56 N.C. 286. Consequently, it is well settled in this jurisdiction that the intent of the testator is to be ascertained, if possible, from a consideration of the language used by him, and 'the will is to be considered in the light of the conditions and circumstances existing *at the time the will was made.' Trust Co. v. Waddell, supra; Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578; *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410; *Raines v. Osborne,* 184 N.C. 599, 114 S.E. 849; *Herring v. Williams,* 153 N.C. 231, 69 S.E. 140."

In the instant case, the defendant Harold Stanley Thomas was not born when the testator died. In fact, the testator executed his last will and testament on 13 March 1926 and died sometime later in that same year, 23 years before the defendant was adopted. Moreover, at the time the testator executed his will, an adopted child was incapable of inheriting from the ancestor of the adoptive parents. In fact, our first statute that authorized an adopted child to take from and through the adoptive parents was not enacted until 1941, fifteen years after the death of the testator. *Grimes v. Grimes,* 207 N.C. 778, 178 S.E. 573; *Phillips v. Phillips,* 227 N.C. 438, 42 S.E. 2d 604; *Wilson v. Anderson,* 232 N.C. 212, 59 S.E. 2d 836. Consequently, at the time the testator executed his will, there was nothing in our statutes of descent and distribution or in our adoption laws, or in the will itself, as executed, to indicate that the testator had any idea that in leaving real estate to his son for life, then in fee simple to his children living at his death, if any, would or could include any child except a child or children of the blood of the ancestor.

In 95 C.J.S., Wills, section 653, page 954, *et seq.,* it is said: "Ordinarily, an adopted child is not actually a child of the adopting parent, and does not come within the usual meaning of 'children,' as used in a will to designate beneficiaries. However, whether the term 'children' as so used in a will includes adopted children as well as children of the blood of the person designated depends on the intention of the testator, which must govern, and such intention is to be ascertained from the reading of the will, in the light of all the surrounding circumstances; it will not include an adopted child in the absence of circumstances

clearly showing that the testator so intended, but an adopted child will be deemed included in the term when the intention of the testator is clear.

"If the testator knows and approves of the adoption, as where the adoption occurs before the execution of the will, or a considerable time before the death of the testator, after the execution of the will but prior to the testator's death, or before or after the execution of the will, but prior to the death of the testator, an adopted child will be included in the word 'children.' An adoption after the testator's death, there being no indication that the testator knew that the adoption was contemplated, indicates that the adoped child was not intended to be included. * * *"

Likewise, in 57 Am. Jur., Wills, section 1365, page 904, *et seq.*, we find the following statement: "In the absence of a contrary context, it is generally held that the word 'child' or 'children' as used in a will should not be construed as including adopted children, especially where the adoption took place after the death of the testator or was for other reasons unknown to him, or the statutes relating to adoptions impose some restrictions on the rights of adoptees to inherit from or through their adopting parents; but where it is clear that the testator intended that the terms should include adopted children, that intention will be respected. * * * Among the indicia which have been relied upon as showing that a particular testator intended that the term 'child' or 'children,' as used by him, should include adopted children are the circumstance that the testator knew and approved of the adoption, and the effect of the applicable statutes relating to adoptions to make an adopted child the equivalent of a legitimate natural child for purposes of succession."

In the case of *Belfield v. Findlay, supra,* Sarah Findlay executed a will in 1916. She died in 1930. She devised her real property to her son for life and on his death "the said land to go to his children, or if he leaves no children surviving him, then said land is to go to my daughters." The son adopted a child, Nelson Findlay, in 1939. The adopted child was born in 1933. Upon the death of the adoptive parent in 1940, the identical question was raised that is presented in the instant case. The Supreme Court of Illinois said: "Here, defendant, the adopted child, was not born until seventeen years after the execution of the will of Sarah Findlay and, we note again that she died three years prior to defendant's birth and nine years before he was adopted. It follows that, under the law established by applicable decisions, defendant is not the owner of the property in controversy. Arthur Findlay, at his death, not having been survived by any child or children or other

lineal descendants, within the meaning of his mother's will, the land devised by her became the property of plaintiffs, and title was properly quieted in them. Our conclusion is in accord with the great weight of authority. Indeed, 'It is almost universally agreed that where a provision is made in a will for children of some person other than the testator, an adopted child is presumed not to be included unless there is language in the will, or there are circumstances surrounding the testator at the time he made the will, which make it clear that the adopted child was intended to be included.' 70 A.L.R. 621."

The case of *Headen v. Jackson,* 255 N.C. 157, 120 S.E. 2d 598, has no bearing on the question presented on this appeal. The question there was one which involved the interpretation of our antilapse statute, G.S. 31-42.1, in light of the provisions of G.S. 48-23.

Under the law in this jurisdiction, the plaintiffs, the brothers and sister of William Marshall Thomas, are the owners of the lands involved as tenants in common, and the judgment entered below is

Affirmed.

HIGGINS, J., dissenting: The majority opinion correctly summarizes the facts as disclosed by the record. At the time James C. Thomas executed his will and at the time of his death — both in 1926 — the testator had three sons and one daughter. To each of these children he devised lands upon substantially identical terms and conditions. In this controversy we are concerned only with the devise to William Marshall Thomas for life with remainder in fee, first to his children. After the life estate the remainder is provided for in the following words: "To the children of my said son living at the time of his death . . . and if there should be no such children . . . then to go in fee simple to the brothers and sister of my said son."

At the time the will was executed, William Marshall Thomas was married to Agnes Thomas. They were childless. However, effective May 19, 1949, they adopted for life Harold Stanley Thomas. Agnes Thomas died in 1958 and William Marshall Thomas died in 1961, leaving the adopted son as the only child.

The remainder given to the children was contingent for the reason that the ultimate takers of the fee could not be known until the son's death. "When there is uncertainty as to the person or persons who are to take, the uncertainty to be resolved in a particular way or according to conditions existing at a particular time in the future, the devise is contingent." *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899. The remaindermen must be determined by calling the roll at the time fixed in the will. Does the adopted son, Harold Stanley Thomas, have

the right to answer as a surviving child of William Marshall Thomas? The answer, decides this case. The will, speaking as of 1926, nevertheless fixes 1961 as the time to determine who are children of William Marshall Thomas. In 1926 he was married but was without child, either born or adopted. The will neither limits nor qualifies the word "children." Therefore, must we not determine who are children according to the law in effect at the time the testator appointed for the determination? The majority opinion says the testator did not mean adopted children. If the testator meant children by birth and not by adoption, by a few simple words, he could have so provided. His failure should not now be supplied by the Court.

Effective July 1, 1955, "An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever as he would have had if he were born the legitimate child of the adoptive parents at the date of signing the final order of adoption. . ." The rights relate back to prior adoptions. Chapter 813, Session Laws, 1955; *Headen v. Jackson*, 255 N.C. 157, 120 S.E. 2d 598; 33 N. C. Law Review. The argument that rights of adopted children involve only descent and distribution in case of intestacy is unsound. The law of adoption by specific terms extends to and includes all rights. No longer can the adopted child inherit from his actual parents, nor they from him. By the adoption order the court takes the child from one family, leaving behind his name and all rights, and places him in the family of the adoptive parents, giving him their name and all the rights of a child. Nature provides for children by birth. Realizing the loss when nature fails, the law authorizes the court, after very careful scrutiny, to supply the loss by its order of adoption.

Without force in this case is the argument the testator did not know the law of adoption might be changed to give an adopted child full family status. Neither did he know to the contrary. At the date of the will there were no children. There was a possibility of a child by birth. Likewise there was a possibility of a child by adoption. The testator selected the date of his son's death as the time for the remainder to go to a child or children. On that date the law said Harold Stanley Thomas was the son of William Marshall Thomas "for all purposes." If so, he took the remainder.

Of the cases cited in support of the majority view that a child adopted after the testator's death is not included in the term "child," only those from Indiana, Wisconsin and New York appear to have been controlled by statutes similar to ours. The New York statute contains a qualifying phrase.

On the other side, the Supreme Court of Minnesota, *In re Patrick's Will*, 259 Minn. 193, 106 N.W. 2d 888, had this to say: "In this State

adopted children stand in the same position as biological children in all respects, including their right to inherit by laws of intestacy or under appropriate testamentary provisions. By such legal policy the terms 'children' and 'issue' are presumed to include both biological and adopted offspring. . . . We have come to realize that it is not the biological act of begetting offspring—which is done even by animals— . . . but the emotional and spiritual experience of living together that creates a family." See also 43 Michigan Law Review, 705; *In re Stanford's Estate,* 49 Cal. 120, 315 P. 2d 681; *Dyer v. Lane,* 202 Ark. 371, 151 S.W. 2d 678; *Meek v. Ames,* 177 Kan. 365, 280 P. 2d 957.

Undoubtedly there is lack of uniformity in the attitude of appellate courts towards adopted children. Some are inclined to take them by the hand; others by the seat of the pants. On occasion our own Court has been reluctant to give full effect to what appears to me to be the legislative intent in fixing the rights of adopted children. The amendments to the law following this Court's decisions furnish proof. See cases cited in both opinions in *Headen, supra.* Also see 33 N.C. Law Review, there quoted.

The reasons supporting the majority opinion in this case remind me of the defense a big, rough mountain boy offered when called to answer an indictment for assault resulting in serious damage. He said he really liked the boy and didn't want to hurt him, but when he saw that new suit he had a sudden urge to mess him up a little.

A case apparently on all fours with the one before us is *Edmands v. Tice* (Ky.) 324 S.W. 2d 491. The testator died in 1896 after devising lands to his daughter for life with remainder to her children, if any. She adopted a child in 1928. The daughter died in 1954. The court gave the remainder to the adopted child, holding that the adoption statute in effect at the time of the expiration of the life estate was controlling — not the statute in effect at the testator's death.

In my view the will and the law applicable thereto give Harold Stanley Thomas the land in controversy. Consequently I am unable to join in a court opinion that takes it from him.

PARKER, J., joins in dissent.

A. W. WIDENHOUSE, JR., v.
W. C. YOW, JR., AND HOWARD DEAN HELMS.
AND
A. W. WIDENHOUSE, SR., TRADING AS WIDENHOUSE MOTORS v.
W. C. YOW, JR., AND HOWARD DEAN HELMS.

(Filed 1 February 1963.)

1. Appeal and Error § 51—

In determining the sufficiency of the evidence to sustain the lower court's denial of nonsuit, incompetent evidence admitted by the trial court, as well as competent evidence, must be considered.

2. Same—

When a defendant offers evidence, the only motion for judgment of nonsuit to be considered on appeal is that made at the close of all the evidence.

3. Automobiles § 42e—

Evidence tending to show that plaintiffs' automobile collided with the rear of the automobile owned by one defendant after defendant's vehicle had entered the highway from a private driveway from plaintiffs' left and turned left, angling across the highway, blocking both lanes, and that it did so when plaintiff's vehicle was only some 200 feet away and traveling some sixty miles per hour in a sixty mile per hour speed zone, *is held* insufficient to show contributory negligence as a matter of law.

4. Appeal and Error § 51—

Where it is held on appeal that defendants' motions for judgment of nonsuit were properly overruled, but a new trial is awarded for error in the course of the trial, the Supreme Court will refrain fom discussing the evidence except to the extent necessary to show the reasons for the conclusions reached.

5. Trial § 42—

A verdict will be interpreted with reference to the pleadings, the evidence, and the judge's charge.

6. Automobiles § 52—

Where the uncontradicted evidence is to the effect that the owner of an automobile was riding therein, such owner cannot be entitled to nonsuit in an action to recover for the negligent operation of the car for failure of plaintiffs' evidence to show that the owner was the actual driver.

7. Automobiles § 46; Negligence § 28—

Where one party relies upon several acts or omissions of another as constituting actionable negligence, it is prejudicial error for the court to charge the jury conjunctively that if it found such other party was guilty of negligence in all the respects relied upon it should answer the issue in the affirmative, since negligence in any one of the respects warrants an affirmative answer if such negligence is a proximate cause of the injury.

8. Appeal and Error § 45—

Where error relating to one issue affects the answer to other issues, a new trial as to all issues must be awarded.

9. Automobiles § 46; Negligence § 28—

Where defendant introduces evidence at the trial that the driver of plaintiffs' car was driving at excessive speed and contends that such excessive speed made it impossible for the driver to avoid collision after he saw or should have seen the defendant's vehicle on the highway in front of him, an instruction on the issue of contributory negligence predicated upon the negligence of the driver of plaintiffs' car in failing to keep a proper lookout, with only incidental reference to speed, must be held for prejudicial error in failing to explain the law arising on the evidence as required by G.S. 1-180.

10. Appeal and Error § 42—

An erroneous instrument may not be held harmless under the rule of contextual construction when it is apparent from the record that the jury was confused and did not understand the court's charge.

APPEAL by defendants from *Olive, J.*, March, 1962, Civil Term of Cabarrus.

These two civil actions grow out of a collision that occurred Saturday, May 14, 1960, about 8:05 p.m., in Union County, North Carolina, on U.S. Highway No. 601, between a 1960 Chrysler Crown Imperial automobile owned by A. W. Widenhouse, Sr., trading as Widenhouse Motors, and a 1959 Tudor Ford automobile owned by defendant Yow.

It was stipulated that A. W. Widenhouse, Jr., at the time of the collision, was operating "the Chrysler automobile . . . as the agent of A. W. Widenhouse, Sr., t/a Widenhouse Motors."

In each action the plaintiff alleged: The Ford car was being operated by defendant Helms as agent of and "in the immediate presence of and under the direction and supervision of" defendant Yow. Helms drove the Ford from a private driveway directly into the path of the Imperial. The collision was proximately caused by the negligence of Helms, "whose negligence is imputed to the defendant W. C. Yow, Jr," in that Helms: (1) entered the public highway from a private drive and failed to yield the right of way to the car approaching on the public highway; (2) failed to maintain a proper lookout for cars upon the public highway; and (3) failed to exercise due care for his own safety and the safety of others traveling upon the public highway.

Widenhouse, Jr., on account of personal injuries, medical and hospital expenses and loss of time from his employment, prayed that he recover damages in the amount of $10,000.00.

Widenhouse, Sr., on account of the alleged difference in value of his Imperial before and after the collision, prayed that he recover damages in the amount of $4,250.00.

In each action each defendant answered separately. Each admitted defendant Yow was the owner of the Ford but in all other respects denied the essential allegations of the complaints. Each pleaded contributory negligence and asserted a counterclaim. Each defendant alleged the Ford, while proceeding on the highway, was struck from the rear by the Imperial with such force the Ford was crushed and caught on fire.

Each defendant alleged the collision was proximately caused by the negligence of Widenhouse, Jr., whose negligence is imputed to Widenhouse, Sr., in that: (a) Widenhouse, Jr., operated the Imperial at unlawful and excessive speed in violation of designated statutory provisions; (b) he overtook and ran into the rear of the Ford when both cars were proceeding in the same direction: (c) he failed to keep a proper lookout, failed to keep the Imperial under proper control and failed to exercise due care to avoid colliding with the Ford.

In each action defendant Yow in his counterclaim prayed that he recover, for the damage to his Ford, the sum of $2,300.00; and in each action Helms in his counterclaim prayed that he recover, for painful, serious and permanent injuries, the sum of $260,000.00.

The pleadings of defendant Yow differ from the pleadings of defendant Helms in this significant respect: In the pleadings of defendant Yow there is no admission or assertion as to the identity of the operator of his Ford. Defendant Helms, in his pleadings, asserts positively that the Ford was owned *and operated* by defendant Yow and that he (Helms) was riding as a passenger on the back seat.

In each action plaintiff filed a reply in which he denied the said allegations on which each defendant based his plea of contributory negligence and his counterclaim. In said replies plaintiffs did not refer to the allegation of defendant Helms, in conflict with plaintiffs' allegations, that defendant Yow *was operating* his Ford.

By consent the two actions were consolidated for the purpose of trial. Evidence was offered by plaintiff and *by defendants*. The evidence offered *by defendants* includes the testimony of each defendant. Nothing identifies any portion *of defendants' evidence* as having been offered by a particular defendant.

Uncontradicted evidence tended to show: The Imperial was proceeding north on U.S. Highway No. 601, a two-lane paved highway. The Ford entered the highway from a private drive which extended west from the highway to the home of defendant Helms. The weather

was clear. The pavement was dry. The highway was straight. Approximately one thousand feet south of the private drive there was a dip in the highway which hid from view an approaching vehicle. When the collision occurred, no other vehicles were approaching or involved.

Plaintiffs' evidence tended to show: When Widenhouse, Jr., first saw the Ford, it was on the private drive fifteen feet west of the pavement of the highway, proceeding east at a speed of 10-12 miles per hour, and the Imperial was then some 350 feet south of the private drive. When the Imperial was approximately 200 feet south of the private drive, the Ford, continuing east at approximately the same speed, reached the west edge of the pavement. Instead of yielding the right of way in favor of the approaching Imperial, the Ford then proceeded onto the highway, angling north towards the east traffic lane and blocking portions of both traffic lanes. When the collision occurred, the left rear of the Ford had not crossed the center line but was in the west traffic lane. The right center of the Imperial struck the left rear of the Ford as Widenhouse, Jr., attempted to pass to the left of the Ford.

The evidence of all defendants tended to show: The operator stopped the Ford upon reaching and before entering the highway. The occupants of the Ford looked but could see no car approaching from the south. The Ford was then driven onto the highway and was wholly within the east traffic lane, proceeding straight north, when it was overtaken and struck from the rear by the Imperial. Each of the three occupants of the Ford testified he did not see the Imperial at any time prior to the collision.

As indicated, the collision occurred north of the private drive. Estimates as to the distance from the private drive to the point of collision varied from 25-30 feet to 80-100 feet.

When the collision occurred, each driver lost control of the car he had been operating. Widenhouse, Jr., was thrown out of the Imperial. Thereafter, the Imperial came to rest, after striking various obstacles, on the west side of the highway some 240 feet from the point of the collision. The Ford came to rest to the east of the highway, "crossways of the ditch," some 100 feet from the point of collision. When the Ford came to rest, it was on fire. Helms, unconscious, was seriously burned before he was removed from the Ford.

Evidence offered by plaintiffs, in accordance with their allegations, tended to show Helms was operating the Ford.

Defendants' witnesses who testified as to the identity of the operator of the Ford were the three occupants of the Ford, namely, defendant Yow and his brother, Dock Robert Yow, and Helms. Defendant Yow and his brother, Dock Robert Yow, testified Helms was

the operator. Thereafter, Helms testified defendant Yow was the operator.

Each defendant, at the conclusion of all the evidence, moved for judgment of nonsuit and excepted to the court's denial thereof.

The nine issues submitted, and the jury's answers to issues 1-6, inclusive, are as follows:

"1. Were the plaintiffs injured and damaged by the negligence of the defendant Howard Dean Helms, as alleged in the Complaint? ANSWER: No.

"2. Were the plaintiffs injured and damaged by the negligence of the defendant W. C. Yow, Jr.? ANSWER: Yes.

"3. Did the plaintiffs, by their own negligence, contribute to their injuries, as alleged in the Answer? ANSWER: No.

"4. What amount, if any, is the plaintiff A. W. Widenhouse, Sr. entitled to recover? ANSWER: None.

"5. What amount, if any, is the plaintiff A. W. Widenhouse, Jr. entitled to recover? ANSWER: $500.00.

"6. Was the defendant Howard Dean Helms injured by the negligence of the plaintiffs, as alleged in his cross action? ANSWER: No.

"7. What amount, if any, is the defendant Howard Dean Helms entitled to recover? ANSWER: .....

"8. Was the defendant W. C. Yow, Jr. damaged by the negligence of the plaintiff, as alleged in his cross action? ANSWER: .....

"9. What amount, if any, is the defendant entitled to recover for the damage to his automobile? ANSWER: ....."

Each defendant objected and excepted to the submission of issues Nos. 1, 2, 3, 4 and 5.

The record shows: "IT WAS STIPULATED AND AGREED by the defendant W. C. Yow, Jr. that if the jury answered the first issue 'Yes' that the said Helms was operating the said automobile at the time with the permission of the occupant owner W. C. Yow, Jr. as his agent."

Defendant Yow, based on the answer, "No," to the first issue, tendered judgment that plaintiffs have and recover nothing from him and that they be taxed with the costs. The court refused to sign such judgment and defendant Yow excepted.

After verdict and before judgment the court, allowing plaintiff's motions therefor, entered an order in each action permitting the plain-

tiff "to amend his complaint so as to make it conformable to the evidence and the fact proved" and permitting a proposed amended complaint to be filed in the place and stead of the original complaint.

In each amended complaint, the plaintiff alleged:

> "4. That on said date and at said time, the defendant W. C. Yow, Jr. was the owner of a 1959 Tudor Ford automobile, which automobile was being operated *by the defendant W. C. Yow, Jr., or by his agent, the defendant Howard Dean Helms, in the immediate presence of the defendant W. C. Yow, Jr.*" (Our italics)

In the Widenhouse, Sr., action, it was adjudged (1) that the plaintiff have and recover nothing of defendant Yow except the costs of the action, and (2) that defendant Helms have and recover nothing of plaintiff on his counterclaim. In the Widenhouse, Jr., action, it was adjudged (1) that plaintiff have and recover of defendant Yow the sum of $500.00 and costs, and (2) that defendant Helms have and recover nothing on his counterclaim. (Note: Neither judgment refers to the plaintiff's action against Helms or to the counterclaim of defendant Yow.)

Each defendant excepted, appealed and assigns errors.

Hartsell, Hartsell & Mills and E. T. Bost, Jr., for plaintiff appellees.
Williams, Willeford & Boger for defendant appellant Yow.
Smith & Griffin for defendant appellant Helms.

BOBBITT, J. Each defendant assigns as error the denial of his motions for judgment of nonsuit.

There was ample evidence to support a finding that, as alleged by plaintiffs, (1) the negligent operation of the Ford *by Helms* proximately caused the collision and (2) defendant Yow as owner-occupant of the Ford was liable for damages caused by the actionable negligence of Helms. Helms contends the evidence offered *by plaintiffs* and admitted over his objections tending to show Helms was the operator of the Ford was incompetent and should have been excluded. However, admitted evidence, whether competent or incompetent, must be considered on a defendant's motion for judgment of nonsuit. *Kientz v. Carlton*, 245 N.C. 236, 246, 96 S.E. 2d 14, and cases cited; *Frazier v. Gas Co.*, 248 N.C. 559, 103 S.E. 2d 721. Be that as it may, the competent and positive testimony of defendant Yow and his brother, Dock Robert Yow, identified Helms as the operator of the Ford. When a defendant offers evidence, the only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. G.S. 1-183; *Murray v. Wyatt*, 245 N.C. 123, 128, 95 S.E. 2d 541.

With reference to the contention of each defendant that plaintiffs were contributorily negligent as a matter of law, it is our opinion, and we so hold, that the evidence, when taken in the light most favorable to plaintiffs, does not establish plaintiffs' contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Dennis v. Albemarle,* 243 N.C. 221, 223, 90 S.E. 2d 532.

Defendants' motions for judgment of nonsuit were properly overruled. Since a new trial is awarded, we refrain from discussing the evidence presently before us except to the extent necessary to show the reasons for the conclusions reached. *Mason v. Gillikin,* 256 N.C. 527, 530, 124 S.E. 2d 537, and cases cited.

In the interpretation of the verdict, these legal principles must be kept in mind. It is well settled that a verdict must be interpreted with reference to the pleadings, the evidence and the judge's charge. *Guy v. Gould,* 202 N.C. 727, 164 S.E. 120; *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493; *Reid v. Holden,* 242 N.C. 408, 413, 88 S.E. 2d 125; *Litaker v. Bost,* 247 N.C. 298, 306, 101 S.E. 2d 31; *Gunter v. Winders,* 253 N.C. 782, 785, 117 S.E. 2d 787.

With reference to the first issue, the court instructed the jury the burden of proof was on plaintiffs to establish by the greater weight of the evidence that the negligent operation of the Ford *by Helms* proximately caused the collision and plaintiffs' damages; and if they found from the evidence and by its greater weight that the negligent operation of the Ford proximately caused the collision but failed to find from the evidence and by its greater weight that Helms was the operator thereof, the jury should answer the first issue "No."

The court instructed the jury they would consider the second issue only if they answered the first issue "No." If they answered the first issue "No," the judge instructed the jury they should answer the second issue "Yes" if the plaintiffs had satisfied them from the evidence and by its greater weight that the negligent operation of the Ford *by the driver thereof* (without identifying any particular person as the driver) proximately caused the collision and plaintiffs' damages.

When the jury, by answering the second issue "Yes," found that the negligent operation of the Ford *by the driver thereof* proximately caused the collision and plaintiffs' damages, it seems clear the jury answered the first issue "No" solely because it failed to find that Helms was the operator of the Ford.

The court submitted the case to the jury *as if* the complaints had been amended prior to or during trial to set forth the allegations of the (subsequently filed) amended complaints. When defendant Yow

was advised the case would be so submitted does not appear. Certainly he had notice thereof from the time the court settled the issues. There is no merit in the contention of defendant Yow that he was entitled to judgment that plaintiffs recover nothing from him on account of plaintiff's failure to establish that Helms (rather than defendant Yow) was the operator of the Ford.

Defendant Yow assigns as error the orders permitting plaintiffs to file said amended complaints after verdict and before judgment. He contends that, unlike the factual situation considered in *Litaker v. Bost, supra,* the amendments changed the theory of plaintiffs' actions. Originally, he contends, plaintiffs alleged Helms was the operator of the Ford and he, defendant Yow, was liable as owner-occupant for Helms' negligence; but under the after-verdict amendments plaintiffs' actions are to recover on the ground he, defendant Yow, was the actual operator of the Ford. It is noted: Whether defendant Yow or defendant Helms was operating the Ford is a matter of importance (1) in respect of their rights and liabilities *inter se* and (2) in respect of what counterclaim(s), if any, are barred by the negligence (contributory negligence), if any, of the driver of the Ford. However, for reasons noted below, we need not determine whether the after-verdict amendments substantially changed the claims of plaintiffs within the meaning of G.S. 1-163 or whether defendant Yow was otherwise prejudiced in respect of the after-verdict amendments.

Defendant Helms excepted to and assigned as error the following portion of the court's charge:

> "Now, the Court charges you as a matter of law, if you come to this sixth issue, if you are satisfied from the evidence and by its greater weight that the plaintiff Widenhouse, Jr., was operating his automobile at more than 60 miles an hour on this highway, that he did not keep a proper lookout, that the Ford automobile was out on the highway, not just approaching him but out in the highway before he ever saw it, or if he did see it, before he ever attempted to slow down or pass, that the whole left side of the highway was there open for him to pass on, and that he was negligent and that such negligence was a proximate cause of injury to the defendant Helms, it would be your duty to answer the sixth issue YES; if you are not so satisfied, you would answer it NO."

The quoted instruction was erroneous and prejudicial to defendant Helms in that its effect was to require the jury to find plaintiffs guilty of all the acts of negligence detailed by the court in order to answer the sixth issue in favor of defendant Helms. *Andrews v. Sprott,* 249

N.C. 729, 107 S.E. 2d 560; *Krider v. Martello,* 252 N.C. 474, 113 S.E. 2d 924. The instruction placed upon defendant Helms the burden of establishing (1) that Widenhouse, Jr., was operating his automobile at a speed in excess of sixty miles per hour, (2) that he did not keep a proper lookout, (3) that the Ford was out on the highway before he saw it or, if he had seen it, before he attempted to slow down or pass, and (4) that the whole left side of the highway was open for him to pass on. Paraphrasing the language of *Higgins, J.,* in *Andrews v. Sprott, supra*: Defendant Helms was entitled to have the jury pass on the question whether the evidence showed the plaintiffs, *in any* of the particulars alleged, had breached a legal duty which they owed to defendant Helms, and if so, whether such breach proximately caused his injury and damage.

It is noted: The first issue, which was answered in favor of Helms, is in effect a contributory negligence issue in respect of Helms' counterclaim(s) against plaintiffs. Hence, a new trial as to all issues between plaintiffs and Helms is awarded.

With reference to the third (contributory negligence) issue, the court, after reviewing contentions, instructed the jury as follows:

> "Now, the Court instructs you as a matter of law on the third issue, if you come to it, if you are satisfied from the evidence and by its greater weight that the plaintiff Widenhouse, Jr., was operating his automobile on the highway without keeping a lookout as to whether an automobile was coming on the highway or not, or that, seeing the automobile, that he came on when he could have slowed down and stopped after he saw that the automobile was out in the highway and kept coming at such speed and put on his brakes in such a manner that he was injured and the automobile in which he was riding was damaged, that that was negligence and that such negligence was one of the proximate causes of the injury to himself and damage to the automobile, it would be your duty to answer the third issue YES. If you are not so satisfied, you would answer it NO."

Each defendant excepted to and assigns as error (1) the quoted excerpt and (2) "(t)he failure of the Court to comply with the requirements of G.S. 1-180 in that it failed to explain and apply the law relating to speed for the jury's consideration on the issue of contributory negligence."

The maximum speed limit on U.S. Highway No. 601 was 60 miles per hour. On direct examination Widenhouse, Jr., testified he was traveling "about 60 miles an hour." On cross-examination he testified

he so advised the investigating patrolman; and in response to the patrolman's inquiry, "Weren't you going any faster?" stated he "couldn't possibly have been going over 70 miles an hour at the most." The patrolman testified he observed skid marks (black marks on the pavement) extending 210 feet south "from the point of impact." The patrolman also testified Widenhouse, Jr., had stated to him "that he could have been traveling from 60 to 70 miles an hour, that he had been traveling that fast previously down the road prior to that time, but he couldn't say what speed he was running when the collision occurred." The foregoing testimony, when considered with evidence as to the force of the impact, the damage to the cars and their course of travel after the collision, was sufficient to support a finding that Widenhouse, Jr., was operating the Imperial at an unlawful and excessive speed.

Under the court's instruction, the third issue was to be considered by the jury only in the event the jury, by answering the first or second issue "Yes," had found the driver of the Ford guilty of actionable negligence in entering upon the highway from the private drive. Widenhouse, Jr., testified he was 200 feet south of the private drive when the Ford entered the highway. Evidence offered by defendants tended to show the Imperial was not in sight when the Ford entered the highway. Defendants relied largely on their allegations and the evidence as to the speed of the Imperial as a basis for their contention that Widenhouse, Jr., was guilty of contributory negligence. Hence, whether the Imperial was traveling at an unlawful and excessive speed and, if so, whether Widenhouse, Jr., after he saw or should have seen the Ford enter the highway from the private drive, was unable *on account of such unlawful and excessive speed* to avoid striking the Ford, were material questions in the determination of the third issue. We are of opinion, and so decide, that the quoted instruction, although containing an incidental reference to speed, did not sufficiently "declare and explain the law arising on the evidence given in the case" as required by G.S. 1-180. For prejudicial error in this respect, defendants are entitled to a new trial.

It is noted: Although the law and facts pertinent to the third and sixth issues were substantially the same, there was, as indicated above, a variance between the instructions given with reference thereto.

Plaintiffs contend the charge when considered contextually is free from prejudicial error and that the designated portions of the court's instructions, if erroneous, did not mislead or confuse the jury. Whether caused by erroneous instructions or otherwise, it seems the jury was uncertain and confused.

It is noted that the jury, after finding the Imperial was damaged by the negligence of defendant Yow, answered the fourth issue "None." The uncontradicted evidence was that this 1960 Imperial, biggest of the Imperials and having 350 h.p., was practically new, had been in use only three or four months and had been driven about three thousand miles; that its reasonable market value before the collision was $5,200.00 or more and its reasonable market value after the collision was $1,000.00; and that it was not repaired but sold as junk. Indeed, a photograph offered in evidence by defendants shows the Imperial was greatly and extensively damaged.

It is noted further that, when *the jury first returned* and presented the issues to the court, the court stated he could not accept the verdict. The record does not show the jury's answers. After further instructions, the jury again deliberated and returned the verdict now appearing in the record. Suffice to say, the incident tends to show the jury was confused and had not understood the court's instructions.

For the reasons stated, the verdict and judgments are vacated and defendants are awarded a new trial.

New trial.

RUTH OLSON SHAW v. THOMAS H. LEE,
ADMINISTRATOR OF THE ESTATE OF DAVID M. SHAW, DECEASED.

(Filed 1 February 1963.)

1. Husband and Wife § 9—

The common law rule that one spouse cannot sue the other for personal injuries negligently inflicted has been modified in this State so as to permit such action.

2. Same; Courts § 20; Automobiles § 48—

Where the wife is injured in an accident occurring in a state which does not permit the wife to sue her husband or his estate for tortious injury, the wife may not maintain an action in this State on such cause of action, since the *lex loci* controls, nor do our statutes alter this rule, since it was not the legislative intent that the statutes giving the wife such right of action should apply to actions arising outside the borders of this State. G.S. 52-10.1.

3. Same; Insurance § 58—

The Automobile Financial Responsibility Act cannot have the effect of permitting the wife to sue her husband or his estate for tortious injury resulting from an accident occurring in a state which does not

recognize such cause of action, since the existence of liability insurance cannot create a cause of action where none exists otherwise.

APPEAL by plaintiff from *Hobgood, J.*, June 1962 Civil Term of DURHAM.

Plaintiff brings this action to recover damages for injuries allegedly negligently inflicted. The complaint alleges: Plaintiff is a resident of North Carolina. On 31 August 1960 plaintiff was riding as the guest of her deceased husband, David M. Shaw, in an automobile owned and operated by him. She was injured in a collision between the automobile and a truck in Thornburg, Virginia. The collision was caused by the joint and concurrent negligence of her husband and the driver of the truck.

Defendant demurred to the complaint for failure to state a cause of action for that plaintiff, to recover in North Carolina, must allege a right of action given in Virginia to recover for the injuries there sustained; Virginia does not give a right of action to one spouse to recover damages from the other for injuries to the person negligently inflicted. The demurrer was sustained.

Everett, Everett & Everett by Robinson O. Everett for plaintiff appellant.

Spears & Spears for defendant appellee.

RODMAN, J. We have in previous decisions held claimant's right to recover and the amount which may be recovered for personal injuries must be determined by the law of the state where the injuries were sustained; if no right of action exists there, the injured party has none which can be enforced elsewhere. *Doss v. Sewell,* 257 N.C. 404; *Kizer v. Bowman,* 256 N.C. 565, 124 S.E. 2d 543; *Knight v. Associated Transport, Inc.,* 255 N.C. 462, 122 S.E. 2d 64; *Nix v. English,* 254 N.C. 414, 119 S.E. 2d 220; *McCombs v. Trucking Co.,* 252 N.C. 699, 114 S.E. 2d 683; *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398; *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558; *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126; *Bogen v. Bogen,* 219 N.C. 51, 12 S.E. 2d 649; *Wise v. Hollowell,* 205 N.C. 286, 171 S.E. 82; *Young v. Masci,* 289 U.S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170; 11 Am. Jur. 490; 15 C.J.S. 897.

At common law one spouse could not sue the other for personal injuries negligently inflicted. *Scholtens v. Scholtens,* 230 N.C. 149, 52 S.E. 2d 350; *Thompson v. Thompson,* 218 U.S. 611, 54 L. ed. 1180; 27 Am. Jur. 183.

Our Legislature by statute modified the common law and permitted the wife to sue the husband for injuries tortiously inflicted. *Crowell v. Crowell,* 180 N.C. 516, 105 S.E. 206; *Roberts v. Roberts,* 185 N.C. 566, 118 S.E. 9; *Earle v. Earle,* 198 N.C. 411, 151 S.E. 884; *Alberts v. Alberts,* 217 N.C. 443, 8 S.E. 2d 523.

Virginia has also enacted statutes liberalizing the common law rules with respect to married women, but these statutes, as interpreted by the Supreme Court of Appeals of Virginia, do not go so far as to permit a married woman to sue her husband for injuries negligently inflicted. The Virginia statutes were examined at length to determine this specific question in *Keister's Adm'r. v. Keister's Ex'rs.,* 96 S.E. 315, decided in 1918. The Court there held that a wife could not sue her husband for personal injuries; therefore neither she nor her administrator could sue the personal representative of her husband.

The *Keister* case has been recently cited by the Court of Appeals of Virginia as the law of that state at the present time. *Furey v. Furey,* 71 S.E. 2d 191 (1952); *Vigilant Insurance Co. v. Bennett,* 89 S.E. 2d 69 (1955); *Midkiff v. Midkiff,* 113 S.E. 2d 875 (1960). We find no statute or decision subsequent to these dates which in our opinion reverses or modifies the conclusion reached in the *Keister* case. We are convinced if this action had been instituted in Virginia, plaintiff could not recover.

For practical purposes the claim asserted by plaintiff is identical with the claim asserted in *Howard v. Howard,* 200 N.C. 574, 158 S.E. 101, decided in 1931. There plaintiff was injured by the negligent operation of an automobile by her husband. The injuries were inflicted in New Jersey. New Jersey, adhering to the common law, denied a wife the right to sue her husband for injuries resulting from his negligence. This Court sustained a judgment of nonsuit, holding plaintiff could not recover here unless she had a right of action under the laws of New Jersey.

Ten years after the *Howard* case was decided, this Court was called upon to determine whether a resident of Ohio, where the common law rule was in force, could recover in an action against her husband for injuries negligently inflicted here. Applying the rule announced in the *Howard* case, this Court held plaintiff was entitled to maintain her action. *Bogen v. Bogen,* 219 N.C. 51, 12 S.E. 2d 649. Three members of the Court dissented, expressing the opinion that this Court ought to apply the law of Ohio where the parties were domiciled. For more than twenty years the law as announced in the *Howard* and *Bogen* cases was accepted by the lawyers of this State as sound and logical.

In 1931 the highest appellate courts of three states, including North Carolina, passed on the right of a wife to recover in the state of her

residence damages resulting from the negligent operation of a motor vehicle by her husband in another state. The first of these cases was *Buckeye v. Buckeye,* 234 N.W. 342, decided by the Supreme Court of Wisconsin 13 January 1931. Plaintiff in that case was injured by defendant's negligence in Illinois. Plaintiff and defendant married subsequent to the injury. They were residents of Wisconsin when plaintiff was injured and when the suit was begun. Wisconsin permitted a wife to sue her husband for tort. Illinois did not and under the laws of Illinois the right of action which an unmarried person might have for injuries negligently inflicted terminated upon her marriage to the tortfeasor. Plaintiff there insisted that the Illinois law could have no extraterritorial effect, and since she originally had a cause of action for the injuries sustained, she could enforce that right in the courts of Wisconsin. The Supreme Court of Wisconsin answered that contention in this language: "It is plaintiff's contention that the extinguishment of her cause of action in this case could only occur as a result of her loss of legal identity through marriage. From this it is contended that since, under the Wisconsin law, she did not lose her legal identity by marriage, and since the law of Wisconsin governs with respect to the legal consequences of marriage in this respect, the cause of action was not extinguished. This position involves the further contention that there is a valid distinction between the situation presented here and that presented by statute or rule in the state where the tort was committed, specifically and intentionally directed to the extinguishment of causes of action. We have concluded that plaintiff's contention is not sound. If, as seems clear, the law of Illinois, is to govern, both as to the creation and extent of defendant's liability, and if the liability so created is subject to discharge or modification by the law of Illinois, we see no escape from the conclusion that plaintiff's cause of action has been wholly extinguished by her marriage."

Howard v. Howard, supra, was decided 1 April 1931. It makes no reference to the *Buckeye* case. It did not go as far as the decision in *Buckeye.* It merely held that if no cause of action ever arose in the state where the asserted wrong was done no cause of action could be asserted here.

Dawson v. Dawson, 138 So. 414, decided by the Supreme Court of Alabama in December 1931, is factually similar to the *Howard* case. There husband and wife, residents of Alabama, were traveling in Mississippi when the wife was injured by the negligence of the husband. Alabama, like North Carolina, permitted a wife to sue her husband. Mississippi, like Virginia, held that a wife had no cause of action for injuries to her person resulting from her husband's negligence.

Plaintiff in that case conceded that the courts of Mississippi had held that a woman residing in Mississippi could not sue her husband for injuries inflicted in that state but contended that an Alabama wife tortiously injured by her Alabama husband while in transit through Mississippi could recover from her husband for the wrong thus done her. Hence she argued she had a right to maintain her action in Alabama. The Court disposed of the contention by quoting from its previous decision in *Alabama G. S. R. Co. v. Carroll*, 11 So. 803: "The whole argument is at fault. The only true doctrine is that each sovereignty, state or nation, has the exclusive power to finally determine and declare what act or omissions in the conduct of one to another—whether they be strangers, or sustain relations to each other which the law recognizes, as parent and child, husband and wife, master and servant, or the like—shall impose a liability in damages for the consequent injury, and the courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired." The Supreme Court of Alabama did not refer to the *Buckeye* or *Howard* cases.

Gray v. Gray, 174 A 508, 94 A.L.R. 1404, was decided by the Supreme Court of New Hampshire in 1934. There the wife was injured in Maine; it adhered to the common law. New Hampshire permitted a wife to sue her husband. The Court held that plaintiff could not recover as the *lex loci* was controlling.

It is said in the annotation to *Gray v. Gray*, in 94 A.L.R. 1411: "[I]t seems that the common-law rule that the spouses cannot sue each other is more than a prohibition against maintaining an action, but is a substantive rule which prevents the creation of a cause of action as between the spouses." The annotator correctly interprets the law as it has been declared by our Court.

Robinson v. Gaines, 331 S.W. 2d 653, was decided by the Supreme Court of Missouri in February 1960. Plaintiff in that case sustained injuries as a result of her husband's negligent operation of his automobile in New Mexico. Plaintiff and her husband were residents of Missouri where she sued the administrator of her husband's estate. The Court was called on to answer two questions: (1) What was the law of New Mexico? (2) If plaintiff had no cause of action in New Mexico, could she nevertheless maintain her action in Missouri? The Court held plaintiff had no right of action under the laws of New Mexico. In answering the second question, it said the *lex loci* was controlling, thereby prohibiting a recovery in Missouri.

Other cases discussing the right of a wife to sue her husband for injuries tortiously inflicted in a state other than the domicile of the

parties are collected in 108 A.L.R. 1126, 146 A.L.R. 705, and 22 A.L.R. 2d 1248. An examination of these cases will show the general adherence to the rule of *lex loci* as applied in *Howard v. Howard, supra.*

Notwithstanding the enormous preponderance of authority supporting the conclusion reached in *Howard v. Howard,* plaintiff seeks a different result. She assigns two reasons to support her position: (1) The rule which prohibits interspousal suits is founded on the legal myth of unity of person promulgated to promote domestic felicity. This can best be accomplished by applying domiciliary law. (2) Plaintiff has been accorded the right to recover by statute enacted by our Legislature subsequent to the decision in the *Howard* case.

True, as plaintiff says, some courts hold the common law rule is a mere prohibition against suit during the marital relationship, terminating when that relationship ends. This is the view adopted by the Supreme Court of Pennsylvania. It said, in *Johnson v. Peoples First Nat. Bank & Trust Co.,* 145 A 2d 716: "The shackles with which the common law fiction bound a wife no longer exist. The public policy of prevention of marital discord alone can furnish no rational justification for a wife's disability to sue her husband for a tort during coverture: such policy is directed to procedure, rather than substance. . .Danger to marital happiness and harmony arises not from the *existence* of a cause of action arising from the tort, but rather from its *enforcement.*" Hence it held that when a marriage relationship was terminated by death of the husband the wife could maintain an action against his personal representative for injuries negligently inflicted. Had plaintiff's injuries been inflicted in Pennsylvania rather than Virginia, we would, as stated in the *Howard* case, apply the Pennsylvania law and permit her to recover against her husband's personal representative. But the law of Virginia is contrary to the law of Pennsylvania. The Court said in *Keister's Adm'r. v. Keister's Ex'cr., supra*: "The further question is raised in the instant case whether, if there was a right of action aforesaid in the wife, it survived against the personal representative of the husband. In view of our conclusion that there was no such right of action in the wife, the further question mentioned does not arise in the case before us, and hence we do not deal with it in this opinion."

Plaintiff also calls our attention to the case of *Haumschild v. Continental Casualty Co.,* 95 N.W. 2d 814, decided by the Supreme Court of Wisconsin in April 1959. These are the facts of that case: Plaintiff and Leroy Gleason, a defendant, were married in Wisconsin in November 1956. They lived together as man and wife until March 1957. In December 1956 plaintiff sustained injuries resulting from the negli-

gent operation of a motor vehicle by defendant Gleason. The accident occurred in California where a wife could not sue her husband in tort. The marriage was annulled in March 1958. Suit was in Wisconsin, which allowed the wife to sue her husband in tort. The Court stated the question for decision in this language: "Which law controls, that of the state of the forum, the state of the place of wrong, or the state of domicile?"

Prior to 1959 the Supreme Court of Wisconsin had, in a number of cases including *Buckeye v. Buckeye, supra,* applied the *lex loci. Haumschild v. Continental Casualty Co., supra,* expressly overruled the *Buckeye* and similar cases and held the law applicable in interspousal suits was the law of the domicile. It based its conclusion on *Emery v. Emery,* 45 Cal. 2d 421, 289 P 2d 218; *Koplik v. C. P. Trucking Corp.,* 141 A 2d 34; *Pittman v. Deiter,* 10 Pa. Dist. & Co. R. 2d 360; and articles appearing in several law reviews, especially an article entitled "Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement," 15 University of Pittsburgh Law Review 397. The Court announced its conclusion in this language: "We are convinced that, from both the standpoint of public policy and logic, the proper solution of the conflict of laws problem, in cases similar to the instant action, is to hold that the law of the domicile is the one that ought to be applied in determining any issue of incapacity to sue based upon family relationship."

On the same day the Supreme Court of Wisconsin announced its decision in *Haumschild v. Continental Casualty Co., supra,* it handed down a per curiam opinion, *Bodenhagen v. Farmers Mutual Insurance Co.,* 95 N.W. 2d 822. It there said the rule denying the wife the right to sue was not based on the immunity of the husband but was a declaration that no right ever arose because of the tort. Nonetheless, it adhered to the rule announced in the *Haumschild* case and applied the law of the domicile rather than the *lex loci.*

We have given thoughtful consideration to the cases and articles to which plaintiff, in her well prepared brief, called our attention. In our view it is not a question of the capacity of the spouse to sue but a question of whether the spouse ever had any cause of action.

We approve the reason given by the Supreme Court of Missouri in *Robinson v. Gaines, supra,* for adhering to our prior decisions. It said: "Plaintiff would have us apply the *lex domicilii* of the family and disregard our statutory provisions for and decisions applying the substantive law of the *lex loci.* This is not justified by our research of the law of New Mexico or the law as declared by our General Assembly or applicable court decisions. Any modification of the

New Mexico substantive law under factual situations similar to the instant record should be left for determination by the Legislature or Supreme Court of New Mexico." The only amendment we would make to the foregoing statement would be to substitute Virginia for New Mexico.

Plaintiff's second position is that our statutory law necessitates a result opposite to the conclusion reached in *Howard v. Howard, supra.* She says (a) our financial responsibility act affords her protection. The answer to this is, we think, clearly and concisely stated in *Villaret v. Villaret,* 169 F 2d 677, quoted with approval by the Supreme Court of Tennessee in *Prince v. Prince,* 326 S.W. 2d 908: "The existence of liability insurance ought not to create a cause of action where none exists otherwise. A policy of such insurance protects against claims legally asserted, but it does not itself produce liability."

The other statute on which plaintiff relies is c. 263 S.L. 1951, now G.S. 52-10.1, saying: "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried."

This Court held, in *Crowell v. Crowell, supra,* and other cases decided prior to the enactment of the General Statutes by the 1943 Legislature, that a wife might sue her husband for injuries negligently inflicted. The conclusions reached in those cases were based on holdings that our statutes had so modified the common law that a wife might sue her husband. After the statutes as codified and revised were submitted to and approved by the General Assembly of 1943, this Court held the language was not sufficient to authorize a husband to sue his wife for injuries resulting from her negligence. *Scholtens v. Scholtens,* 230 N.C. 149, 52 S.E. 2d 350. The Legislature at the next session enacted the quoted statute. It is, we think, reasonably apparent the enactment was intended to change for the future the result reached in *Scholtens v. Scholtens, supra.* 29 N.C. Law Rev. 359. The Legislature did not intend to extend its enactments beyond our borders and create in a spouse a right of action against the other for acts done beyond the borders of North Carolina.

The reasoning supporting the conclusions reached in *Howard v. Howard, supra,* and *Bogen v. Bogen, supra,* is, we think, sound. To depart from the principles on which those cases were based will open the door to a multitude of claims founded on the assertion that the law of the *lex domicilii* is more equitable and just than the *lex loci*—justifying the application of our substantive law instead of the *lex loci.* We do not deem it wise to voyage into such an uncharted sea, leaving behind well established conflict of laws rules.

Affirmed.

R. S. CHAPPELL, JET MILLER, C. M. CHAPPELL, RALPH WOOD, D. T. WHITEHURST, W. T. MIDGETT, CHARLIE WILSON, A. L. AYDLETT AND FRANK SPENCE, V. G. H. WINSLOW, JR., AND WIFE, EVIE WINSLOW.

(Filed 1 February 1963.)

1. Trial § 26—

A complaint alleging that defendants were digging a canal and proposed to change the drainage on their land so as to drain surface waters into the canal then being cut, with evidence that a wrongful diversion of water was being effected by the cutting of ditches perpendicular to the canal to drain into the canal, without controversy as to defendants' right to cut the canal, *held* not to warrant nonsuit for variance, there being no element of surprise and the pleadings being liberally construed with a view to substantial justice between the parties.

2. Pleadings § 4—

The relief is determined by the allegations and evidence and not the prayer for relief.

3. Pleadings § 24—

Motion to amend after the beginning of trial is addressed to the discretion of the trial court and is not appealable.

4. Appeal and Error § 41—

The exclusion of evidence relating to a subordinate matter which could not possibly affect the ultimate rights of the parties will not be held prejudicial.

5. Appeal and Error § 49—

The findings of fact of the trial court which are supported by competent evidence are binding on appeal even though there be competent evidence to the contrary.

6. Evidence § 35—

Persons who live and work in a locality of flat land with constant problems of drainage of surface waters may testify that the drainage of an additional specified acreage into a ditch would cause the ditch to overflow periodically, and may testify as to the size of ditches and culverts which would be necessary to carry such additional drainage, the testimony being testimony of common observers as to the results of their observation.

7. Appeal and Error § 49—

In a trial by the court under agreement of the parties it will be presumed that the court disregarded any incompetent evidence in making its findings, there being nothing in the record to suggest that the court was in any way influenced in its findings by incompetent evidence.

8. Waters and Water Courses § 1—

Where the evidence discloses that the area was constantly subject to drainage problems, that defendants were cutting ditches to divert sur-

face waters on their lands into a canal flowing by the lands of lower proprietors, and that such additional waters would cause an overflow of such ditch in each recurring heavy rain, rendering plaintiffs' plumbing facilities useless and creating a hazard to health, defendants may be restrained from opening such ditches, even prior to the occurrence of actual injury, injunction being a preventive remedy.

9. Injunctions § 14—

Where the court properly enters a restraining order against defendants, provision of the order that the injunction should terminate if defendants took specified action which would obviate injury to plaintiffs, *is held* not subject to objection on the part of defendants, since such provision is inserted for defendants' benefit and they are not compelled to comply.

APPEAL by defendants from *Morris, J.* January 1962 Term of PASQUOTANK.

Action by plaintiffs to restrain defendants, adjoining landowners, from collecting surface water and discharging it upon the property of plaintiffs.

The following facts are not in dispute:

Plaintiffs and defendants own property on the west side of U. S. Highway No. 17, north of the Foreman-Bundy Road, about three miles south of Elizabeth City. U. S. Highway No. 17 (hereinafter called Highway) extends southwesterly from Elizabeth City. However, it is referred to as running generally north and south. South of the plaintiffs' property the Foreman-Bundy Road (hereinafter called Road) intersects the Highway from the west. Prior to 1924, when it was widened and paved, the Highway was known as the "Old Desert Road." In 1924, the old ditch which had run along the western edge of the Desert Road was filled and a new one, approximately three feet deep, four to eight feet wide at the top, and two to four feet wide at the bottom, was left to drain the Highway.This ditch constitutes the eastern property line of all the parties and is the eastern line of plaintiffs' yards.

The State Highway Commission claims a right-of-way of fifty feet on each side of the center of the Highway but it has no recorded right-of-way. The primary purpose of this ditch is to drain the Highway but, according to the testimony of its district engineer, the Commission does not claim the ditch. It has not serviced it either north or south of the Road nor has it prevented other people from servicing it. Plaintiffs' homes are located from twenty-five to sixty feet from this highway ditch and about forty-five feet from the right of-way. It is about thirty-six feet from the center of the Highway to the yards of the plaintiffs.

Plaintiff Whitehurst lives in the northwest corner of the intersection of the Road and the Highway; the other plaintiffs have residences north of Whitehurst; and the defendants' property is north of the plaintiffs, 1,740 feet from the Road. A driveway gives each plaintiff access to the Highway and under each driveway is a culvert in the highway ditch.

Parallel to the Road, on the south side, is a canal which turns at the Highway and runs southwardly with it on the west side for approximately three hundred feet before it goes through a culvert under the Highway south of a truck stop and 4,740 to 5,240 feet south of defendants' south property line. It then continues over a half a mile before emptying into a swamp. The ditch on the west side of the Highway north of the Road connects with the canal south of the Road through a culvert installed by the Highway Commission.

In 1956, defendants purchased the south portion of the old Foreman Dairy Farm from J. W. Foreman. It is a tract of approximately 320 acres. The surface water from this land which went into the highway ditch flowed both north and south. That which went south flowed past the lands of the plaintiffs through their culverts and the culvert under the Road and thence into the canal under the Highway.

In the summer of 1957, defendants started cleaning out and excavating the ditch between their property and the Highway. When they had gone north 1,700 to 1,800 feet from their south line, on July 5, 1957 plaintiffs instituted this action and defendants were enjoined from proceeding further. The temporary restraining order was made returnable before the Honorable Chester R. Morris, Resident Judge of the district, who heard the matter on July 20, 1957. Upon the hearing the parties agreed: "(1) That the defendant may continue the cutting, cleaning out or excavation of the ditch, or canal, along the west side of U. S. 17 to the north end of the property of defendant, all without prejudice to the rights of the parties involved. (2) That pending the final determination of this action the defendant will not open any drains in the aforesaid ditch or canal." The judge entered an order in conformity with this agreement.

In 1957, defendant cut a ditch (designated as No. 5 on the court map) which began about one hundred feet west of the Highway and 2,600 feet north of the defendants' south property line and ran west for 4,300 feet to a canal known as the Foreman Ditch, a recognized portion of the drainage system of the Foreman Dairy Farm. This canal connected with others which eventually drained into Little River. About three and a half years after the consent order was entered, defendants cleared approximately seventy-five acres of cutover

woodland between ditch No. 5 and plaintiffs' property. In the summer of 1961, in this area, defendants cut ditches designated on the map as Nos. 1, 2, 3, and 4. Ditch No. 1 stopped 150 feet west of the Highway but ditches Nos. 2, 3, and 4, emptied into the highway ditch which had been enlarged by the defendants in 1957. These ditches were approximately 2,000 feet long and were 253 feet apart. Connecting these ditches with the highway ditch violated the restraining order, and thereafter defendants placed a dirt fill in each which prevented drainage from them entering the highway ditch.

When this matter came on for trial at the January 1962 Term, the parties waived a jury and his Honor, Chester Morris, the Presiding Judge, heard the evidence and made several inspections of the *locus in quo*. Thereafter, in conformity with G.S. 1-172, he found the facts and stated his conclusions of law.

Inter alia, the judge found the following facts:

Because their drainage facilities were not adequate, about 1952, at a cost of approximately $2,000.00 for labor and rights-of-way, the plaintiffs widened and deepened the highway ditch south of the Road and made it into the present canal. The Highway Commission has never exercised any control or supervision over this canal. (According to plaintiffs' evidence, pipes from their properties go under the Foreman Road into the ditch on its south side, then into the highway ditch under the Highway, and into the swamp; plaintiffs have no artificial drains directly into the highway ditch.)

At the time the plaintiffs widened and deepened the ditch they inquired of defendants' predecessor in title, J. W. Foreman, if he desired to come into the project. He declined to contribute on the ground that his property did not drain to the south.

The land of both plaintiffs and defendants is level low land with little variation in elevation. ". . .(T)he drainage of this area will always be problematical due to the low flat condition of the land in the area." If not collected into artificial drains or ditches, a portion of the surface water falling upon the defendants' lands would flow westward toward the Forman Ditch, but the greater portion would flow eastward toward the highway ditch. Upon reaching the highway ditch, from a point 2,600 feet from defendants' south property line, and at the mouth of ditch No. 5 if it were extended straight to the Highway, water would flow in each direction. However, the greater portion would flow southwardly upon lands of the plaintiffs. If ditches Nos. 1, 2, 3, and 4, and such other ditches as defendants might cut through their land were opened from the Highway to the Foreman Ditch, surface water collecting in them would flow in each direction but mostly into the highway ditch.

It is not practical for the defendants to drain all of their land through the Foreman Ditch. The construction of ditches through only a portion of the defendants' lands, without connecting them with the Foreman Ditch, results in the collection of water in amounts in excess of that which would normally flow east and therefore imposed a greater servitude upon the plaintiffs' land. For many years the greater portion of the lands now owned by the defendants has drained towards the Highway and, in years gone by, lateral ditches have been in existence. Pipes under the plaintiffs' driveways to some extent impede the passage of water in the highway ditch, and plaintiffs' present drainage facilities are not sufficient for their own need or to drain off the additional waters from defendants' land if it is artificially collected into ditches.

The judge concluded the lands of the plaintiffs are burdened with the surface water from the defendants' land which flows naturally into the highway ditch; that they must receive it into their canals, but that defendants are not entitled to drain into the highway ditch surface water from ditches spaced about 250 feet apart and cut only a portion of the way through their farm. He restrained the defendants from connecting the ditches already cut with the highway ditch unless they were extended at the same width, depth and level to the Foreman Ditch. His order provided, however, that in lieu of cutting ditches all the way through their property to the Foreman Ditch, the defendants might, if they desire, cut a ditch from No. 5 across their farm at the western terminus of the present ditches Nos. 1, 2, 3, and 4, and any other ditch which might hereafter be constructed, provided that this cross-farm ditch be the same depth as the eastern terminus of ditches Nos. 1, 2, 3, and 4, and provided that present ditch No. 5 be widened and deepened so that its level will be the same at its eastern and western terminus. In the event the defendants should elect to drain the farm according to the plan outlined by the judge, the restraining order would terminate.

The judge found that up to the date of the institution of the action, plaintiffs had suffered no damage from the action of the defendants.

Plaintiffs neither excepted to the judgment nor appealed from it. The defendants excepted and appealed, assigning thirty-nine errors.

John H. Hall, and Worth and Horner for plaintiff appellees.
Leroy, Wells and Shaw for defendant appellants.

SHARP, J. Defendants assign as error the failure of the judge to nonsuit plaintiffs' action. They contend that there is a material and

fatal variance between the allegations and proof in that plaintiffs alleged, and sought to enjoin, damage which would result if defendants widened and deepened the north-south highway ditch along the west edge of the Highway; whereas their evidence, and subsequent events, showed that they were attempting to prevent defendants from connecting east-west ditches with the highway ditch. Defendants further contend that they, with the consent of the plaintiffs, were permitted to clean out, widen and deepen the highway ditch the length of their property and that the action is now moot and should be dismissed.

With these contentions we cannot agree. The crux of plaintiffs' complaint is paragraph 5 which follows:

> "That defendants, over the protest of plaintiffs, have now begun the digging of a canal parallel to the east side of the lands owned by them and leading southwardly parallel to said Highway 17 to the lands of plaintiffs and purpose to reverse the drainage of the lands of defendants from the west to the east and into the canal now being cut by defendants and turning all of the water therefrom on the lands of plaintiffs."

It is implicit in this evidence, and in the consent order entered on July 20, 1957, that the plaintiffs do not fear any flooding from the natural drainage of defendants' land into the highway ditch. What they fear is the artificial collection of water from defendants' property into ditches which funnel it into the highway ditch to run south onto their property. This the judge restrained — by consent on July 20, 1957, and by final judgment on March 30, 1962.

While the complaint did not specifically ask that the defendant be restrained from opening east-west ditches into the highway canal, within fifteen days after the suit was started defendants themselves agreed not to open such ditches pending the trial. No element of surprise appears. It is the rule with us that the relief to be granted does not depend upon that asked for in the complaint but upon whether the matters alleged and proved entitle the complaining party to the relief granted. *Griggs v. York-Shipley, Inc.*, 229 N.C. 572, 50 S.E. 2d 914. The following statement by Chief Justice Merrimon in *Presson v. Boone*, 108 N.C. 79, 12 S.E. 897, is pertinent here:

> *"While it is far better and very desirable that the pleadings shall be directly pertinent, precise and orderly,* still when they can be upheld as sufficient, this must be done, if to do so works no injustice to a party. This is the spirit and purpose of the present method of civil procedure." (Italics ours.)

The motions for nonsuit were properly overruled.

At the beginning of the trial the defendants moved to be allowed to amend the answer "to allege that a part of the system of drainage referred to in the complaint and in the answer as 'defendants' system of drainage' had been dammed by a dirt fill by at least one of the plaintiffs and that this damming occurred approximately two weeks ago." The judge denied this motion. The denial was a matter within his discretion and not appealable.

Thereafter the defendants attempted to offer evidence about *a* fill, presumably the one referred to in the motion although this cannot be ascertained from the motion. The judge excluded the evidence and defendants assign this exclusion as error. They contend the evidence was competent to contradict plaintiffs that their drainage ditches were taxed to capacity because the fill would "*to some extent* create a flooded condition of plaintiffs' property." (Italics ours.)

The excluded evidence tended to show the following:

The fill in question was in a ditch on the southwest side of the Old Desert Road where it joined the Highway some distance south of the truck stop. The fill had been put there in the first instance by the State Highway Commission and then removed. About two weeks before the trial one of the plaintiffs replaced it. Water was higher on the west side of the fill than on the east.

There appears in the record a temporary restraining order signed by Judge Morris on December 29, 1961 enjoining the plaintiffs from placing any fill in the ditch along the southwest side of the Old Desert Road. This order was returnable on January 12, 1962, but the record does not show what was then done. The effect of the fill is far from clear from the proffered evidence. If the exclusion of this evidence was error, it involved a situation of only two weeks duration immediately preceding the trial, and its exclusion will not upset the trial. The judge who heard the excluded evidence also saw the fill. He ruled the evidence incompetent and, on this record, prejudice does not appear.

Defendants' assignments of error 23 through 36 are to the findings of fact made by the judge. The defendants' discussion of these assignments of error in their brief is as follows:

> "It is respectfully submitted that these findings of fact insofar as they support the plaintiffs' position and prejudice the rights of the defendants, are not supported by the evidence, nor any evidence of sufficient probative force to be considered by the court. It is reversible error for the judge to admit and act upon incompetent evidence in finding facts."

As to those assignments, appellants' brief is a "pass brief" such as was condemned in *Jones v. R. R.*, 164 N.C. 392, 80 S.E. 408; *Crowell v. Air Lines*, 240 N.C. 20, 31, 81 S.E. 2d 178. However, except for an obvious and immaterial error in the date of the preliminary restraining order in finding No. 2, and a likewise immaterial statement in finding No. 4 (which statement is admitted to be true in defendants' brief), all of the judge's findings are supported by competent evidence. These findings are therefore binding on this Court even though there was evidence to the contrary. *Cauble v. Bell*, 249 N.C. 722, 107 S.E. 2d 557.

Plaintiffs offered evidence that sometime prior to July 1957, defendant Winslow told one or more of them that he intended to drain from 250 to 300 acres into the highway ditch. Defendant denied this and testified that he only intended to drain from 185 to 200 acres into the ditch by means of ditches, varying from 2,000 to 4,000 feet in length, spaced about 250 feet apart from ditch No. 5 to his south property line next to plaintiffs. Plaintiffs' evidence tended to show that the highway ditch north of the Road (as well as the other ditches which constituted this drainage system) was already taxed to capacity in wet weather; that after heavy rains, yards and septic tanks were flooded and plumbing facilities would not drain.

The defendants objected to testimony of the plaintiffs, and of others who lived and worked in the vicinity, who were familiar with the drainage system under consideration, that if defendants drained 200 acres of their lands into the highway ditch, this drainage would from time to time cause the ditch to overflow at either end of their property and flood their lands. Over objection, these same witnesses expressed opinions as to the size of the ditch and culverts which would be necessary to carry such additional drainage from the defendants' lands south. Defendants contend that this testimony was incompetent opinion evidence by lay witnesses. We think it was competent as "the evidence of common observers testifying as to the results of their observation." Stansbury, Evidence, Section 125.

The conscientious judge who heard this case lives in the area and was thoroughly familiar with its drainage problems. He made not one but several personal inspections of the properties. Even if some incompetent evidence had been admitted, which we do not decide, his Honor was peculiarly qualified to weigh the evidence and to disregard the incompetent. There is a rebuttable presumption that when the court sits without a jury it acts only on the basis of competent evidence. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668. There is nothing whatever in the record to suggest that incompetent evidence in any way influenced his findings of fact or final judgment.

The defendants concede this well established principle of law: Where two tracts join each other, one being lower than the other, the lower tract is burdened with an easement to receive waters from the upper tract which flow naturally therefrom. The owner of the upper tract may increase the natural flow of water and may accelerate it, but he cannot divert the water to cause it to flow in a lower land in a different manner or in a different place from which it would naturally go. *Braswell v. State Highway and Public Works Commission,* 250 N.C. 508, 108 S.E. 2d 912.

The judge found, upon competent evidence, that the defendants were the upper landowners. He ruled, therefore, that the plaintiffs must receive the waters which flow naturally therefrom. The next question was whether the defendants, unless prevented from doing so, would divert water from its natural course so as to cause plaintiffs injury for which they had no adequate remedy at law. The defendants' own testimony and prior acts established this intention.

The judge found that the plaintiffs' drainage facilities were not adequate under existing conditions. If as their evidence tended to show, heavy rains caused flooded septic tanks and made plumbing facilities useless, a hazard to health inevitably resulted. Additional water could only aggravate the existing situation. Such aggravations, recurring with every wet spell, would create a condition which the plaintiffs are entitled to restrain. *Wiseman v. Constr. Co.,* 250 N.C. 521, 109 S.E. 2d 248. In an action to enjoin one from collecting and discharging surface waters in volume upon plaintiffs' land, it is not necessary for the plaintiff to prove that actual injury has already occurred. The remedy is preventive and may be had upon proof that the act complained of, unless restrained, will result in damage. 56 Am. Jur., Waters, Section 85.

Defendants assigned as error the plan of drainage which his Honor designed for their lands and which, if adopted by defendants, would terminate the injunction. The plaintiffs might have effectively objected to this plan. They did not, and the defendants may not. It was intended for defendants' benefit but they are not required to adopt it. Upon the facts found, the plaintiffs were entitled to the injunction granted.

If the defendants' property is inadequately drained, and they do not care to adopt his Honor's plan to which the plaintiffs assented when they did not appeal, defendants are not without remedy. The provisions of Chapter 156 of the General Statutes are still available.

No error.

JOHN T. HIGH, JOHN D. CONSTABILE, KENNETH W. RAMSEY, C. RAY LAWRENCE, AND JAMES S. BAILEY, COMPRISING THE NORTH CAROLINA STATE BOARD OF EXAMINERS IN OPTOMETRY v. RIDGEWAY'S OPTICIANS.

(Filed 1 February 1963.)

1. Physicians and Surgeons § 1—

A dispensing optician, G.S. 90-235, does not engage in the unlawful practice of optometry, G.S. 90-114, in using a keratometer in measuring the curvature of the cornea and in fabricating, fitting, and inserting contact lenses onto the eyes of a patient so long as the refraction of the lenses is controlled by the prescription of an examining physician or oculist and the optician requires the patient to return to the examining physician or oculist for verification.

2. Appeal and Error § 22—

A single exception to the findings of fact and conclusion of law of the lower court presents for review only whether the court's conclusion of law is supported by the findings.

APPEAL by North Carolina State Board of Examiners in Optometry (hereinafter referred to as plaintiff) from *Mallard, J.*, May Civil Term 1962 of Wake.

This cause came on to be heard, and by consent of the parties was heard, before his Honor, Raymond B. Mallard, Judge Presiding, without a jury.

The plaintiff instituted this action, alleging that the defendant was engaged in the illegal, unlawful, and unauthorized practice of optometry, and further alleging that the defendant had violated various provisions of Chapter 90, General Statutes of North Carolina, particularly sections 114, 115, 125, 126 and 126.1, in that the defendant did measure and examine the eyes of certain persons for the purpose of determining whether such individuals could or should use contact lenses, in violation of the laws of the State of North Carolina. The plaintiff prayed that the defendant be permanently and perpetually enjoined and restrained from engaging in the practice of optometry within the State of North Carolina.

The defendant denied all allegations with reference to examining eyes for the purpose of determining whether or not the individual could or should use contact lenses. The defendant admitted "that it has on the prescription of medical doctors and/or oculists and under their direction actually measured the size and radius of curvature of the cornea of prospective customers, and based upon said measurements and its judgment has determined what it deemed to be the appropriate size and curvature of the contract lenses suitable for use

by the customer, and thereafter inserted and fitted contact lenses into the eyes of certain persons * * *."

Among other things, the court found the following pertinent facts: " * * * (T)hat the defendant has not by and through its officers and agents measured and examined eyes of persons coming to the establishment of the defendant for the purpose of determining whether said persons could or should use contact lenses; and the court further finding as a fact that defendant has on the prescription of medical doctors and oculists and under their direction actually measured the size and radius of curvature of the cornea of prospective customers, and based upon said measurements and its judgment has determined what it deemed to be the appropriate size and curvature of contract lenses suitable for use by the customers and thereafter fitted contact lenses into the eyes of such customers.

"Upon the foregoing findings the court concludes as a matter of law that the conduct of the defendant as above set forth does not consist of nor constitute engaging in the unlawful practice of optometry nor the unlawful practice of a dispensing optician, and that the plaintiff is not entitled to the restraining order prayed for."

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

Holding, Harris, Poe & Cheshire for defendant.
Teague, Johnson & Patterson; Robinson O. Everett for plaintiff.

DENNY, C.J. The determinative question on this appeal is whether or not the use of a keratometer by a duly licensed optician in the measurement of the curvature of the cornea, and the subsequent fabrication and fitting of contact lenses as prescribed by a medical doctor or oculist, constitute the unlawful practice of optometry as defined in G.S. 90-114.

G.S. 90-114 defines the practice of optometry as follows: "The practice of optometry is hereby defined to be the employment of any means, other than the use of drugs, medicines, or surgery, for the measurement of the powers of vision and the adaptation of lenses for the aid thereof; and in such practices as above defined, the optometrist may prescribe, give directions or advice as to the fitness or adaptation of a pair of spectacles, eyeglasses or lenses for another person to wear for the correction or relief of any condition for which a pair of spectacles, eyeglasses or lenses are used, or to use or permit or allow the use of instruments, test cards, test types, test lenses, spectacles or eyeglasses or anything containing lenses, or any device for the pur-

pose of aiding any person to select any spectacles, eyeglasses or lenses to be used or worn by such last mentioned person or by any other person."

There is no attack made on the defendant or its officers and agents challenging their competency as opticians. The evidence tends to show that the defendant has not by or through its officers and agents measured and examined the eyes of persons for the purpose of determining whether or not such persons could or should use contact lenses, and the court below so found. Furthermore, there is no evidence on this record tending to show that the defendant by and through its officers and agents has ever examined the eyes of persons for the purpose of measuring their powers of vision to determine whether or not they need to wear eyeglasses or lenses of any kind.

The evidence further tends to show that the defendant's officers and agents who fill prescriptions written by medical doctors or oculists for ordinary spectacles or contact lenses, are duly licensed opticians, and that the defendant is engaged in the business of a "dispensing optician" within the meaning of the statute G.S. 90-235.

The last cited statute reads as follows: "Within the meaning of the provisions of this article, the term 'dispensing optician' defines one who prepares and dispenses lenses, spectacles, eyeglasses and/or appurtenances thereto to the intended wearers thereof on witten prescriptions from physicians or optometrists duly licensed to practice their professions, and in accordance with such prescriptions interprets, measures, adapts, fits and adjusts such lenses, spectacles, eyeglasses and/or appurtenances thereto to the human face for the aid or correction of visual or ocular anomalies of the human eye. The services and appliances related to ophthalmic dispensing shall be dispensed, furnished or supplied to the intended wearer or user thereof only upon prescription issued by a physician or an optometrist; but duplications, replacements, reproductions or repetitions may be done without prescription, in which event any such act shall be construed to be ophthalmic dispensing, the same as if performed on the basis of a written prescription."

G.S. 90-236 defines what constitutes practicing as a dispensing optician as follows: "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."

We think it is apparent from an examination of our statutes defining the practice of optometry and the business of a dispensing optician that the General Assembly has not expressly authorized either the optometrist or the optician to fit contact lenses to the human eye, but that the general terms of the statutes governing both are broad enough to authorize the optometrist to do so and to authorize the dispensing optician to do so upon prescription of a physician, oculist or optometrist.

The practice of optometry has been regulated by statute in this State since the enactment of Chapter 444 of the Public Laws of 1909, codified with amendments in G.S. 90-114 through G.S. 90-128. Likewise, dispensing opticians have been regulated by law in North Carolina since the adoption of Chapter 1089, Session Laws of 1951, codified as G.S. 90-234 through G.S. 90-255.

In 70 C.J.S., Physicians and Surgeons, Section 10 f. (2), page 842, *et seq.*, it is said: "Under statutes which expressly require a license or certificate for the practice of optometry a person may be required to obtain a license only where he performs such acts or services as are within the customary sphere of the practice of optometry. The legitimate scope of the practice of an optometrist, within licensing statutes, is the measurement of the refractional abnormalities of the eye and the prescription, and sometimes the grinding, of the lenses to correct them, or, as otherwise stated, the scientific professional examination of eyes and vision and the furnishing of remedies including lenses for the correction of abnormal conditions. * * *

"An optician practicing his trade in accordance with the limitations imposed by statute is not engaged in the practice of optometry so as to be required to hold a license therefor except where he illegally holds himself out as engaged in such practice. The mere duplication of ophthalmic lenses or the duplication or replacement of a frame or mounting for such lenses does not constitute the practice of optometry within the statute, and the mere fact that a statute provides that a person shall be deemed to be practicing optometry if he duplicates a lense or replaces or duplicates a frame or mounting without a prescription does not make it so unless such duplication or replacement constitutes the practice of optometry within the statutory definition thereof," citing *Palmer v. Smith*, 229 N.C. 612, 51 S.E. 2d 8.

The State of Nevada, Revised Statutes, 637.020, defines a dispensing optician as follows: "* * * 'Dispensing optician' means a person engaged in the practice of ophthalmic dispensing. * * * 'Ophthalmic dispensing' means the practice of filling prescriptions of licensed physicians, surgeons or optometrists, and includes the taking of facial

measurements, fitting and adjustment of lenses or frames, duplication of lenses, and the measurement, fitting or adaptation of contact lenses to the human eye under the direction and supervision of a physician or surgeon licensed in the State of Navada. * * *"

At the time the case of *Palmer v. Smith, supra,* was written there were no statutory provisions in this jurisdiction requiring that a dispensing optician be licensed. The North Carolina State Board of Opticians was created by Chapter 1089 of the Session Laws of 1951, and the General Assembly provided therein, just as we had held in the *Palmer* case, that no prescription is required for a dispensing optician to make "duplications, replacements, reproductions or repetitions * * *, any such act shall be construed to be ophthalmic dispensing, the same as if performed on the basis of a written prescription."

We said in *Palmer v. Smith, supra*: " * * * (S)o long as the optician confines his work to the mere mechanical process of duplicating lenses, replacing or duplicating frames and mountings, 'making mechanical repairs to frames for spectacles,' filling prescriptions issued by a duly licensed optometrist or oculist, and does not in any manner undertake 'the measurement of the powers of vision and the adaptation of the lenses for the aid thereof,' he is not practicing optometry."

A keratometer (or ophthalmometer) is a mechanical instrument or device used for measuring the curvature of the cornea of the human eye. As we interpret the evidence, its use has no relation whatever to the methods used by medical doctors, oculists or optometrists in the measuring of the powers of vision. There is no evidence on the record tending to show that there is any other instrument, device, or method in general use that is better adapted for the purpose of obtaining the curvature of the cornea of the human eye, which information is necessary to properly fabricate a contact lens for the eye.

The appellant relies strongly on the decision in the case of *State ex rel The Oregon State Board of Examiners in Optometry v. Kuzirian,* 228 Ore. 619, 365 P 2d 1046, in which State ORS 683.010 (2) defines the practice of optometry as the "employment of any means other than the use of drugs for the measurement or assistance of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof."

ORS 683.190 provides: "No person other than a registered optometrist shall accept or offer to accept for purposes of duplication any ophthalmic lens ordinarily used before the human eye for corrective

purposes or for assisting vision. However, any manufacturing, dispensing or surfacing optician may grind or supply any such lens in conformity with the prescription or instruction of any optometrist duly licensed to practice in this state."

In the above *Oregon* case, the Court said: "* * * (E)xcept when acting under direct personal supervision of legally qualified personnel, the defendant is enjoined and prohibited from: '(a) Measuring portions of the cornea of any persons whatsoever, and based upon such measurement and his judgment, determining what he deems to be the appropriate size and curvature of contact lenses suitable for use by said person.' "

The State of Oregon requires no license and has no requirement with respect to skill in order to engage in the practice of a dispensing optician. It is otherwise in North Carolina. Since 1 July 1951, every person before beginning the practice of a dispensing optician must pass an examnation before the North Carolina State Board of Opticians. The examination is confined to such knowledge as is essential to practice as a dispensing optician and shall show proficiency in the following subjects: "Ophthalmic lens surface grinding; Prescription interpretation; Practical anatomy of the eye; Theory of light; Edge grinding; Ophthalmic lenses; Measurements of face; Finishing, fitting and adjusting glasses and frames to face."

The plaintiff appellant herein further cites and quotes voluminously from the opinions of many State Attorney Generals in support of its contention. Such opinions, however, may be persuasive but they are not controlling on the record before us.

It appears that the Supreme Court of Oregon is the only appellate court of last resort in the several states that has heretofore passed on the question presented on this appeal. Even so, the difference in the statutory provisions in Oregon and those in this State with respect to opticians and what they may and may not do are substantially different. In our opinion, so long as the dispensing optician fabricates, fits and inserts contact lenses in the eyes in accordance with the prescriptions of examining physicians or oculists, and requires the patient to return to the examining physician or oculist in order that the writer of the prescription may determine whether or not the prescription has been properly filled and the contact lenses properly measured, fabricated and fitted, such optician is not engaged in the practice of optometry within the meaning of the statute.

As we interpret the evidence on this record, there is always a possibility that a contact lens may cause irritation of the eye regardless of who fabricates and fits it; the lens may scratch the cornea which

may, unless treated, cause an ulcer of the cornea. The physician or oculist routinely, according to the defendant's evidence, ascertains whether or not such a scratch exists by the use of flourescein, which is a dye. The use of such dye is necessary because often small scratches which irritate the eye cannot be discovered in any other way. Neither an optician nor an optometrist is permitted to use any medicine to treat the eye in order to relieve irritation or for any other trouble which requires the use of drugs.

The appellant objects to a dispensing optician being permitted to "insert a contact lens into the eye." It contends this is a hazardous act. Even so, the insertion of a contact lens into the eye and the removal of the lens therefrom are merely routine procedure by the wearer once the lens is properly fabricated and fitted.

We have examined the plaintiff's exceptions and assignments of error with respect to the exclusion and admission of certain evidence. In our opinion, no prejudicial error has been shown in this respect that would warrant another hearing.

Moreover, assignment of error No. 6 is based on an exception to the findings of fact and conclusion of law. We have repeatedly held that a single exception to the findings of fact and the conclusion or conclusions of law present nothing for review except whether or not the court's conclusion or conclusions of law are supported by the findings of fact. *Logan v. Sprinkle,* 256 N.C. 41, 123 S.E. 2d 209, *Kovacs v. Brewer,* 245 N.C. 630, 97 S.E. 2d 96; *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601.

Based on the facts found, in our opinion, the conclusion reached by the trial judge and the judgment entered pursuant thereto should be upheld, and it is so ordered.

Affirmed.

HENRY L. INGRAM, JR., SUBSTITUTED TRUSTEE, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT.

(Filed 1 February 1963.)

1. Negligence § 9; Torts § 6—

Where one of two tort-feasors is liable to the injured party for the active negligence of the other solely by reason of constructive or technical fault imposed by law, as under the doctrine of *respondeat superior,*

the tort-feasor whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to indemnity against the primary wrongdoer.

2. Insurance § 65.1—

Where the tort-feasor secondarily liable is entitled to indemnity against insured, who is primarily liable, the obligation of insured for indemnity ordinarily comes within the coverage of a policy of public liability insurance.

3. Judgments §§ 45, 47—

If a tort-feasor secondarily liable pays the judgment and has it cancelled of record or has it assigned to himself, the judgment is extinguished; but if he has the judgment assigned to a trustee, he is subrogated to the rights of the judgment creditor, and the trustee may maintain an action for indemnity without joining his *cestui que trust*. G.S. 1-63.

4. Insurance § 65.1—

The trustee to whom a judgment is assigned for the benefit of one of the tort-feasors paying the injured party, may not sue the insurer in a policy of public liability insurance issued to the other tort-feasor unless he alleges that his *cestui que trust* is entitled to indemnity and that the right to indemnity had been determined according to the provisions of the policy, and a complaint failing to set forth such right of indemnity fails to state a cause of action against insurer.

5. Pleadings § 19—

An action should not be dismissed upon demurrer unless the allegations of the complaint affirmatively disclose that plaintiff has no cause of action against defendant, since if there is a defective statement of a good cause of action the plaintiff is entitled to move to amend if so advised. G.S. 1-131.

APPEAL by plaintiff from *Olive, J.*, April 1962 Term of RANDOLPH.

Action to recover benefits under an automobile liability insurance policy.

The complaint, summarized in part and verbatim in part, is as follows:

On 24 February 1958 a motor vehicle, owned by W. C. Garner and being operated by H. F. Garner on Highway 211 in Moore County, collided with a vehicle in which Reece Trotter was riding, and Trotter was injured. Trotter sued the Garners in the Superior Court of Randolph County and "recovered judgment against both defendants in the sum of $35,000." The Garners did not appeal. W. C. Garner's liability insurance carrier (Harleyville Mutual Insurance Company), "because at the time of the accident Henry Fletcher (H.F.) Garner was operating the motor vehicle with the implied consent" of W. C. Garner, defended the action and paid $10,000 (the limit of its lia-

bility) to Trotter on the judgment. W. C. Garner also paid Trotter $10,000 on the judgment, and the "judgment was assigned according to the provisions of G.S. 1-240" to a trustee. Because the trustee originally named could not serve, Henry L. Ingram, Jr., was substituted, he having been "named and appointed by the beneficial owner of said judgment" to act as trustee. Ingram, trustee, is the plaintiff in this action. At the time of the accident an automobile liability insurance policy, issued by Nationwide Mutual Insurance Company to H. F. Garner, was in full force and effect. Nationwide is the defendant in this action. "This policy was issued to cover a truck owned by Henry Fletcher Garner and also provided coverage to pay on behalf of Henry Fletcher Garner all sums (not to exceed $10,000 for one injured person) for which he shall become legally obligated to pay as damages because of: (Coverage E) bodily injury liability — Automobile." A copy of this policy is made a part of the complaint. Nationwide denied coverage, declined to defend the Trotter action, and refused to pay the $10,000 "bodily injury liability" on the Trotter judgment in behalf of H. F. Garner. H. F. Garner "was not using the motor vehicle of . . . William Curtis (W. C.) Garner 'in the business or occupation of the named insured' at the time of the injury to . . . Trotter, as claimed by" Nationwide. H. F. Garner was a sawyer, and at the time of the accident "was travelling to the saw-mill of William Curtis Garner in order to engage in his occupation of sawyer. He had no duty to drive this truck and he was not receiving any pay for driving this truck." And "according to the provisions of G.S. 1-240 said judgment remains unsatisfied against . . . Henry Fletcher Garner, who has paid nothing on the judgment and on whose behalf Nationwide . . . has paid nothing on said judgment." Plaintiff is entitled to have recourse to the proceeds of the Nationwide policy "in the amount of $10,000 to be applied in payment on said judgment."

Defendant Nationwide demurred to the complaint on the grounds that it fails to state facts sufficient to constitute a cause of action, and there are defects in parties plaintiff and defendant. The demurrer was sustained and the action dismissed. Plaintiff appeals.

John Randolph Ingram for plaintiff, trustee.
Coltrane and Gavin for defendant.

MOORE, J. Plaintiff states in his brief that "this is not an action to secure contribution of a joint tort-feasor's proportionate part of a payment on a Judgment . . .; it is an action to secure the entire proceeds available under defendant's insurance policy to be applied on

said Judgment as complete reimbursement of the . . . $10,000.00 . . . payment made by William Curtis Garner, who was responsible on this judgment only through Henry Fletcher Garner. . . ." In other words, plaintiff maintains that the complaint states a cause of action to require Nationwide, under the terms of the automobile liability insurance policy issued by it to H. F. Garner, to pay $10,000 for reimbursement of W. C. Garner for the $10,000 he personally paid on the judgment. This assertion embraces the theory that W. C. Garner is entitled to indemnity from H. F. Garner.

"Where two persons are jointly liable in respect to a tort, one being liable because he is the active wrongdoer, and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tortfeasor, ordinarily will be allowed to recover full indemnity over against the actual wrongdoer." *Hayes v. Wilmington,* 243 N.C. 525, 543, 91 S.E. 2d 673. For example, where liability has been imposed on the master because of the negligence of his servant, and the master did not participate in the wrong and incurs liability solely under the doctrine of *respondeat superior,* the master, having discharged the liability, may recover full indemnity from the servant. *Gadsden v. Crafts & Co.,* 175 N.C. 358, 363, 95 S.E. 610; *Smith v. Railroad,* 151 N.C. 479, 66 S.E. 435. It was alleged that Trotter's judgment was assigned to plaintiff trustee pursuant to G.S. 1-240, but there is no right of indemnity by virtue of that statute. It provides only for *contribution* as between tort-feasors who are *in pari delicto* with respect to the same injury, but before that statute was enacted (1929), it was settled law that a tort-feasor whose liability was secondary, upon payment by him of the injured party's recovery, was entitled to indemnity against the primary wrongdoer. *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822; *Gregg v. Wilmington,* 155 N.C. 18, 70 S.E. 1070.

It is alleged that W. C. Garner's insurance carrier paid $10,000 (the limit of its policy) on the $35,000 judgment, W. C. Garner personally paid an additional $10,000, and the judgment was assigned to plaintiff trustee. Pursuing plaintiff's theory of the case we assume, though the complaint does not expressly allege, that the judgment plaintiff, Trotter, accepted W. C. Garner's payment in full compromise settlement of the balance of the judgment. In proper cases the right to indemnity, after judgment, is predicated entirely upon the discharge of the judgment debt. *Hodges v. Armstrong,* 14 N.C. 253.

When it has been established that one tort-feasor has incurred a legal obligation to indemnify another tort-feasor for payment by the latter of a judgment obtained against them by an injured party, it is

a type of obligation against which a public liability insurance policy ordinarily insures. The insurance policy in the instant case obligates Nationwide "to pay on behalf of insured all sums which the insured shall become legally obligated to pay as damages because of: Bodily injury . . . sustained by any person, arising out of the use . . . of . . . any non-owned automobile." Defendant Nationwide contends that it insures only against obligations arising out of insured's tortious use of an automobile causing injury to another, that the right to indemnity is based on contract implied in law and is not within the coverage of the insurance contract. It is true that we have said that the right of indemnity is not based on any theory of subrogation to the rights of the injured party. Further, that it is based upon a contract implied in law from the circumstance that the passively negligent tort-feasor has discharged an obligation for which the actively negligent tort-feasor was primarily liable. *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768. But defendant's contention is not sustained. The distinction is more apparent than real. In final analysis the obligation of defendant's insured to indemnify, if such obligation exists, stems from his wrongful conduct in the use of an automobile. The theory, contract implied in law, upon which indemnitee establishes his right to indemnity and to be subrogated to the rights of the judgment creditor with respect to the lien and certain incidents of the judgment, does not affect the nature of the transaction which gives rise to insured's obligation. The courts are divided on the question, but the great weight of authority is that liability for indemnity to a passively negligent tort-feasor ordinarily comes within the coverage of a public liability insurance policy. Most of the decided cases have arisen under circumstances in which the insured was compelled to pay indemnity and sued his insurer for reimbursement. The matter is summarized thus: ". . . public liability policies ordinarily are not confined to, and do not contemplate, indemnity only against direct actions by injured persons against the insured; rather, they cover losses which he may suffer by reason of being liable over to another who has been compelled to pay for damages to persons injured because of the negligence or wrongful act of the insured, or his agents, which resulted in such injuries being inflicted. In other words, the insured may sustain a loss from liability to the public on account of personal injuries caused by them, or their workmen, and such loss be brought within the terms of the policy by circuity of action, . . ." Couch, Cyclopedia of Insurance Law, Vol. 5, s. 1165(b), pp. 4136-4137; *United States F. & G. Co. v. Virginia Eng. Co.*, 213 F. 2d 109, 63 A.L.R. 2d 1114 (4th Cir. 1954); *Board of Trade Livery Co. v. Georgia Casualty Co.*, 200

N.W. 633 (Minn. 1924); *Creem v. Fidelity & Casualty Co.*, 100 N.E. 454 (N.Y. 1912); *Fidelity & Casualty Co. v. Southern R. News Co.*, 101 S.W. 900 (Ky. 1907). Our Court is in accord with this principle. *R. R. v. Guarantee Corporation*, 175 N.C. 566, 96 S.E. 25; *Hamilton v. R.R.*, 203 N.C. 468, 166 S.E. 392.

Assuming for the moment that the complaint states facts sufficient to constitute a cause of action in accordance with plaintiff's contention, it is our opinion that the plaintiff trustee can maintain the action without joining W. C. Garner, his *cestui que trust*. It is a firmly established principle in this jurisdiction that if a judgment debtor, who has a right to indemnity as against another judgment debtor (of the same judgment), pays the judgment and has it cancelled of record or has it assigned to himself, the judgment is extinguished, notwithstanding intention. But if he has assignment made to a trustee for his benefit, the judgment remains in force. The trustee is subrogated to the rights of the judgment creditor with respect to the lien and other incidents of the judgment, for the benefit of his *cestui que trust*, and may at the request of the beneficiary cause execution to issue or otherwise enforce collection, according to the rights and interest of the beneficiary. *Burnett v. Sledge*, 129 N.C. 114, 39 S.E. 775; *Peebles v. Gay*, 115 N.C. 38, 20 S.E. 173; *Liles v. Rogers*, 113 N.C. 197, 18 S.E. 104; *Rice v. Hearn*, 109 N.C. 150, 13 S.E. 895; *Tiddy v. Harris*, 101 N.C. 589, 8 S.E. 227; *Hanner v. Douglass*, 57 N.C. 262; *Barringer v. Boyden*, 52 N.C. 187; *Hodges v. Armstrong, supra; Sherwood v. Collier*, 14 N.C. 380. The foregoing is subject to the rule that the payment in full by a judgment debtor operates as an absolute discharge of the judgment, notwithstanding that an assignment is made to a trustee to keep it alive, if the payor is not, aside from the assignment, entitled to contribution, subrogation or indemnity. 30A Am. Jur., Judgments, s. 1009, p. 867. Most jurisdictions do not require assignment to a trustee or third person on the reasoning that "where the right of subrogation exists an assignment is unnecessary, for that is supplied by equity." *Royal Indemnity Co. v. Becker*, 173 N.E. 194, 75 A.L.R. 1481 (Ohio 1930); *Muldowney v. Middleman*, 107 A. 2d 173 (Pa. 1954). An assignee of a judgment can maintain an action on it in his own name. *Moore v. Nowell*, 94 N.C. 265. The assignee of the injured party may maintain an action against the judgment debtor's insurer. *Roth v. General Casualty & Surety Co.*, 146 A. 202 (N.J. 1929); 85 A.L.R. 38. A trustee may sue in his own name, or he may join his *cestui que trust*. *Mebane v. Mebane*, 66 N.C. 334. ". . . (A) trustee of an express trust . . . may sue without joining with him the person for whose benefit the action is prosecuted." G.S. 1-63; *Chatham v. Realty Co.*, 180

N.C. 500, 105 S.E. 329; *Martin v. Mask,* 158 N.C. 436, 74 S.E. 343. Where a judgment is assigned to a trustee for the benefit of a judgment debtor, who is entitled to indemnity, the trustee may maintain the action for indemnity without joining the *cestui que trust. Searing v. Berry,* 11 N.W. 708 (Iowa 1882); *Brown v. Powers,* 65 N.Y.S. 733 (1900).

The subrogee of the injured party may sue the primary wrongdoer's insurance carrier, and the primary wrongdoer is not a necessary party to the action. *New York Casualty Co. v. Sinclair Refining Co.,* 108 F. 2d 65 (10th Cir. 1939).

Anyone for whose benefit an insurance policy is issued, covering the legal liability of the insured (as distinguished from a mere indemnity insurance contract), may maintain an action directly against the insurer. *Distributing Co. v. Insurance Co.,* 214 N.C. 596, 200 S.E. 411. The insured must sustain a loss before insurer is liable, and a beneficiary of the policy must comply with the conditions precedent to suit according to the terms of the policy before an action may be instituted against insurer. *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12; *Newton v. Seeley,* 177 N.C. 528, 99 S.E. 347. It does not appear from the complaint that it has been judicially established that W C. Garner is entitled to indemnity from H. F. Garner. The policy issued by Nationwide provides that "No action shall lie against the Company unless, as a condition precedent thereto, . . . the amount of the insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the insured, the claimant and the Company." If as plaintiff contends this action involves indemnity as the sole right of recovery, and if it be determined judicially that no right of indemnity exists, then H. F. Garner is entitled to have the judgment cancelled and has incurred no obligation. The question of primary and secondary liability is for the offending parties to adjust between themselves (*Bowman v. Greensboro,* 190 N.C. 611, 130 S.E. 502), and neither is a party to this action. Futhermore, the policy provides that the insurance company may not be joined in an action to determine insured's liability. The question of primary and secondary liability could have been, and perchance was, determined in the Trotter action. Where two alleged tort-feasors are sued by the injured party, one may set up a cross-action against the other for indemnity and have the matter adjudicated in that action. *Green v. Laboratories,* 254 N.C. 680, 690, 120 S.E. 2d 82; *Gregg v. Wilmington, supra.* And where one who is secondarily liable is sued in tort, he may make the primary wrongdoer a party defendant and assert his right to indemnity and have the matter

adjudicated in the injured party's action. *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859. See *Cheshire v. Wright,* 243 N.C. 441, 90 S.E. 2d 687, for issues submitted to determine the right to indemnity as between master and servant. Where one secondarily liable is sued, he may, after judgment, maintain a separate action against the primary wrongdoer for indemnity. *Gregg v. Wilmington, supra.* The complaint in the present action is defective in that it does not allege, as a condition precedent to the right to maintain the action, that the right to indemnity has been determined according to the provisions of the policy. Parenthetically, the facts alleged in the complaint are insufficient to show that a right to indemnity exists in favor of W. C. Garner.

It is not to be inferred from anything stated in this opinion that the provisions of the policy have been judicially construed with respect to the facts alleged. The allegations of the complaint are too indefinite for construction of the policy. The alleged facts are not sufficiently specific to show that plaintiff's claim comes within the policy coverage.

We have discussed this case only in the light of what plaintiff contends his cause of action is. There are many and varied questions we do not reach. In our opinion the complaint does not sufficiently state a cause of action on any grounds. The court below properly sustained the demurrer. But there was error in dismissing the action. When a demurrer is sustained, the action will be dismissed only if the allegations of the complaint affirmatively disclose that plaintiff has no cause of action against the defendant. *Lumber Co. v. Pamlico County,* 250 N.C. 681, 110 S.E. 2d 278.

The portion of the judgment sustaining the demurrer is affirmed, but the portion dismissing the action is stricken. If so advised, plaintiff may move to amend. G.S. 1-131.

Modified and affirmed.

ARLENA PEARSALL, PLAINTIFF v. DUKE POWER COMPANY, ORIGINAL DEFENDANT AND DAVID W. ELKINS AND IDA RUTH ELKINS ADDITIONAL DEFENDANTS.

(Filed 1 February 1963.)

1. Appeal and Error § 4; Torts § 6—

Where the verdict fixes liability of the original defendant and exculpates the additional defendant, joined for contribution, the original

defendant may pay the judgment in favor of plaintiff and, without appealing therefrom, appeal from the judgment denying it the right to contribution. G.S. 1-240; G.S. 1-277.

2. Automobiles § 8—

The failure of a motorist to pass to the right of the center of an intersection in making a left turn at the intersection is negligence *per se* and is actionable if it proximately causes injury to another. G.S. 20-153(a).

3. Automobiles § 18—

An intersection is an area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundry lines of two or more highways which join one another at any angle, G.S. 20-38(1), and the center line of an intersection is the meeting point of the medial lines of the highways intersecting one another.

4. Automobiles § 41h—

Evidence that one defendant, in turning left at an intersection "cut the corner" and failed to pass to the right of the center of the intersection, so that the driver of a bus approaching the intersection from such defendant's left, upon having his attention called by the sounding of defendant's horn to the presence of such defendant's vehicle in a place where it had no right to be, stopped so suddenly to avoid collision that a passenger in the bus was thrown to her injury, *is held* sufficient to be submitted to the jury on the issue of such defendant's negligence.

5. Automobiles § 46—

Where all of the evidence tends to show that there were curb lines along the intersecting streets, the definition by the court of an intersection as "a prolongation of the lateral lines, if any, or the property, lines if any," must be held for prejudicial error, especially when an interrogation of a juror, properly interpreted, requests instructions as to the line of travel permitted by law to a motorist in making a left turn at an intersection, and the court fails to give instructions on this material point.

6. Trial § 33—

Where the instruction of the court on a material aspect of the case is incomplete and unclear, it is prejudicial error for the court to refuse to give further instructions upon the point in response to interrogation of a juror, even though the juror's question is not clearly phrased, it being the duty of the court to apply the law to the evidence on a material aspect even in the absence of a special request. G.S. 1-180.

APPEAL by defendant Duke Power Company from *Johnston, J.* February 5, 1962 Civil Term of GUILFORD, Greensboro Division.

Plaintiff brought this action against Duke Power Company, hereafter Duke, to recover compensation for injuries sustained while a passenger on a bus operated by Duke as a common carrier in Greensboro. Plaintiff was injured at or near the intersection of Asheboro and

Gorrell Streets. She entered the bus at the intersection of Asheboro and Murray Streets, approximately 460 feet south of the place where she was injured. When she entered, she gave the motorman a five dollar bill to be changed so she could pay her fare. The motorman handed her the change and put the bus in operation, going north on Asheboro Street. Having placed the fare in a box provided for that purpose, plaintiff started to a seat, but before she had an opportunity to find one the motorman applied his air brakes, making a sudden stop which threw plaintiff down. Plaintiff sustained severe injuries as a result of the fall. The bus was stopped to avoid collision with a vehicle traveling west on Gorrell Street, making a left turn into Asheboro Street.

Plaintiff alleged her injuries were caused by the negligence of Duke in (a) putting the bus in operation without allowing her reasonable opportunity to find a seat, (b) the failure of the motorman to maintain a proper lookout, thereby necessitating the sudden stop to avoid the collision with the other vehicle. Duke admitted its bus made a sudden stop, causing plaintiff to fall. It denied the fall and resulting injuries were caused by negligence on its part. It alleged the stop was made necessary by the negligence of David W. Elkins, hereafter Elkins, operating a Chevrolet station wagon owned by his wife, Ida Ruth Elkins.

In addition to its denial of liability, Duke alleged its right to contribution from Ida Elkins and her agent-husband, David Elkins, if the jury should find plaintiff was injured by its negligence. On Duke's motion the Elkins were made additional defendants to answer Duke's claim of contribution. The Elkins denied Duke's allegations that their negligence caused plaintiff's injuries.

To determine the rights of the parties the court submitted three issues answered as follows:

"1. Was the plaintiff, Arlena Pearsall, injured by the negligence of the Defendant, Duke Power Company, as alleged in the complaint?

"ANSWER: Yes.

"2. What amount, if anything, is the plaintiff entitled to recover of the defendant, Duke Power Company, for personal injuries?

"ANSWER: $17,500.00.

"3. Were the defendants, David W. Elkins and Ida Ruth Elkins, negligent and did their negligence contribute to the injury of Arlena Pearsall as alleged in the cross action of the defendant, Duke Power Company?

"ANSWER: No."

Judgment was entered on the verdict. Duke gave notice of appeal and was allowed time to serve its case on appeal. Before the expiration of the time allowed to serve case on appeal Duke paid plaintiff the damages awarded by the jury plus interest accrued, whereupon plaintiff, acting through her attorney, assigned and transferred without recourse the judgment "to Durward S. Jones, Trustee for Duke Power Company, the purpose of this assignment and transfer is to protect whatever rights Duke Power Company may have under General Statute 1-240." Thereafter and within the time agreed on Duke served its case on appeal on counsel for the additional defendants. The case served constitutes the record here.

Adams, Kleemeier, Hagan & Hannah by Durward S. Jones for original defendant appellant.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin for additional defendant appellees.

RODMAN, J. The appeal presents these questions: (1) Did Duke, by paying and taking an assignment of the judgment which plaintiff had obtained against it, forfeit its right to have its claim for contribution reviewed by appeal? (2) If not, has Duke shown prejudicial error entitling it to a new trial on its claim for contribution?

In stating the questions for decision we reverse the order stated by the parties, for the second need not be answered if, as appellee asserts, the first should be answered in the affirmative. In our opinion that question requires a negative answer, if a reasonable interpretation be given to c. 68, P.L. 1929, now the last portion of the first paragraph of G.S. 1-240.

Prior to the enactment of that statute one tort-feasor was, as a rule, not entitled to contribution from another. *Doles v. R.R.*, 160 N.C. 318, 75 S.E. 722; *White v. Realty Co.*, 182 N.C. 536, 109 S.E. 564. The statute was enacted to reverse the rule declared in the cited and similar cases. Contribution was made the rule and not the exception. Of course there can be no contribution unless the parties are joint tort-feasors.

The statute made no attempt to interfere with the right of the injured party to decide who would be called on for compensation. A defendant sued in tort cannot compel plaintiff to sue all responsible for the damage, *Bell v. Lacey*, 248 N.C. 703, 104 S.E. 2d 833, but the party sued may have contribution from all responsible for the damage. This right may be enforced in either of two ways. The party sued may wait until a judgment has been obtained against him, whereupon he

may maintain an action against the other tortfeasors; or defendant may, in the action against him, have the other tortfeasors made parties. In either event the party called on to compensate the injured party is a plaintiff in the action against his alleged joint tortfeasors. *Bell v. Lacey, supra; Norris v. Johnson,* 246 N.C. 179, 97 S.E. 2d 773.

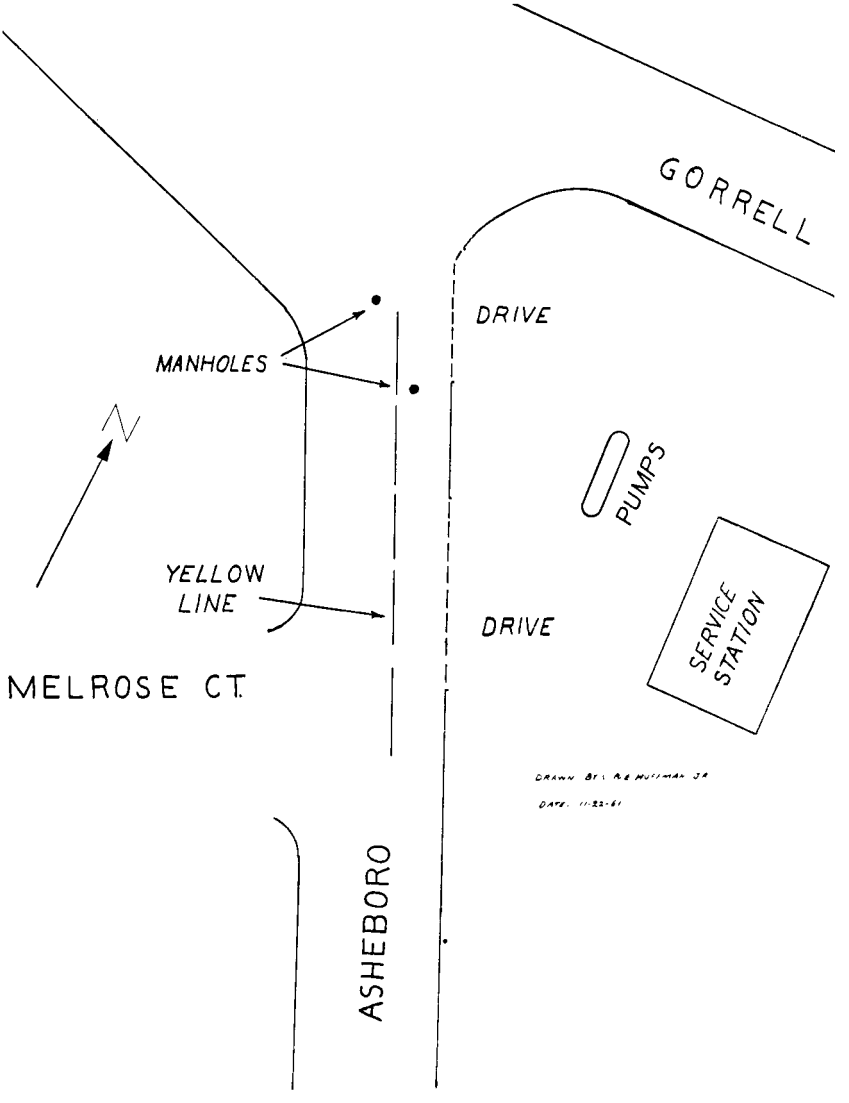
Here plaintiff has established Duke's duty to compensate her. Duke, by its failure to perfect its appeal from the adjudication of its liability to plaintiff and the discharge thereof, is not thereby barred from asserting its right against Elkins. The appeal is based on assertion of error with respect to Duke's right of action for contribution against Elkins. The right to appeal is accorded it by G.S. 1-277. It is not a condition precedent to the exercise of this right that it also appeal from the judgment rendered in favor of plaintiff.

Unless Duke can obtain a new trial on its claim against the additional defendants, the verdict and judgment which it seeks to review will be a bar to any action it may hereafter assert for contribution. It would be manifestly unjust to compel Duke to withhold compensation from plaintiff until its rights, if any, against Elkins had been determined.

Since Duke has the right to appeal because of asserted error resulting in a denial of its claim for contribution, an answer must be given to the second question.

The negligent act of Elkins as charged by Duke was a left turn by Elkins from Gorrell Street into Asheboro Street before he had reached the intersection of these streets, forcing Duke, who had the right of way at the point where the turn was made, to stop suddenly to avoid a collision.

The parties used at the trial a map for the purpose of illustrating the testimony given by the witnesses. It shows the location of some but not all of the structures which front the streets. It does show the manner in which the streets join. For convenience in understanding the factual situation as described by the witnesses, that portion of the map showing the intersection and the area adjacent thereto is reproduced and made a part hereof.



As will be observed, Asheboro Street runs northwardly until it reaches Gorrell Street. It there makes a turn to the left approximating 50 degrees. The southern portion of Asheboro Street is thirty-three feet

wide. The yellow line separating north and southbound traffic is twelve feet four inches from the eastern curb on Asheboro Street.

Gorrell Street runs in a northwest-southeast direction. It terminates when it reaches Asheboro Street. The curb lines on the east side of Asheboro and south side of Gorrell do not extend to the apex of the angle. That portion excluded from the statutory definition of the intersection is cut off by an arc about twenty or twenty-five feet from the apex. The area between the apex and the arc is not private property but a portion of the streets.

The jury could find from the evidence these facts: The bus was traveling northwardly on Asheboro Street. It had stopped at the intersection of that street and Murray Street, which is south of the area shown on the printed diagram. Elkins saw the bus when it was about 160 feet from the intersection of Asheboro and Gorrell Streets. He was uncertain whether it was moving toward the intersection or was stopping. Its movement was slow. The bus was on its righthand side of the street. It stopped suddenly to avoid a collision with Elkins. It stopped opposite the southwest end of the arc connecting Asheboro and Gorrell Streets and thirty feet or more south of the apex of the angle formed by extending the curb lines of these streets. There are no lights controlling traffic at the intersection nor are there any other signs directing traffic. Elkins lived in the vicinity of the intersection. He was familiar with the conditions there. He stopped before reaching the intersection of the streets. He gave a signal with his light indicating his intent to make a left turn and then proceeded into the intersection. He did not go out to the point constituting the apex of the angle formed by extending the curb lines of the two streets but turned close to the arc connecting the two streets. He saw that the motorman was not keeping a lookout for he was putting money in his pocket. Elkins blew his horn when a few feet from the bus to attract the motorman's attention and then proceeded in front of it. The bus applied its brakes and stopped. There was no contact between the vehicles.

If Elkins made the turn as alleged, was he negligent? G.S. 20-153(a) and (b) say the operator of a motor vehicle "when intending to turn to the left shall approach such intersection in the lane for the traffic to the right of and nearest to the center of the highway, *and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left.* (Emphasis added.)

"For the purpose of this section, the center of the intersection shall mean the meeting point of the medial lines of the highways intersecting one another."

An intersection is "the area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at any angle whether or not one such highway crosses the other." G.S. 20-38(1).

Denny, J. (now C.J.), said in *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849: "A violation of G.S. 20-153(a) constitutes negligence *per se* and such negligence is actionable if it proximately causes injury to another." He supports this statement by reference to *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565.

If Elkins violated the statute, the question of whether such negligence proximately caused the injury was for the jury. *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1.

The court, in charging the jury on the first issue, read G.S. 20-153(a) and (b). He told the jury that one who violated these statutes was negligent. He then said: "Now, members of the jury, an intersection is the area embraced within the prolongation of the lateral curb lines, if any, *or property lines,* if any, where two streets or highways meet, whether they continue on across or whether they stop without continuing or across." (Emphasis added.) Duke excepted to the quoted portion of the charge. The italicized language will show that the court did not quote correctly the statute which fixes the intersection at "the prolongation of the lateral curb lines *or if none, then the lateral boundary lines of two or more highways which join.*" (Emphasis added.) Here all the evidence was to the effect that there were curb lines along the street. The inadvertent use of the words "property lines" could well have, and we think did cause confusion. This is indicated by an inquiry directed to the court by a juror after the jury had been unable for some hours to agree on a verdict.

The court had recalled the jury to inquire if it could be of assistance. The foreman propounded questions to the court in response to which the court gave instructions. The court inquired if any other juror desired to ask a question in response to which a juror said: "Yes, sir, I have. A fellow gets in the intersection, a flickering light, he's got the right of way, if he pulls over out of the path that he's supposed to go and would cause another in the party of another truck coming that was in its proper lane, if he pulls out of the lane he's traveling where would he stand?" The court had the reporter repeat the question. After she had done so, he said: "The court instructs you that it cannot properly answer that question."

Duke assigns the failure of the court to answer the question as error. The assignment is, we think, well taken. True the question is not

clearly phrased, but when examined in the light of the testimony, it is, we think, apparent that the juror wanted to know where the law permitted Elkins to make his left turn. Nowhere in the charge had the court applied the law relating to the place where and how Elkins should proceed in making a left turn. This was a duty imposed by statute G.S. 1-180, which should have been discharged without special request. *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522; *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212. When the failure to explain the law so the jury could apply it to the facts was specifically called to the court's attention by the juror's request for information, it should have told the jury how to find the intersection of the streets as fixed by G.S. 20-38(1) and how, when the motorist reached the intersection, he was required to drive in making a left turn. G.S. 20-153(a) and (b).

The testimony would support a finding that Elkins turned left before he reached the intersection as defined by the statute. Such a turn would put Elkins directly in the path of the bus at a place where Elkins had no right to be.

Because of the failure of the court to apply the law to the facts of the case and inform the jury where Elkins was permitted to make his left turn, there must be a

New trial.

THE HOME INDEMNITY COMPANY v. WEST TRADE MOTORS, INC., E. M. CROCKETT, AND LOUIS CROSBY BRADSHAW.

(Filed 1 February 1963.)

1. Appeal and Error § 59—

A decision of the Supreme Court must be read in the light of the facts of the case in which it is written, and general statements therein appearing may not be applicable to a different factual situation.

2. Automobiles § 4—

Where the owner of a registered vehicle transfers ownership to a nondealer, it is the duty of the vendor to endorse the certificate of title to the transferee with a statement of all liens and encumbrances verified by oath, and these papers must be transmitted to the Department of Motor Vehicles; but when an owner sells to a dealer, the dealer is not required to transmit the certificate of title to the Department of Motor Vehicles until the dealer resells. G.S. 20-75 as amended.

3. Same; Insurance § 57— Garage liability policy held not to cover negligence of purchaser to whom dealer had endorsed certificate,

even though purchaser's mortgagee fails to send papers to Department of Motor Vehicles.

Where a dealer purchases a car from an individual and thereafter sells it to another individual and, upon payment of the full purchase price, endorses his certificate of title to the purchaser and, at the direction of the purchaser delivers the certificate of title to a finance company loaning a part of the purchase price secured by chattel mortgage, *held* the dealer has done all required of him by law and may not be penalized for the failure of the mortgagee to transmit the endorsed certificate, with notation of liens, to the Department of Motor Vehicles, and the insurer in a garage liability policy issued to the dealer may not be held liable for damages thereafter resulting from the negilgent operation of the vehicle by the purchaser.

APPEAL by plaintiff from *McConnell, S.J.*, August 20, 1962 Term of UNION.

Plaintiff seeks by declaratory judgment a determination of its liability, if any, arising under a standard garage liability policy issued by it to West Trade Motors, Inc., hereafter designated as dealer. Individual defendants are hereafter designated by their surnames.

The facts as stated in the complaint which give rise to the question are: Dealer is a registered dealer in used automobiles. On 24 July 1961 it purchased from Albert Selby a described 1955 Mercury coupe. It took immediate possession, receiving from Selby a verified assignment and warranty of title by completion of the form appearing on the reverse side of the Selby certificate of title issued to him by the Department of Motor Vehicles.

On 16 September 1961 dealer sold the Mercury coupe to Bradshaw. Dealer "executed and acknowledged an Assignment and Warranty of Title as a registered dealer of automobiles in the form approved by the Department of Motor Vehicles of the State of North Carolina and printed upon the reverse side of the certificate of title to said Mercury automobile, and duly delivered possession of said vehicle to the defendant Louis Crosby Bradshaw after having received payment in full. . ."

Bradshaw "executed on the form approved and provided by the Department of Motor Vehicles of the State of North Carolina for such purpose, a Purchaser's Application for New Certificate of Title to said automobile, duly sworn to by him and notarized, and took possession of said automobile."

On 16 September 1961 Bradshaw borrowed from Smart Finance Company monies necessary to make the purchase. He gave the finance company "a written security instrument" to secure payment of the loan. Dealer, by agreement with Bradshaw, "delivered said certificate

of title for the Mercury automobile, together with the Purchaser's Application for New Certificate of Title, to said Smart Finance Company, through whom the defendant Louis Crosby Bradshaw had procured a loan for the balance of the purchase money on said 1955 Mercury automobile, as aforesaid, as security for said loan, and that said Smart Finance Company had possession of all the aforesaid documents at all times referred to hereinafter."

On 4 November 1961 Bradshaw, operating the Mercury coupe, was in a collision with a motor vehicle owned and operated by Crockett. Crockett asserted the collision was due to the negligence of Bradshaw; Bradshaw had not acquired title to the Mercury because title was still vested in dealer; Crockett was protected and entitled to recover from plaintiff compensation for his injuries under the garage liability policy issued by plaintiff to dealer.

The policy issued by plaintiff to dealer covers bodily injury and property damage resulting from "the ownership, maintenance or use of any automobile in connection with the above defined operations, and the occasional use for other business purposes and the use for non-business purposes of (1) any automobile owned by or in charge of the named insured and used principally in the above defined operations, and (2) any automobile owned by the named insured in connection with the above defined operations for the use of the named insured, a partner therein, and executive officer thereof, or a member of the household of any such person." The policy defines the insured as "the named insured. . .and (2) any person while using an automobile covered by this policy, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

Crockett demurred to the complaint, asserting that it stated no cause of action because Bradshaw acquired no title until he applied to the Department of Motor Vehicles for a title, citing in support of his position G.S. 20-75 and 20-72(b) as amended by the Legislature in 1961. The court was of the opinion that these statutes prevented title vesting in Bradshaw, and because he had no title "the defendant, Bradshaw, would be deemed in law to have operated said automobile at the time of the collision with the permission and consent of West Trade Motors, Inc. within the meaning of said policy of insurance and as an insured of the plaintiff under said policy. . ." For this reason it sustained the demurrer. Plaintiff excepted and appealed.

Carpenter, Webb & Golding by William B. Webb for plaintiff appellant.

Wilson & Clark by Richard S. Clark for defendant appellee Crockett.

RODMAN, J. Before Crockett could recover, he would have to establish dealer's liability. This liability exists, Crockett asserted and the court approved, because dealer was the owner of the Mercury coupe used by Bradshaw with dealer's permission on 4 November 1961. The contention is based on the interpretation Crockett places on our decision in *Credit Co. v. Norwood,* 257 N.C. 87, 125 S.E. 2d 369.

We repeat what Justice Jackson so well said in *Armour & Co. v. Wantock,* 323 U.S. 126, 89 L. ed. 118: "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading." This clearly-stated rule has been applied by this Court on many occasions. *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897, *Lane v. Dorney,* 250 N.C. 15, 108 S.E. 2d 55, *In re Will of Pridgen,* 249 N.C. 509, 107 S.E. 2d 160, are illustrative.

Credit Co. v. Norwood, supra, called for a determination of the priority between two creditors of Norwood. It did not determine any rights as between vendor and vendee of a motor vehicle. That question was not presented. If the sales and collision referred to in the complaint had occurred prior to 1961, Crockett would, probably, not have asserted any claim against dealer or plaintiff, its insurance carrier. If he had made such assertion, he would have found a clear-cut and positive denial of liability in *Godwin v. Casualty Co.,* 256 N.C. 730, 125 S.E. 2d 23. Unless the 1961 amendments to our motor vehicle laws require a different result, the law declared in *Godwin v. Casualty Co., supra,* is still an effective barrier to Crockett's claim.

C. 835, S.L. 1961, is entitled "AN ACT TO STRENGTHEN THE MOTOR VEHICLE CERTIFICATE OF TITLE LAWS BY PROVIDING FOR A MANUFACTURER'S CERTIFICATE OF TRANSFER FOR NEW MOTOR VEHICLES AND FOR THE RECORDATION AND PERFECTION OF SECURITY INTERESTS IN VEHICLES." Unlike most of our statutes this bill contains a preamble stating the reasons which called for a modification of the law. The bill said: "WHEREAS, the present motor vehicle certificate of title law provides for a declaration of all existing liens at the time of application for registration, but does not require that liens given thereafter be declared and entered on the certificate of title; and

"WHEREAS, the certificate of title, often regarded as absolute, is not conclusive as to liens and may not be relied upon to show good title for purpose of sale or encumbrance, except as it relates to lien perfection under Section 213 of the Interstate Commerce Act; that is, liens on equipment of interstate common and contract carriers; and

"WHEREAS, the present certificate of title law does not meet the requisites of the Uniform Title Code because the certificate of title is not in and of itself adequate notice to third parties of existing liens; and

"WHEREAS, a certificate of title that can be relied upon as a ready means by which all legal interest in motor vehicles may be determined would be to the public interest: Now, therefore. . ." Then followed the enacting clause.

For the purpose of this decision sales of motor vehicles may be put in two classes: (a) sale by a registered owner to someone other than a dealer, G.S. 20-72, and (b) sale by a registered owner to a dealer and the subsequent sale by the registered dealer to a nondealer, G.S. 20-75.

G.S. 20-72(b) was rewritten by the 1961 Legislature. The concluding sentence of that subsection now reads: "Transfer of ownership in a vehicle by an owner is not effective until the provisions of this subsection have been complied with." That subsection makes it the duty of the vendor of a registered vehicle to endorse his certificate of title to the transferee with a statement of all liens or encumbrances to be verified by the oath of the owner. These papers must be transmitted to the Department of Motor Vehicles. But when a sale is made to a dealer, it is not necessary to transmit the certificate of title to the Department of Motor Vehicles until the dealer resells. G.S. 20-75. To G.S. 20-75 the Legislature in 1961 added: "Transfer of ownership in a vehicle by a dealer is not effective until the provisions of this subsection have been complied with." The burden is imposed on the vendee, or as the statute describes him, transferee, to present the certificates and make application for a new certificate of title within twenty days. A wilful failure to do so is expressly declared to be a misdemeanor, G.S. 20-73, and when the certificate of title is delivered to a lien holder, it is nonetheless the duty of the purchaser to see that the certificate is forwarded to the Department of Motor Vehicles. G.S. 20-74.

We said in *Credit Co. v. Norwood, supra*: "Since 1 July 1961 the purchaser of an automobile does not acquire title until he has compiled with the provisions of G.S. 20-72(b) and 75. These sections make it the duty of the purchaser to secure from his vendor the old certifi-

cate duly endorsed or assigned and to apply for a new certificate. They do not relate to the duty of the Department to issue a new certificate. What the amendments of 1961 say is: The vesting of title is deferred until the purchaser has the old certificate endorsed to him and makes application for a new certificate.

"If, as appellee argues, the Legislature intended the quoted amendment to mean purchaser acquired no title until the Dpartment issued him a certificate, it would doubtless have said: 'Title shall not pass to purchaser until the Department has issued him a new certificate' or some other plain and positive language to that effect. *The intent declared in the preamble, to prevent vendor from using the old certificate to entrap the unwary was effectively accomplished by the language selected by the Legislature.*" (Emphasis added.)

The facts here admitted by the demurrer not only fail to suggest any attempt on the part of dealer to entrap Crockett or any other person injured by the negligence of its vendee but affirmatively show dealer had, as required by the statute, given the duly indorsed certificate of title and Bradshaw's application for a new certificate to his agent, Smart Finance Company. Dealer had put it beyond its power to use the certificate for any purpose.

There is nothing in the statute which suggests dealer, a vendor, should be penalized and held liable because of the failure of Bradshaw, a purchaser, to perform his statutory duty.

Prior to 1961 a creditor claiming a lien on a motor vehicle was required to register his lien in the office of the register of deeds to protect himself against claims of other creditors of the owner. Now he protects himself by having his claim noted on the certificate of title issued by the Department of Motor Vehicles.

One who claims an interest in a motor vehicle and *defers* or delays giving notice of his right by applying to the Department of Motor Vehicles for a new certificate or the notation of his claim on the outstanding certificate must suffer the consequences of his delay. As to him *the transfer of ownership is not effective* until he has requested the Department to act.

Nothing here said is intended to indicate nonliability of a registered dealer's insurance carrier where the dealer permits purchaser to use dealer's registration plates within the twenty-day period allowed purchaser to obtain insurance and have the vehicle registered in his own name. G.S. 20-79.1.

Reversed.

BIBB T. PRIDDY v. KERNERSVILLE LUMBER COMPANY, INC.

(Filed 1 February 1963.)

1. Laborers' and Materialmen's Liens § 5—

A material furnisher must file his lien within six months after the final furnishing of the materials, and where the time for filing lien has begun to run the material furnisher cannot thereafter extend the time by furnishing small additional items not contemplated in the original contract when such items are furnished successively just prior to the expiration of the time limited solely for the purpose of keeping the lien alive. G.S. 44-39.

2. Fraud § 2—

Constructive fraud does not require any fraudulent intent and exists when there is a breach of legal or equitable duty which tends to deceive others or violates public or private confidence.

3. Appeal and Error § 49—

In a trial by the court under agreement of the parties the findings of the court are conclusive if supported by competent evidence, but when all of the evidence tends to show the facts to be otherwise than found by the court, the findings must be set aside and the cause remanded.

4. Fraud § 2—

The acts of the owner and material furnisher in ordering and supplying small items after completion of the contract for the sole purpose of extending the time within which the materialman might file his lien constitutes constructive fraud as to persons acquiring subsequent liens long after the expiration of the time apparently required for the filing of materialmen's liens.

5. Execution § 13—

The fact that the mortgagee in a deed of trust purchases the property at the execution sale foreclosing a lien for materials does not preclude the mortgagee, prior to confirmation, G.S. 1-339.67, from asserting the priority of his lien over the lien for materials when it appears that the material furnisher had fraudulently sold the owner small items for the purpose of extending the time for filing lien, and therefore had not filed lien within the time required by law.

6. Estoppel § 4—

The doctrine of equitable estoppel does not apply when no party has changed his position in reliance upon the acts of the party against whom the estoppel is asserted.

APPEAL by plaintiff from *Riddle, J.*, July 23, 1962 Term of FORSYTH.

This action was instituted by the holder of a deed of trust against a lienor-judgment creditor to determine the priority of their liens.

There is no substantial conflict in the evidence which is stated chronologically as follows:

On or about May 14, 1959, W. A. Davis and wife entered into an entire and indivisible contract with defendant corporation to supply all the materials required for the construction of a residence upon lot No. 1, Section 1 of "The Hammocks" in Forsyth County. There was no agreement as to the amount or cost of these materials, and defendant was to be paid when Davis sold the house. Defendant began furnishing materials on May 14, 1959 and continued to supply them regularly until November 2, 1959 on which date Davis purchased, *inter alia,* one medicine cabinet.

Before the house was finished Davis began his efforts to sell it. His first tenant, with an option to purchase, moved in before Christmas. According to Davis he actually "sold the house three different times with options." However, he "got fouled up three different times with it for some reason.'

On May 2, 1960, this tenant wanted storm doors. Davis reported his wishes to Mr. John W. Lain, President and General Manager of defendant corporation, who told him that the optionee should have the doors. Defendant supplied them at a cost of $71.00.

On October 19, 1960, Davis and wife executed a deed of trust on the property to C. B. Poindexter, trustee, to secure a loan of $8,500.00 from plaintiff due in six months with interest at the rate of six per cent. This deed of trust was duly recorded on October 19, 1960.

On October 24, 1960, the defendant delivered to Davis one set of medicine cabinet shelves at fifty cents. These shelves were a part of the medicine cabinet which was delivered on November 2, 1959 and should have come with it.

On April 24, 1961, the house was occupied by the second tenant. According to Davis, Mr. Lain telephoned him that defendant's time for filing its lien for materials furnished in constructing the house was running out, and that unless Davis made a purchase he would have "to lien the property." The tenant was interested in buying the house and Davis did not want a lien filed; so he purchased one gallon of white paint for six dollars. He told Lain that "he could probably trim the outside or use it for something." However, the paint was never used and Davis still has it. The outside trim did not need painting and paint was the only item Davis knew of that could be used later. According to Lain, when he telephoned Davis on April 24, 1961 to tell him that defendant's time for filing a lien was about up, Davis told him that he had a prospect in the house who would purchase it if Davis would paint the outside, and Lain told him that if he would come down and purchase the paint to do the work that would renew his lien.

Lain testified as follows: "On the 2nd day of November, 1959, I supplied Mr. Davis certain materials including a medicine cabinet.

Exactly 6 months to the date later on May 2, 1960, I supplied him with storm doors. Eight days lacking 6 months later I supplied him with a set of medicine cabinet shelves, the cost of $.50, and that would be October 24th, 1960. Exactly 6 months later to the day, April 24, 1961, I supplied him with a gallon of paint. . . I stayed within the law. The law protects us. I stayed within it. I knew."

On June 15, 1961, Davis and wife, executed a second deed of trust on the property to C. B. Poindexter, trustee, to secure a loan of $1,500.00 from the plaintiff due sixty days from date with interest at the rate of six per cent. This deed of trust was duly recorded on June 15, 1961.

On September 25, 1961, defendant filed a material furnisher's lien in the amount of $4,995.88 on the property. The lien stated that defendant began furnishing materials on May 14, 1959 and finished on April 24, 1961.

On December 20, 1961, defendant wrote plaintiff that his loan to Davis on the house had come to its attention; that defendant intended to institute an action to foreclose its lien in the amount of $4,995.88 plus $624.49 interest unless plaintiff would pay it off.

On February 21, 1962, defendant instituted an action to foreclose the lien. Davis and wife filed no answer and on March 28, 1962 defendant took a judgment by default final for $4,995.88 with interest from May 14, 1959. Plaintiff was not a party to this suit.

On May 25, 1962, the Sheriff offered the property for sale under execution issued on the default judgment. Plaintiff became the last and highest bidder in the amount of $6,100.00 Four days later, on May 29, 1962, plaintiff instituted this action. In his complaint, he alleged generally the facts detailed above. He averred that the house was completed on November 2, 1959 and that any subsequent supplying of materials was a fraudulent effort to defeat the liens of the plaintiff; that the purported lien was not filed in the office of the Clerk of the Superior Court within six months after the final furnishing of materials as required by G.S. 44-38 and 44-39 and that the action to enforce the purported lien was not commenced as required by law and was therefore discharged. He alleged that his deeds of trust were prior liens to the defendant's judgment and prayed for an injunction restraining the Sheriff from proceeding with the sale until the priority of the liens had been adjudicated. The defendant, by answer, denied that the plaintiff's deeds of trust had priority and alleged that plaintiff was estopped by his bid at the execution sale to deny the validity of the sale or the superiority of the defendant's lien.

When the matter came on for trial the parties waived a jury. The judge found facts in accordance with the record evidence and, in ad-

dition, upon the evidence detailed above, he found that the defendant last furnished Davis materials on April 24, 1961. He further found "that each controverted item was a bona fide purchase duly ordered and authorized by the owner; that each item was calculated to enhance the house and its salability, and that no evidence of bad faith was found on the part of the defendant but that the extension of the time of filing lien was one of the motivating factors in the ordering and furnishing of the disputed items." He concluded as a matter of law, that defendant's judgment had priority over plaintiff's deeds of trust and that the execution sale was valid. He dissolved the temporary restraining order which had been issued on June 11, 1962. Plaintiff appealed, assigning as error his Honor's findings of fact set out in the preceding paragraph and his conclusions of law based thereon.

Fred M. Parrish, Jr., for the plaintiff appellant.

Frank C. Ausband & Clyde C. Randolph, Jr., for defendant appellee.

SHARP, J. When a jury trial is waived, findings of fact by the trial judge are conclusive on appeal if there is any competent evidence to support them. *Insurance Co. v. Lambeth,* 250 N.C. 1, 108 S.E. 2d 36. Was there any evidence to support the court's finding that the defendant furnished materials to Davis until April 24, 1961, and that each contested item purchased between November 2, 1959 and April 24, 1961 was a bona fide purchase? The answer must be NO. Here the query does not seek to ascertain whether defendant actually sold Davis the questioned items; the question relates to the purpose of the sale. Did defendant sell Davis the disputed items for the purpose of fully performing its contract with him or merely for the purpose of extending the lien?

G.S. 44-39 requires the lien of a materialman to be filed within six months after the *final furnishing* of the materials. The lien is lost if the steps required to perfect it are not taken in the manner and within the time prescribed by law. *Assurance Society v. Basnight,* 234 N.C. 347, 67 S.E. 2d 390.

What is the legal test for determining when the last materials were furnished? The applicable law was stated by Brogden, J., in *Beaman v. Hotel Corporation,* 202 N.C. 418, 163 S.E. 117, in a quotation from *Breeding v. Melson,* 34 Del. 9, 143 A 23, 60 A.L.R. 1252: "There is no conflict between the authorities as to the proposition that the time for filing a claim in a mechanic's lien proceeding is computed from the date when the last item of work labor or materials is done, per-

formed or furnished, and that principle is, undoubtedly, correct. But the work performed and materials furnished must be required by the contract, and whatever is done must be done in good faith for the purpose of fully performing the obligations of such contract, *and not for the mere purpose of extending the time for filing lien proceedings.*" (Italics ours)

Furthermore, in order that the date of the last item be taken as that from which limitation for filing notice of lien shall run, it is essential that the work or materials at different times be furnished *under one continuous contract.* 57 C.J.S., Mechanics Liens', p. 632. (Italics ours)

Where the time allowed for filing a lien has begun to run, the claimant cannot thereafter extend the time within which the lien may be filed by doing or furnishing small additional items for that purpose. *Apartments, Inc. v. Noland Co.,* 202 Md. 43, 95 A 2d 90, 39 A.L.R. 2d 387. *Gem State Lumber Co. v. Witty,* 37 Idaho 489 217 Pac. 1027; *Tire and Rubber Co. v. Tire and Rubber Co.,* 99 Conn. 396, 122 A 102.

The reason for the rule is clearly stated in *Cahoon et al. v. Fortune Min. & Mill. Co.,* 26 Utah 86, 72 Pac. 437:

> "To permit a contractor, long after the completion of his contract, to revive or keep alive his right of lien by tacking on and adding to his account by filling additional orders for labor or material not contemplated by his original contract, would throw open wide the doors to fraud and collusion, and in many cases defeat the very purpose and object of the statute, as it would enable the favored creditor to keep alive indefinitely his right to a lien, and at the same time prevent the property subject to lien from being reached by other lienholders whose contracts were entered into subsequent to that of his own. 'It is particularly as regards the rights of bona fide purchasers and incumbrancers that the claimants of this lien are held to the strictest compliance with the statutory provisions as to time of its enforcement. Mechanics and materialmen, it is said, should understand that any unreasonable delay in giving public notice of their intention to hold a lien is dangerous, as the public, in purchasing the property, have nothing to warn them after the building is substantially completed, and the statutory period of filing the notice of lien has expired.' "

The only conclusion to be drawn from all the evidence in this case, including the testimony of Lain, is that the items furnished after November 2, 1959 were not for the purpose of completing the house as required by any contract, but for the sole purpose of extending the time

for filing the lien which Davis and defendant both feared would discourage a sale of the property. The defendant was not a general contractor on this job. The only contract it had with Davis was to furnish the materials. There was no agreement as to amount or cost. The specifications for the house, if there were any, are not in evidence. It is obvious that the house was substantially completed before May 2, 1960 for it was then occupied by a tenant-optionee who wanted storm doors. The gallon of paint was selected as the April 24th (1961) purchase on the theory that Davis could "use it for something." It was never used.

The evidence establishes that the purpose of the disputed sales was to extend the defendant's time for filing its lien. The defendant acted under a mistake of law, but its attempts to extend the lien constituted legal or constructive fraud which may exist without any fraudulent intent.

> "Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud." 37 C.J.S., Frauds, Section 2 C.

Whether the materials furnished after the contract had been substantially completed were in good faith and for the purpose of completing the contract or colorably to revive the lien is a question of fact. *Sachetti v. Recreation Co.*, 304 Mich. 185, 7 N.W. 2d 265.

Had this been a jury trial plaintiff would have been entitled to a peremptory instruction. Since the plaintiff alleged fraud the burden is on him to establish it, and he is therefore not entitled to a directed verdict. 57 C.J.S., Mechanics' Liens, Section 308 K.

The findings of the trial judge to which the plaintiff excepted must be set aside and the case remanded for a new trial.

In the meantime it would appear that plaintiff, if he has not already done so, would be well advised to move below to be allowed to withdraw his bid. There is no sale prior to confirmation. G.S. 1-339.67.

In *Glass Co. v. Forbes, ante,* 426, this Court affirmed the action of the superior Court judge in permitting a bidder, who had bid too much at an execution sale on the faith of erroneous advice given him by the judgment debtor and his attorney, to withdraw his bid. *Rodman, J.*, speaking for the Court said: "Courts are as diligent in protecting purchasers from imposition because of fraud or mistake as they are in

protecting judgment debtors in similar situations. While the doctrine of caveat emptor applies to purchasers at execution sales it does not tie the hands of a court to prevent a manifest injustice not due to the fault or neglect of the purchaser."

As the defendant points out in his brief, plaintiff is in the novel position of seeking to restrain a sale at which he was the last and highest bidder. Defendant contends that plaintiff has committed himself to pay $6,100.00 for whatever interest Davis had in the property at the time it was sold, G.S. 1-339.68(b), and that the question of priority of liens has become moot. Defendant argues that if plaintiff's deeds of trust were prior to defendant's judgment, the lien of defendant's judgment attached only to Davis' equity of redemption which plaintiff bought at the Sheriff's sale and if defendant's lien had priority the result was the same.

If a third person had become the last and highest bidder at the sale, clearly plaintiff would not have been estopped to maintain the priority of his deed of trust. While the defendant's judgment is in all respects binding as between Davis and defendant, the plaintiff is not bound by it since he was not a party to it. *Thomas v. Reavis,* 196 N.C. 254, 145 S.E. 226.

The record does not disclose the value of the property. This litigation, however, is convincing proof that it is not worth the encumbrances against it. The record likewise does not disclose what prompted the plaintiff to bid $6,100.00 for the property at the execution sale four days before he brought this action to restrain the Sheriff "from proceeding with the sale."

The only logical explanation is that on the day of the sale he thought defendant's lien had been filed in time. If so, this supposition was caused by the notice of lien which defendant, the judgment creditor, had filed. Defendant may not profit from a judgment priority which it obtained by constructive fraud nor capitalize upon plaintiff's mistake occasioned by it. The doctrine of equitable estoppel, which defendant pleads, does not apply here. Defendant has not changed its position in reliance upon plaintiff's bid. *Hardware Co. v. Lewis,* 173 N.C. 290, 92 S.E. 13.

New trial.

C. A. DANIELS, AND BANKERS AND SHIPPERS INSURANCE COMPANY OF NEW YORK, v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 1 February 1963.)

1. Insurance § 61—

Notice to insured of the cancellation of an assigned risk automobile liability policy is not required when the policy is cancelled by insured or his duly authorized agent, G.S. 20-310, nor does provision in the policy for notice if insurer cancels the policy require notice in such instance.

2. Same—

Insured may authorize his agent to cancel a policy of automobile liability insurance and may confer such authority on his agent at the time a policy is issued, and nothing in the Vehicle Financial Responsibility Act, expressly or impliedly, forbids the cancellation of such policy by insured through a duly authorized agent.

3. Same; Insurance § 65— Injured party may not recover against insurer cancelling policy at request of insured's agent prior to accident.

At the time of making application for a noncertified risk under the assigned risk plan, G.S. 20-314, insured financed the premium with a finance company of which the insurance agency was also an agent, and authorized the finance company to cancel the insurance if insured failed to pay installments when due. The policy was assigned to another insurer and such insurer was paid the full premium. Insured failed to pay an installment when due and the finance company requested cancellation, and insurer cancelled the policy and returned the unearned premium. Thereafter insured had a collision and the injured party recovered judgment against insured. *Held:* Notice to insured of cancellation was not required and the policy was validly cancelled prior to the accident, and neither the injured party nor his subrogatee may recover against insurer.

APPEAL by defendant from *Crissman, J.*, June 4, 1962, Civil Term of GUILFORD (High Point Division).

Action to recover benefits under an automobile liability insurance policy.

The following facts are not in dispute:

On 5 January 1961 LeRoy Brand applied to Bell & Wood Insurance Agency, Inc. (Bell & Wood) of High Point for automobile liability insurance. He made application as a noncertified risk under the Assigned Risk Plan. G.S. 20-314; G.S. 20-279.21; G.S. 20-279.34. He requested premium financing, and signed a contract with Insurance Finance Company, Inc., of Fayetteville (Finance Company), of which Bell & Wood was an agent. The Finance Company agreed to (and did) pay the premium. Brand made a down payment of $25 and agreed to pay the Finance Company the balance of $40 in four equal monthly installments, the first to be due 1 February 1961. The contract pro-

vides that "failure to make payment of any installment within ten days from the due date thereof shall terminate this agreement." In connection with the contract Brand executed an assignment to the Finance Company of any unearned premiums, and a power of attorney as follows: "I do hereby irrevocably constitute and appoint Insurance Finance Company, Inc., as my attorney in fact, to authorize the cancellation of said insurance policy and to receive on behalf of Insurance Finance Company, Inc., any unearned premium and to issue proper receipt for the same." The application for insurance was sent to the Department of Motor Vehicles and the Department assigned the risk to Nationwide Mutual Insurance Company (Nationwide). Upon receipt of the assignment of risk Nationwide issued its policy, in compliance with G.S. 20-279.21, to Brand for a period of one year, effective 10 January 1961, and sent a Form FS-1 (showing coverage) to the Department of Motor Vehicles. Nationwide issued and mailed to Brand an "Endorsement — Financed Premium." When the first installment was due the Finance Company, Brand failed to pay. On 28 February 1961 Nationwide received a written request from Finance Company for cancellation of the policy and return of unearned premium. Nationwide cancelled the policy as of that date and returned the unearned premium to the Finance Company three days later. On 28 February 1961 Brand paid to Bell & Wood $10.00, but it was later returned to him. On 6 March 1961 Nationwide wrote Brand, sending a copy to Bell & Wood, acknowledging his request for cancellation and advising that the Policy had been cancelled effective 28 February 1961, but Brand denies having received the letter. On 7 March 1961 Nationwide sent Form FS-4 (Notice of Termination) to the Department of Motor Vehicles. Brand on 11 March 1961, while driving the automobile described in the policy, was involved in a collision with C. A. Daniels, whose vehicle was damaged. Bankers and Shippers Insurance Company of New York (Bankers) carried collision insurance, with a $50 "deductible" provision, on Daniels' automobile. Daniels sued Brand and recovered judgment for $392.09. Nationwide declined to defend the action and pay the judgment. Bankers paid Daniels $342.09. Daniels and Bankers instituted this action against Nationwide on 20 November 1961.

The parties waived trial by jury, and the judge heard the case on facts stipulated and oral and documentary evidence, found facts, including some of the essential facts stated above, submitted to himself and answered two issues deciding in effect that the policy was issued by Nationwide and was not terminated "in accordance with the applicable status (statutes) prior to the collision," and adjudged that

plaintiffs recover of Nationwide $392.09 with interest and costs. Defendant Nationwide appeals.

James B. Lovelace and Edward R. Hardin for plaintiffs.

Jordan, Wright, Henson & Nichols and G. Marlin Evans for defendant.

MOORE, J. "Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately." G.S. 1-185. Where jury trial is waived and the court acts both as judge and jury, it is irregular for the court to render a verdict on issues submitted to itself. But in the absence of objection and exception, a new trial will not be ordered for this cause if from the judgment it can be determined what the court found the ultimate facts to be and what the legal basis of the judgment is. *Wynne v. Allen,* 245 N.C. 421, 96 S.E. 2d 422; *Parks v. Davis,* 98 N.C. 481, 4 S.E. 202. In the case at bar we infer from the court's answer to the second issue that it was the opinion of the court that the policy had not been validly cancelled because Nationwide had not given insured fifteen days notice prior to cancellation. G.S. 20-310.

Nationwide contends that the cancellation was by insured and no notice was required either by statute or by the terms of the policy. We have not had occasion under the Vehicle Responsibility Act (G.S., Ch. 20, Art. 13) to consider the question of cancellation on a factual situation such as is here presented. There are very few decisions from other jurisdictions based on similar circumstances. These authorities are favorable to defendant.

Chamberlain v. Employers' Liability Assur. Corporation, 194 N.E. 310 (Mass. 1935) is in point. The policy in question was issued pursuant to a compulsory automobile insurance statute. Plaintiff was injured in an automobile accident because of the negligence of one McEvoy, who was insured by defendant. Defendant had filed a certificate of coverage with the Registrar of Motor Vehicles. Plaintiff obtained judgment against McEvoy, and failing to collect the judgment sued defendant on the policy. McEvoy had executed a note to Insurance Budget Plan, Inc., a finance company which paid the premium for him, promising to pay the note in installments. The note contained an acceleration provision, made the finance company the agent for McEvoy to procure the policy, and authorized the finance company to cancel the policy if there was a default in the payment of any installment. McEvoy defaulted. The insurance was cancelled by defend-

and at the request of the finance company. This cancellation occurred before the accident in which plaintiff was injured. Plaintiff contended that the cancellation was void because the defendant had not given McEvoy the statutory notice before cancelling. The court said: "The policy was not cancelled by the insurer. Consequently provisions applicable to such cancellation do not apply. . . . The policy was cancelled . . . by the insured acting by his agent the Insurance Budget Plan, Inc. . . . (I)n the matter of cancellation of a compulsory motor vehicle liability insurance policy, the insured can act by an agent. . . ." Further: "Perhaps there are reasons why a person insured under a compulsory motor vehicle liability insurance policy should not be permitted to authorize an agent to cancel such policy, particularly in the circumstances here shown. But nothing in the statute expressly or impliedly forbids. And nothing in the ordinary principles of agency or insurance prevents. (Citing authorities) Cancellation of such a policy by the insured is not an act so personal in its nature that it cannot be delegated in the absence of statutory prohibition of such delegation." The following cases, though they do not involve compulsory insurance, are in accord with the principles stated in *Chamberlain*: *Hardware Mutual Casualty Co. v. Beals,* 158 N.E. 2d 778 (Ill. 1959); *Angelo v. Traviglia,* 155 N.E. 2d 717 (Ohio 1957); *Saskatchewan Government Ins. Office v. Padgett,* 245 F. 2d 48 (5th Cir. 1957). However, in the *Beals* case the insurance was held to be in force because the request for cancellation was a forgery, and in the *Padgett* case it was held that there had been no actual cancellation and the request therefor was conditional.

"Cancellation of an insurance policy under a provision allowing cancellation at the request of insured may be effected through agents. It is not necessary under a provision of this kind that the request for cancellation be made personally by insured, but it is sufficient if it is made by a person acting as agent of the insured." 29 Am. Jur., Insurance. s. 404, p. 752.

". . . It would seem on principle that a premium payment service plan entered into between an insured and a finance company not so connected with the insurer as to create conflicting interests would be valid and enforceable, providing the contract was fairly made, and contained no provisions in conflict with statutory regulations governing insurance contracts." 115 A.L.R. 1212.

In this jurisdiction, *Dawson v. Insurance Co.,* 192 N.C. 312, 135 S.E. 34 (1926), is strong authority for defendant's position. It involved fire insurance. The insurance agent extended credit for payment of premiums. Insured agreed that the agent might retain the policies and

cancel them if the premium was not paid by a certain date. Insured defaulted, and the agent marked the policies cancelled and mailed them to the insured. Insurer entered the cancellation on its records but sent no notice to insured. Thereafter insured's property was destroyed by fire and he sued insurer and asserted that the insurance was in force because he had not been given notice of the cancellation according to policy provisions. The policy provided that it would be "cancelled at any time at the request of the insured," and that it might "be cancelled at any time by the Company by giving to the insured five days' written notice of cancellation." The court held that agent's duties to the insurer were fully performed when the policy was issued, the extension of credit was no part of the insurance contract, and the agreement respecting cancellation was for the benefit of the agent, who was responsible to insurer for the premium. The court declared: ". . . (R)equest (for cancellation) may be made by the insured, in person, or by his authorized agent. . . . (A)uthority (to an agent to cancel) may be given prior to, or contemporaneously with the issuance of the policy. It may also be given upon condition, to be exercised in the discretion of the agent, upon the happening of the condition." It was the decision of the court that the insurance had been effectively cancelled and was not in force at the time of the fire.

Plaintiffs cite *Clark v. Employers Mut. Casualty Co.*, 90 F. 2d 667 (8th Cir. 1935), in support of their position. It is factually distinguishable. There was a conflict of interest between the finance company and the insurer. The controlling officers of the latter were the owners of the former. The business of the finance company was carried on in the offices of the insurance company, and in part for the benefit of the latter. The court distinguishes the case from *Chamberlain* and *Dawson,* and does not repudiate the principles declared in those cases. The court held invalid the authority to cancel which insured had given the finance company, for the reason that the finance company and the insurance company were so inter-related that the act of the one in cancelling the policy was the act of the other. Under the pertinent statute and the terms of the policy insurer could not cancel without giving notice.

In the instant case the policy provides that it "may be cancelled by the named insured by mailing to the Company written notice stating when thereafter the cancellation shall be effective." The statute (G.S. 20-310) does not require insurer to give any notice when the cancellation is by the insured. *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303. Plaintiffs contend that the instant case is con-

trolled by *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E. 2d 149, in which it is said: "Once the certificate (FS-1) has been issued, nonpayment of premium, nothing else appearing, is no defense to a suit by a third party beneficiary against insurer. To avoid liability insurer must allege and prove cancellation and termination of the insurance policy in accordance with the applicable statute. . ." In that case insured was in default with insurer with respect to premium payments, and *insurer* had undertaken to cancel the policy and the question was whether the notice given by insurer complied with statutory requirements. In the present case the premium had been paid in full and cancellation, if any, was by insured. Brand was indebted to the Finance Company for the money borrowed by him to pay the premium; he did not owe insurer any sum on account of premium. The Finance Company is not an agent of insurer.

The court below, in the findings of fact, quotes from the "Financed Premium" Endorsement as follows: "If the Company cancels the policy it will be with advance notice to the Policyholder and the Lender." The court apparently interpreted this to mean that in event of any cancellation, by the Company or by insured, advance notice would be given by insurer. Considered contextually it merely means that existence of the contract for premium financing and the insurer's recognition of it does not waive insurer's duty to give advance notice of cancellation if "the Company" (insurer) for any reason of its own cancels the policy. The endorsement recognizes the power of attorney given by Brand to the Finance Company authorizing the Finance Company to request cancellation of the policy on Brand's behalf.

Bell & Wood was agent of the Finance Company but not of Nationwide. As to the insurance contract Bell & Wood was merely "producer." *Underwood v. Liability Co.*, 258 N.C. 211, 128 S.E. 2d 577. The Finance Company was not an agent of Nationwide. In his testimony at the trial Brand admitted the execution of the contract with the Finance Company and the power of attorney authorizing the Finance Company to request cancellation of the policy, and admitted that he was delinquent in meeting the first contract installment. In accordance with the terms of the contract and the power of attorney the Finance Company requested Nationwide in writing to cancel the policy. The policy complies with the requirement of G.S. 20-279.21. There is nothing in the Vehicle Financial Responsibility Act which expressly or impliedly forbids the cancellation of such policy by insured through a duly authorized agent. Cancellation of the policy by the insured is not an act so personal in its nature that it cannot be delegated to an agent. *Dawson v. Insurance Co., supra; Chamberlain*

v. Employers' Liability Assur. Corporation, supra. The power of attorney was for the benefit of the Finance Company and its security against loss if Brand failed to pay. The extension of credit and agreement that Brand might pay in installments were sufficient consideration to support it.

Nationwide was under no duty to give Brand advance notice since the cancellation was at the request of Brand's duly authorized agent.

The judgment below is

Reversed.

LEM D. SEAWELL v.
FRANK BRAME AND HALIFAX PAPER CO., INC.

(Filed 1 February 1963).

1. Evidence § 43—

The fact that a medical expert is not a specialist in the particular field upon which he gives his medical opinion does not disqualify his testimony, and the court may hold a medical expert specializing in the general practice of medicine, who had had psychiatric training, qualified to testify that the injured party's nervous condition caused the physical ailments he had observed in the injured party, notwithstanding the expert states he is not an expert of the mind and nervous system.

2. Evidence § 44—

A medical expert may testify only in regard to facts within his personal knowledge or upon an assumed state of facts supported by evidence and recited in a hypothetical question, and it is error to permit an expert to give his opinion based upon unsworn statements made by the injured person's wife and others.

APPEAL by defendants from *Clark (Heman R.), J.*, April Term 1962 of GRANVILLE.

Plaintiff alleged he was injured on the premises (woodyard) of the corporate defendant in Oxford, North Carolina, when the corporate defendant's Hyster motorized lift (Hyster), operated by defendant Brame, "lurched forward, striking the plaintiff with great force and violence," pinning plaintiff between the front of the Hyster and the side of plaintiff's truck. He alleged his injuries were proximately caused by the negligence of Brame in that he operated the Hyster and failed to keep it under control when he knew or by the exercise of due care should have known that plaintiff was between the front of the Hyster and the side of his truck.

Defendants, answering separately, admitted the corporate defendant owned the Hyster and that Brame was operating it as the corporate defendant's agent. Except as stated, each defendant denied all plaintiff's essential allegations and, as further defenses, pleaded contributory negligence and assumption of risk.

There was evidence tending to show the facts narrated in the following numbered paragraphs.

1. On January 1, 1960, about 9:30 a.m., plaintiff hauled a load of pulpwood logs to the corporate defendant's woodyard. The logs were on plaintiff's truck. The truck had no body or bed. It consisted of the chassis and "a runner." Logs were stacked across the runner. The bottom of the logs was "about practically level" with plaintiff's hips.

2. The Hyster was used to remove logs from trucks and transfer them to railroad cars. Two sets of cables were lowered from the boom. Before logs could be lifted from a truck, it was necessary that, on each side of the truck, a set of cables be put around the bottom of the logs and hooked.

3. As on previous occasions, plaintiff aided employees of the corporate defendant. Plaintiff's truck and the Hyster were in position, the front of the Hyster facing the side of the truck. One lot of plaintiff's logs was removed from the truck and transferred to a railroad car without mishap. Plaintiff had put the cables around the bottom of the logs and hooked them on the side of the truck opposite the front of the Hyster and an employee of the corporate defendant had done so on the other side.

4. The two vehicles were again in position for removal of all or part of the remaining logs. The distance between the front of the Hyster and the side of plaintiff's truck was two and one-half feet or less. The distance was such plaintiff "just could squeeze in." Although not "exactly full sideways" between the Hyster and the truck, plaintiff's left side was toward the ends of the logs and his right side was toward the Hyster. He was attempting to put a set of cables around the bottom of logs then on his truck.

Plaintiff's version: When plaintiff was in the position described above, Brame operated the lift or some portion thereof forward, striking plaintiff's right side and mashing his left side against the ends of the logs. Soon thereafter, Brame backed the lift off of plaintiff. When he stopped, the lift was some three and one-half feet from plaintiff's truck.

Defendants' version: No portion of the lift moved forward while plaintiff was between it and his truck. Plaintiff, for reasons unknown

to defendants, walked out from between the two vehicles saying Brame had mashed him and complaining that his chest was hurting.

The jury answered the negligence and contributory negligence issues in favor of plaintiff and awarded damages in the amount of $15,000.00.

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

H. F. Seawell, Jr., and Royster & Royster for plaintiff appellee.

Maupin, Broughton, Taylor & Ellis for defendant appellant Brame.

Teague, Johnson & Patterson and Ronald C. Dilthey for defendant appellant Halifax Paper Co., Inc.

BOBBITT, J. There was ample evidence to require the submission of plaintiff's case to the jury. Indeed, defendants abandoned their exceptions and assignments of error relating to the denial of their motions for judgment of nonsuit in failing to discuss them in their (joint) brief. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

We pass, without discussion, all of defendants' assignments of error except those relating to the basis of our decision. Defendants' other assignments of error are of such nature that discussion thereof would be of no assistance in conducting the next trial.

Plaintiff alleged he "was badly crushed about his back, chest and both shoulders, causing severe abrasions and contusions to the chest, back and both shoulders, a number of fractured ribs and severe, painful and permanent injuries to his back and left shoulder." (No reference to a neurosis, asthma or an ulcer appears in the complaint.)

Evidence offered by plaintiff tended to show, *inter alia,* the facts narrated in the following numbered paragraphs.

1. The Hyster "mashed the breath out of" plaintiff when it came up against him. Plaintiff was "scared." He did not fall to the ground when Brame backed the Hyster off of him. He "hobbled"—"staggered"—out from between the two vehicles. Brame and another person caught hold of him and "led (him) around to the depot." At the depot, he was sick, sweating and still could not get his breath. Too, he was worried. Soon thereafter he was taken to the Granville Hospital and remained there (on this occasion) one week.

2. Upon arrival at the hospital, plaintiff "was half gasping for breath and complained of severe pain in his chest and some in his left shoulder." A physical examination disclosed "slight abrasions on his right shoulder, but otherwise . . . no bruises or marks . . . he was quite

tender to any pressure or touch of the sternum or any of the anterior wall of the chest and . . . pain in the back on the left side when you applied pressure on the chest." An x-ray "suggested fracture of the first right rib." (There was some conflict as to whether a rib was fractured. In either event there were no bandages, no brace and no strapping of his ribs.)

3. When plaintiff returned home from the hospital, he was complaining "about the wheezing in his chest" and about a week later he started complaining about the "burning" in his stomach. Plaintiff was suffering from asthma and from an ulcer.

4. Plaintiff "laid around for about a couple of months" tried to do some work for about twelve weeks but had to quit, and since then has been unable to work.

5. Plaintiff was 58 years old when injured. Prior to January 1, 1960, his general health had been good and he had not suffered from asthma or an ulcer. After January 1, 1960, plaintiff's general health was bad. He now is "highly nervous," suffers from asthma and an ulcer, takes medicine for his condition, and is unable to work.

Defendants assign as error the court's admission of testimony of Dr. C. B. Finch to the effect plaintiff's injury of January 1, 1960, *in his opinion,* either caused or aggravated plaintiff's neurosis and that plaintiff's neurosis caused his asthmatic condition and ulcer.

Dr. Finch saw plaintiff on January 1, 1960, soon after he reached the hospital, and treated plaintiff in the hospital and thereafter.

On direct examination, Dr. Finch testified he had an opinion satisfactory to himself as to what caused plaintiff's asthmatic attacks and ulcer. When asked his opinion defendants objected. Dr. Finch, directed by the court to "Go ahead," testified as follows:

> "The opinion is that this fellow developed a neurosis, a nervous condition that led to the formation of an ulcer and of an asthmatic condition. Now, my reasons for saying this are that at first I could not evaluate him accurately *because I did not know his background other than what the patient himself related. After talking to his former employee and after talking to other members of his family and finding out that the man had never suffered any symptoms relative to these he now had before* and for them to onset afterwards and with both diseases known to be at least made worse, if not caused, in the opinion of most medical people, by a nervous condition, I would have to, therefore, associate this with the accident in my own mind." (Our italics)

Defendants' motion that the court strike the (quoted) testimony of Dr. Finch was denied and defendants excepted.

Upon cross-examination, Dr. Finch testified: "I stated that I am not an expert in the diseases of the mind and the nervous system. *My diagnosis was made on the basis of what Mr. Seawell's wife and other people had told me about him in the past. My opinion is based on that.*" (Our italics) Defendants excepted to the denial of their motions that Dr. Finch's testimony "as to mental diseases or anything to do with neurosis be stricken," and that "any hearsay evidence that he has presented here be stricken."

Defendants assert all of Dr. Finch's testimony relating to mental diseases or neurosis should have been stricken when he testified he was "not an expert in the diseases of the mind and the nervous system." This contention is without merit.

"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." *S. v. Moore,* 245 N.C. 158, 164, 95 S.E. 2d 548, and cases cited. It was for the court upon all the evidence to determine whether and on what subjects Dr. Finch was qualified to testify as an expert. As stated in *Spaulding v. City of Edina,* 122 Mo. App. 65, 97 S.W. 545: "Whether the doctor considered himself an expert on nervous affections, although a matter to be taken into consideration by the court in order to determine his competency as such, was not conclusive of the question any more than if he had said he was such."

It was admitted that Dr. Finch was "a medical expert specializing in the general practice of medicine." Dr. Finch testified he had psychiatric training while in medical school at Duke but did not hold himself out to be a psychiatrist. Certainly it was within the power of the presiding judge to determine that Dr. Finch was better qualified than the jury to draw inferences from the facts in evidence with reference to the subjects of his testimony. Stansbury, North Carolina Evidence, § 132.

". . . it may be concluded that, by the great weight of authority, a physician or surgeon is not incompetent to testify, as an expert, merely because he is not a specialist in the particular branch of his profession involved in the case; although this fact may be considered as affecting the weight of his testimony." Annotation: 54 A.L.R. 860, 861. It was so held by this Court in *Pridgen v. Gibson,* 194 N.C. 289, 139 S.E. 443.

In *Spaulding v. City of Edina, supra,* the admission of the testimony of a practicing physician concerning the nervous condition of the plaintiff was held proper, although the physician testified that he did not "claim to be an expert on the subject of nervous diseases." In accord: *Sanguinett v. May Department Stores Co.,* 228 Mo. App. 1161, 65 S.W. 2d 162; *Taylor v. Monongahela Railway Co.,* 155 F. Supp. 601; *Parker v. Gunther* (Vt.), 164 A. 2d 152; *McGhee v. Raritan Copper Works* (N.J.), 44 A. 2d 388; *Frye v. Joe Gold Pipe & Supply Co.* (La.), 50 So. 2d 38.

Even so, Dr. Finch was subject to the rules applicable to opinion testimony of expert witnesses.

"It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question." *Spivey v. Newman,* 232 N.C. 281, 284, 59 S.E. 2d 844, and cases cited. "The witness may not base his opinion on facts related to him by the subject whose condition he is testifying about, or by any other person, even though such person be another expert." Stansbury, *op. cit.,* § 136.

Dr. Finch testified he had never examined plaintiff before January 1, 1960, and that the accident on that date was the only thing to which he could trace the ulcer. He testified: "There may be some other facts that I do not know that could have caused it." Plaintiff's wife, plaintiff's former employee, and other members of plaintiff's family, are identified as the source of information on which Dr. Finch based in material part his opinions as to plaintiff's neurosis, asthma and ulcer. What any of these persons told Dr. Finch is not disclosed. Suffice to say, the opinion evidence of Dr. Finch was not based "either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question."

For the reasons stated, defendants' motions to strike the challenged opinion testimony of Dr. Finch should have been allowed and denial thereof was prejudicial error.

Since a new trial is awarded, we need not consider whether defendants were prejudiced by the variance between plaintiff's allegations and evidence in respect of his injuries. Before the next trial plaintiff may, if so advised, move for leave to amend his complaint.

New trial.

DAVID LEVINSON v. THE TRAVELERS INDEMNITY COMPANY.

AND

MRS. GLORIE LEVINSON v. THE TRAVELERS INDEMNITY COMPANY.

(Filed 1 February 1963.)

1. Insurance § 61—

If insurer fails to give insured 15 days notice in conformity with statute of insurer's cancellation of an assigned risk policy of automobile liability insurance, the contract remains in force as to injured third persons; if insurer gives notice in conformity with statute, insurer's obligation ends at the time fixed, notwithstanding insurer fails to notify the Commissioner of Motor Vehicles. G.S. 20-310.

2. Same; Insurance § 65—

If insured requests insurer to substitue another vehicle for the vehicle insured, the operation of the original vehicle thereafter by insured, or under insured's authority, is unlawful, G.S. 20-313, and under the rules of the Commissioner of Insurance in conformity with statute insurer properly uses Form FS-1, and Form FS-4 is not required. G.S. 20-315.

3. Same; Insurance § 54—

Where insured requests insurer to substitute another vehicle for the vehicle insured, and insurer in compliance with the request endorses the policy and issues form FS-1, there is no cancellation of the policy but the policy does not thereafter cover the original vehicle, and no liability can attach to insurer for any injuries inflicted in the negligent operation of the original vehicle by insured or by another with insured's permission.

APPEALS by plaintiffs from *Williams, J.*, June 1962 Civil Term of ROBESON.

On 24 January 1961 plaintiffs were injured in a collision between a 1955 Buick automobile operated by the widow of Donald E. Rutherford and a Chrysler owned by Mrs. Levinson, operated by Mr. Levinson. Plaintiffs, asserting their injuries resulted from the negligent operation of the Buick, sued and obtained judgments against Mrs. Rutherford. Plaintiffs then instituted these actions against defendant claiming it was obligated to pay on the judgments against Mrs. Rutherford the sums named in a policy of liability insurance issued by defendant on 8 May 1960 as an assigned risk to Donald E. Rutherford.

Defendant admitted issuing a policy of liability insurance on 8 May 1960 to Donald E. Rutherford covering a 1956 Ford station wagon and a 1955 Buick. The policy was, at the request of the named insured, amended so as to substitute a 1949 Oldsmobile which replaced the 1955 Buick.

The cases were consolidated. The parties waived jury trial and stipulated the facts. The court adjudged plaintiffs were not entitled to recover.

Britt and Campbell by David M. Britt for plaintiff appellants.
Henry & Henry by Ozmer L. Henry for defendant appellee.

RODMAN, J. The policy of insurance issued by defendant was for a term of one year. The collision occurred while the policy was in force. Defendant concedes Mrs. Rutherford comes within the definition of "insured" when operating an automobile for which protection was provided.

The facts determinative of the rights of the parties as stipulated are these: "On 21 July 1960, the said Donald Eugene Rutherford requested defendant to discontinue the insurance provided by said policy on said 1955 model Buick and substitute in the place thereof a 1949 Oldsmobile; pursuant to said request defendant on 21 July 1960 issued an amendment endorsement to said policy for the purpose of discontinuing said policy of insurance on said Buick and substituting a 1949 Oldsmobile. . .Defendant did not file Form FS-4 with the North Carolina Department of Motor Vehicles, but defendant did duly issue Form FS-1 covering 1949 Oldsmobile as a replacement for the 1955 Buick and delivered the same to Donald Eugene Rutherford. Said Form FS-1 was not on file with said Department of Motor Vehicles at the time of the accident in question.

"The 1955 Buick referred to in the original policy, and endorsement thereof, was registered in the name of Donald Eugene Rutherford with the North Carolina Department of Motor Vehicles on the date of said collision, to wit: On January 24, 1961."

Defendant was notified of the institution of the actions against Mrs. Rutherford. It declined to defend, "contending that it provided no coverage on said Buick automobile."

Defendant's liability, if any, is imposed by the Financial Responsibility Act of 1957, c. 1393, S.L. 1957, now c. 20, art. 13 of the General Statutes. Plaintiffs insist liability is imposed by the express language of G.S. 20-310, which requires notice to the Commissioner when a policy is cancelled. Defendant asserts that section is not applicable to the facts of this case.

G.S. 20-315 makes it the duty of the Commissioner of Motor Vehicles to "administer and enforce the provisions of this article relating to registration of motor vehicles and make necessary rules and regulations for its administration." Acting pursuant to this statutory com-

mand, the Commissioner promulgated rules which, as revised in November 1958, were published and distributed under the title "Insurance Handbook."

Rule 1 of the "Handbook" requires insurer to furnish insured a certificate designated as Form FS-1. This form, when completed, gives this information: Name of insured, name of insurer and policy number, effective date of insurance, and a description of the insured vehicle or vehicles. It also contains a space for "Description of Vehicle Replaced if Certificate is Filed for Such Reason." On the reverse side of the form are "Instructions to Vehicle Owner" and to "Insurance Company." Owner is instructed to forward the certificate to the Department of Motor Vehicles. The instructions to insurer provide: "For replacement of vehicle do not use Form FS-4—enter on Form FS-1 the description of the newly covered vehicle in the upper line and the replaced vehicle in the lower line."

Form FS-4 is designated "Notice of Termination." The instructions with respect to this form state: "Do not use this Notice of Termination (FS-4) for replacement of motor vehicle when coverage is continuous. For that purpose use Certificate of Insurance (FS-1)."

Rule V, headed "Replacements — Vehicle Changes," provides, so far as here pertinent: "A. If the vehicle is replaced an FS-1 must be issued on the replacing vehicle. The FS-1 has a space in which to show the description of a replaced vehicle. If this is used, the FS-1 becomes a 'superseding certificate' and serves to certify coverage on the new vehicle and to terminate the filing on the replaced vehicle. In this case, no FS-4 is required." "C. If the car is removed and not replaced an FS-4 must be sent to the Financial Security Section, Department of Motor Vehicles not later than fifteen (15) days following the effective date of removal."

Defendant complied with the rules promulgated by the Commissioner. Plaintiffs assert these rules are in conflict with the express language of the statute, G.S. 20-310, and for that reason afford no protection.

The statute requires an insurer, before it terminates its contractual relationship with its insured, depriving him of protection, to give fifteen days' notice. This gives insured reasonable opportunity to procure other insurance. If the notice fails to conform to the statute, the contract remains in force. *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E. 2d 149. When the notice to the insured conforms to the statute and gives him information necessary for his protection, the contractual obligation ends at the time fixed. This is so notwithstanding insurer's failure to notify the Commissioner as directed by G.S. 20-310. *Nixon v. Insurance Co.*, 258 N.C. 41; *Faizan v. Insurance Co.*, 254 N.C. 47,

118 S.E. 2d 303. The statute was intended to protect insured from the acts of the insurer not from his own intentional acts. Operation of a motor vehicle without insurance or deposit for the protection of those injured as a result of its use is a crime. G.S. 20-313.

Here the contractual relationship betweent defendant and Donald Rutherford did not terminate. Defendant continued to afford protection in the operation of two motor vehicles—the Ford and the Oldsmobile which was substituted for the Buick. By policy provision Rutherford was protected if he acquired another vehicle to replace one of the vehicles named in the policy. We take judicial notice of the fact that similar provisions are generally included in automobile liability insurance policies.

These provisions for automatic insurance coverage when replacing an old car with another facilitate the registration and licensing of newly acquired cars. This fact was doubtless the reason which caused the Commissioner, when promulgating rules, to require a single form (FS-1) which describes both the new and the replaced vehicle rather than two forms each containing a part of the information necessary for the proper maintenance of the records in the Commissioner's office. The rules appropriately provide that this FS-1 should be given to the owner of the vehicle replacing one named in the policy. It was unlawful for Rutherford to operate or permit the Oldsmobile to be operated until registered and licensed in his name. With the FS-1 in his possession the insured could register the Oldsmobile and obtain license to operate.

When Rutherford requested the amendment, he in effect said to defendant, "I can damage no one by the 1955 Buick because I will neither operate it nor authorize anyone to operate it after this date." This is so because a replacement vehicle "must replace the car described in the policy which must be disposed of or be incapable of further service at the time of replacement." *Insurance Co. v. Shaffer,* 250 N.C. 45 (52), 108 S.E. 2d 49.

The stipulated facts do not disclose a cancellation of the policy of insurance. They merely show that the policy did not, after 21 July 1960, cover the 1955 Buick. *Underwood v. Liability Co.,* 258 N.C. 211. Insured's act placed the responsibility of notifying the Commissioner that the replaced vehicle was no longer covered on the insured—not the insurer. If the insured had complied with the law, registered and licensed the Oldsmobile, the records in the Commissioner's office would have disclosed the fact that there was no insurance on the Buick. The operation of that vehicle after 21 July by Mrs. Rutherford was unlawful. This unlawful act did not impose liability on defendant.

Affirmed.

ROBERT L. SPIVEY v. G. W. GODFREY AND WIFE, MRS. G. W. GODFREY AND W. W. SEYMOUR, ADMINISTRATOR OF THE ESTATE OF D. M. SPIVEY.

(Filed 1 February 1963.)

Executors and Administrators; §§ 6, 8; Descent and Distribution § 10—

Title to personal property of an intestate vests in his administrator and not his next of kin, and the next of kin may not sue a debtor of the estate for their distributive share in the absence of allegation of request upon and refusal of the personal representative to sue, collusion between the debtor and the personal representative, insolvency of the personal representative, or other like circumstance, even though the personal representative is made a party defendant and the next of kin allege that the proceeds of the debt are not necessary to pay the cost of administration or obligations of the estate.

APPEAL by plaintiff from *Mallard, J.*, September 1962 Term of LEE.

Plaintiff instituted this action in his own right on June 29, 1962 to recover from the individual defendants the sum of $1,252.43, money which belonged to D. M. Spivey, deceased. W. W. Seymour, administrator of D. M. Spivey, was made a party defendant.

The complaint alleges the following facts:

Plaintiff is an heir at law and one of the next of kin of D. M. Spivey who died intestate December 29, 1961. Plaintiff is entitled to one-sixth (⅙th) of the estate and the *feme* defendant is also entitled to one-sixth (⅙th). Defendant, W. W. Seymour, was appointed administrator of D. M. Spivey on January 12, 1962, and is presently acting in that capacity. After he was appointed, Mr. and Mrs. Godfrey disclosed "that they held and had in trust for the benefit of all the heirs of said estate the sum of $13,514.60, the property of the late D. M. Spivey, which was to be divided among his heirs at law and next of kin, ratably, according to their interest, ..." Plaintiff's share of these funds amounted to $2,252.43, of which $1,000.00 has been paid him. No part of these funds has come into the hand of the administrator and he needs no part of the funds for the payment of debts or the cost of administration.

Plaintiff prayed judgment for $1,252.43, the alleged balance due. The individual defendants demurred to the complaint on the grounds that the plaintiff has no legal capacity to sue and that there is a defect of parties plaintiff, G.S. 1-127. The demurrer was sustained and the action dismissed. Plaintiff appealed.

Hoyle and Hoyle for plaintiff appellant.

Gavin, Jackson and Williams, for defendants, appellees.

SHARP, J. Pending the administration of an estate, it is well settled that title to personal property of an intestate vests in his administrator and not his next of kin. *Merrill v. Merrill,* 92 N.C. 657; *Snipes v. Estates Administration, Inc.,* 223 N.C. 777, 28 S.E. 2d 495; *Sales Co. v. Weston,* 245 N.C. 621, 97 S.E. 2d 267; *Rudisill v. Hoyle,* 254 N.C. 33, 118 S.E. 2d 145. Therefore, it necessarily follows that the administrator, and not creditors or next of kin, is the proper party to bring an action to collect a debt due the estate or to recover specific personal property. G.S. 28-172; 21 Am. Jur., Executors and Administrators, Section 897; *Rogers v. Gooch,* 87 N.C. 442; *Tulburt v. Hollar,* 102 N.C. 406, 9 S.E. 430; *Gilliam v. Watkins,* 104 N.C. 180, 10 S.E. 183. If a debt is due a decedent, it can be collected only by his administrator. *Brown v. Wilson,* 174 N.C. 636, 94 S.E. 416; *Anderson v. Anderson,* 177 N.C. 401, 99 S.E. 106; *Penland v. Wells,* 201 N.C. 173, 159 S.E. 423.

To this general rule, however, there are certain exceptions. If the administrator has refused to bring the action to collect the assets; if there is collusion between a debtor and a personal representative — particularly if the latter is insolvent; or, if some other peculiar circumstance warrants it, the creditors or next of kin may bring the action which the personal representative should have brought. 34 C.J.S., Executors and Administrators, Section 738(b); Anno. 158 A.L.R. 729, 730; *Spack v. Long,* 22 N.C. 60; *Fleming v. McKesson,* 56 N.C. 316; *Wilson v. Pearson,* 102 N.C. 290, 9 S.E. 707. However, in such a case the administrator must be a party defendant. *Murphy v. Harrison,* 65 N.C. 246; *Lansdell v. Winstead,* 76 N.C. 366; *Hardy v. Miles,* 91 N.C. 131; *Snipes v. Estates Administration, Inc., supra.*

In the complaint under consideration there are no allegations which would bring this case within any of the stated exceptions. The question posed on this appeal is this: Without such allegations, may one of six next of kin of an intestate, by making his administrator a party defendant, maintain an action against another of the next of kin for his distributive share of decedent's money which that other is wrongfully withholding? The answer is NO.

In at least two cases the Court has permitted the next of kin to maintain a suit against the representative of a defaulting administrator for a distributive share in the estate by making the administrator d.b.n. of the intestate a party defendant even though there were no allegations of collusion or refusal to bring suit. *Hardy v. Miles, supra* and *Snipes v. Estates Administration, Inc., supra.* In *Hardy,* the record was so voluminous that the court remanded the case so that the administrator d.b.n. could be made a party in order to save the litigants

"the repetition of the trouble and vexation they have already encountered." In *Snipes, Denny, J.* (now C.J.) reviewed the cases and said:

> "Consequently, under the facts disclosed on this record and in view of the character of the relief sought, it is proper but not mandatory that the administrator d.b.n. shall bring the action, but it is necessary for him to be a party to the action, either as the plaintiff or as a party defendant, in order to prevent a dismissal thereof . . . *The better, and more orderly, procedure is for the next of kin to bring such action only after the administrator d.b.n. has refused to do so.* However, we are not advertent to any case, and the appellant cited none, where this Court had dismissed an action of this character brought by the next of kin, for lack of necessary parties, where the administrator d.b.n. was named a party defendant . . . In the present action, if the relief sought is obtained, the assets of the estate of Bruce Snipes, deceased, will not be recovered by these plaintiffs directly, but said assets will belong to J. M. Wells, Jr., administrator d.b.n. of said estate and administered by him as provided by law, and the plaintiffs will receive from said administrator their distributive share of said estate." (Italics ours).

In both *Hardy* and *Snipes,* plaintiffs were seeking to recover their distributive shares of an estate from the representative of a former administrator whom they alleged had wrongfully converted or failed to account for it. In the instant case, the plaintiff's claim is not against the administrator but against a debtor of the estate. Indeed, although plaintiff has made the administrator a party defendant, what he really seeks to do here is by-pass an incomplete administration. Plaintiff has alleged that no part of the funds for which he sues is needed for costs or debts, but this action was instituted before the time had expired for creditors to file claims against the estate. G.S. 28-47. The administrator was appointed January 12, 1962; this suit was begun June 29, 1962.

It is one situation when the next of kin sue an administrator for conversion or negligence and quite another when they attempt to take over the administrator's duty. One is within the administration; the other is without. A suit by one of the next of kin to collect his share of decedent's funds in the hands of a third person is no different from a suit by a creditor of the estate to collect a debt due it. In the absence of allegations bringing the suit within one of the exceptions, this has never been permitted. *Nicholson v. Commissioners of Dare County,* 118 N.C. 30, 24 S.E. 728; *Davidson v. Potts,* 42 N.C. 272.

This Court has stressed the necessity for an orderly administration of estates. In *Alston v. Batchelor,* 41 N.C. 368, in holding that a legatee may not pay off the debts of a testator and then file a bill for repayment, it said: "It is the duty of the executor or administrator to pay debts; and if a legatee was allowed to interfere, it would be inconvenient and derange the clear course of administration."

We cannot imagine anything more calculated to interfere with an orderly administration than suits by impatient creditors or next of kin who attempt to preempt the duties of the personal representative by making him a party defendant to the suit. We think this case is controlled by *Nance v. Powell,* 39 N.C. 297. The factual situation there is somewhat complicated but, in essence, is this: The children of decedents, D and E, brought a suit against P the administrator of R, for two shares in the estate of R which they alleged had been assigned to D and E by defendants B and F. Without alleging any collusion or exceptional facts to justify it the plaintiffs made L, as the administrator of D and the executor of E, parties defendant. The position of the defendant was that he was ready to account to the proper person but that he was at liberty to account only to the executor and administrator of E and D respectively. The Court in sustaining this position and dismissing the action, said:

> "Legatees, next of kin and creditors of a deceased person can only file a bill against a debtor to the deceased, or his trustee, by charging collusion between the debtor or trustee and the personal representative, or some other peculiar circumstances, which give a right to the legatees, next of kin or creditors, to bring that suit which the personal representative might and ought to have brought. Collusion is the usual foundation of such a bill, and without it or some equivalent ground, as the insolvency of the executor or the like it will not lie."

If the allegations in the complaint under consideration are true, and the administrator had knowledge of the facts alleged, it was his duty to bring an action to recover not only for the plaintiff's one-sixth interest in the fund but the others as well. In a proper case, a personal representative may be removed for failure to prosecute or defend actions in behalf of the estate he represents. 23 C.J., Executors and Administrators, Section 297; 33 C.J.S., Executors and Administrators, Section 90; *Simpson v. Jones,* 82 N.C. 323. But clearly a request to sue and a refusal would be conditions precedent.

In addition to the plaintiff and the *feme* defendant, there are others of the next of kin of D. M. Spivey who represent four distributive

shares and are not parties to this action. If plaintiff were to be allowed to maintain this action, the court ought not to deal with the merits of the case unless these absent parties were also brought in. *Huson v. McKenzie et al,* 16 N.C. 463; *Parker v. Cobb,* 131 N.C. 25, 42 S.E. 531.

This case points up some of the difficulties which may be expected when orderly procedures for settling an estate are disregarded. The administrator's duty to collect funds belonging to the estate cannot be waived or obliterated by an allegation that he does not need them to pay the obligations of the estate. The interest of the next of kin in an estate is ordinarily only in distribution. The administrator owes a duty not only to the next of kin but to the creditors, the probate Court, and to the government.

Although the rule has been relaxed to permit next of kin to sue the representative of a defaulting administrator for their shares of the estate when the administrator d.b.n. is made a party defendant, the Court emphasized in *Snipes, supra,* that in the absence of exceptional circumstances this is not the orderly procedure. We are not inclined to relax the rule further so as to permit the next of kin to institute a suit to collect assets from a third party during the course of an apparently orderly administration.

The ruling of the court sustaining the demurrer and dismissing the action is

Affirmed.

ETHEL LEE PEELE; LEON SMITH AND WIFE, LOIS G. SMITH; BY HER NEXT FRIEND, GEORGE L. CAUSE v. L. E. HARTSELL, T/A HARTSELL MOTOR COMPANY.

(Filed 1 February 1963.)

1. Actions § 8; Negligence § 2—

Allegations and evidence that defendant, in the course of performing his contract to move plaintiff's heavy trailer, elected not to pull it backward over hard ground but pulled it forward into marshy ground, where it became stuck, and then pulled it sideways out of the mud, resulting in damage to the trailer, *held* to constitute a cause of action in tort for defendant's failure to use due care not to injure plaintiffs' property in the performance of the contract, and not a cause of action *ex contractu,* the contract merely creating the relationship and circumstances imposing on defendant the duty to use due care not to injure plaintiffs' property.

2. Pleadings § 4—

The relief to which plaintiffs are entitled is determined by the evidence and not the conclusions of the pleader nor the prayer for relief.

3. Negligence § 24a—

Evidence that defendant's employee, in the performance of defendant's contract to move plaintiffs' heavy trailer, elected to pull the trailer forward over marshy ground where it became stuck, that defendant then ordered his employee to unhook the tractor and leave the trailer, but, upon the *feme* plaintiff's insistence that he perform the contract, defendant directed that the trailer be pulled sideways through the mud, resulting in damage to the trailer, *is held* sufficient to overrule nonsuit on the issue of defendant's negligence, since defendant should have foreseen that damage to the trailer would likely ensue from the method by which he elected to perform the contract.

4. Trial § 21—

On motion to nonsuit, plaintiffs' evidence is to be taken as true and all the evidence considered in the light most favorable to plaintiffs, giving them the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence.

5. Damages § 12—

Where the issue is the difference between the market value of plaintiffs' trailer immediately before and immediately after defendant's negligence, testimony as to the value of the trailer three years thereafter when repairs had been attempted and the trailer had been moved several times, *held* incompetent as being too remote.

APPEAL by plaintiffs from *Gambill, J.*, March 12, 1962 Term of RICHMOND.

This is an action to recover for damage done to plaintiffs' house trailer when defendant, pursuant to contract, attempted to move it.

Plaintiffs allege that defendant contracted to move their 1957 trailer from a site on U. S. Highway No. 74 near Rockingham, North Carolina, eighty-two miles to Rock Hill, South Carolina, for a consideration of thirty dollars; "that it was implied in the contract with the defendant that said defendant would use due care in the moving of said trailer to keep from damaging said trailer in the performance of the contract"; the defendant breached the contract by attempting to move the trailer in a circle over soft earth when it could have been pulled backwards over solid ground; that, in the exercise of due diligence, he should have known that it could not be moved in safety over such wet, mushy ground; that as a result it became partially buried in the mud; that then defendant "further failed to use due care and preserve the condition of said house trailer and, in breach of said contract, pulled said trailer out of the mud at an angle" by means of a

wrecker; and that as a result the trailer was twisted, warped, and damaged in the sum of $4,200.00 "by the defendant in the breach of his contract."

The plaintiffs' evidence and admissions in the pleadings tend to show the following facts:

The outside of the trailer involved in this action was aluminum; the inside walls and ceiling were plywood; and the floor was tiled. It was forty-two feet long and eight feet wide. It had four wheels, two on each side about the center of the unit. It contained four rooms and bath, and was completely furnished, including a stove, washer, and refrigerator. On February 12, 1959, defendant contracted with Mrs. Smith one of the plaintiffs, to move it to Rock Hill the next day if the weather were clear. It had been raining for two or three days.

On the morning of February 13, 1959, defendant sent his employee, Ernest Barnes, with a truck called a short dog and especially designed to move mobile units, to take the trailer to South Carolina. The trailer had been unblocked the night before. Barnes hooked the short dog to the hitch on the front of the trailer and then asked Mrs. Smith which way he should go out to the highway with the trailer. She said, "Mr. Barnes, I can't tell you, as long as you are hooked to the trailer, you are responsible for it, and I couldn't say which way." Fairley Ivey, an uncle of Mrs. Smith's, was present at the time. He told Barnes not to pull the trailer through the yard in front of the trailer occupied by Mrs. Smith's mother and parked eight feet from plaintiffs' trailer; that the ground there was too boggy to withstand its weight and he would get stuck. He advised him to back the trailer straight out because that route would be over bedrock to the highway. Barnes looked at the ground and told Ivey that he preferred to go across the yard. When he had gone about twenty feet, the wheels of the trailer became buried in the mud so that he was unable to move it farther. After several unsuccessful efforts, Barnes telephoned the defendant who ordered him to unhook the short dog, leave the trailer where it was, and return to his place of business. When this message was relayed to Mrs. Smith, she immediately telephoned the defendant and told him that if he unhooked from her trailer and left it stuck in the mud he would be sorry; that she wanted it out of the mud that day. Her husband was working in South Carolina; she was in Richmond County with her baby; and her trailer was stuck in the mud, disconnected from utilities. She told Barnes that she did not know what to do and he said he would call Mr. Morse who had a wrecker. He called Morse and inquired what he would charge to pull the trailer out. Morse said the cost would depend on the time involved. He came with the wrecker and, after

disconnecting it from the trailer, pulled the short dog out of the mud. He then hooked a chain from the winch on the back of the wrecker to the side hitch of the trailer but he could not move it. Morse announced that he would not be responsible for anything that happened to the trailer. Mrs. Smith did not expect him to be responsible because she had no contract with him.

The defendant himself came to the scene after Morse arrived, and was present when Morse failed to move the trailer with the wrecker. Defendant parked his automobile on the highway next to the trailer, opened the door, turned around in his seat, and — without getting out of the car — "was telling Mr. Barnes how to get the trailer unstuck, giving him directions on how to get the trailer unstuck to get it out of there." Defendant stayed at the scene about half an hour, and Barnes and Morse got the trailer out before he left. After Morse was unable to move the trailer with the wrecker alone, he and Barnes hooked the truck to the side of the trailer, put boards under the truck wheels, took the chain from the winch on the wrecker and hooked it to the front bumper of defendant's truck and the two vehicles together pulled the trailer sideways through the mud across the yard. Thereafter it took five truckloads of dirt and rock to fill up the holes which were made in the yard.

When the trailer was pulled sideways, at least five inches of the front end dug through the mud. The trailer "cracked and popped," and two jalousied glasses in the door were broken. The plywood boards under the tile in the kitchen buckled, screws pulled through the aluminum siding and the seams at the top of the unit separated. Thereafter the trailer leaked and it was never possible to level it so that the washing machine could be used.

After Morse got the trailer out he told Barnes the bill was fifteen dollars, and Mrs. Smith said she would send the money back. Barnes agreed to stand good for the money until he returned from Rock Hill, and Mrs. Smith's father gave Barnes the money. As soon as the trailer was removed from the mud Barnes took it to Rock Hill with defendant's short dog, and Mrs. Smith paid him the thirty dollars for moving it.

After a year in Rock Hill Mr. Smith was transferred to Camden, fifty-five miles away. They moved the trailer to Camden and, after a time, they moved back to Rock Hill with the trailer. In November 1961 in Charlotte, the plaintiffs traded the trailer for another. Evidence of its condition at that time was excluded upon objection.

At the close of plaintiffs' evidence the defendant's motion for nonsuit was allowed. Plaintiffs appealed.

Pittman, Pittman & Pittman for plaintiff appellants.
Webb & Lee by Charles Sedberry for defendant appellee.

SHARP, J. Plaintiffs have misconstrued the nature of the cause of action which they have stated. It is not in contract but in tort. *Pinnix v. Toomey,* 242 N.C. 358, 362, 87 S.E. 2d 893; 12 Am. Jur., Contracts, Section 458. *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551.

The following observations of the Oklahoma Court in *Jackson v. Central Torpedo Company,* 117 Okla. 245, 246 Pac. 426, 46 A.L.R. 338, are pertinent:

> " 'If the transaction complained of had its origin in a contract which placed the parties in such a relation that, in attempting to perform the promised service, the tort was committed, then the breach of the contract is not the gravamen of the suit. The contract in such case is mere inducement, creating the state of things which furnishes the occasion of the tort, and in all such cases the remedy is an action on the case. For illustration, take the contract of a carpenter to repair a house, — the implication of his contract is that he will bring to the service reasonable skill, good faith, and diligence. If he fails to do the work, or leaves the house incomplete, the only remedy against him is ex contractu; but suppose he, by want of care or skill, destroys or wastes material, or makes the repairs so unskillfully as to damage other portions of the house; this is tort, for which the contract only furnished the occasion. *Mobile L. Ins. Co. v. Randall,* 74 Ala. 170.' "

However, the relief to which plaintiffs are entitled is determined by the evidence and not the conclusions of the pleader or the prayer for relief. 3 N. C. Index, Pleadings, Section 4, p. 610.

It is plaintiffs' contention that when Barnes attached defendant's short dog to the trailer, possession and control of the trailer passed to the defendant and there was a bailment; that thereafter the trailer was damaged while in defendant's possession and proof of this damage entitled plaintiffs to go to the jury under the *prima facie* case rule stated in *Hanes v. Shapiro,* 168 N.C. 24, 84 S.E. 33; *Insurance Co. v. Motors, Inc.* 240 N.C. 183, 81 S.E. 2d 416, and many other cases. The *prima facie* rule is not applicable here; plaintiffs have no need of it. They know exactly how the damage to the trailer occurred. Mrs. Smith was an eye witness to the entire fiasco. *Insurance Co. v. Motors, Inc., supra.*

It matters not whether the relationship between plaintiffs and defendant was that of bailor and bailee. A contractual relationship exist-

ed between them, and out of that relationship arose the defendant's duty to exercise due care to protect the plaintiffs' trailer. *Insurance Asso. v. Parker,* 234 N.C. 20, 65 S.E. 2d 341. As defendant frankly concedes in his brief, "(W)hile Barnes was performing defendant's contract with plaintiffs to move the trailer from its original location in Richmond County to Rock Hill, South Carolina, Barnes was under a duty to exercise reasonable care not to cause damage to said trailer."

The evidence was plenary that the negligence of Barnes caused the trailer to become stuck in the mud, but defendant contends that if the trailer were damaged, the damage occurred while it was being removed from the mud by the wrecker. Defendant argues that he is not responsible because, upon being informed that the trailer was stuck, he instructed Barnes to unhook the short dog from it, return to his place of business and leave the trailer alone. It is not necessary to decide what defendant's liability would have been had these instructions been followed by Barnes and by defendant himself. They were not. When Mrs. Smith insisted that defendant comply with his contract he came to the scene himself. Defendant admits in his brief that "there is evidence that he (defendant) was telling Barnes how to get the trailer unstuck." He maintains, however, that there is no evidence that these instructions proximately caused damage to the trailer. With this contention we cannot agree.

The trailer had front, back and side hitches. Under defendant's direction the short dog was hooked to the side of the trailer, the wrecker hooked to the front bumper of the short dog, and the two vehicles together pulled the trailer sideways through the mud. Under the evidence produced, it was for the jury to say whether the defendant should reasonably have anticipated that damage to the trailer would result from this method of extraction.

"On motion to nonsuit, plaintiff's evidence is to be taken as true and all the evidence considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence." 4 N. C. Index, Trial, Section 21, p. 312.

The motion for nonsuit was erroneously granted.

Since this case goes back for trial by jury, plaintiffs' assignment of error No. 2 merits attention. Paul Many, a contractor with fifteen years experience "in this business," testified that he examined the trailer on February 13, 1962 in Charlotte. Upon objection, his proffered testimony with reference to its condition on that date was excluded. Many first saw the trailer three years after the alleged damage had occurred; repairs had been made or attempted; it had been moved

three times. The trial judge reasoned that his evidence was too remote to throw any light on the difference in the value of the trailer immediately before and immediately after the injury on February 13, 1959. The exclusion of this evidence was not error.

> "Within what range as to place and time witnesses shall be confined in their testimony to the value of personal property, when its value comes in question, must often depend upon the circumstances of the case and be in the discretion of the trial judge." 15 Am. Jur., Damages, Section 349.

For the reasons herein stated the judgment below is
Reversed.

TROY SMITH v. WILLIAM C. PERDUE, ADMINISTRATOR OF THE ESTATE OF W. P. MOSER, AND WILLIAM C. PERDUE, ADMINISTRATOR OF THE ESTATE OF MAGGIE J. MOSER.

AND

WILLIS SMITH v. WILLIAM C. PERDUE, ADMINISTRATOR OF THE ESTATE OF W. P. MOSER, AND WILLIAM C. PERDUE, ADMINISTRATOR OF THE ESTATE OF MAGGIE J. MOSER.

(Filed 1 February 1963.)

1. Evidence § 11; Executors and Administrators § 24a—

In actions by husband and wife to recover for personal services rendered decedent, each is competent to testify for the other as to transactions between the decedent and the other tending to establish an agreement that the decedent should pay for the services. G.S. 8-51.

2. Executors and Administrators § 24a—

The evidence in this case *is held* sufficient as to each plaintiff to show that each rendered personal services to each decedent upon an express contract that decedent would pay for such services either during his lifetime or in his will.

3. Same; Evidence § 39—

It is competent for witnesses to testify as to the value of personal services rendered a decedent when the testimony is based on services which they themselves actually saw rendered.

4. Evidence § 29—

In an action to recover against the estate of husband and wife for personal services rendered them, it is competent for a witness to testify that the husband, after the death of his wife, stated that plaintiffs had cared for him and his wife in accordance with their agreement and that

he was sure that plaintiffs would continue to care for him, and that he planned to pay them well for their services, the declaration being competent as an admission against interest as to both estates, her net estate belonging to him, there being no children. G.S. 29-14(4).

5. Executors and Administrators § 24a; Trial § 16—

In an action to recover for personal services rendered decedent, evidence as to the value of a tract of land owned by decedent is incompetent, but where the court withdraws such incompetent testimony and categorically instructs the jury not to consider it and in the charge stressfully instructs the jury that plaintiffs were entitled to recover only the reasonable value of the services rendered, the admission of such evidence will not be held prejudicial, it being apparent from the entire record that any prejudicial effects were removed by the instructions of the court.

6. Executors and Administrators § 24d—

Where personal services are rendered under an express contract for payment without specifying the amount of compensation, a promise to pay the reasonable value of such services is implied and plaintiffs are entitled to recover the reasonable value of such services.

APPEAL by defendant from *Carr, J.*, April 1962 Civil Term of ALAMANCE.

These two actions, each by a different plaintiff for personal services rendered the same two decedents over a period of approximately nineteen years, were consolidated for trial. The defendant is the duly appointed administrator of W. P. Moser and also of Maggie J. Moser, both of whom died intestate. The plaintiffs are husband and wife. Each alleged, and offered exidence tending to show, that from the spring of 1941 until the spring of 1960, he rendered services to W. P. Moser and his wife, Maggie J. Moser, upon the express promise of each to "fully and adequately compensate" plaintiff either during his lifetime or in his will but that no compensation was made. Mrs. Moser died on May 10, 1960 at the age of seventy-nine; Mr. Moser died on April 23, 1960 at the age of eighty-four. Plaintiff Troy Smith was the nephew of Mrs. Moser.

As to each plaintiff, the judge submitted the case to the jury on the hypothesis of both an express and implied contract. On the first, he charged the jury that the plaintiff would be entitled to recover the reasonable value of his services rendered each from March 1941 until decedent's death in May 1960; on the second, the reasonable value of such services rendered during the three years immediately prior to the death of each decedent. In both actions the jury found that the plaintiff had rendered services under a contract as alleged in the complaint and that he had not been paid. The verdict established that the estate

of W. P. Moser owed Troy Smith $17,884.00, and the estate of Mrs. Moser owed him $4,750.00; that the estate of W. P. Moser owed Willis Smith $4,940.00, and the estate of Mrs. Moser owed her $9,880.00 From judgment on the verdicts the defendant appealed assigning errors in the charge, in the admission of evidence, and the ruling on the motion for nonsuit.

Clarence Ross, Thomas C. Carter and B. F. Wood for plaintiff appellees.

Allen and Allen for defendant appellants.

SHARP, J. Over objection, each plaintiff testified for the other. This was permissible procedure and defendant's assignments of error to the evidence thus elicited are not sustained. We have consistently held that in actions of this kind the relationship of husband and wife does not render the testimony of one for the other incompetent under G.S. 8-51. *Burton v. Styers,* 210 N.C. 230, 186 S.E. 248; *Bank v. Atkinson,* 245 N.C. 563, 96 S.E. 2d 837.

As a witness for her husband, Willis Smith testified that in March 1941 while they were visiting in the home of the Mosers, Mr. Moser said to him: "Troy, we are getting up in years and we have no children, and there will be lots of things we need to have done for us that we can't do ourselves. Will you do these things for us as long as we live? We will take care of you well for these services in our wills. I want you to have a tract of land, enough to make you a living and enough money to build a nice house." To this question she testified that her husband answered, "I will so long as you live." She further testified that Mrs. Moser was present when this conversation took place and she said, "We have talked this over many times and this is what I want, will you do it?" and he said, "Yes, I will so long as you both live."

Troy Smith, as a witness for his wife, testified that he heard both Mr. and Mrs. Moser tell her that she was doing what she was told to do in carrying out the plan and that she would be taken care of in their will.

Numerous other witnesses testified that at various times between March 1941 and May 1960, both Mr. and Mrs. Moser had declared that plaintiffs had more than fulfilled their promises; and that they would be repaid for all they had ever done for them.

The evidence of plaintiffs further tended to show the following facts:

Up until about 1945, when his physical condition forced him to give it up, Mr. Moser had operated a dairy farm. He suffered with high blood pressure, arthritis and urinary disturbances. Mrs. Moser

had a lung ailment, hypertension, cardiac enlargement, and circulatory disorders resulting from an embolism. Services rendered by Mr. Smith included cutting and hauling wood, feeding cattle, delivering milk, getting groceries, feeding chickens, mending fences cleaning the milk house, carrying Mr. Moser to the doctor, sitting up with him at night, and assisting with the periodic treatments his condition required. Mrs. Smith on occasion cooked and cleaned house, canned and froze produce, gave medicine and helped nurse. Plaintiffs, although they did not live with Mr. and Mrs. Moser, were on call day and night.

The evidence was plenary to overrule the motions of nonsuit.

Based on the services which they themselves actually saw rendered, witnesses testified that the value of Troy Smith's service to Mr. Moser was from $40.00 a week to $1,500.00 a year and to Mrs. Moser, from $20.00 a week to $750.00 a year; that the value of such services renderd by Willis Smith to Mrs. Moser was from $15.00 a week to $300.00 a year and to Mr. Moser, from $5.00 a week to $25.00 a month. This evidence was competent; its weight for the jury.

Over objection, the son of plaintiffs testified that on the afternoon after Mrs. Moser's death, Mr. Moser said to him, "Ronnie, Miss Maggie is gone. As you know, she died this morning. Willis and Troy have continued to care for us as they said they would and I am sure that they will continue to care for me and I plan to well pay them for this service." The court admitted this statement against both estates and the administrator assigns it as error in behalf of both. The statement was clearly competent as an admission against the estate of W. P. Moser. *Gidney v. Moore,* 86 N.C. 484; Stansbury, Evidence, Section 174; 31 C.J.S., Evidence, Section 334. It was likewise admissible against the estate of Mrs. Moser as a declaration against interest. Her net estate belonged to Mr. Moser. G.S. 29-14(4). He is now dead; the statement was against his pecuniary interest; the facts were within his personal knowledge; he made it at a time when there was no motive to misrepresent. *Roe v. Journegan,* 175 N.C. 261, 95 S.E. 495; Stansbury, *supra, Section* 147.

Without objection, Mr. and Mrs. Rainey Pope, witnesses for plaintiffs, testified that they heard Mrs. Moser say in the presence of Mr. Moser that there was a tract of land they wanted Troy to have; that they hoped he would build there and be closer to them or closer to the farm. Mrs. Addie West also testified, without objection, that both Mr. and Mrs. Moser told her they wanted Troy to have a twenty-one acre tract of land known as the peach orchard for a home. Over objection, she was permitted to testify that sometime during the last fifteen months of their lives Mr. Moser had declined an opportunity

to sell it because he had said he wanted Troy to have it. Also over objection, Mr. Pope testified that the peach orchard was worth $2,000.00 an acre in 1959 and 1960. However, at the conclusion of all the evidence, the judge instructed the jury not to consider the evidence as to the value of the land. He said, "The Court instructs you that you will erase it from your minds and not give any consideration to that evidence in making up your verdict in the case."

Evidence as to the value of the peach orchard was not competent. There is no suggestion in the case that either of the plaintiffs had agreed to render services in consideration of a devise or conveyance of the peach orchard. The suggestions were that Mr. and Mrs. Moser hoped plaintiffs would build on the peach orchard *during their lifetime* so as to be near them. This is inconsistent with an intent to devise the property to the plaintiffs. There is nothing in the evidence to indicate that the value of the peach orchard was the value which the parties themselves put on the services plaintiffs were to render to the Mosers.

However, admission of incompetent evidence, even though it is not withdrawn, is no ground for a new trial unless prejudice is shown. *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326. The court withdrew this incompetent evidence and instructed the jury categorically not to consider it. Ordinarily it is presumed that the jury followed such an instruction and the admission is not held to be reversible error unless it is apparent from the entire record that the prejudicial effect of it was not removed from the minds of the jury by the court's admonition. N. C. Index, Trial, Section 16. Whether the withdrawal of incompetent evidence has cured the error or created further prejudice is frequently a difficult question, and each case must be determined in the light of its own particular facts. *Driver v. Edwards,* 251 N.C. 650, 112 S.E. 2d 98.

The defendant contends that the evidence under consideration here was so prejudicial that its effect could not be removed by an instruction to the jury not to consider it. However, in the charge, the judge stressed very forcibly that plaintiffs were only entitled to recover the reasonable value of the services rendered. *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764. He laid down the rule stated in *Beasley v. McLamb,* 247 N.C. 179, 100 S.E. 2d 387, "Where an express contract for services does not specify the amount of the compensation, a promise to pay the reasonable value of the services is implied, . . ."

The evidence was voluminous and conflicting. Thirty witnesses testified. Mr. Moser was an intelligent, industrious man. He was represented by counsel, and alert until a few days before his death.

The jury could have found that plaintiffs were paid for services as they were rendered and that their value was slight. However, it took the other view. The verdict was substantial, but when the jury found that the plaintiffs were entitled to recover for services rendered over nineteen years, we cannot say that the size of the verdict indicates that prejudice resulted from this incompetent evidence.

The defendant makes fifty-one assignments of error. Each has been considered, but obviously we cannot discuss them all. The issues of fact were submitted to the jury under a scrupulously impartial charge by an able judge. In the trial we find no prejudicial error.

No error.

BALLENGER PAVING COMPANY v.
NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 1 February 1963.)

1. Contracts § 30—

Where a contract specifies that time is of the essence and provides liquidated damages in a specified amount for each day over the specified number of working days it should take the contractor to complete the project, the liquidated damages must be computed on the basis of the number of working days taken to complete the contract and not whether the contractee was damaged or inconvenienced by the delay.

2. Administrative Law § 4— Superior Court is limited to questions of law on appeal from award of Board of Review.

Upon appeal from the Board of Review to the Superior Court in a controversy between a contractor and the State Highway Commission as to the amount of liquidated damages which the Commission was entitled to withhold under the contract for the failure of the contractor to complete the project within the number of working days specified, the Board's findings of fact are conclusive and the Superior Court is limited to the question of whether the findings are supported by evidence and, if so, whether the findings support the legal conclusions reached, and while the court properly sets aside a conclusion which is not supported by the facts found, the court may not make additional findings, but must enter judgment in accordance with the Board's findings of fact which are supported by the evidence. G.S. 136-29.

3. Damage § 1—

Nominal damage is a trivial sum awarded in recognition of a technical injury which has caused no substantial damage, and an award of $900 cannot be denominated nominal damage.

APPEAL by defendant from *Clark, S.J.*, March Term 1962 of WAKE.

This cause was instituted before a Board of Review under the provisions of G.S. 136-29 and grew out of the following facts which were either stipulated or found by the Board:

On June 8, 1960, plaintiff contractor and defendant Highway Commission executed a contract whereby the plaintiff agreed to pave 5.75 miles of North Carolina Highway No. 27 in Stanly County according to the specifications for Project No. 6.800066. The contract made time an essential element. Plaintiff bound itself to complete the project within thirty working days to be computed from June 15, 1960. If plaintiff failed to complete the work within the time specified, liquidated damages at one hundred dollars per calendar day were to be assessed for the additional time required. A working day is "(a)ny day, when in the opinion of the Engineer, soil and weather conditions are such as would permit the contractor to proceed toward the completion of his current controlling major operation or operations for a period of more than 6 hours. . . ."

An asphalt plant was essential to the performance of the contract and, on May 24, 1960 when plaintiff bid on this project, it had an asphalt plant available for this use. However, in early June plaintiff ordered a new plant from a reliable supplier who agreed to deliver it to the site of Project W. O. 6.800066 by July 15, 1960. Relying on this commitment, plaintiff elected not to move its old plant to Stanly County. For reasons beyond the control of the plaintiff the new plant was not delivered until August 15, 1960. It was not set up and ready for operation until August 24th, on which day work first began. The project was completed on September 7, 1960 at 9:30 a.m.

On August 9, 1960, plaintiff wrote to the defendant requesting an extension of working days for the completion of the project because of the delay in receiving the asphalt plant. The request was denied. Through June 30, 1960, eleven working days had been charged to the contractor on the project. Through July 15, 1960, eighteen working days had been charged to him. Through July 31, 1960, twenty-four working days had been charged on the project. After establishment of the asphalt plant, the contractor completed the project in eleven days beyond the thirty working days within which the contract provided for the completion of the project. Had the asphalt plant been delivered on July 15th as plaintiff expected, completion of the project would have been delayed for nine calendar days beyond the thirtieth working day.

Section 8.6 of the Standard Specifications applicable to this contract provided, *inter alia*: "In computing the time spent in the execution

of the work, working days will not be charged during periods of delay due to, but not restricted to, the following, provided such delays prevent the contractor from proceeding toward the completion of the current controlling major operation or operations: (1) Unforeseeable causes beyond the control and without the fault or negligence of the contractor. . . ."

Pursuant to this provision the defendant withheld $2,900.00 from its final settlement with plaintiff. Plaintiff thereafter fully complied with all the requirements of G.S. 136-29. He filed his claim for a waiver of the $2,900.00 deduction with the State Highway Engineer who denied the claim. Plaintiff then appealed to the State Highway Commission. A Board of Review was properly constituted and heard the evidence of both parties.

The Board made the findings above set out and, upon them, held "that the delay experienced by Ballenger was such a delay as to be unforeseeable and excusable to the contractor within the provisions of Section 8.6 of the Standard Specifications." It held further, however, that the plaintiff should be assessed $900.00 for the nine calendar days which the project would have been delayed had the asphalt plant been received when plaintiff expected it on July 15th. It awarded plaintiff the sum of $2,000.00.

Upon exceptions to the Board's findings of fact and conclusions of law, the defendant appealed to the Superior Court of Wake County as provided by G.S. 136-29. When the matter came on for hearing the presiding judge held that the findings of fact made by the Board were supported by competent evidence but that "(t)he facts do not support the conclusion that causes of the delay were unforeseeable beyond the control and without fault or negligence of the claimant, within the provisions of Section 8.6 of the Standard Specifications." The correctness of this latter ruling is not questioned by this appeal.

His Honor's judgment continued as follows:

> ". . . . It does not appear that the Board of Review considered the question of whether the liquidated damage provision of the contract was properly and lawfully invoked by the State Highway Commission. In this regard, the contract provided that time was of the essence, but the facts here indicate that both the claimant and the Commission were not concerned about the delay. In two letters dated July 1 and August 1, 1960, the Commission notified claimant of the accumulated working days, but there is no evidence that the Commission requested that work begin or that it suffered any damage or inconvenience by the delay. The Highway was already paved and was adequate for normal traffic. Reference

is made to the Commission's preconstruction meeting letter of August 3, 1960, in which it is stated that the preconstruction meeting was held on that day, about 48 days after construction should have begun.

"The claimant breached the contract, but the State Highway Commission has failed to show that it was entitled to recover liquidated damages. It is entitled to recover only nominal damages, and the court assesses nominal damages in the sum of $900.00.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the State Highway Commission have and recover of the claimant Ballenger Paving Company the sum of $900.00, and it pay to said claimant $2,000.00 of the $2,900.00 withheld.

"Done the 30th day of March 1962.

(s) EDWARD B. CLARK
Judge Presiding."

The defendant excepted to the foregoing portions of the judgment for that "the Court has reviewed evidence and found facts and conclusions, which is beyond the scope of proper review by the Superior Court." On defendant's appeal from the judgment these exceptions constituted assignments of error 3, 4, 5 and 6.

Attorney General Bruton, Assistant Attorney General Harrison Lewis, John C. Daniel, Trial Attorney, for the State.

Maupin, Broughton, Taylor & Ellis for plaintiff appellee.

SHARP, J. The defendant has specifically waived its assignments of error 1 and 2 which charged that the facts found by the Board of Review are not supported by competent evidence. The position of the defendant on this appeal is that the Board's findings of fact are supported by competent evidence but that the judge exceeded his jurisdiction by making additional findings of fact upon which he based *a new award* of $2,000.00 to the plaintiff. The defendant argues that the quoted portions of the judgment (unnumbered paragraphs 4, 5, & 6) are a nullity and that the cause should be remanded for judgment in accordance with the facts found by the Board and the legal conclusion of his Honor that those facts do not support the Board's conclusion that the delay was due to unforeseeable causes beyond the control and without fault or negligence on the part of plaintiff. In other words,

the defendant contends that having reached this legal conclusion, Judge Clark should have modified the award of the Board in conformity with its findings of fact. With this contention we must agree. The Board having found that plaintiff actually delayed the project for eleven days beyond the thirty working days within which the contract required its completion, defendant was entitled to deduct $1,100.00 and the plaintiff is entitled to an award of $1,800.00.

G.S. 136-29 provides that an appeal from the decision of the Board of Review to the Superior Court of Wake County shall be "under the same terms, conditions and procedure as appeals from the Industrial Commission, as provided in Section 97-86." Under this latter section the award of the Industrial Commission is conclusive and binding as to all questions of fact, and the appeal to the Superior Court is for error of law only. Therefore, when an award of a Board of Review constituted under G.S. 136-29 is appealed to the Superior Court, it has only appellate jurisdiction to review the award for errors of law. The judge may not find additional facts or make an award himself. *Fetner v. Granite Works*, 251 N.C. 296, 111 S.E. 2d 324; *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439.

The only questions before the judge were whether the Board's findings of fact were supported by the evidence and, if so, whether these findings supported the legal conclusion it reached. The judge answered the first question YES and the second question NO. He had no power to make additional findings with reference to correspondence between the plaintiff and the Highway Commission or to find, in effect that the Commission had suffered no damages as a result of plaintiff's delay in completing the project. A specific provision of the contract made time of the essence. *Childress v. Trading Post,* 247 N.C. 150, 100 S.E. 2d 391. Damages were not an issue. At the hearing before the Board the parties had made the following stipulation:

> "It is further stipulated and agreed that in accordance with the contract liquidated damages on this project will be one hundred dollars per calendar day."

The only question before the Board was how many, if any, of excess working days should be charged under Section 8.6 of the Standard Specifications. Furthermore, an award of $900.00 cannot be denominated *nominal damage* which is "a small trivial sum awarded in recognition of a technical injury which has caused no substantial damage." *Hairston v. Greyhound Corp.*, 220 N.C. 642, 18 S.E. 2d 166. Inflation has not yet reached the stage where $900.00 can be called trivial.

We think it not amiss to say that the evidence in the case on appeal as to the number of working days between June 15th and September

7th is scant indeed. The record contains only a few entries from the engineer's diary, and does not disclose the basis upon which the State Highway Commission deducted $2,900.00 from its final settlement. A possible explanation of the Board's finding that the project was completed in eleven days beyond the thirty working days specified in the contract can be found. However, be that as it may, on this appeal, the findings of the Board are unchallenged and conclusive.

The portions of the judgment of the Superior Court of Wake County to which defendant excepted are a nullity and must be stricken. The cause is remanded to the Superior Court which is directed to enter a judgment that the plaintiff recover of the defendant the sum of $1,800.00

Error and remanded.

WACHOVIA BANK AND TRUST COMPANY v.
SMITH CROSSROADS, INC., AND E. L. SMITH.

(Filed 1 February 1963.)

1. Bills and Notes §§ 4, 18—

A negotiable note is *prima facie* issued for valuable consideration, G.S. 25-29, and when the note is also under seal, there is a rebuttable presumption of consideration, with the burden upon the maker and endorser to prove their defense of want of consideration.

2. Bills and Notes §§ 3, 17— Monies deposited to drawer's account in reliance on genuineness of forged drafts is consideration for drawer's note.

The evidence disclosed that the office manager of a corporation converted to his own use monies paid to him for the corporation and covered his defalcations by forged drafts and chattel mortgages in favor of the corporation, which were discounted by plaintiff bank and the proceeds deposited to the corporation's credit in accordance with custom, and that upon the discovery of the forgeries the corporation executed its note to the bank in the amount of the forged drafts, which note was endorsed by the corporation's president. *Held:* The note of the corporation and its renewals were supported by the consideration of the sums deposited to its account, and it may not deny liability on the note without refunding the sums so deposited, there being no extension of credit by the bank on the forged instruments to the manager. G.S. 25-28.

APPEAL by defendants from *Gwyn, J.*, May 28, 1962 Regular Term of FORSYTH.

Plaintiff, by this action, seeks to recover the sum of $50,000, the amount of a promissory note executed by corporate defendant (hereafter Crossroads), endorsed by individual defendant on 21 August 1960, payable to plaintiff's order ninety days after date.

Defendants not only denied liability because of lack of consideration to support the note but asserted a counterclaim in the sum of $267,892. As the basis of the counterclaim defendants allege plaintiff, by fraud, coercion, and without consideration, caused them to pay it $67,892, which payment financially embarrassed defendants, causing them damages for loss of profits in the amount of $150,000, and an additional sum of $50,000 as punitive damages. During the trial defendants withdrew their charges of fraud and duress, but insisted they had paid plaintiff $57,564.84 not supported by any consideration and were to that extent entitled to recover on their counterclaim.

The court nonsuited the counterclaim. It submitted one issue directed to the amount owing plaintiff. The jury answered the issue in the sum of $50,000. Judgment was entered on the verdict and defendants appealed.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge and C. F. Vance for plaintiff appellee.

Ted G. West and W. C. Palmer for defendant appellants.

RODMAN, J. The note was negotiable in form. *Prima facie* it was issued for valuable consideration. G.S. 25-29. It was also under the seal of each of the parties. This created a rebuttable presumption of consideration, *Mills v. Bonin,* 239 N.C. 498, 80 S.E. 2d 365. Defendants had the burden of proving their defense of want of consideration; but the verdict was in response to a peremptory instruction. Defendants assign this as error.

The evidence on which the parties based their respective contentions is to this effect: Crossroads is a Ford dealer. Individual defendant is its president. He owns about 90% of its stock. Carl Smith (hereafter manager) was in September 1959 and had been for some years prior thereto Crossroads' office manager and bookkeeper. He was a trusted employee. Crossroads had for several years prior to September 1959 financed a substantial part of its business by loans obtained from plaintiff. One of the purposes for which it regularly applied to plaintiff for loans was to purchase new automobiles from other dealers. When Crossroads purchased a new vehicle from another dealer, it would execute a mortgage and note to plaintiff on the vehicle so purchased. This note and mortgage would then be attached to a draft on

plaintiff. The draft would be deposited in Union National Bank of Lenoir to the credit of Crossroads. Plaintiff would honor the drafts so drawn. Boyd J. Smith, E. L. Smith, and B. A. Lutz had authority to draw drafts on plaintiff. It had cards showing their signatures. Manager was not authorized to draw drafts, but he did have authority to sign checks on Crossroads' account with Union National Bank. Manager, for a substantial period of time prior to September 1959, had been converting to his own use monies paid to him for Crossroads. To balance his books he would deposit to the account of Crossroads with Union National Bank a draft on plaintiff purportedly drawn by Lutz for Crossroads, to which drafts were attached mortgages securing the amount of the drafts. Manager forged Lutz' name to the drafts and mortgages. On 30 September 1959 plaintiff held drafts to the amount of $166,000, secured, or purportedly secured by mortgages on new motor vehicles owned by Crossroads. This amount included $117,892 of forgeries. Plaintiff inquired of Crossroads about the amount of the debt and the location of the motor vehicles securing the loans. Manager then confessed that the motor vehicles listed on most of the drafts did not exist. The monies obtained from plaintiff by means of the forged drafts had been deposited in Crossroads' account at Union National Bank to cover the shortages created by his previous thefts of cash belonging to Crossroads.

Upon disclosure of these facts, defendants executed a note to plaintiff dated 30 September 1959 for the shortage—$117,892. Before the maturity of that note, payments were made reducing plaintiff's claim to $95,000. A note for that amount was executed 23 October 1959. A renewal note for like amount was executed 21 February 1960. A payment of $10,000 was made and renewal note for $85,000 was executed 21 April 1960. A payment of $20,000 was made and renewal note for $65,000 was executed 6 June 1960. A payment of $15,000 was made and the note sued on was given.

Defendants contend since the drafts were all forged no liability could be imposed on Crossroads. They rely on G.S. 25-28.

The statute does not relieve the party whose name is signed to a forged document "unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

It is conceded the amounts called for by the drafts were credited to Crossroads' bank account. Manager never had possession of any of these funds. Plaintiff never extended him credit. That being so, Crossroads could not deny liability on a claim made by plaintiff without repaying the monies it received on the face of the forged instruments.

Mills v. Bonin, supra (503); *Jones v. Bank,* 214 N.C. 794 (799), 1 S.E. 2d 135; *Lawson v. Bank,* 203 N.C. 368, 166 S.E. 177; *Bank v. Grove,* 202 N.C. 143, 162 S.E. 204; *Brittain v. Westhall,* 135 N.C. 492(496); *Brown v. Smith,* 67 N.C. 245; *Union Bank & Trust Co. v. Long Pole Lumber Co.,* 74 S.E. 674 (W. Va.); 3 Am. Jur. 2d 557.

If there was no ratification of manager's acts in drawing drafts, Crossroads nevertheless received consideration for the original and renewal notes because of the monies deposited by plaintiff in Crossroads' bank account under the belief it had been requested to make the deposit. *Guaranty Co. v. Reagan,* 256 N.C. 1; *Dean v. Mattox,* 250 N.C. 246, 108 S.E. 2d 541; *Rhyne v. Sheppard,* 224 N.C. 734, 32 S.E. 2d 316; *Sparrow v. Morrell & Co.,* 215 N.C. 452, 2 S.E. 2d 365; *White v. Green,* 50 N.C. 47.

Since the evidence fails to establish Crossroads' plea of lack of consideration, individual defendant is liable by reason of his endorsement.

The conclusion here reached that defendant could not deny liability on the note without refunding the monies paid Crossroads in reliance on the drafts renders it unnecessary to consider the question of competency of audits of Crossroads' records for the purpose of establishing its profits or losses in differing periods.

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1963

ERNEST KING, JR. v.
PREMO & KING, INC. AND BANK OF MONTGOMERY.

(Filed 27 February 1963.)

1. Receivers § 13; Appeal and Error § 3—

The allowance of cost of administration and attorney's fees affects a substantial right of the creditors in that assets available for payment of their claims are reduced *pro tanto*, and such allowance is reviewable by the Supreme Court.

2. Receivers § 13—

The allowance by the lower court of fees to the attorney for the receiver is *prima facie* correct, and the Supreme Court will not alter or modify the same unless the allowance is based on wrongful principle or is clearly inadequate or excessive.

3. Same—

A receiver is not entitled to five per cent upon receipts and disbursements but is entitled to a reasonable compensation not to exceed five per cent.

4. Same—

An amount allowed as fees to an attorney for a receiver may not be enlarged to cover compensation for ministerial functions required to be performed by the receiver in contacting purchasers, showing property for sale, accounting and bookkeeping, etc., but such allowance must be based upon services requiring special legal skill performed by the attorney.

5. Same—

In consideration of the moderate amounts derived from the liquidation of the assets of the insolvent, the inadequacy of the assets to pay even secured creditors in full, and the absence of indication of any litigation or dispute in the collection of the assets, or the amount of professional time necessarily required for the services of the receiver's counsel, the allowance by the Superior Court of counsel fees to the receiver's attorney in this case *is held* excessive and is reduced by order of the Supreme Court.

6. Receivers § 12—

Where the insolvent is indebted to creditors on interest-bearing obligations secured by a lien on specific chattels, and the chattels are sold for a sum in excess of the principal of the debt secured, the creditor is entitled, as far as his security suffices, to interest to the time of the order of disbursement, and not merely to the date of the appointment of the receiver.

7. Receivers § 13—

Where the receiver sells the insolvent's real property which is subject to a deed of trust, it is error for the receiver to charge the *cestui* only with the cost of selling the real property and the amount necessary to pay tax liens against the land, but the costs of sale and the tax liens should be included in the cost of administration and then the *pro rata* share of the administrative expenses should be charged against the *cestui*, and order of the lower court approving the receiver's disproportionate charge of administrative expenses will be reversed on appeal of another creditor even though the order will inure *pro tanto* to the benefit of creditors who did not appeal.

8. Assignments § 4; Receivers § 5—

Where a factor contends that prior to the receivership it had paid full consideration for all accounts assigned to it by the account creditor prior to insolvency and that actual notice of the assignment was given to the account debtors on the face of the original invoices, G.S. 44-80(2), the receiver's report should find the facts with regard to the factor's contentions in order to determine the factor's right to proceeds of the accounts receivable free from the costs of the receivership and the claims of other creditors, and when the receiver has made no findings in respect thereto the cause must be remanded.

APPEAL by the Bank of Montgomery, and an intervening factor of Premo & King, Inc., namely, J. N. Rawleigh Company, North Carolina, from *Olive, J.*, 28 May 1962 Civil Term of MONTGOMERY, docketed and argued as Case No. 536 at Fall Term 1962.

Receivership proceeding involving the general liquidating receivership of Premo & King, Inc., a North Carolina insolvent commercial printing corporation with its principal office and place of business in Troy, Montgomery County, North Carolina, heard by Judge Olive

on exceptions by the appellants, and others, to the report of the receiver and his application to make disbursements, distributions, and for discharge.

The reports of the receiver dated 10 January 1962 and 2 May 1962 lack clarity and precision of statement. The controlling facts, as we can best glean them from the reports of the receiver, and from the pleadings, appear in the numbered paragraphs set forth below. The monetary items mentioned in these paragraphs and the ensuing opinion are approximate.

1. At the time of the appointment of the temporary receiver on 11 August 1961, which appointment was made permanent on 16 September 1961, Premo & King, Inc., was indebted to numerous secured creditors in various sums on sundry obligations which arose before the receivership, and were as follows: (a) $6,749.91 due the Bank of Montgomery on a note originally for $10,000.00, which note was secured by a chattel mortgage on certain articles of machinery used in the business of Premo & King, Inc., and which note and chattel mortgage are dated 15 May 1958, and were recorded 25 April (sic) 1958 in Book Z-76, page 98, Montgomery County Register of Deeds office; (b) $1,548.07 due the Bank of Montgomery on a note originally for $2,000.00, which note was secured by a chattel mortgage on certain printing equipment used in the business of Premo & King, Inc., and which note and chattel mortgage are dated 5 December 1960, and were recorded 7 December 1960 in Book 97, page 359, in the public registry of Montgomery County; (c) $9,940.84 due Peoples Mutual Building and Loan Association, Mt. Gilead, North Carolina, on a note originally for $10,500.00, which note was secured by a deed of trust on certain realty, and which note and deed of trust are dated 20 January 1960, and were recorded the same day in Book 90, page 189, in the public registry of Montgomery County; (d) $139.83 due General Motors Acceptance Corporation on a note originally for $1,660.20 secured by a conditional sales contract on an Opel station wagon, which instruments are dated 18 November 1958, and were recorded 22 November 1958 in Book 81, page 400, public registry of Montgomery County; (e) $420.00 due George R. Keller, Inc., on a note dated 23 February 1959 secured by a conditional sales contract on a Chandler-Price paper cutter; (f) $506.09 balance due Russell Ernest Baum, Inc. on a note originally for $1,685.00 secured by a conditional sales contract on a Baum folder, which instruments are dated 10 December 1956, and were recorded 15 December 1956 in Book Z-64, page 84, public registry of Montgomery County (in another place in the receiver's report the amount due Baum is stated as $442.00, plus interest); (g) $684.40

balance due Davidson Corporation on a note secured by a chattel mortgage on a Davidson Offset Press dated 12 February 1957, and recorded 21 February 1957 in Book Z-66, page 94, public registry of Montgomery County.

2. The receiver allowed all of these seven claims amounting to $19,989.14 as secured and preferred claims to the extent of the security held, and as a general claim for any deficiency.

3. On 13 November 1961 Al Lincoln Buick-Chevrolet, Inc., Troy, North Carolina, filed a claim with the receiver in the amount of $53.50 for storage of an Opel station wagon. The receiver allowed this as a secured and preferred claim to the extent of the security held, and as a general claim for any deficiency.

4. J. N. Rawleigh Company, North Carolina, hereafter called Rawleigh, is engaged in the business of factoring accounts receivable. A copy of the factoring agreement entered into between Rawleigh and Premo & King, Inc. on 15 November 1960 is set forth on more than ten pages of the Record. The receiver in his report to the court as to the allowance of claims dated 10 January 1962 states, Rawleigh "has a factor's lien filed on the 4th day of April, 1961, and filed in Book 100 at page 96, Montgomery County Registry, against certain accounts owing to Premo & King, Inc.; that your Receiver has on hand certain funds which have been collected by him on accounts factored, and that the J. N. Rawleigh Company has a reserve account which is owing to Premo & King, Inc.; that some of these accounts still remain unpaid and upon final settlement, proper adjustments will be made with J. N. Rawleigh Company and Premo & King, Inc." Following this report of the receiver, Rawleigh on 30 April 1962 filed in the cause a petition to the court in substance as follows: The factoring agreement entered into between it and Premo & King, Inc. on 15 November 1960 is attached to its petition, and made a part thereof, and sets forth the terms under which accounts receivable of Premo & King, Inc. were factored by it with Rawleigh. On all accounts assigned to and factored with Rawleigh by Premo & King, Inc., actual notice of the assignment was given on the face of the original invoice to the account debtor, and in addition said Premo & King, Inc., executed a notice of assignment, which is recorded in Book 100 at page 96 of the public registry of Montgomery County. After the execution of the factoring agreement, Premo & King, Inc. assigned numerous of its accounts receivable to Rawleigh, in accordance with the terms of the factoring agreement, for which Premo & King, Inc. was paid by Rawleigh a full consideration as provided for in said factoring agreement. Then there follows a list of 24 specifically named accounts receivable assigned to Rawleigh

by Premo & King, Inc. in the total amount of $1,613.12. The petitioner is informed, believes and therefore alleges that these specifically named accounts receivable have been collected in full by the receiver and the funds are being held by him, although these funds of $1,613.12, pursuant to paragraph First M of the factoring agreement and pursuant to G.S. 44-77 *et seq.*, and specifically G.S. 44-84 (2) (a), are the property of the petitioner and should be turned over to it. Inasmuch as the receiver is holding, according to his report, funds belonging to the petitioner in the amount of $1,613.12, and the petitioner is holding funds belonging to Premo & King, Inc. in the sum of $1,113.79, the receiver is holding funds in the net amount of $499.33 which belong to petitioner.

The receiver in his report and application to make disbursements and distributions addressed to the court dated 2 May 1962 reported: "That your Receiver has in his hands the sum of $1,609.64, being the sums he has collected on accounts, less bank charges of 80¢, from accounts which he is informed and believes were factored by Premo & King, Inc., with J. N. Rawleigh Company, Exhibit 'A' attached hereto includes the sum of $531.32 as an asset and as money available for distribution, being a prorated charge against said sum of $1,609.64 for costs and expenses of administration. That the J. N. Rawleigh Company is holding the sum of $1,243.23 as a reserve which is due the Receiver, and said sum has been included in Exhibit 'A' as an asset and money available for distribution and disbursement."

5. The receiver allowed common unsecured claims against the insolvent corporation in the amount of $45,668.48.

6. The receiver reported to the court that the total amount received by him from the liquidation of the assets of the insolvent corporation amounted to $29,900.88, and came from the following sales and collections:

(1) Sale of certain articles of machinery used in the business of the insolvent corporation for $8,000.50. There was a chattel mortgage on this property securing an indebtedness of the insolvent corporation to the Bank of Montgomery in the amount of $6,749.91, as set forth above.

(2) Sale of certain printing equipment used in the business of the insolvent corporation for $2,900.00. There was a chattel mortgage on this property securing an indebtedness of the insolvent corporation to the Bank of Montgomery in the amount of $1,548.07, as set forth above.

(3) Sale under a deed of trust of a lot and building in the town of Troy for $10,200.00. This deed of trust secured an indebtedness

of the insolvent corporation to Peoples Mutual Building and Loan Association, Mt. Gilead, North Carolina, for $9,940.84, as set forth above.

(4) Sale of an Opel station wagon for $335.00. There was a conditional sales contract on this property securing an indebtedness of the insolvent corporation to General Motors Acceptance Corporation in the sum of $139.83, as set forth above.

(5) Sale of a Chandler-Price paper cutter for $1,750.00. There was a conditional sales contract on this property securing an indebtedness of the insolvent corporation to George R. Keller, Inc. in the amount of $420.00, as set forth above.

(6) Sale of a Baum folder for $525.00. There was a conditional sales contract on this property securing an indebtedness to Russell Ernest Baum in the amount of $506.09, as set forth above.

(7) Sale of a Davidson Offset Press for $2,045.00. There was a chattel mortgage on this property securing an indebtedness of the insolvent corporation to Davidson Corporation in the sum of $684.40, as set forth above.

(8) Sale of unencumbered personal property of the insolvent corporation for $3,171.81.

(9) Collections from the insolvent corporation's accounts receivable in the sum of $973.57—this does not include any accounts receivable set forth in the petition of Rawleigh to the court, and does not include the sum of $1,609.64 which the receiver, in his report of 2 May 1962, states he has collected on accounts receivable which were factored by Premo & King, Inc. with Rawleigh.

7. The receiver reported that the total costs of the administration of the receivership paid by him amounted to $7,553.25. This is itemized in his report as follows: Costs of conserving and sales of personal property, $1,137.69; personal and real property taxes in the amount of $800.56 paid to Montgomery County and to the town of Troy; paid to Lee Houston, accountant, $615.00; paid to receiver for his services, $1,000.00; paid to Charles H. Dorsett, attorney for receiver, $3,750.00; court costs and estimate of future expenses for postage and clerical help, $250.00.

8. The receiver's report shows that out of the $29,900.88 collected by him from the liquidation of the assets of the insolvent corporation he has paid the costs of administration of the receivership amounting to $7,553.25, leaving for distribution on the secured and preferred claims the sum of $22,347.63.

9. The receiver reported that the Peoples Mutual Building and Loan Association should bear $1,053.34 of the total costs of the ad-

ministration of the receivership amounting to $7,553.25, by reason of the fact that out of the $10,200.00 received by him from the sale of the lot and building owned by the insolvent corporation, on which there was a deed of trust in favor of the Peoples Mutual Building and Loan Association, he paid *ad valorem* taxes on this realty due Montgomery County for the years 1960 and 1961 in the amount of $292.81, and paid *ad valorem* taxes due the town of Troy for the year 1961 in the amount of $151.97; paid insurance on this building in the sum of $98.56; and paid 5% on the sales price, to-wit, $510.00, to himself for fees, cost and commission for foreclosure of the said deed of trust—making total payments of $1,053.34. Whereupon, the receiver recommended that the court approve payment to the Building and Loan Association of $9,146.66 ($10,200.00 less $1,053.34) out of the sales price of $10,200.00 on the secured and preferred claim allowed by him of the Building and Loan Association for $9,940.84. Note: The receiver's report shows that real property taxes in the exact amount set forth above in this paragraph were paid by the receiver and charged as part of the costs of administration of the receivership. His report is not clear, but this seems to be a double charge.

10. The receiver's report deducts from the total amount of assets received by the receiver from the liquidation of the assets of the insolvent corporation amounting to $29,900.88, the amount of $10,200.00 derived from the sale of the building and lot, which leaves the amount of $19,700.88 in the hands of the receiver. The report deducts from the total cost of administration of the receivership amounting to $7,553.25, the amount of $1,053.34, the cost of administration to be borne by Peoples Mutual Building and Loan Association, which leaves a balance of $6,499.91. The receiver reports that this $6,499.91 of expense is to be borne by the $19,700.00 in his hands, which equals 32.992%.

11. The receiver deducted from the $8,000.50 received by him from the sales of certain articles of machinery belonging to the insolvent corporation, and upon which there was a chattel mortgage securing an indebtedness of the insolvent corporation to the Bank of Montgomery in the amount of $6,749.91, as set forth above, the pro rata share of the cost of administration of the receivership amounting to $2,639.52. This leaves an amount of $5,360.98, which he recommends should be paid on the allowed preferred and secured claim of the Bank of Montgomery in the amount of $6,749.91.

12. The receiver deducted from the $2,900.00 received by him from the sale of certain printing equipment belonging to the insolvent corporation, and upon which there was a chattel mortgage securing an in-

debtedness of the insolvent corporation to the Bank of Montgomery in the amount of $1,548.07, as set forth above, the pro rata share of the cost of the administration of the receivership amounting to $956.77. From the balance of the proceeds of the sale, the receiver recommends that $1,548.07 be paid to the Bank of Montgomery on its secured claim, and in his report he carries the balance of $395.16 to the surplus account.

13. The receiver deducted from the $335.00 received by him from the sale of the Opel station wagon belonging to the insolvent corporation, and upon which there was a conditional sales contract securing an indebtedness to General Motors Acceptance Corporation in the amount of $139.83, as set forth above, the pro rata share of the cost of administration of the receivership amounting to $110.52. From the balance of the proceeds of sale, he recommends that the secured claim of the General Motors Acceptance Corporation in the amount of $139.83 be paid, and the balance amounting to $84.65 he carries to the surplus account.

14. The receiver deducted from the $1,750.00 received by him from the sale of a Chandler-Price paper cutter belonging to the insolvent corporation, and upon which there was a conditional sales contract securing an indebtedness to George R. Keller, Inc. in the amount of $420.00, as set forth above, the pro rata share of the cost of administration of the receivership amounting to $577.36. From the balance of the proceeds of the sale, he recommends that the secured claim of George R. Keller, Inc., in the amount of $420.00 be paid, and the balance amounting to $752.64 he carries to the surplus account.

15. The receiver deducted from the $525.00 received by him from the sale of a Baum folder belonging to the insolvent corporation, and upon which there was a conditional sales contract securing an indebtedness to Russell Ernest Baum, Inc. in the amount of $506.09, as set forth above, the pro rata share of the cost of administration of the receivership amounting to $173.21. The balance of $351.79 he recommends should be paid to Russell Ernest Baum, Inc. on its secured claim for $506.09.

16. The receiver deducted from the $2,045.00 received by him from the sale of a Davidson Offset Press belonging to the insolvent corporation, and upon which there was a conditional sales contract securing an indebtedness to Davidson Corporation in the amount of $684.40, as set forth above, the pro rata share of the cost of the administration of the receivership amounting to $674.69. From the balance of the proceeds of the sale, he recommends that the secured claim of the

Davidson Corporation in the amount of $684.40 be paid, and the balance amounting to $685.91 he carries to the surplus account.

17. The receiver's report shows that after his recommendation for the payment of the allowed secured and preferred claims above set forth, and after charging the proceeds derived from the sales of the secured property with a pro rata share of the total expenses of the administration of the receivership, as above set forth, he had left in his hands from the proceeds of the sales of the encumbered property a surplus of $1,918.36. Adding to this $1,918.36 the sum of $3,171.81 received by him from the sales of unencumbered personal property, and also adding the sum of $973.57 received by him from collections of the insolvent corporation's accounts receivable which accounts receivable were not factored with Rawleigh, as above set forth, his report shows he had the sum of $6,063.74 for distribution to other preferred creditors of the insolvent corporation. From this $6,063.74 his report shows he deducted as a pro rata part of the total cost of the administration of the receivership the sum of $1,367.64, thus leaving $4,696.10. In his report he adds to this $4,696.10 the sum of $1,243.23, which he reports is the amount due from Rawleigh on reserve, and also adds the sum of $531.32, which he reports as "additional funds prorated and charged to J. N. Rawleigh Company on collection of $1,610.44," thus reporting as the total amount in his hands for distribution to other preferred creditors the amount of $6,470.65. His report shows that from this amount of $6,470.65 the following payments should be made: (1) District Director of Internal Revenue, Greensboro, N. C., for federal taxes, $4,672.47; (2) North Carolina Department of Revenue for State taxes, $262.89; (3) North Carolina Employment Security Commission for all unemployment taxes, $156.64—a total of $5,092.00. The receiver deducts this amount from $6,470.65, which leaves $1,378.65, according to his report for other priority creditors. His report shows that from this $1,378.65 there is due for wages $1,326.97, leaving for postage and clerical aid $51.68.

18. On 3 May 1962 the receiver filed an addendum to his report of 2 May 1962 in substance as follows: He inadvertently omitted the sum of $450.00 paid to Karl H. Vonebeinstein on 26 October 1961 for cleaning, listing and inventorying machinery, assisting in advertising, contacting prospective purchasers, and other general duties, as an item of cost of conserving and sales of property paid. This sum will reduce the amount $1,378.65 as shown on his report of 2 May 1962 as amount available for payment to other priority creditors to the sum of $928.65, and that he distributed this $928.65 as wages to nine

specifically named persons, which leaves no balance on hand for payment to other priority creditors.

19. The receiver in his report states he calculated and included in the total amount of the claims of secured creditors interest on the amounts due on the claims to 11 August 1961, the date of the receivership, but not later.

To the receiver's report exceptions were filed by the Bank of Montgomery and by Rawleigh. These exceptions are in the Record.

The report of the receiver and the exceptions filed thereto came on to be heard by Judge Olive. His judgment recites that exceptions to the receiver's report were also filed by the District Director of Internal Revenue, by Russell Ernest Baum, by the Davidson Corporation, and the Peoples Mutual Building and Loan Association, but these exceptions are not in the Record.

Judge Olive found as a fact and as a matter of law the following (the numbering of paragraphs is ours):

1. "That the Receiver's item of costs of administration and costs of conserving and sales of property, together with the Receiver's fee, attorney's fee, and accountant's fee, were all necessary to the Receivership and the same are hereby in all respects approved and confirmed."

2. "That the actions and proceedings of the said Receiver are correct and according to law and that the priority and the preference in payment of claims appearing in the Report of the Receiver and Application to make Disbursements and Distributions and for Discharge, are according to law and the same is (sic) hereby ratified and confirmed, except as hereinafter provided."

3. "That the pro rata charge assessed by the Receiver against the various claims of preferred creditors for costs of administration is fair and equitable to each creditor and is hereby approved and confirmed, except that it is ordered that the claim of the Federal Government and the claim of the State of North Carolina for taxes shall bear their proportionate share of said costs of administration, and the same shall not include any penalty or interest."

4. "That within ten (10) days, J. N. Rawleigh Company is hereby ordered and directed to deliver to David H. Armstrong, Receiver, the sum of $531.32, representing its proportionate share of the costs of administration in connection with the collection of $1,610.44, and J. N. Rawleigh Company is further ordered and directed to deliver to David H. Armstrong, Receiver, the sum of $1,243.23, representing a reserve fund held by said corporation."

5. "Upon receipt of said sums from J. N. Rawleigh Company, the Receiver is directed to deliver to J. N. Rawleigh Company the sum of $1,610.44, representing the collection of factored accounts owned by J. N. Rawleigh Company."

6. "That the claim for wages reported by the Receiver are (sic) approved and confirmed, but it is hereby ordered that said wages and the amount thereof shall be subject to such deductions as are necessary for social security, withholding tax, and any other legal deductions, and shall bear their pro rata share of the costs of administration."

Whereupon, Judge Olive adjudged and decreed that the actions and proceedings of the receiver are correct and according to law and the same are in all respects ratified, approved and confirmed, and the receiver is hereby ordered and directed to comply with the directions and orders of the court hereinabove set forth.

From the judgment, the Bank of Montgomery and Rawleigh appealed to the Supreme Court. The other creditors did not appeal.

S. H. McCall, Jr., for appellant Bank of Montgomery.

Craige, Brawley, Lucas & Hendrix and Hamilton C. Horton, Jr., for appellant J. N. Rawleigh Company, North Carolina.

Charles H. Dorsett for appellee David H. Armstrong, Receiver.

APPEAL BY THE BANK OF MONTGOMERY

PARKER, J. The Bank of Montgomery assigns as error Judge Olive's finding as a fact and as a matter of law "that the Receiver's item of costs of administration and costs of conserving and sales of property, together with the Receiver's fee, attorney's fee, and accountant's fee, were all necessary to the Receivership and the same are hereby in all respects approved and confirmed."

The allowance of the costs of administration of a receivership of an insolvent corporation made by a court affects a substantial right of the creditors, in that it disposes of a part of the assets of the insolvent corporation, and is a reduction to that extent of the amounts to which the creditors are entitled under their claims against it. G.S. 1-507.9; *Bank v. Bank*, 126 N.C. 531, 36 S.E. 39.

Costs of administration of a receivership include, *inter alia*, such items as the following: 1. Court costs in proceedings relating to the receivership; 2. Compensation for the receiver; 3. Reasonable and proper compensation for the receiver's attorney for services which require legal knowledge and skill, and which were rendered to the receiver for the benefit of the receivership; 4. Costs of conserving prop-

erty in receivership; 5. Costs of sales of property in receivership; 6. Premiums for fire insurance on property in receivership; 7. Bookkeeping, clerical, and accounting expense and postage in connection with the administration of the receivership; 8. Payment of all taxes on property, real or personal, in the possession of the receiver which fall due during the time he is in possession as receiver, or which have accrued upon the property in his possession prior to his appointment. *Surety Corp. v. Sharpe,* 236 N.C. 35, 72 S.E. 2d 109; *Stagg v. Nissen Co.,* 208 N.C. 285, 180 S.E. 658; 75 C.J.S., Receivers, sec. 383, Counsel Fees, page 1047; 53 C.J., Receivers, sec. 613, Counsel Fees, page 377; 75, C.J.S., Receivers, sec. 179, Taxes, page 825.

That the amount of the allowance by the superior court of attorney's fees is reviewable by this Court is well settled. *Hood, Comr. of Banks v. Cheshire,* 211 N.C. 103, 189 S.E. 189; *In re Stone,* 176 N.C. 336, 97 S.E. 216. However, the allowance of commissions and counsel fees to a receiver by the superior court is *prima facie* correct, and the Supreme Court will not alter or modify the same unless based on the wrong principle, or clearly inadequate or excessive. *Hood, Comr. of Banks v. Cheshire, supra; Graham v. Carr,* 133 N.C. 449, 45 S.E. 847.

This is said in 75 C.J.S., Receivers, sec. 384, a, page 1049:

> "The trial court fixes the compensation, if any, to be allowed for the services of an attorney for a receiver. While the court is vested with discretion in the matter, and its action is presumptively correct, nevertheless its discretion must be properly exercised and not abused, and the matter is discretionary only in the sense that there are no fixed rules for determining the proper amount, and not in the sense that the court is at liberty to award more than fair and reasonable compensation, nor less than such compensation. Bills for counsel fees should be carefully scrutinized by the court or chancellor, and not allowed as a matter of course. The allowance must rest on facts showing actual benefits. A certain esprit de corps among attorneys which prevents them from interposing objections to the allowance of fees may make it somewhat awkward for the court to determine applications for the allowance of fees in receivership cases."

The receiver's report shows, as set forth above, that the total amount received by him from the liquidation of the assets of the insolvent corporation amounted to $29,900.88, and $10,200.00 of this amount was received by the receiver from the foreclosure of a deed of trust on a lot and building in favor of Peoples Mutual Building and Loan Association. This does not include the sum of $1,609.64 which, in his

report of 2 May 1962, he states he has collected on accounts receivable factored by the insolvent corporation with Rawleigh. In his report of 2 May 1962 he asked the court to approve costs of administration of the receivership amounting to $7,553.25. In an addendum to this report dated 3 May 1962 he listed an additional cost of administration in the sum of $450.00. The total costs of the administration of the receivership approved by Judge Olive amounted to $8,003.25, which is more than 26% of the total amount received by the receiver from the liquidation of the assets of the insolvent corporation, excluding the sum of $1,609.64 collected on accounts receivable factored by the insolvent corporation with Rawleigh. The $8,003.25 of administration costs are itemized in the receiver's report as follows: 1. Costs of conserving and sales of personal property, $1,137.69, and included in the costs of said sales of property of the receivership is the amount of $81.97 for long distance telephone calls by counsel for the receiver; 2. Personal and real property taxes in the amount of $800.56; 3. Paid to Lee Houston, accountant, $615.00; 4. Paid to receiver for his services, $1,000.00; 5. Paid to Charles H. Dorsett, attorney for receiver, $3,750.00; 6. Court costs and estimate of future expenses for postage and clerical help, $250.00; 7. Paid to Karl H. Vonebeinstein for services rendered to receivership, $450.00. In addition, the receiver receives under Judge Olive's order $510.00 for the foreclosure of the deed of trust above set forth.

The only evidence in the Record before us as to the services rendered by his attorney is set forth in his report of 2 May 1962 as follows:

> "9. That your Receiver further reports to the Court that the administration of this Receivership has consisted of numerous sales and resales necessarily involving the contacting of many prospective purchasers and the showing of the property to the same at all hours of the day and night, and the accounting and bookkeeping connected therewith has been most involved, complicated and time consuming; that most of the work in connection with the foregoing has been performed by Charles H. Dorsett, attorney; that under the provisions of G.S. 1-507.9, your Receiver would be entitled to a 5% commission upon receipts and disbursements, which would amount to $2,990.00; that your Receiver respectfully requests the Court that a balance of the fees to which the Receiver would be entitled to over $1,000.00 be applied against the fees to Charles H. Dorsett, Attorney."

It is to be noted that G.S. 1-507.9 does not state that the receiver is entitled to a five per cent commission upon receipts and disburse-

ments, but reads in part as follows, "the court shall allow a reasonable compensation to the receiver for his services, *not to exceed five per cent upon receipts and disbursements.*" (Emphasis supplied.)

The contacting of purchasers, the showing of property for sale, the sales and resales of property, and the accounting and bookkeeping in respect to the administration of the receivership required no legal knowledge and skill, and are the performance of ordinary duties, which may and should be performed by the receiver himself, and are not the subject of an allowance of counsel fees. *Henry v. Henry,* 103 Ala. 582, 15 So. 916; *Saulsbury v. Lady Ensley Coal, Iron & Railroad Co.,* 110 Ala. 585, 20 So. 72, where the Court held a receiver is not entitled to allowance for the services of an attorney in hunting up and taking into possession the property belonging to the estate, since it is the personal duty of the receiver to look after such matters; *Deputy v. Delmar Lumber Mfg. Co.,* 10 Del. Ch. 101, 85 A. 669; *Olson v. State Bank,* 72 Minn. 320, 75 N.W. 378; *Conover v. West Jersey Mortgage Co.,* 96 N.J. Eq. 441, 126 A. 855; *Society for Relief of Destitute Children v. McDaniel,* 148 N.Y.S. 951; *Elsesser v. Pfleging,* 254 App. Div. 753, 4 N.Y.S. 2d 275; *Wilkinson v. Washington Trust Co.,* 102 F. 28; 75 C.J.S., Receivers, sec. 383, Counsel Fees, b, page 1048. The receiver states accounting and bookkeeping in respect to the receivership was most involved, and recommended, and Judge Olive confirmed, a payment to Lee Houston, an accountant, of $615.00 for his services rendered to the receivership.

In *Conover v. West Jersey Mortgage Co., supra,* the Court said: "And while a receiver should be allowed reasonable counsel fees for legal services rendered necessary in the discharge of his duties, he will not be allowed fees paid to counsel for services which are the ordinary duties he is presumed to know how to perform." In *Olson v. State Bank, supra,* the Court said: "And, when employing counsel, the receiver must also remember that it is his duty to perform such duties as any ordinarily competent businessman is presumed to be capable of performing. These are his duties, and he is paid therefor. It is only for services requiring special legal skill that he will be allowed counsel fees."

In *Wilkinson v. Washington Trust Co., supra,* the Court said:

> "There was no error in the order of the court striking out the $750 paid by the appellant for the services of attorneys in preparing and presenting his reports as receiver and master. It is one of the indispensable personal duties of a receiver and of a master to make a report of his acts, and of his receipts and dis-

> bursements, to the court which appoints him. If he is incapable of keeping accounts and of reporting his receipts and disbursements, he ought not to accept the appointment. But if he does accept it, and his reports, like those in hand, involve nothing more than a simple narrative of his acts, and an account of his receipts and disbursements, he cannot be permitted to receive compensation for the discharge of these, his personal duties as receiver, and to charge the trust with moneys expended by him to hire others to discharge them for him. Such allowances would pay twice for the same services. In ordinary cases the making and presentation to the court of reports of the acts, receipts, and disbursements of receivers and masters is one of their indispensable duties. The compensation allowed them as receivers or masters pays them for this service, and they cannot be allowed disbursements which they may have made to hire attorneys or others to discharge these duties for them, because such allowances would effect two payments for the same service, and because cestuis que trustent are always entitled to a report of the doings of their trustee, with out expense or charge to them."

There is nothing in the Record before us to indicate there was any litigation or dispute in respect to the collection of the assets of the receivership, or anything to show the amount of professional time necessarily required for the services of the receiver's counsel, or the extent or value of his legal services rendered to the receiver.

As said by Chief Judge Boyd in *Friedenwald v. Burke,* 122 Md. 156, 164, 89 A. 424, 427:

> "One of the most delicate duties courts are called upon to perform is that of fixing the amount of compensation of attorneys in cases in which they are entitled to be paid out of an estate or fund before the court. It would be difficult to lay down a general rule, to be followed in all cases where such compensation is to be allowed, beyond saying that it must be reasonable and fair."

We are confident that the counsel for the receiver performed his professional services in the receivership ably and well, but considering all the pertinent facts and circumstances, the moderate amount of the assets derived from the liquidation of the assets of the insolvent corporation, and its complete insolvency with nothing to be paid to the unsecured creditors, and not enough apparently to pay the preferred creditors in full, it is our opinion, and we so hold, that the allowance by Judge Olive of $3,750.00 as counsel fees to the receiver's attorney

is clearly excessive, and we feel it our duty to reduce the sum allowed to receiver's counsel to $1,000.00. This reduction is in accord with former decisions of this Court: *Bank v. Bank, supra,* where it was held that there was error in that part of the court's order allowing commissions in the amount of $2,350.00 because they were clearly excessive, and the amount was reduced; *In re Stone, supra,* where services rendered by a lawyer to an infant were reduced from $1,000.00 to $500.00; *Outland v. Outland,* 118 N.C. 138, 23 S.E. 972, where this Court held that an allowance of $200.00 as an attorney's fee in an action by the next friend of an idiot to have land charged with his support sold declared subject to the lien, etc., is excessive and reduced the fee to $100.00; *Moore v. Shields,* 69 N.C. 50, where an attorney's fee paid by a guardian was held excessive and reduced to $25.00. See also *Richardson v. Tyson,* 110 Wis. 572; *Smith v. Smith,* 69 Ill. 308, where an attorney's fee of $3,500.00 was reduced to $1,000.00.

The part of Judge Olive's judgment approving and confirming the receiver's report in respect to the costs of the administration of the receivership is affirmed, with the exception that the fees allowed counsel for the receiver are reduced from $3,750.00 to $1,000.00, and with the further exception that the superior court shall investigate and determine whether or not the receiver's report shows there has been a double charge in the costs of administration of the receivership of taxes paid by the receiver to Montgomery County and the town of Troy—a matter not clear from the Record before us.

The Bank of Montgomery further assigns as error that Judge Olive approved the report of the receiver to the effect that it was entitled to interest on its claims against the insolvent corporation only to the date of the appointment of the receiver.

When the Bank of Montgomery took the two above-mentioned chattel mortgages from Premo & King, Inc. in May 1958 and in December 1960, prior to the date of the appointment of the receiver on 11 August 1961, which chattel mortgages secured the two debts of Premo & King, Inc. to the Bank of Montgomery by a specific lien on specific property, and caused these chattel mortgages to be registered in the public registry of Montgomery County, the county in which its debtor resided and had its principal place of business, it acquired property rights in the personal property specified in and covered by the chattel mortgages. G.S. 47-20; *Surety Corp. v. Sharpe, supra; Odom v. Clark,* 146 N.C. 544, 60 S.E. 513. In the very nature of things, the receiver took the property of Premo & King, Inc., subject to the lien of these two chattel mortgages, which existed at the time of his appointment. *Surety Corp. v. Sharpe, supra; Vanderwal v. Dairy Co.,*

200 N.C. 314, 156 S.E. 512; *Acceptance Corp. v. Mayberry*, 195 N.C. 508, 142 S.E. 767.

The liens of these chattel mortgages constituted valuable property rights of the Bank of Montgomery, and this became "trebly true," when Premo & King, Inc. was placed in receivership. "A primary purpose for the receivership of an insolvent private concern owing no duty to the public is the preservation of the rights of lien creditors as they exist at the time of the appointment of the receiver." *Surety Corp. v. Sharpe, supra.*

It seems clear from the Record that the insolvent corporation was indebted to the Bank of Montgomery on interest-bearing obligations. The receiver in his report states he calculated and included in the total amount of the claims of secured creditors interest on the amounts due on the claims to 11 August 1961, the date of the receivership, but not later. The receiver allowed one claim of the Bank of Montgomery for $6,749.91—this included interest to 11 August 1961. The pledged property securing this loan was sold by the receiver for $8,000.50, thereby resulting in a surplus of $1,250.59 over the allowed claim, with interest to 11 August 1961. The receiver allowed the other claim of the Bank of Montgomery for $1,548.07—this included interest to 11 August 1961. The pledged property securing this loan was sold by the receiver for $2,900.00, thereby resulting in a surplus of $1,351.93 over the allowed claim, with interest to 11 August 1961. It is manifest that the security given by Premo & King, Inc. to the Bank of Montgomery was given to secure the payment of interest as well as principal of its debts to the Bank of Montgomery.

This Court said in *Moore v. R.R.*, 173 N.C. 726, 92 S.E. 361: "Under the law of this State the appointment of a receiver for a corporation does not have the effect *eo instanti* to stop the interest upon all of its interest-bearing obligations." This Court in the *Moore* case held that the appointment of a receiver for a railroad company did not stop the running of interest on claims for labor and material furnished in the construction of the road, which were a lien on the property and entitled to a preference over other indebtedness. This Court followed the decision in *American Iron & S. Mfg. Co. v. Seaboard A.L.R. Co.*, 233 U.S. 261, 58 L. Ed. 949, and quoted from it as follows: "For, manifestly, the law does not contemplate that either the debtor or the trustees can, by securing the appointment of a receiver, stop the running of interest on claims of the highest dignity."

The order appointing the permanent receiver enjoined all persons, firms, and corporations "from selling under foreclosure of any mortgage or deed of trust any real estate or personal property which

constitutes a part of the property and assets of the said defendant corporation, whether executed by said corporation or assumed by it in the purchase of property, except by permission first obtained from this Court." The receiver cared for and sold property for $8,000.50 upon which there was a chattel mortgage to secure an indebtedness of the insolvent corporation to the Bank of Montgomery in the amount of $6,749.91—this includes interest to the date of the appointment of the receiver. After deducting from the sale price of $8,000.50 the Bank of Montgomery's fair pro rata share of the costs and expenses of the administration of the receivership as modified above (G.S. 1-507.9; *Wood v. Woodbury & Pace, Inc.*, 217 N.C. 356, 8 S.E. 2d 240), the receiver will pay to the Bank of Montgomery $6,749.91, if there is enough left for that purpose, or if not enough, what is left; and if enough is left to pay the $6,749.91 in full and then a surplus remains, then the receiver will pay to the Bank of Montgomery interest on the amount of its claim to the date of the order of disbursement, or if not enough is left to pay the interest to the date of the order of disbursement, to pay what part of it can be paid. If interest can be paid on the claim of the Bank of Montgomery after the appointment of the receiver, the interest is to be figured on the amount of the claim as it was allowed before interest was added to the date of the appointment of the receiver. In other words, no interest is to be paid on interest. No surplus, if any, from the sale in the amount of $8,000.50 can be turned into the general fund of the receivership, unless the allowed claim of the Bank of Montgomery can be paid in full, with interest on its claim to the date of the order of disbursement. The same is applicable to the sale by the receiver for $2,900.00 of property upon which there was the lien of a chattel mortgage in favor of the Bank of Montgomery. In other words, a secured creditor may collect all of its principal and interest *as far as his security suffices. Moore v. R.R., supra; American Iron & S. Mfg. Co. v. Seaboard A.L.R. Co., supra; Spring Coal Co. v. Keech,* 239 F. 48, L.R.A. 1917D, 1152, and annotation following the case in L.R.A.; *Georgia, Florida & Alabama R. Co. v. Bankers Trust Co.,* 170 F. 2d 733; *Board of Com'rs of Sweetwater County, Wyo. v. Bernardin,* 74 F. 2d 809, cert. denied 295 U.S. 731, 79 L. Ed. 1680; *Leach v. Sanborn State Bank,* 210 Iowa 613, 231 N.W. 497, 69 A.L.R. 1206; *BancoKentucky Co.'s Receiver v. National Bank of Kentucky's Receiver,* 281 Ky. 784, 137 S.W. 2d 357, 378; *Metropolitan Life Ins. Co. v. Richard Gill Co., Texas Civil App.,* 303 S.W. 2d 501; 75 C.J.S., Receivers, sec. 270, page 905. It has been generally held that where in the administration of a bankrupt's estate the sale of pledged property by the trustee realizes more than enough to

satisfy the principal of the secured claim, any surplus from the sale of the secured claim should be applied to the satisfaction of after-accruing interest on the secured claim before being turned into the general funds of the estate. Anno. 27 A.L.R. 2d 592, where a multitude of cases is cited in support of the text.

The Bank of Montgomery further assigns as error that Judge Olive approved the report of the receiver to the effect "that the pro rata charge assessed by the Receiver against the various claims of preferred creditors for costs of administration is fair and equitable to each creditor," with the exception that later on in the judgment the judge found as a fact and as a matter of law "that the claims for wages reported by the Receiver* * *shall bear their pro rata share of the costs of administration."

This Court said in *Wood v. Woodbury & Page, Inc., supra*: "Ordinarily, it is the rule with us, when a receivership inures to his benefit, to hold that a lienholder should pay a fair share of the administrative expenses, where the receiver has managed, cared for and sold the encumbered property."

The lot and building upon which there was the lien of a deed of trust in favor of Peoples Mutual Building and Loan Association was sold by the receiver for $10,200.00. The receiver fixed as a pro rata charge of the costs of the administration of the receivership against this amount the sum of $1,053.00—a rate of a little less than 10%—as set forth above in detail, and the judge approved it. The receiver realized in the liquidation of the remainder of the assets of the insolvent corporation $19,700.88—excluding the amount of $1,609.64 collected by him on accounts factored with Rawleigh. The receiver reports that he fixed pro rata charges for the costs of the administration of the receivership against the $19,700.88 of the assets of the insolvent corporation at the rate of 32.992%, and the judge confirmed this. Such a difference cannot be sustained as against the Bank of Montgomery on the Record before us. The charges for the sale of the house and lot for $10,200.00 will be added to the costs of administration as modified in this opinion, and then the Bank of Montgomery will pay a fair pro rata share of the administrative expenses of the receivership, based upon the sum of $29,900.88, the total amount received by the receiver from the liquidation of the assets of the insolvent corporation, with the exception of the sum of $1,609.64 which the receiver collected on accounts receivable factored with Rawleigh.

The non-appealing creditors have acquiesced in the order of distribution. "As a general rule, an appellate court will not grant relief to a party who has not appealed or complained of the judgment."

Surety Corp. v. Sharpe, supra. See *Queen v. Jarrett,* 258 N.C. 405, 128 S.E. 2d 894. However, the reduction in the fee allowed counsel for the receiver will necessarily give some relief to some of the non-appealing preferred creditors. Note, no part of the fee allowed the receiver's counsel was charged to Peoples Mutual Building and Loan Association.

The order of distribution on the appeal of the Bank of Montgomery is modified to conform to this opinion. As thus modified it is affirmed.

APPEAL BY J. N. RAWLEIGH COMPANY, NORTH CAROLINA

Rawleigh assigns as error the failure of the judge to pass upon its verified petition, and his order that it shall deliver to the receiver $531.22, representing its proportionate share of the costs of the administration of the receivership, and the sum of $1,243.23, representing a reserve fund held by Rawleigh, as a prerequisite to the receiver paying to it $1,610.44, representing the collection of factored accounts owned by Rawleigh.

The General Assembly of North Carolina enacted an ASSIGNMENT OF ACCOUNTS RECEIVABLE AND LIENS THEREON ACT, which is set forth in G.S. 44-77 *et seq.* G.S. 44-77, (3), states " 'Assignment' includes an assignment for value as security and the creation by agreement of a lien on an account." G.S. 44-78 and 44-80 set forth the means by which the assignee of accounts receivable becomes protected as against others. G.S. 44-80,(2), reads: "When an assignment becomes protected, it shall be deemed to have been fully perfected at that time, and no bona fide purchaser from the assignor, no creditor of any kind of the assignor, and no other assignee or transferee of the assignor, in any event shall have, or be deemed to have, acquired any right in the account so transferred or in the proceeds thereof, or in any obligation substituted therefor, superior to the rights of the protected assignee therein." G.S. 44-84, (2), reads: "The assignor shall hold in trust for the assignee* * *."

The case of *In re Battery King Manufacturing Company, Inc.,* 240 N.C. 586, 83 S.E. 2d 490, involved a receivership. In that case, shortly prior to the receivership, the insolvent corporation delivered to Burlington Mills fourteen batteries, and the account receivable in the amount of $388.00 representing the delivery was assigned to Rawleigh-Moses, who immediately made payment to the insolvent corporation for the account. Upon delivery of the batteries to Burlington Mills, together with two copies of the invoice, one of which was stamped with notice of assignment of the account receivable, the receiving clerk for Burlington Mills refused to accept the shipment on the ground that it contained improper batteries. The returned batteries

were in the possession of the insolvent corporation when the receiver was appointed. Later the identical batteries were sold by the receiver to Burlington Mills for the reduced sum of $364.88. The Court stated:

> "The foregoing facts bring the claim of Rawleigh-Moses within the provisions of the Returned Goods section of the Assignment of Accounts Receivable Act, G.S. 44-84, under which the receiver was required to hold in trust for Rawleigh-Moses the goods which gave rise to this assigned account receivable. This being so, the purchase money received from the sale of the goods was impressed with a trust in favor of Rawleigh-Moses, and it is so ordered."

The petition filed by Rawleigh in the cause states, *inter alia,* that on all accounts assigned to and factored with Rawleigh by the insolvent corporation actual notice of the assignment was given on the face of the original invoice to the account debtor, and in addition Premo & King, Inc. executed a notice of assignment, which is recorded in Book 100 at page 96 of the public registry of Montgomery County. The petition further states that Rawleigh paid Premo & King, Inc. a full consideration for all the accounts receivable assigned to it by Premo & King, Inc.

The receiver's report in failing to state the facts in respect to the accounts receivable factored with Rawleigh, which he collected, and the judgment approving the report in respect to Rawleigh, do not give us facts sufficient accurately and safely to pass on Rawleigh's rights. Consequently, on Rawleigh's appeal the case will be remanded to the superior court that it may find with exactitude the facts in respect to the accounts receivable factored with Rawleigh, which the receiver collected, and then determine Rawleigh's rights according to the applicable law.

On Rawleigh's appeal the case is

Remanded.

DAVID R. IVERY v. GLADYS W. IVERY, EXECUTRIX OF THE ESTATE OF PAUL F. IVERY, AND, GLADYS W. IVERY, INDIVIDUALLY.

(Filed 27 February 1963.)

1. Appeal and Error § 51—

When defendant introduces evidence, only his motion to nonsuit made at the close of all the evidence is to be considered.

2. Wills § 7—

The word "divorce" is used in G.S. 31-5.4 in its general and comprehensive sense, and the statute effects a revocation of all provisions of a will in favor of testator's spouse upon the dissolution of the marriage either by absolute divorce or by annulment.

3. Marriage § 2; Wills § 8—

It is not required that the husband's probated will leaving his property to his wife be first set aside in a caveat proceeding in order for the husband's next of kin to maintain an action to have the marriage declared void for mental incapacity of the husband to contract the marriage, since the provisions of the will in favor of the wife are revoked by statute if the marriage is annuled.

4. Marriage § 2—

The marriage of a person incapable of contracting for want of understanding is not void *ipso facto;* but, if and when declared void in a legally constituted action, such marriage is void *ab initio*; and such marriage may be declared void in an action instituted during the lifetime of the parties to the marriage by a guardian for the alleged incompetent, or by such incompetent if and when he should become mentally competent to do so.

5. Same; Abatement and Revival § 14—

The marriage of a person incapable of contracting for want of understanding may not be declared void after the death of either party to the marriage when the marriage is followed by cohabitation and the birth of issue, but when there is no issue, such marriage may be declared void in an action instituted after the death of the incompetent by a person or persons whose legal rights depend upon whether the marriage is valid or void. G.S. 51-3; G.S. 50-4.

6. Marriage § 2; Insane Persons § 8—

The test of mental capacity to contract a marriage is the capacity to understand the special nature of the marriage contract and the duties and responsibilities which it entails, and an instruction which, in effect, includes as an element of mental capacity knowledge of the provisions of our statutory law relating to the revocation of a will by marriage and relating to the persons who shall succeed to the estate of an intestate, must be held for prejudicial error.

APPEAL by defendant from *McConnell, Special Judge,* January 22, 1962, Special "A" Civil Term of MECKLENBURG, docketed and argued as No. 250 at Fall Term 1962.

This action was instituted July 28, 1960, to annul and declare void *ab initio* the alleged purported marriage of Paul F. Ivery and Gladys W. Ivery.

Paul F. Ivery, plaintiff's brother, died July 7, 1960.

It was alleged and admitted: (1) that Paul F. Ivery, on or about May 12, 1960, "entered into a marriage ceremony with the defendant, Gladys W. Ivery"; and (2) that defendant "is the duly appointed and acting Executrix of the Estate of Paul F. Ivery, having been appointed as such on or about the 20th day of July, 1960."

Plaintiff alleged Paul F. Ivery, at the time of said marriage ceremony, was mentally incompetent to enter into a marriage contract; that defendant had knowledge of his mental incompetency; and that defendant "persuaded and induced . . . Paul F. Ivery to enter into said marriage ceremony with her . . . to get all the property of the said Paul F. Ivery for herself." Defendant by answer denied these allegations.

The marriage ceremony was performed May 12, 1960, in accordance with all legal formalities.

On May 12, 1960, Paul F. Ivery was living alone. He had lived with his first wife and with his mother. His mother died in February, 1959, and "(h)is first wife had died a couple of years before."

Paul F. Ivery had no children. Plaintiff is his nearest blood kin.

On June 3, 1960, Paul F. Ivery visited the neurosurgeon who had removed a tumor from his brain in January, 1957. On June 10, 1960, Paul F. Ivery was taken to a hospital where he remained until his death on July 7, 1960.

Much evidence was offered by plaintiff and by defendant. The testimony of defendant's witnesses was in sharp conflict with the testimony of plaintiff's witnesses. A review of the evidence is unnecessary to an understanding and the disposition of the crucial questions presented by defendant's appeal.

The court submitted, and the jury answered, the following issue: "Did Paul F. Ivery have sufficient mental capacity to enter into a marriage contract with Gladys W. Ivery on May 12, 1960? Answer: No."

On said verdict, the court entered judgment "that the marriage entered into between Paul F. Ivery and Gladys W. Ivery on May 12, 1960, be and it is hereby declared null and void, and the said marriage is hereby dissolved AB INITIO, and the parties to said marriage ceremony are hereby set free and divorced therefrom as though it had never been entered into."

The court entered a separate order providing that, pending defendant's appeal and until otherwise ordered by the court, "the defendant is hereby restrained and enjoined from disposing of the real estate of which Paul F. Ivery was seized and possessed and the personal property owned by him, at the time of his death, or from attempting or undertaking to do so."

Defendant excepted to said judgment and appealed.

Robert G. Sanders and J. C. Sedberry for plaintiff appellee.
B. F. Wellons and Brock Barkley for defendant appellant.

BOBBITT, J. Defendant's Assignments of Error Nos. 1 and 5 are based on his exceptions to the overruling of his motions for judgment of nonsuit. The only motion to be considered is that made by defendant at the conclusion of all the evidence. G.S. 1-183; *Spaugh v. Winston-Salem,* 249 N.C. 194, 105 S.E. 2d 610.

The evidence, when considered in the light most favorable to plaintiff, was sufficient to support a finding that Paul F. Ivery, deceased, at the time of the marriage ceremony on May 12, 1960, was mentally incapable of contracting a valid marriage. Indeed, defendant does not contend otherwise.

Defendant proffered as evidence the record of the proceedings before the Clerk of the Superior Court of Mecklenburg County showing the probate on July 20, 1960, in common form, as the last will and testament of Paul F. Ivery, deceased, of a paper writing dated May 16, 1960, in which Gladys W. Ivery is named sole beneficiary and sole executrix. Plaintiff's objection to the admission of this record was sustained and defendant excepted. (Note: Plaintiff's counsel stated that no caveat had been filed.)

Defendant contends plaintiff cannot maintain this action unless and until the said will is attacked and set aside in a caveat proceeding. The proffered evidence as to a probated will of Paul F. Ivery, deceased, was *excluded* and therefore not for consideration in passing upon defendant's said motion for judgment of nonsuit. Even so, whether the probated will, if admitted, would bar plaintiff's action is discussed in the briefs. The respective contentions relate to the proper interpretation of the statute (Session Laws 1953, c. 1098, s. 6) now codified as G.S. 31-5.4, which provides:

"§ 31-5.4. Revocation by divorce.—Dissolution of marriage by absolute divorce after making a will does not revoke the will of any testator but it revokes all provisions in the will in favor of the testator's spouse so divorced, including, but not by way of limitation, the appointment of such spouse as executor or executrix."

Defendant contends the quoted statute refers expressly and solely to the *dissolution* of a marriage by absolute *divorce* and is not applicable where a marriage is annulled. Plaintiff contends the word "divorce," as used in the quoted statute, includes the *annulment* as well as the dissolution of a marriage.

The technical distinctions between an action for absolute divorce and a suit for annulment are well known and need not be restated. 17 Am. Jur., Divorce and Separation § 3; 27A C.J.S., Divorce § 1; Nelson, Divorce and Annulment, Second Edition, Volume 3, § 31.04; *Pridgen v. Pridgen,* 203 N.C. 533, 166 S.E. 591; *Sawyer v. Slack,* 196 N.C. 697, 146 S.E. 864.

In *Johnson v. Kincade* (1843), 37 N.C. 470, this Court held the statute conferring jurisdiction "in all cases of applications for divorce" conferred jurisdiction over all matrimonial causes, including "the jurisdiction to pronounce the nullity of a marriage *de facto* for want of capacity."

In *Lea v. Lea,* 104 N.C. 603, 10 S.E. 488, the action was "to declare a marriage void because of a prior existing marriage on the part of the defendant." The question was whether the court could award alimony *pendente lite* to the plaintiff under a statute providing for the award of alimony *pendente lite* where a married woman applied to a court for a divorce from "the bonds of matrimony or from bed and board." It was held the word "divorce" was used in a general and comprehensive sense and included an action for the annulment of a marriage. Hence, the award of alimony *pendente lite* was upheld.

In *Taylor v. White,* 160 N.C. 38, 75 S.E. 941, and in *Watters v. Watters,* 168 N.C. 411, 84 S.E. 703, this Court, citing *Lea v. Lea, supra,* while recognizing the technical distinctions, refers to an annulment of a marriage as coming under the general heading of divorce.

In *Sawyer v. Slack, supra,* this Court, in opinion by Connor, J., said: "An action to annul a marriage for statutory reasons is in the nature of an action for divorce."

In enacting G.S. 31-5.4, we think it clear the General Assembly used the word "divorce" in its general and comprehensive sense, that is, as denoting a judgment or decree by which a marriage is dissolved or annulled, rather than in its limited and technical sense. This being true, an attack on the (proffered) probated will is not a prerequisite to plaintiff's right to maintain this action. An annulment of the marriage of Paul F. Ivery, deceased, and defendant would, under G.S. 31-5.4, revoke all provisions of said will in favor of defendant. In such event, the heir(s) at law and next of kin of Paul F. Ivery, deceased, would be entitled to his estate.

The more difficult question presented by defendant's motion for judgment of nonsuit is whether the marriage of Paul F. Ivery and defendant is subject to attack *after* Paul F. Ivery's death.

"The question whether a suit to annul a marriage can be instituted and maintained after the death of one of the parties to the marriage

or, if instituted prior to death, may be continued or revived by or against a representative of the deceased, resolves itself into inquiry whether the marriage is void in the true sense or voidable only. The invalidity of a marriage which is absolutely void or void ab initio may be maintained in a proceeding between any proper parties, either in the lifetime, or after the death, of the supposed husband or wife, and whether the question arises directly by petition for annulment or collaterally in other proceedings, at least in the absence of a statute requiring the action to be brought in the lifetime of both parties. But the right to annulment of a marriage which is voidable only is a personal right and proceedings for annulment must be brought during the lifetime of both parties to the marriage." 4 Am. Jur. 2d, Annulment of Marriage § 69; Annotations, "Right to attack validity of marriage after death of party thereto," 76 A.L.R. 769 and 47 A.L.R. 2d 1393.

At common law, the marriage of a person who was mentally incompetent to enter into the marriage was void and open to attack after the death of either or both of the parties. 76 A.L.R. 772; 47 A.L.R. 2d 1396; *Gathings v. Williams,* 27 N.C. 487. In each jurisdiction decision as to what extent, if any, the rule of the common law has been superseded or modified depends upon the statutes of such jurisdiction. Too, the significance of each court decision must be considered in relation to the statutory provisions then in force.

In *Pridgen v. Pridgen, supra,* the action was to annul a pretended marriage between the plaintiff and the defendant on the ground the defendant had a living husband at the time the ceremony between the plaintiff and the defendant was celebrated. While mindful that this action was to annul a pretended marriage by a party thereto on the ground it was bigamous, the following portion of the opinion of Adams, J., is pertinent:

"Between void and voidable marriages the law recognizes a distinction which applies to the status of the parties before the marriage relation is dissolved. A voidable marriage is valid for all civil purposes until annulled by a competent tribunal in a direct proceeding, but a void marriage is a nullity and may be impeached at any time. Schouler's Marriage, etc., sec. 1081; *Johnson v. Kincade,* 37 N.C. 470; *Crump v. Morgan,* 38 N.C. 91; *Williamson v. Williams,* 56 N.C. 446; *Taylor v. White,* 160 N.C. 38. In *Gathings v. Williams, supra,* the principle is stated in these words: 'Where the marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is want of age ('want of age' being obiter, *Koonce v. Wallace,* 52 N.C. 194), or understanding, or a prior marriage still

subsisting, the marriage is void absolutely and from the beginning, and may be inquired of in any court. For, although in such case there may be a proceeding in the ecclesiastical court, it is not to dissolve the marriage, but merely, for the convenience of the parties, to find the fact and declare the marriage thereupon to have been void *ab initio*, and no civil rights can be acquired under such a marriage. It is said to be no marriage, but a profanation of marriage, and the *factum* is a nullity.'

"The General Assembly has provided that all marriages between persons either of whom has a husband or wife living at the time of such marriage shall be void, and that the aggrieved party may seek relief in the Superior Court, which has succeeded to the functions of the ecclesiastical courts of England. C.S., 1658, 2495; *Gathings v. Williams, supra; Johnson v. Kincade, supra; Setzer v. Setzer,* 97 N.C. 252; *Watters v. Watters,* 168 N.C. 411. The plaintiff accordingly brought suit, not for divorce, but to have the marriage relation between the defendant and himself adjudged void from the beginning, on the ground that at the time their marriage was solemnized the defendant had a husband living. *Taylor v. White, supra.*"

The statutory provisions in effect on May 12, 1960, now codified as G.S. 51-3 and G.S. 50-4, which, in all respects presently pertinent, were enacted as Sections 2 and 33, respectively, of Chapter 193, Public Laws of 1871-2, are as follows:

"§ 51-3. Want of capacity; void and voidable marriages.— *All marriages* between a white person and a negro or Indian, or between a white person and person of negro or Indian descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro, or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or *between persons either of whom is at the time* physically impotent, or is *incapable of contracting from want of* will or *understanding, shall be void*: Provided, double first cousins may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or Indian, or of negro or Indian descent to the third generation, inclusive, and for bigamy; provided further, that no

marriage by persons either of whom may be under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within forty-five (45) days of the marriage which separation has been continuous for a period of one year shall be voidable: Provided, that no child shall have been born to the parties within ten (10) lunar months of the date of separation." (Our italics)

"§ 50-4. What marriages may be declared void on application of either party.—The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled Marriage, or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the second proviso contained in § 51-3."

The statute now codified as G.S. 51-3 declares all marriages in violation of its provisions "shall be void." The second proviso declares "no marriage followed by cohabitation and the birth of issue shall be declared void *after the death of either of the parties for any of the causes stated in this section*, except for that one of the parties was a white person and the other a negro or Indian, or of negro or Indian descent to the third generation, inclusive, and for bigamy." (Our italics)

In *Baity v. Cranfill*, 91 N.C. 293, this Court held the authority conferred upon the court by the statute now codified as G.S. 50-4 was so limited by the second proviso of the statute now codified as G.S. 51-3 as to deprive the court of the power to declare void the marriage of uncle and niece, "nearer of kin than first cousins," after the husband's death, when their marriage was followed by cohabitation and the birth of issue.

In *Setzer v. Setzer, supra,* the plaintiff's action was against the administrator of his father's estate and a surety on the administration bond. The defendants alleged and the jury found that plaintiff's father did not have sufficient mental capacity to understand and enter into the marriage contract at the time of its solemnization. The defendants contended the pretended marriage was void and that the plaintiff, being illegitimate, was not entitled to a distributive share in his father's estate. This Court held, citing *Baity v. Cranfill, supra,* the marriage of plaintiff's parents followed by their cohabitation and the birth of issue (the plaintiff) was not subject to attack on the

ground of alleged mental incapacity after the intestate's death and that the issue as to the mental capacity of the plaintiff's father at the time of the marriage should not have been submitted.

It is noted that the second proviso of G.S. 51-3 does not apply to bigamous marriages. Actions to annul a marriage on the ground it was void because the defendant at the time of the ceremony had a living wife (or husband) include the following: *Pridgen v. Pridgen, supra; Taylor v. White, supra; Lea v. Lea, supra.*

Although G.S. 51-3 provides that all marriages "between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, . . . shall be void," it is well established that such marriages are voidable rather than void. *Sawyer v. Slack, supra; Watters v. Watters, supra; S. v. Parker,* 106 N.C. 711, 11 S.E. 517. *This was the rule of the common law. Koonce v. Wallace, supra.* As stated by Connor, J., in *Sawyer v. Slack, supra*: ". . . even where the statute declares a marriage void, because one of the parties thereto was under the age at which he or she might lawfully marry, the word 'void,' used in the statute, will be construed to mean 'voidable,' thus rendering the marriage valid until it has been declared void by a court of competent jurisdiction in an action directly attacking the validity of the marriage. (Citation) It has been held by this Court that a marriage which is not void, *ab initio,* but merely voidable, because one of the parties thereto was at its date under the age at which he or she might lawfully marry, may be ratified by the subsequent conduct of the parties in recognition of the marriage. (Citations)" Presumably, these decisions caused the codifier to include the word "voidable" in the caption of G.S. 51-3.

In *Watters v. Watters, supra,* Clark C.J., referring to the statute now codified as G.S. 50-4, says: "This recognizes that the only absolutely void marriages are those named in the proviso to Revisal, 2083 (now G.S. 51-3), and that the others need to be *'declared void.'* Though the declaration may be, if granted, that the marriage was void *ab initio,* such marriage is valid until this declaration is made by the court after hearing and trial." Again: "Though the court has jurisdiction to declare a marriage in proper cases void *ab initio,* they are not *ipso facto,* but must be so declared by a decree of the court, for only in the instances set out in the *proviso* to Revisal, 2083, can they be treated as void in a collateral proceeding."

Our decisions are inconclusive as to whether a marriage contracted when a party thereto is "incapable of contracting for want of . . . understanding" is void or voidable.

In *Watters v. Watters, supra,* it was held that the husband could not maintain an action to annul the marriage on the ground his wife was

incapable of entering into a contract of marriage for want of understanding. It appearing that the marriage was followed by many years of cohabitation and the birth of five children, it was held the plaintiff was estopped to assert the invalidity of the marriage.

In *Sims v. Sims,* 121 N.C. 297, 28 S.E. 407, the action was by the guardian of a woman who had been adjudged a lunatic to annul a marriage she thereafter purported to enter into with the defendant. In the opinion of Clark, J. (later C.J.), it is stated: "Indeed, the marriage at the time of a legally declared lunacy, being a nullity, could only have been remedied by proceedings to set aside the inquisition of lunacy for fraud or other good ground, or by a new marriage, if the lunatic is since found to be restored. *The void marriage on account of lunacy could not be cured merely by cohabitation after restoration.* Marriages entered into by parties under the legal age, however, being not void, but voidable, can be validated by cohabitation after arrival at the marriageable age." (Our italics) The opinion concludes: "The jury found, further, that Nancy E. Sims did not have mental capacity to enter into the marriage with the defendant on 14 November, 1893, but this was unnecessary, as the marriage with a declared lunatic was *ipso facto* void. *Crump v. Morgan, supra.*"

We reach these conclusions:

1. Under the rule of the common law as modified by our statutes, the marriage of a person incapable of contracting for want of understanding is not void *ipso facto;* but, if and when declared void in a legally constituted action, such marriage is void *ab initio.*

2. Such marriage, when followed by cohabitation and the birth of issue, may not be declared void after the death of either of the parties.

3. An action to declare such marriage void may be instituted in the lifetime of the parties thereto by a guardian for the alleged mentally incompetent or by such mentally incompetent if and when he (she) becomes mentally competent to do so; and, unless such marriage is followed by cohabitation *and* the birth of issue, such action may be instituted after the death of such mentally incompetent by a person or persons whose legal rights depend upon whether such marriage is valid or void.

In the instant case, the marriage of Paul F. Ivery and defendant on May 12, 1960, was followed by cohabitation but not by birth of issue. Hence, the second proviso of G.S. 51-3 does not apply. Therefore, under the applicable legal principles, plaintiff is entitled to prosecute this action for annulment upon allegation and proof that he is the brother and heir at law of Paul F. Ivery, deceased.

Although defendant's motion for judgment of nonsuit was properly overruled, we are constrained to hold that she is entitled to a new trial on account of prejudicial error in the charge.

Defendant excepted to and assigns as error these excerpts from the charge:

"(e) Now when they become husband and wife, what are the consequences of that contract? As we know the husband has the duty to support and maintain his wife and family. But in addition to that, there are certain instances of marriage which also occur and which have been pointed out from the evidence in this case. Section 31-5.3 of the General Statutes provides that where a man is married, a will is revoked by subsequent marriage, except in certain instances which are not pertinent here, in other words if a man marries, any will which he had made prior to the time of that marriage is void. Also, Section 29-14 of the General Statutes provides under the law that the share of the surviving spouse shall be all of the property, that is the net estate of the deceased, that is, the surviving spouse or widow, if the intestate is not survived by a child, children or any lineal descendant, that is child or children or granchild of a deceased child or children, the surviving spouse is entitled to all the net estate. Now those are some of the property rights which are incident to the contract of marriage. (f)

"(g) Now we come next to the issue, which is, did Paul F. Ivery have sufficient mental capacity to enter into a marriage contract with Gladys W. Ivery, which is to determine whether Paul F. Ivery had sufficient mental capacity to contract a valid marriage. The test is whether he had the capacity to understand the nature of the contract and the duties and responsibilities it created, and the consequences. Now I have just discussed with you the consequences; therefore the issue is whether Paul F. Ivery on May 12, 1960, had sufficient mental capacity to understand the nature of the marriage contract which he entered into, and the duties and responsibilities it created, and the consequences as to property. (h)"

It is noted that the portion of the charge between (g) and (h) follows immediately the portion of the charge between (e) and (f).

In the portion between (g) and (h), the court instructed the jury that the issue was whether Paul F. Ivery on May 12, 1960, had sufficient mental capacity to understand the nature of the marriage contract when he entered into it, and the duties and responsibilities it created, *and the consequences as to property*, and referred to the fact that he had "just discussed" with the jury "the consequences."

In the portion between (e) and (f) the court refers to "some of the property rights which are incident to the contract of marriage," to wit, the consequences of the marriage contract as to property. One of the consequences referred to is that G.S. 31-5.3 provides that, with certain exceptions, a will is revoked by the subsequent marriage of the maker. Another consequence referred to is that, under the provisions of G.S. 29-14(4), all the net estate of an intestate becomes the property of the surviving spouse if the intestate is not survived by a child, children or any lineal descendant of a deceased child or children or by a parent. Incidentally, G.S. 29-14 became effective July 1, 1960, that is, subsequent to the solemnization of the marriage.

"As to what constitutes mental capacity or incapacity to enter into marriage, it is not possible to lay down any general rule of universal application. . . . Ordinarily, the mental incapacity must relate specifically to the contract of marriage in order to affect it, and if a person entering the marriage relation has sufficient capacity to understand the nature of the contract and the duties and responsibilities which it creates, the marriage will be valid." 35 Am. Jur., Marriage § 18; Annotation: "Mental capacity to marry," 28 A.L.R. 635. ". . . the general rule is that the test is the capacity of the person to understand the special nature of the contract of marriage, and the duties and responsibilities which it entails, which is to be determined from the facts and circumstances of each case." 55 C.J.S., Marriage § 12.

For the purpose of this appeal, it is sufficient to say that knowledge of the provisions of our statutory law relating to the revocation of a will by marriage and relating to the persons who shall succeed to the estate of an intestate is not a prerequisite or necessary element of mental capacity sufficient to contract a valid marriage. In our opinion, the jury might reasonably have understood from the court's (quoted) instructions that Paul F. Ivery, unless he had such knowledge of our statutory law on May 12, 1960, did not then have mental capacity sufficient to contract a valid marriage.

New trial.

IN THE MATTER OF KIRKMAN FURNITURE COMPANY, A CORPORATION, IN STATE COURT RECEIVERSHIP UNITED STATES OF AMERICA, APPELLANT v. BEN L. HERMAN, STATE COURT RECEIVER, KIRKMAN FURNITURE COMPANY; GUILFORD COUNTY AND THE CITY OF HIGH POINT; NORTH CAROLINA NATIONAL BANK (FORMERLY SECURITY NATIONAL BANK OF GREENSBORO); CAROLINA SPRING CORPORATION; HENLEY PAPER COMPANY; BALDWIN MANUFACTURING COMPANY; KAY MANUFACTURING COMPANY, AND WAGE EARNERS, APPELLEES.

(Filed 27 February 1963.)

1. Appeal and Error § 16—

When *certiorari* is allowed, the Supreme Court will examine the record proper to determine whether there is error of law appearing thereon adversely affecting legal rights as between appellant and appellees who are parties to the appeal, notwithstanding that appellant has preserved no exception or assignment of error.

2. Appeal and Error § 60—

Where notice of petition for *certiorari* is not served on some of the parties and they are not parties to the appeal, the adjudication of their rights in the lower court is the law of the case and the Supreme Court will not undertake to determine whether there was error in the judgment of the lower court in respect to their rights.

3. Receivers § 12—

R.S. 3466, 31 U.S.C.A. 191, does not create a lien upon the debtor's property in favor of the United States but merely gives it the right to priority of payment, which attaches upon the appointment of a voluntary or involuntary receiver or assignment by the debtor for the benefit of creditors, and the statute does not give the Government priority over liens against specific property of the debtor created prior to insolvency and prior to the filing of any notice by the collector. 26 U.S.C.A. 6323.

4. Same—

Where the receiver sells property subject to the lien of a deed of trust executed by the debtor prior to insolvency, municipal and county *ad valorem* taxes then constituting a lien against the property are properly given priority of payment out of the proceeds of the sale, G.S. 105-376, and then the balance due on the deed of trust should be paid prior to the payment of Federal taxes, R.S. 3466, 31 U.S.C.A. 191, and the contention of the United States that although the lien of the deed of trust was prior to its claim, its claim should have priority over the county and municipal taxes, is untenable.

PETITION for writ of *certiorari* filed in this Court by the United States of America was allowed on 2 May 1962. The case was docketed in the Supreme Court as No. 593 and argued at the Fall Term 1962.

This is a civil action instituted in the Municipal Court of the City of High Point, North Carolina, and involves the general liquidating

receivership of the Kirkman Furniture Company, a North Carolina corporation formerly engaged in a manufacturing operation, having its principal place of business in High Point, Guilford County, North Carolina.

An order was entered by the judge of the Municipal Court of the City of High Point in this cause on 13 September 1960, appointing a receiver to take charge of the affairs and property of Kirkman Furniture Company for the purpose of liquidating the assets of said debtor for the satisfaction of the creditors of the said corporation.

The receiver filed a petition and report on 11 October 1960, setting forth the recorded encumbrances against the property of Kirkman Furniture Company, as found in the public Registry of Guilford County and the liens for taxes due Guilford County and the City of High Point. A mortgage in favor of Security National Bank (now North Carolina National Bank) on all the real property of the Kirkman Furniture Company was recorded on 26 November 1958, securing the sum of $10,000.00, with a balance due of $3,700.00. *Ad valorem* taxes were due Guilford County and the City of High Point for the years 1954 through 1960 in the amount of $6,906.76. The United States had filed in the office of the Register of Deeds of Guilford County federal tax liens totaling $23,870.71 during the period from 4 December 1959 through 28 July 1960. On 25 October 1960 an order was entered transferring all liens on the assets of said debtor to the proceeds of the sale thereof.

On 4 November 1960 the receiver filed a report showing that the real estate of said debtor on which the liens attached had been sold for $30,000 and the personal property was sold for $14,781.75. The sale of the real estate was confirmed by the court on 15 November 1960.

This cause came on for hearing before the court upon the petition of the receiver on 17 January 1961, stating that all of the assets of the said debtor had been liquidated; that there was a fund of $38,661.31 on hand for disbursement among the creditors of Kirkman Furniture Company; and that there were insufficient funds on hand with which to pay in full creditors holding priority claims. The receiver prayed for an order setting forth the order of priority of payment as described in the receiver's petition. All claims as hereinafter set out were listed in the petition of the receiver. On 17 January 1961, an order was entered and served on all lienholders, requiring them to show cause, if any, why an order of preference should not be entered as set out in the petition.

An order was entered on 31 January 1961 by the judge of the Municipal Court of the City of High Point, directing the receiver

to distribute the balance of the funds then in his possession and any additional funds which might come into his possession as follows:

(1) Balance due on deed of trust from Kirkman Furniture Company to North Carolina National Bank (formerly Security National Bank).
The payment of priority of No. 1 subject first to payment of the following creditors out of the proceeds of the property on which the lien was fixed:
   (a) Wage earners, as described in order dated 17 January 1961, which amounts to approximately $1,945.18.
   (b) City of High Point and Guilford County tax liens totaling $6,906.76.

(2) Federal tax liens filed on the following dates:

4 December 1959	$15,135.69
23 December 1959	279.79
10 May 1960	249.95
10 May 1960	4,463.36
5 July 1960	3,674.83

(3) Judgment in favor of Carolina Spring Corporation for $9,173.16, filed 18 July 1960.

(4) Judgment in favor of Henley Paper Company for $1,495.91, filed 27 July 1960.

(5) Federal tax lien filed 28 July 1960 in the amount of $67.09.

(6) Judgment in favor of Baldwin Manufacturing Company for $1,304.70, filed 28 July 1960.

(7) Judgment in favor of Kay Manufacturing Company for $1,055.57, filed 28 July 1960.

To this order of distribution and the signing thereof the United States of America excepted and gave notice of appeal in open court.

The appeal was heard at the January Term 1962 of the Superior Court of Guilford County, High Point Division. On 12 January 1962 the Honorable Walter E. Crissman, Judge Presiding, entered an order affirming in all respects the judgment of the Municipal Court of the City of High Point. To this order and the signing thereof the United States of America excepted and gave notice of appeal in open court.

On 19 January 1962 a motion by the United States for extension of time to file the case on appeal was filed with the Clerk of the Superior

Court of Guilford County, directed to the Honorable Walter E. Crissman. No order of extension was entered, and on 20 March 1962, notice of a motion to dismiss the appeal was served on the United States of America, setting the hearing for 27 March 1962 in the Superior Court of Guilford County, High Point Division, before the Presiding Judge, the Honorable F. Donald Phillips.

On 21 March 1962 the appellees were notified by telephone to appear in the office of the Honorable Walter E. Crissman, Resident Judge of the Superior Court, Guilford County, High Point Division, and an order was signed *nunc pro tunc*, dated 26 January 1962, extending for sixty days the time for the United States to serve its case on appeal. To this order the appellees excepted.

The motion to dismiss the appeal of the United States of America was heard on 27 March 1962, and by order dated 28 March 1962 the Honorable F. Donald Phillips, Judge Presiding at the March Term 1962 of the Superior Court of Guilford County, High Point Division, the appeal of the United States of America to this Court was dismissed.

Thereupon, the appellant herein, the United States of America, filed its petition for writ of *certiorari* in this Court and gave notice thereof to Forrest E. Campbell, one of the attorneys of record for Guilford County and the City of High Point; to Charles W. McAnally, attorney for the North Carolina National Bank, High Point, North Carolina; to Arch K. Schoch, attorney for Henley Paper Company (Mr. Schoch was appointed attorney for the receiver on 17 August 1961 and thereafter was allowed by the court below to withdraw as counsel for Henley Paper Company); and to Ben L. Herman, the receiver.

No notice of the filing of the petition for writ of *certiorari* in this Court was given to the wage earners or to any other parties to this action except to those listed above.

The petition for writ of *certiorari* filed in this Court was allowed on 2 May 1962.

Louis F. Oberdorfer, Assistant Attorney General; Lee A. Jackson, Joseph Kovner and Fred E. Youngman, Attorneys, Department of Justice; and William H. Murdock, United States Attorney, counsel for appellant, United States of America.

Arch K. Schoch, attorney for Receiver, appellee.

Charles W. McAnally, attorney for North Carolina National Bank, appellee.

Forrest E. Campbell and William D. Branham, attorneys for Guilford County and the City of High Point, appellees.

DENNY, C.J. The appellant has preserved no exceptions entered in the court below nor has it set out any assignments of error in the record on appeal. Even so, since we allowed *certiorari*, we will examine the record proper to determine whether or not there is error of law appearing thereon adversely affecting the rights of the appellant as between it and the appellees who are parties to the appeal. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590; *Logan v. Sprinkle*, 256 N.C. 41, 123 S.E. 2d 209; *Cratch v. Taylor*, 256 N.C. 462, 124 S.E. 2d 124; *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118.

Counsel who argued the case before this Court on behalf of the appellant stated to the Court that the only parties to this appeal are those on whom notice of its petition for writ of *certiorari* were served. Consequently, the only question presented for our consideration and determination is whether or not the order of distribution entered in the Municipal Court of the City of High Point and affirmed in the Superior Court of Guilford County was erroneous in any respect as between the appellant and those lienholders who are parties to this appeal. It follows, therefore, that we will not consider or undertake to determine whether or not there was error in the preference given to the claims of the wage earners entered in the Municipal Court of the City of High Point on 31 January 1961. The order with respect to the priority given to such wage earners stands unchallenged on this appeal, notwithstanding our decision in *Leggett v. College*, 234 N.C. 595, 68 S.E. 2d 263.

The Congress of the United States, in 1797, enacted a staute conferring upon the government a right of priority in payment out of the assets of an insolvent debtor of all claims due the United States. There has been no substantial change in this statute in the meantime, which is now R.S. 3466, 31 U.S.C.A. 191, the pertinent part of which reads as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied."

"It is well settled that the priority statute does not create a lien upon the debtor's property in favor of the United States, but merely confers upon the government a right of priority in payment out of that property in the hands of the debtor's assignees or other representatives, under the conditions specified in the statute. *It follows that if, before the right of priority of the United States accrues under the statute, the debtor parts with his property, either absolutely or conditionally by way of mortgage or other liens, or involuntary liens are acquired*

against the property, the priority of the United States does not attach to such property, and the claims of the transferee, mortgagee, or other lienee are superior to that of the United States, at least where the lien so created or acquired is a specific lien upon specific property, as contradistinguished from a general lien upon all the property of the debtor. While the lower federal courts have followed the foregoing rule, the Supreme Court of the United States has declared that it has not yet decided whether a specific and perfected lien will be accorded priority against the United States under Revised Statutes section 3466. However, it is well settled that, even though section 3466 does not create a lien upon the debtor's property in favor of the United States, a claim of the United States within the scope of the statute is entitled to priority as against a pre-existing inchoate lien on the debtor's property. For the purposes of the federal statute, a pre-existing lien is inchoate and not specific, unless it is definite, as of the crucial time of insolvency, in at least three respects: (1) the identity of the lienor, (2) the amount of the lien, (3) and the property to which it attaches. * * *" (Emphasis added.) 29 Am. Jur., Insolvency, section 77, page 346, *et seq. Bramwell v. United States Fidelity & G. Co.,* 269 U.S. 483, 70 L. Ed. 368; *United States v. Emory,* 314 U.S. 432, 86 L. Ed. 315, 44 C.J.S., Insolvency, section 14 (b), page 374.

The priority of the United States, under the provisions of the above statute, attaches upon the appointment of a voluntary or involuntary receiver, *Gordon v. Campbell,* 329 U.S. 362, 91 L. Ed. 348, or upon the date of the debtor's assignment for the benefit of creditors, *United States v. Waddill, Holland & Flinn,* 323 U.S. 353, 89 L. Ed. 294; *United States v. Texas,* 314 U.S. 480, 86 L. Ed. 356; *Price v. United States,* 269 U.S. 492, 70 L. Ed. 373; *In re Mitchell's Restaurant* (1949 Del.), 67 A. 2d 64; *Spokane Merchants' Asso. v. State,* 15 Wash. 2d 186, 130 P 2d 373; *Surety Corp. v. Sharpe,* 236 N.C. 35, 72 S.E. 2d 109; *Bishop v. Black,* 233 N.C. 333, 64 S.E. 2d 167.

However, the right to priority of payment under the above statute does not give the government any lien or right that may be enforced "against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector" in accordance with the provisions of 26 U.S.C.A. 6323 (formerly 26 U.S.C.A. 3672).

As we construe the record before us, the debtor, Kirkman Furniture Company, conditionally parted with its title to all the real estate involved by executing a deed of trust thereon to a trustee to secure a loan of $10,000 from the North Carolina National Bank (formerly Security National Bank), which deed of trust was executed and filed of record on 26 November 1958, nearly two years prior to the appointment of the receiver in this action.

Furthermore, all the delinquent taxes now due Guilford County and the City of High Point had become a lien on the real estate of the debtor prior to the appointment of the receiver for the debtor on 13 September 1960. G.S. 105-280; G.S. 105-325; G.S. 105-340. Moreover, all taxes due Guilford County and the City of High Point had accrued and constituted a lien against the real estate of the debtor herein before any notice of taxes due the United States was filed of record in Guilford County, North Carolina, except for the year 1960.

Therefore, we hold that the taxes due Guilford County and the City of High Point constitute liens superior to the deed of trust held by the bank, G.S. 105-376, and that the lien of the bank under its deed of trust was superior to and had priority over the claims of the United States. R.S. 3466, 31 U.S.C.A. 191; 26 U.S.C.A. 6323; *United States v. Atlantic Municipal Corp.* (U.S.C.A. 5th Circ.), 212 F 2d 709; *Exchange Bank & Trust Co. et al v. Tubbs Mfg. Co.* (U.S.C.A. 5th Circ.), 246 F 2d 141; *Brent v. The Bank of Washington*, 10 Peters 596.

The appellant is not contesting the validity of the claim to priority of the North Carolina National Bank (formerly Security National Bank) over the claims of the appellant, but does contend the judgment is erroneous in that it orders the receiver to pay the taxes due Guilford County and the City of High Point as being superior and entitled to priority over the bank's deed of trust, and, therefore, prior and entitled to be paid ahead of the bank and the tax claims of the appellant.

In the case of the *United States v. Atlantic Municipal Corp., supra*, the question submitted for determination on an agreed statement of facts, was whether the district court erred in holding that, a distribution of the proceeds on all property of an insolvent taxpayer corporation, the holder of a tax lien certificate issued by the County of Orange, Florida, for 1949 *ad valorem* taxes, which became a lien on the taxpayer's real property on 1 January 1949, was entitled to priority as against income and excess profit tax claims of the United States which became a lien on 31 May 1949 and was duly filed in the public records of Orange County, Florida, on 1 June 1949. The appellant insisted "(1) that lien for lien, the tax lien of the United States primes that of the appellee and receives priority in payment, and (2) that if this is not so, the debtor being insolvent, Section 3466 accords priority in payment to debts due the United States for taxes." Among other things, the Court said: "On its part, as a conclusive answer to appellant's first claim, appellee points: to the showing in the agreed statement of facts that its claim is supported by a specific and perfected lien which primes, that is, is prior in time to, the tax lien of the United States; and to the law as most recently declared in *United States v.*

City of New Britain, 347 U.S. at page 85 (98 L. Ed. 520) 74 S. Ct. at page 370 * * *.

"It is also clear that appellee's second contention, that Section 3466, the debt priority statute, may not, under the agreed facts, be availed of by the United States, is equally well taken. This statute applies only as against unsecured debts, that is, debts not secured by a specific and perfected lien. It has never been, we think it will never be, applied as it is sought to be applied here, to accord payment to a debt due the United States in preference to a claim secured by a lien which is prior in time and superior in law to the lien of the United States securing the debt for which preferential payment is sought."

Likewise, in *Exchange Bank & Trust Co. et al v. Tubbs Mfg. Co., supra,* the district court granted the United States priority for taxes out of the sale of the assets of the corporation over mortgagees and claims of the City of Dallas for municipal taxes. The mortgage lien claimants and the City of Dallas appealed. The Fifth Circuit Court said: "We will content ourselves with saying that upon a consideration of the relevant facts and a review of the authorities now extant, we are of the clear opinion that the claim of the United States to priority over the mortgage lien claims is unfounded, and that, on the appeal of the mortgage lien claimants, the judgment must be reversed with directions to provide for the payment of the claim of each out of the proceeds of the property on which its lien was fixed, subject, however, to first payment thereout of the City's tax claims. * * * The judgment awarding the United States priority and directing the clerk to issue his check to it for the moneys on deposit, received from the sale of the assets of the debtor is accordingly reversed, and the cause is remanded with directions to enter judgment awarding priority to the respective mortgage claimants, subject to payment of the City's taxes due on the respective properties, and directing the clerk to issue his check to each of the claimants in payment of its debt to the extent that the funds derived from the property secured by its mortgage permit, and to issue his check to the United States for the balance remaining undistributed."

Consequently, we think the court below properly directed the receiver to pay off the tax liens held by Guilford County and the City of High Point before paying the bank the balance due on its secured loan. After the payment of these liens and the claims for wages, which claims are not contested, the appellant is entitled to have all its tax claims paid which were filed prior to the filing of the judgment in favor of Carolina Spring Corporation on 18 July 1960 if the funds in the hands of the receiver are sufficient to pay such claims. *Surety Corp. v. Sharpe, supra.*

The judgment entered in the Municipal Court of the City of High Point on 31 January 1961, and affirmed in the Superior Court of Guilford County, will be upheld.

Affirmed.

BLANCHE P. PAINTER, WIDOW, TOLVIN EDGAR PAINTER, DECEASED, AND BLANCHE P. PAINTER, ADMINISTRATRIX OF THE ESTATE OF TOLVIN EDGAR PAINTER, DECEASED, EMPLOYEE, CLAIMANT v. THE MEAD CORPORATION, EMPLOYER, SELF-INSURER, DEFENDANT.

(Filed 27 February 1963.)

1. Master and Servant §§ 54, 56—

Whether suicide following an accident causing injury to the brain and resulting in mental disorder or insanity, is compensable must be determined upon the facts of each particular case. G.S. 97-38, G.S. 97-12.

2. Same— Evidence held to support finding that suicide was result of mental condition and not wilful intent of employee.

Deceased employee received an injury to his head by accident arising out of and in the course of his employment. A cranial operation was performed to relieve what was diagnosed by the company physician as a blood clot producing pressure on the brain. Less than a month after the operation the employee committed suicide. There was testimony that after the injury and operation the employee suffered a complete change of personality and became progressively more emotional and depressed. There was expert testimony that due to the brain injury the workman was bereaved of reason and lacked control, and that in committing suicide he was dominated by a disturbance of the mind directly caused by his injury and its consequences, etc. *Held:* The evidence supports the finding of the Industrial Commission to the effect that the injury caused insanity to such an extent that the workman was without conscious volition in committing suicide, and the award of compensation is sustained.

3. Master and Servant § 94—

The findings of fact by the Industrial Commission are conclusive on appeal if supported by competent evidence notwithstanding conflicts and inconsistencies in the evidence which might support a contrary finding.

APPEAL by defendant from *Fountain, S.J.*, June, 1962 Specal Term, JACKSON Superior Court.

This proceeding originated as a claim for compensation and death benefits under our Workmen's Compensation Act. The parties stipulated:

"Prior to entering upon the hearing of the cause, it was stipulated between the parties that on July 21, 1960, the deceased employee and the defendant employer were subject to and bound by the provisions of the Workmen's Compensation Act, and that the employer-employee relationship existed on said date. That on said date the defendant was a self-insurer, and that the average weekly wage of the deceased employee was $78.40. That on July 21, 1960, while in the employment of the defendant, the deceased employee was injured by an accident arising out of and in the course of his employment, and the last day that he worked with the defendant was August 10, 1960, and that death occurred on September 2, 1960, and that it was self-inflicted. That Blanche P. Painter is the duly acting, qualified administratrix of the estate of Tolvin Edgar Painter, and, also, that she is the sole dependent of the deceased."

The plaintiff's evidence tended to show the following: For 27 years prior to July 21, 1960, Tolvin Edgar Painter had been a happy, contented and prosperous employee of the Mead Corporation. He was actively interested in sports, especially fishing. He delighted in having visitors, took great interest and pride in his family — especially his grandchildren — some of whom lived nearby. He had planned and was building a new home and spent much time supervising the construction. On July 21, 1960, while at work, he suffered a head injury for which he received first aid attention at the plant. Headaches of increasing intensity followed the injury, although he did some work. A cranial operation was performed by a neurosurgeon on August 10, 1960, for the purpose of relieving what was diagnosed by the company physician as a blood clot producing pressure on the brain.

The effects of the accident and surgery were described by Mr. Painter's wife, in part, as follows:

"He had an entirely different personality after he had this accident. He was worse after he had the operation. He had a headache from the accident. I noticed the change more as the days went by. He just gradually changed after the operation. He came home and was never himself any more. At first he complained of a severe headache and when he would take something for his head, he slept a lot. He seemed to be sleepy, and then, after the operation, he was just restless and he did not sleep. He couldn't sleep; he didn't sleep any hardly, just only when he had something to take to help him sleep; and he would wake at night just like a child that had had a bad dream. He would take a little nap

and he would wake and he'd jump out in the floor and turn the light on, just like he was scared, and he would complain of some kind of spells. He'd say, 'Something comes over me.' . . . He would make motions with his hands, and when he would make those motions with his hands, he'd stare. . . . he'd just stare out in space; it just seemed like he was staring into space, just like he was blank. . . I could not interest him in anything after he complained of these spells, . . . Some of these periods lasted longer than others, and they were getting more frequent, and he was getting worse all the time. When these periods would occur, sometimes he would get up and walk and sometimes he would just sit down, and sit down and stare, and sometimes he would walk. I have known him to get out and walk all the way around the house and come in, and it seemed to be like somebody walking in his sleep."

Mr. Poteet, general superintendent of the Mead Corporation, testified:

"I did see him the morning of his death. I was visiting out there with Mr. Painter. In reference to something coming over him, he was a very depressed man. He said, 'I'm just in all bad shape. This whole side is killing me,' and he made that kind of a motion, pointing towards his left side. He was running both hands like this, and he was very emotional, and I didn't stay very long on that occasion, and a couple of other occasions that I was out there, because it looked like the longer I stayed the more emotional and upset he got. This was different from his behavior prior to July 21, 1960, and prior to the date he bumped his head."

On the morning of September 2, 1960, after a restless night and without eating breakfast, Mr. Painter left the house and in a short time thereafter his body was found hanging from a rafter in the barn. The old rope around his neck had been used to secure the gate into the barn lot.

The evidence further disclosed that Mr. Painter was free of debt and that no trace of insanity had occurred in the family.

Dr. John D. Bradley, a specialist in psychiatry and neurology, testified in part:

"I have an opinion satisfactory to myself of the injury, whether there would be a causal relationship of the injury of the deceased on July 21, 1960, and the death of the decedent on September 2, 1960, based upon the findings set out. I should think from the his-

tory and findings that there is a definite causal relationship between the injury and his death, the suicide.

"I have an opinion on whether the decedent was so insane or bereaved of reason that the act was voluntary or a willful one. My opinion is that he was so—his judgment was so impaired, his control was so impaired or so decreased that he probably was unable to control this action and there in that sense it would be involuntary.

"I have an opinion satisfactory to myself as to whether the decedent had a mental disorder resulting from the physical injury. My opinion is that this man suffered a possible traumatic psychosis in the form of a depression, and that he was so depressed and upset and bereaved of judgment and reason that he would be considered insane.

"I have an opinion as to the cause of that mental disorder. In my opinion, I think the cause of this, or the precipitating main cause would be that of a disturbance in his brain physiology due to the concussion or trauma of injury.

"I have an opinion as to whether the blow on the head and injury to the brain could have or might have during certain intervals produced temporary insanity. My opinion is that he did have periods of insanity or acute depression where he was bereaved of reason as a result of the accident.

"I have an opinion whether at times, due to the brain injuries, the deceased could not will or purpose. I understand that to mean that at times this man was so bereaved of reason or lack of control, of judgment or the ability to control his self-destruction or other impulses or mostly cleared impulses that he was unable to control these things and that in that sense he would be unable to will or purpose if that is satisfactory to the Court.

"I have an opinion as to whether the deceased in committing suicide dominated by a disturbance of mind directly caused by his injury and its consequence. In my opinion, the deceased in committing suicide was dominated by a disturbance of mind directly caused by his injury and its consequence."

The defendant offered Dr. Robert S. Boatwright who performed an autopsy. He testified in part:

"I did perform an autopsy upon Edgar Painter on September 2, 1960. I only examined the head and cavity of the brain. I found only evidence of a recent operation. The operation had been three

pieces of bone removed, two in the front of the head, one in the back, and the operation was in that area. From my examination and observation, I ascertained that the tissue or the part that was operated upon had healed properly. I only found blood in the brain that would or could follow an operation of this type.

"I think the operation was approximately three or four days before the autopsy.

"There was a staining rather than blood. The cavity of the brain cell had been stained in blood. I found this blood or staining on the left side of the brain. This side of the brain controls the motion of the opposite side of the body. The brain operates in reverse order to the extremities of the body; they are the controlling motion. In my opinion, the blood or stains found was the result of the operation. After the operation of the type that was performed upon Mr. Painter, it is natural that these blood stains appear very frequently. It is not unnatural for them to appear." * * *

"I found about a quarter of an ounce of blood there over to the left. This clot was very thinly distributed over the surface of the brain over a good portion of the left side. There was none over on the right side, but it was a good portion of the surface on the left side of the brain. I would say it was approximately six inches; six square inches. That would be about two inches by three inches. I would say it was probably four inches by two inches. The four inches runs from the front to the back and about two inches wide."

In short summary, (omitting details) the Hearing Commissioner found: Tolvin Edgar Painter had worked for the Mead Corporation for 27 years. He had prospered and had been happy in his work, devoted to his family, and faithful to his church. On July 21, 1960, he suffered an injury by accident while performing his assigned duties as employee of the defendant. He received first aid treatment, but headaches began immediately and continued with increasing intensity until a brain operation was performed for the purpose of relieving what had been diagnosed as pressure from a blood clot on the brain. After nine days in hospital he returned home on August 20, 1960. His condition was found to be substantially as depicted in the evidence of Dr. Bradley, sketchily quoted in the statement of facts. The Hearing Commissioner summarized his findings as follows:

"9. That the accidental injury of deceased employee, Tolvin Edgar Painter, on July 21, 1960, caused the deceased to become

insane and mentally deranged to such an extent that he had an uncontrollable and irresistible impulse to such an extent that he became delirious and frenzied without rational knowledge of the physical consequence of his act, without conscious volition to produce death on September 2, 1960."

Upon the facts found and the conclusions based thereon, the Hearing Commissioner awarded compensation. The defendant filed detailed exceptions to all findings and conclusions, and requested review by the Full Commission, which in turn overruled all exceptions, adopted the findings, conclusions, and award made by the Hearing Commissioner. Thereafter, on appeal to the Superior Court, Judge Fountain overruled all exceptions, affirmed and approved the findings, conclusions, and award of the Full Commission. Whereupon the defendant appealed to this Court.

J. Charles McDarris, Frank D. Ferguson, Jr., for plaintiff appellee.

Hall, Thornburg & Holt by W. Paul Holt, Jr., for defendant appellant.

HIGGINS, J. Our Workmen's Compensation Act G.S. 97-38, provides for payment of benefits to the defendants of an employee whose death "results proximately from the accident arising out of and in the course of the employment," unless "death was occassioned . . . by the wilful intention of the employee . . . to kill himself." G.S. 97-12.

In this proceeding the parties stipulated: (1) On July 21, 1960, Tolvin Edgar Painter, defendant's employee, suffered an injury "by accident arising out of and in the course of his employment." (2) "Death occurred on September 2, 1960, and that it was self-inflicted."

This Court has not passed on the question whether suicide following an injury by accident is compensable, and, if so, under what circumstances. Text writers, commentators, and other courts have dealt with the question on numerous occasions. By statute, in most cases, death is compensable if it proximately results (within time limits) from the industrial accident. Likewise, most states have statutes similar to our own denying recovery if death is the result of the wilful intent of the employee to kill himself. Many jurisdictions emphasize the proximate cause theory and do not attach much importance to the "wilful intent." However, cases of suicide are so different and dissimilar that each case must be classified according to its own facts.

In 1915 the Supreme Judicial Court of Massachusetts adopted what has become known as the harsh rule. "It is that where there

follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy 'without conscious volition to produce death, having knowledge of the physical consequences of the act,' then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary willful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act even though choice is dominated and ruled by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury." *In Re Sponatski,* 220 Mass. 526, 108 N.E. 466.

Other courts followed and the foregoing became the majority rule. Among cases supporting the rule are: *Jones v. Traders & General Ins. Co.,* 140 Tex. 599, 169 S.W. 2d 160; *Barber v. Industrial Commission,* 241 Wis. 462, 6 N.W. 2d 199; *Karlen v. Department of Labor and Industries,* 41 Wash. 2d 301, 249 P. 2d 364.

On the other hand, the English courts, *Marriott v. Maltby Main Colliery Co.,* 13 B.W.C.C. 353; *Graham v. Christie,* 10 B.W.C.C. (Scot.) 486; and a growing minority in this country have held that the death is compensable if a work-connected injury causes insanity which in turn induces the suicide. *Whitehead v. Keene Roofing Co., Fla.,* 43 So. 2d 464; *Delinousha v. National Biscuit Co.,* 248 N.Y. 93, 161 N.E. 431; *Burnett v. Industrial Commission,* 87 Ohio App. 441, 93 N.E. 2d 41; *Prentiss Truck & Tractor Co. v. Spencer,* 228 Miss. 66, 87 So. 2d 272; *Olson v. F. I. Crain Lumber Co.,* 259 Minn. 248, 107 N.W. 2d 223.

"The basic legal question seems to be agreed upon by almost all of the authorities: it is whether the act of suicide was an intervening cause breaking the chain of causation between the initial injury and the death. The only controversy involves the kind or degree of mental disorder which will lead a court to say that the self-destruction was not an independent intervening cause. . . . (I)f the sole motivation controlling the will of the employee when he knowingly decides to kill himself is the pain and despair caused by the injury, and if the will itself is deranged and disordered by these consequences of the injury, then it seems wrong to say that this exercise of will is 'independent', or that it breaks the chain of causation. Rather, it seems to be in the direct line of causation." The foregoing is according to Larson, The Law of Workmen's Compensation, Vol. 1, §§ 36.00, 36.20, and 36.30, p. 503, *et seq.,* citing many authorities.

The *Sponatski* rule has been criticized as an application of the test of criminal responsibility not justified in workmen's compensation cases. "Its effect is unnecessarily harsh as a measure of civil consequences. A different view prevails in a minority of jurisdictions. Reasoning that workmen's compensation policy demands a more liberal result, New York, Ohio, Florida, and Mississippi have judicially rejected *Sponatski.* Massachusetts, its state of origin, has overruled it by statute. This minority follows the English view that if a compensable injury results in insanity and such insanity results in suicide, the suicide cannot logically be an independent intervening cause if there is an otherwise unbroken chain of causation between the injury and the death." U.C.L.A. Law Review, Vol. 8, 1961, Workmen's Compensation, p. 673 *et seq.*, citing authorities. Actually an award of compensation was upheld in the *Sponatski* case. The evidence giving rise to the rule, however, does not appear to be more favorable to an award of compensation than the case now before us.

"Courts which take this position (suicide is an independent intervening cause of death) tend to confuse an intervening *act* with an intervening *cause.* As its name indicates, independent intervening cause stems from an *independent* agency and is not produced from a prior cause within the chain of causal connection. . . . if it can be shown by competent expert testimony that a compensable injury has caused insanity, which in turn has caused suicide, then the first cause, *i.e.*, the injury, is the proximate cause of this suicide." Iowa Law Review, Vol. 45, 1960, Workmen's Compensation, p. 669, *et seq.* citing cases and authorities.

As presented on this record, our specific problem is to determine whether the evidence is sufficient to support the findings of the Commission and whether the findings, in turn, sustain the award. The facts found, in our opinion, are sufficient to sustain the award, even under any reasonable interpretation of what we have quoted as the majority rule. Number 9, supplemented by the other findings, is sufficient to support the award of compensation. Hence, if the evidence is sufficient to permit the Commission to make the finding the law requires us to affirm the judgment.

Dr. Bradley's evidence (unobjected to) permits the inference and finding that periods of insanity followed as a consequence of Mr. Painter's injury during which his judgment was so impaired that he was not enabled to control his action. "(A)t times this man was so bereaved of reason or lack of control, of judgment or the ability to control his self-destruction . . . that he was unable to control these things . . . it would be my opinion, from this, that death resulted from the

uncontrollable impulses. . . . I think at the time he was aware he was going to meet his death." This evidence, in the light of what happened immediately before the suicide, permitted the inference the act of suicide occurred during a period of insanity. The evidence was sufficient to support finding No. 9. Whether it might support a different finding is immaterial. The Superior Court, in reviewing the Commission's order, and this Court, in passing on the appeal, are bound by the findings supported by the evidence, the weight of which is for the Commission. Conflicts and inconsistencies in the evidence come to us resolved by the findings of the Industrial Commission.

In holding the evidence sufficient to support a finding that by reason of insanity the suicide was the result of an uncontrollable impulse, or in a delirium of frenzy without conscious volition to cause death, we are not thereby to be understood as fixing as our standard the rigid rule of the *Sponatski* case. We go no further now than to hold the evidence was sufficient to meet the reasonable tests of that rule which the Industrial Commission seems to have used as the standard. Any further discussion is not now required. The judgment of the Superior Court is

Affirmed.

W. E. SALE, W. FRANK SALE, AND FRED A. SALE, TRADING AND DOING BUSINESS AS W. E. SALE AND SONS, RONDA, N. C. v. W. A. JOHNSON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 27 February 1963.)

1. Statutes § 5—

G.S. 105-164.13(37) which, in providing exemptions from sales and use tax, uses the word "or" between its specifications of wrapping paper, containers, and like articles exempt from the tax and its limitation on exemptions "when such articles constitute a part of the sale of tangible personal property and are delivered with it to the purchaser" is ambiguous and therefore subject to judicial construction, since the word "or" is popularly used in the sense of "and" and may be so construed when necessary to give effect to the Legislative intent.

2. Same—

Where a statute is ambiguous its legislative history may be considered in connection with the object, purpose, and language of the statute in order to arrive at its true meaning.

3. Taxation § 19—

The power to tax and to exempt from taxation is an essential attribute of sovereignty, and as a general rule exemption from taxation is never presumed and statutes providing exemptions are to be strictly construed.

4. Taxation § 23—

Regulations of the Commissioner of Revenue interpreting a tax statute will be held *prima facie* correct, and although not controlling on the courts, will be given due and careful consideration.

5. Taxation § 29—

G.S. 105-164.13(37) which, in providing exemptions from sales and use tax, specifies wrapping paper, containers, coops, etc., when used for packaging or delivering tangible personal property "or" when such articles constitute a part of the sale and are delivered to the customer, *is held* to exempt the enumerated articles from taxation only when such articles constitute a part of the sale and are delivered to the customer, the word "or" being construed "and" to effect Legislative intent as ascertained from a consideration of the history of the enactment, the presumption against exemption from taxation, the rule of strict construction of statutory exemptions, and the administrative regulations of the Department of Revenue.

6. Pleadings § 30—

Plaintiffs' motion for judgment on the pleadings is in effect a demurrer to the answer and admits for the purpose of the motion the truth of all facts well pleaded in the answer and the untruth of plaintiffs' allegations so far as they are controverted in the answer.

7. Same—

On plaintiffs' motion for judgment on the pleadings, defendant's answer will be liberally construed and the motion denied if the facts alleged in the answer constitute a defense or if the answer is good in any respect or to any extent. G.S. 1-151.

8. Same—

In passing upon plaintiffs' motion for judgment on the pleadings, an exhibit attached to the answer and made a part thereof is to be considered.

9. Same—

Plaintiffs' motion for judgment on the pleadings must be denied if plaintiff's would fail in their action even though they prove every allegation of their complaint, but the court will not dismiss the action *ex mero motu* when it cannot be determined whether plaintiffs by amendment can state facts sufficient to constitute a cause of action.

APPEAL by defendant from *Crissman, J.*, June 1962 Civil Term of WILKES, docketed and argued as Case No. 378 at Fall Term 1962.

Civil action, by virtue of G.S. 105-267, against the State Commissioner of Revenue to recover sales tax paid under protest.

From a judgment on the pleadings that plaintiffs recover $4,487.73, with interest from 15 December 1961, and for the costs, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Peyton B. Abbott for the State.

Allen, Henderson & Williams by Hoke F. Henderson for plaintiff appellees.

PARKER, J. Defendant assigns as error the judgment on the pleadings entered upon plaintiffs' motion.

The complaint alleges, and the answer admits, the following: All procedural requirements of G.S. 105-267 have been met by plaintiffs to maintain this action for a refund of North Carolina sales tax paid by plaintiffs under protest to defendant State Commissioner of Revenue for the period 1 August 1958 to 1 July 1961. Plaintiffs, doing business under the name of W. E. Sale and Sons, own and operate a manufacturing business at Ronda in Wilkes County, which is principally engaged in the manufacture of chicken and turkey coops.

Paragraph five of the complaint alleges that "plaintiffs sell their coops to farmers, poultrymen, and persons, firms, and corporations engaged in the poultry business, and such coops are used for packaging, shipment, and delivery of tangible personal property which is sold either at wholesale or retail, or such coops are delivered with the chickens or turkeys to the customer, and therefore are exempt from the retail sales and use tax under the provisions of G.S. 105-164.13, subsection 37."

Paragraph five of the answer, replying to paragraph five of the complaint, says:

> "It is admitted that the plaintiffs sell their coops to farmers, poultrymen and persons, firms and corporations engaged in the poultry business, and that such coops are used by such customers in the delivery of live poultry, which is sold by such customers at either wholesale or retail. Except as herein admitted, the allegations of paragraph 5 of the complaint are denied except as further admitted and set out in the minutes of the hearing held before the defendant Commissioner of Revenue on September 28, 1961, a copy of which minutes is attached hereto and marked EXHIBIT 'A' and asked to be taken as a part of this answer."

The relevant part of the minutes of the hearing held before the defendant State Commissioner of Revenue on 28 September 1961, a

copy of which minutes is attached to the answer and made a part thereof, reads:

> "* * *The sales of coops on which tax was assessed were identified as sales made to poultry processors who use the coops to haul chickens from their source of supply to their processing plants; sales to producers and farmers for use in hauling their chickens to the market; and sales to poultry dealers who use the coops to haul chickens and turkeys which are grown for them under contract with farmers and producers. The taxpayers contend that their sales of coops as described above are exempt from retail sales and/or use tax under provisions of G.S. 105-164.13(37) of the Sales and Use Tax Law as revised in 1959. The taxpayers maintain that those sales of coops come within the purview of the exemption since the purchasers use the coops to deliver the chickens and turkeys which are ultimately sold, notwithstanding some of the sales occur only after the chickens and turkeys are processed.
>
> "DECISION:
>
> "The Commissioner has considered the taxpayers' contention with respect to the sales of coops to poultry processors, producers and farmers, and dealers associated with contract growers. The Commissioner does not agree that the coops purchased and used as a means of transporting the users' chickens and turkeys come within the purview of the exemption provided by G.S. 105-164.13(37) of the 1959 Statute. It is the decision of the Commissioner that the tax on the amended audit has been properly assessed, and it is therefore directed that the amount of the amended assessment be sustained. It is further directed that the statutory penalty be abated."

Paragraph six of the complaint alleges, and the answer admits, that on 15 December 1961 plaintiffs paid under protest to defendant State Commissioner of Revenue the sum of $4,487.73 in sales tax assessed against them for the period from 1 August 1958 to 1 July 1961. This paragraph of the complaint avers that this assessment of tax was contrary to the provisions of G.S. 105-164.13, subsection 37.

Defendant denies this conclusion of law in the corresponding paragraph of the answer.

The General Assembly at its 1957 Session completely revised the North Carolina Sales and Use Tax Act. Session Laws 1957, chapter 1340, Article 5. This article became effective 1 July 1957, and is

codified as General Statutes, chapter 105,, Article 5, sections 105-164.1 *et seq.* Division III of this article is entitled EXEMPTIONS AND EXCLUSIONS. G.S. 105-164.13 under this article reads: "The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this article:" Thirty-eight subdivisions of tangible personal property are set forth as specifically exempt. Subdivision 37, which is relevant at all times here, reads as follows:

> "Sales of wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail or when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer."

Plaintiffs make these contentions in their brief:

> "* * *that portion of subsection (37) which reads: 'when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail,' is the controlling portion of the statute which exempts the sale of coops from the sales and use tax imposed by Chapter 105 of the Statute. The defendant, on the other hand, undertakes to eliminate this and to place all the emphasis upon the closing words of subsection (37), which reads: 'when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.' These two provisions in subsection (37) of the Statute are connected with the word 'or'; therefore, it is plaintiffs' contention that the sales of coops which comply with the requirements of EITHER OF THESE PROVISIONS ARE EXEMPT from the sales and use tax under this statute.
>
> "The plaintiffs contend that the approved and general practice in the trade is to transport live poultry in coops; therefore, coops are used for packaging, shipment, or delivery of tangible personal property within the purview of the exclusion of subsection (37) of the Statute.
>
> "The applicable statute is clear in its provision for the exclusion of items set forth therein from the sales and use tax and

shows that the Legislature clearly had in mind the exclusion of coops;* * *"

Defendant's contention is to the effect that G.S. 105-164.13(37) exempts from the sales tax the articles of tangible personal property therein enumerated, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail, and when such materials attach to and constitute a part of the sale of such tangible personal property and are delivered with it to the customer.

In our opinion, the language of G.S. 105-164.13 (37) is not plain and clear, but ambiguous. The difficulty of its construction arises from the terms that sales of the materials specified therein are exempt from the sales tax "when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail or when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer."

Consequently, the duty devolves upon us to construe this subsection of the statute in order to ascertain and declare the meaning and intention of the Legislature, and to carry such meaning and intention into effect. *Midkiff v. Granite Corp.*, 235 N.C. 149, 69 S.E. 2d 166; *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797; *Whitford v. Insurance Co.*, 163 N.C. 223, 79 S.E. 501, Ann. Cas. 1915B 270; 50 Am. Jur., Statutes, sec. 223. This Court said in *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E. 2d 505: "The legislative intent is the essence of the law and the guiding star in the interpretation therof."

"And where the meaning of a statute is doubtful, the history of legislation on the general subject dealt with, including statutory changes over a period of years, may be considered in connection with the object, purpose, and language of the statute, in order to arrive at its true meaning." *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433.

On 10 November 1956 the Commission for the Study of the Revenue Structure of the State made its report to the then Governor of the State of North Carolina. On page 44 of this Report is set forth recommended changes in the sales and use taxes. Its second recommendation is that "the present levies on the retail sale and/or use, storage or consumption of tangible personal property now subject to the retail sales and/or use tax be retained in the main. There is, however, included in the proposed recodification some recommended changes as follows:* * *(c) Certain transactions or kinds of tangible personal property now exempt by administrative interpretation which in the

opinion of the Commission should continue to be exempt are specifically set forth in the exemption section." The exemption section beginning on page 50 of this Report is entitled ITEMS NOW EXEMPT BY ADMINISTRATIVE PRACTICE WHICH ARE SPECIFICALLY EXEMPTED IN THE PROPOSED NEW LAW. Ten items are listed. Item 9 on page 52 reads:

> "(9) Sales of wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones, or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws, and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail or when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.
>
> "Present Law:
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> These articles are exempt in part by regulation and in part by administrative practice.
>
> "Problem:
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> These articles are essential in packaging, shipment and delivery of tangible personal property which is sold at wholesale or retail and have been included in the statutory exemptions to conform to present practice and also to specifically exclude from tax liability these materials which are an essential part of every sale."

G.S. 105-164.13 (37) is a verbatim enactment into law by the General Assembly of this Item 9.

The power to exempt from taxation, as well as the power to tax, is an essential attribute of sovereignty. *Atlantic Coast Line R. Co. v. Phillips,* 332 U.S. 168, 91 L. Ed. 1977, 173 A.L.R. 1. Since "taxation is the rule; exemption the exception" (*Odd Fellows v. Swain,* 217 N.C. 632, 9 S.E. 2d 365), the general rule is that a grant of exemption from taxation is never presumed, and statutes providing exemption from taxation are strictly construed. *Investment Co. v. Cumberland County,* 245 N.C. 492, 96 S.E. 2d 341; *Henderson v. Gill, Comr. of Revenue,* 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; 84 C.J.S., Taxation, sec. 225.

In 50 Am. Jur., Statutes, sec. 282, it is said:

> "The popular use of 'or' and 'and' is so loose, and so frequently inaccurate, that it has infected statutory enactments. For this

reason, their strict meaning is more readily departed from than that of other words. In this respect, it is clear that the courts have power to change and will change 'and' to 'or' and vice versa, whenever such conversion is required by the context, or is necessary to harmonize the provisions of a statute and give effect to all its provisions, or to save it from unconstitutionality, *or, in general, to effectuate the obvious intention of the legislature.*" (Emphasis added.)

To the same effect, see 82 C.J.S., Statutes, sec. 335.

In *Union Ins. Co. v. United States,* 6 Wall. 759, 18 L. Ed. 879, the Court said:

"The difficulty of construction arises from the terms in which jurisdiction is granted 'to any district or circuit court having jurisdiction of the amount, or in admiralty, in any district where the property is found.' It is said that the use of the disjunctive 'or' restricts the jurisdiction in admiralty to the district courts. And this view is certainly not without some warrant in the phraseology of the act. But when we look beyond the mere words to the obvious intent we cannot help seeing that the word 'or' must be taken conjunctively; and that the sense of the law is that both the circuit and the district courts shall have jurisdiction 'according to the amount' and 'in admiralty.'"

Pursuant to the authority vested in the Commissioner of Revenue by G.S. 105-262 and G.S. 105-264 (*In re Vanderbilt University,* 252 N.C. 743, 114 S.E. 2d 655), on 1 May 1958 the Department of Revenue filed in the office of the Honorable Thad Eure, Secretary of State of North Carolina, a true copy of the revised sales and use tax regulations, approved by the Tax Review Board, the original of which is now on file and a matter of record in his office. Rule 15, entitled CONTAINERS, WRAPPING AND PACKING MATERIALS AND RELATED PRODUCTS, reads as follows:

"(a) Items of tangible personal property which attach to, contain or otherwise become a part of a sale of tangible personal property, and for which there is no separate charge, are not subject to the retail Sales or Use Tax but are subject to the wholesale rate of tax. Such items include containers for products sold, wrapping paper, shipping or mailing labels, wrapping twine and similar items which actually accompany delivery of the tangible personal property sold.

"(b) Sales of tangible personal property to a person who uses such property in rendering services in the conduct of his business are subject to the Sales or Use Tax.

"(As Revised)"

This Rule 15 was in effect at all times relevant here.

"Ordinarily, the interpretation given to the provisions of our tax statutes by the Commissioner of Revenue will be held to be *prima facie* correct and such interpretation will be given due and careful consideration by this Court, though such interpretation is not controlling. Moreover, this Court will not follow an administrative interpretation which, in its opinion, is in conflict with the clear intent and purpose of the statute under consideration. [Citing authority.]" *In re Vanderbilt University, supra.*

Considering the language of G.S. 105-164.13 (37) and the history of its enactment by the Legislature, and further considering the general rule that a grant of exemption from taxation is never presumed, and statutes providing exemption from taxation are strictly construed, and in addition considering the regulations of the Department of Revenue, approved by the Tax Review Board, in respect to this subsection of the statute exempting certain tangible personal property therein enumerated from the sales tax, and looking beyond the mere words to the obvious intent of the Legislature, it is our opinion, and we so hold, that the word "or" must be taken conjunctively and construed as "and," and that the manifest legislative intent of G.S. 105-164.13 (37) is that the materials therein enumerated shall only be exempt from the sales tax "when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer."

Plaintiffs' motion for a judgment on the pleadings is in effect, or in the nature of, a demurrer to the answer, and admits for the purpose of their motion: One, the truth of all well-pleaded facts in the answer, and, two, the untruth of plaintiffs' own allegations insofar as they are controverted in the answer. *Hill v. Parker,* 248 N.C. 662, 104 S.E. 2d 848; *Burton v. Reidsville,* 240 N.C. 577, 83 S.E. 2d 651; *McGee v. Ledford,* 238 N.C. 269, 77 S.E. 2d 638; *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; *Oldham v. Ross,* 214 N.C. 696, 200 S.E. 393.

The answer of the appealing defendant must be construed liberally, which means that every reasonable intendment must be taken in favor of him, and if the answer contains well-pleaded facts sufficient to constitute a defense, or if it is good in any respect or to any extent, it

will not be overthrown by a motion for judgment on the pleadings. G.S. 1-151; *Hill v. Parker, supra; Burton v. Reidsville, supra; Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384; *Bessire and Co. v. Ward,* 206 N.C. 858, 175 S.E. 208; *Pridgen v. Pridgen,* 190 N.C. 102, 129 S.E. 419.

Exhibit "A" attached to the answer, and made a part thereof, may be considered in passing upon a judgment on the pleadings. 71 C.J.S., Pleading, sec. 257; 41 Am. Jur., Pleading, sec. 246. See also *Coach Lines v. Brotherhood,* 254 N.C. 60, 118 S.E. 2d 37; *Moore v. W.O.O.W., Inc.,* 253 N.C. 1, 116 S.E. 2d 186.

Plaintiffs allege that they "sell their coops to farmers, poultrymen, and persons, firms, and corporations engaged in the poultry business, and such coops are used for packaging, shipment, and delivery of tangible personal property which is sold either at wholesale or retail, or such coops are delivered with the chickens or turkeys to the customer." Defendant admits "that the plaintiffs sell their coops to farmers, poultrymen and persons, firms and corporations engaged in the poultry business, and that such coops are used by such customers in the delivery of live poultry, which is sold by such customers at either wholesale or retail." Such allegations in the complaint and admissions in the answer are not sufficient to exempt plaintiffs' sales of coops from the sales tax within the purview and intent of G.S. 105-164.13 (37). There is no allegation in the complaint to the effect that when plaintiffs' vendees sold poultry the coops constituted a part of the sale of such poultry and were delivered with the poultry to the customer. It is obvious that the lower court committed reversible error in entering a judgment on the pleadings for plaintiffs on their motion.

We are concerned here with pleadings alone. If plaintiffs prove everything they allege in their present complaint, they must eventually fail in their action. Why then should we not *ex mero motu* dismiss the action? *Ice Cream Co. v. Ice Cream Co.,* 238 N.C. 317, 77 S.E. 2d 910. The answer is that not knowing the facts we cannot determine with certitude whether or not plaintiffs by amendment can state facts sufficient to constitute a cause of action.

For the reasons stated above, the judgment on the pleadings is set aside, and the case is remanded to the lower court for further proceedings according to law.

Error.

OWEN H. TEAGUE AND WIFE, BERTHA V. TEAGUE v. DUKE POWER COMPANY AND HARRISON-WRIGHT COMPANY.

(Filed 27 February 1963.)

1. Evidence § 31—

Evidence that an agent for defendants stated upon inspecting the premises after the fire in suit that he did not know why the workman ran "hot" wires in the manner indicated into plaintiffs' house, *held* properly excluded as being testimony of a declaration by the agent after the occurrence, and therefore outside of the *res gestae*.

2. Evidence § 49—

Witnesses found by the court to be experts in their field may testify from hypothetical facts in evidence that wires installed in the manner indicated could not have caused fire.

3. Same—

Electrical experts may testify from their observation of a piece of electrical equipment taken from the scene as to what physical changes would have been apparent had it been subjected to an electrical arc and that such condition was not apparent on the equipment in evidence.

4. Appeal and Error § 41—

The admission of evidence over objection cannot be held prejudicial when evidence of the same import is thereafter admitted without objection.

5. Evidence § 43—

Where there is sufficient evidence to support a finding that the witnesses in question were experts in their field, it will be presumed that the court, before admitting their expert testimony, found that they were experts notwithstanding the absence of a specific finding to this effect, and a general objection to their testimony without specific objection to their qualifications will be considered only as to the competency of the particular question.

6. Evidence § 42—

The fact that the testimony of experts is in the form of a positive statement is not ground for objection when in the nature of things the statement necessarily relates to an opinion.

7. Evidence § 49—

The statement of a witness that contact with metal or another live wire is necessary to cause a short circuit is not objectional as opinion testimony, since the statement is not of an opinion but of a generally known fact about electricity.

8. Appeal and Error § 4—

Where both plaintiffs and defendants appeal from judgment in favor of defendants, defendants' appeal will not be considered when no error is found on plaintiffs' appeal, since in such instance defendants are not the parties aggrieved by the judgment. G.S. 1-271.

TEAGUE *v.* POWER CO.

APPEAL by both the plaintiffs and defendants from *Olive, J.*, February 1962 Term of RANDOLPH. This appeal was docketed in the Supreme Court as Case No. 538 and argued at the Fall Term 1962.

Civil action to recover damages for the destruction of plaintiffs' home and its contents by fire allegedly caused by defendants' negligence. The jury answered the issue of negligence in favor of the defendants.

On October 5, 1958, plaintiffs were engaged in remodeling their residence on the east side of U. S. No. 220. It had been completely rewired by the Liberty Machinery Company. The two defendants, Duke Power Company and Harrison-Wright Company, acting jointly, ran a service cable from a transformer on the distribution line of the Duke Power Company on the highway and attached it to a service pole about eighty-five feet to the rear of the southeast corner of the house. The transformer had a built-in control designed "to trip the line . . . in case of a short, trouble or overload." The line to plaintiffs' house was a "three-ply roll together service," consisting of two wires insulated with rubber and one bare aluminum neutral wire which was not charged with electricity. The neutral wire was run through and wrapped about six times around a portion of a porcelain spool or insulator. It was then turned back and hooked onto a screw hook which had been attached to a rafter in the overhang of the roof at the southeast corner of the house. The porcelain insulator was attached to a bail which hooked into the screw hook, insulating the wires from the house. There was a space of from twelve to fifteen inches between the weatherboarding and the rafter. The ends of the two insulated wires were taped with a high insulating, plastic tape, folded back and taped down. The insulation tape was then covered with friction tape. From the point at which they were bent the length of these insulated wires was from twelve to eighteen inches. The end of one insulated wire was from eight to ten inches from the other and bent back underneath and to the side of the aluminum wire. According to the defendants' evidence, the wires used and the method of installing them were in general and approved use for servicing homes.

Defendants completed this installation about 3:30 p.m. on September 18, 1958. The wires were then energized so that the service men would not have to go back to the main line when they were connected with the wiring in the house. Connection could not be made until the wiring had been approved by the electrical inspector who had been notified to come. At that time, according to defendants' evidence, no part of the energized wires was dangling.

Workmen engaged in renovating the house, as well as the plaintiffs, got electricity from a cord which was plugged into a connection on a

pole at a trailer site fifty to sixty feet from the house. This cord was a regular Romax drop cord designed for inside use; it was not waterproof. From the pole to the house, it lay on the ground. It entered the house on the north side over the top of the bathroom window. Inside, according to defendants' evidence, it hung over a nail in the hall; according to plaintiffs', it was run through a loop of string which was hung from the nail. The cord had an outside connection which the cement mixer and plumbers used.

Mrs. Teague, one of the plaintiffs, testified that several times during the week preceeding October 5th she heard a beating noise on the south side of the house. On the Thursday before during a heavy rain and windstorm she went outside to see what was making the noise. She observed that two of the wires which came from the service pole were hanging down from two and a half to three feet under the roof with the ends ten to twelve feet above the ground. She saw no fire and did not suspect a fire hazard. During that week, plaintiffs had used no electrical appliances in the house and had had no fire in the stove or fireplace. On Sunday, October 5th, plaintiffs left home about 5:00 p.m. They returned about 8:00 p.m. to find the house burning to the ground.

Sometime after 7:00 p.m. Charlie Vickory, Wilbur Allen and Edgar Parsons observed the house on fire and came to the scene. Vickory testified that he observed the flames through a picture window and all the fire he could see was inside the house. Allen and Parsons testified that they saw no fire on the outside of the house until it began to break out from under the eaves on the west side. Plaintiffs' witness Batten, who lived about two hundred yards from their home, testified that his attention was first attracted by the smoke and the odor of rubber burning. At that time he saw no fire on the outside. About ten minutes later he saw the southeast corner burning.

J. S. Jones, a motorist on Highway No. 220, testified that between 5:00 and 6:00 p.m. he observed something like "an electric arc welder" on the south end of the plaintiffs' house; that it flashed a couple of times eight or ten feet above the ground; that there was some smoke and the odor of burning, but he saw no flame. Mrs. Louise Toomes testified that about 7:00 p.m., as she traveled north on the highway, she observed a small fire on the south side of the house about the height of a window but she did not think the house was on fire. T. E. Brown, an employee of Duke Power Company, came to the scene after the house had collapsed. He found the wires from the service pole on the ground and cut them.

The defendants made timely motions of nonsuit which were overruled. From a judgment entered on the verdict that plaintiffs recover

nothing of the defendants, the plaintiffs appealed, assigning errors in the admission of evidence and in the charge. Defendants also appealed, assigning as error the overruling of their motions for judgment as of nonsuit.

L. T. Hammond and Deane F. Bell for plaintiffs.

James B. Lovelace for Harrison-Wright Construction Company, defendant.

G. E. Miller for Duke Power Company, defendant.

SHARP, J. Plaintiffs offered the evidence of Mrs. Teague that when Mr. Brown came to cut the wire after the fire he first told her the wires from the pole to the house were not energized, but a short time later he same back to say "that those wires were hot, and he couldn't understand what the boys meant by running the wires to the house; it was a fuse job, after the wires had been completed and it has been inspected." Defendants' objection to this evidence was sustained, and its exclusion constitutes plaintiffs' first assignment of error. The evidence was clearly incompetent.

> "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." *Hubbard v. R.R.*, 203 N.C. 675, 166 S.E. 802.

Joseph E. Fennell, Electrical Superintendent of the Durham District of Duke Power Company was found by the court to be an expert electrical engineer. Herbert Weeks, an electrical contractor not connected with defendants, was found to be an expert in electrical power line construction. Plaintiffs' assignments of error 32 through 36 relate to the opinion evidence of these two experts. Fennell, in answer to a hypothetical question, testified that if the jury should find the installation of wires from the service pole to the plaintiffs' house to have been made in the manner defendants' evidence tended to show, in his opinion, the installation could not have caused the fire; and if, between September 18th and October 5th the two insulated wires were caused to hang downward from the neutral wire, they could not have caused the fire. He further testified that there was "no lack of safety

in a properly insulated wire." Weeks testified, in answer to a hypothetical question, that the attachment of the wires to the southeast corner of plaintiffs' residence, if made as detailed by defendants' witnesses, was safe and in keeping with the customary practice in the electrical construction business. It is noted, that on cross-examination plaintiffs did not propound a hypothetical question which assumed the facts to be as plaintiffs' evidence tended to show.

> "Persons skilled in matters relating to electricity may state inferences or judgments with respect to such matters, as, for example, whether certain electrical equipment is defective or unsafe; the proper construction of electrical equipment; whether certain construction was negligent; whether certain equipment was maintained in accordance with the standards of practice; the cause of a certain result; the effect of certain occurrences; and other matters." 32 C.J.S., Evidence, Section 530 a.

Fennell and Weeks testified as expert electricians; the evidence was competent. Assignments of error 32 through 36 are overruled. *Lynn v. Silk Mills,* 208 N.C. 7, 179 S.E. 11.

The cases cited by the defendants, in which opinion evidence as to the cause of fires or other damage to property was excluded, involved the opinions of non-expert or lay witnesses which, the Court said, were worth no more than any one else's. *Kerner v. R.R.,* 170 N.C. 94, 86 S.E. 998. In such instances, lay witnesses are not permitted to invade the prerogative of the jury. *Wood v. Insurance Co.,* 243 N.C. 158, 90 S.E. 2d 310. However, an expert in a particular field may give his opinion, based on personal observation or in answer to a properly framed hypothetical question, that a particular event or situation could or could not have produced the result in question. Stansbury, Evidence, Section 137.

Defendants' evidence tended to show that the day after the fire, H. K. Davis, District Manager of Duke Power Company; Joe F. Connor, Construction Superintendent for Harrison-Wright Construction Company; F. J. Fitts, Line Foreman for Duke Power Company; and J. C. Vuncannon, Claim Agent of Duke Power Company, went to the premises and made an investigation. About fifteen feet from the southeast corner of the house they found a piece of screw hook, a bail, and several pieces of a broken porcelain insulator. These were the same kind and type which defendants had attached to the Teague residence and were introduced in evidence as defendants' Exhibit 8.

After examining the metal hook and the four pieces of porcelain constituting defendants' Exhibit 8, Weeks testified, over objection,

that in his opinion it had not been subjected to an electrical arc or fire; that an electrical burn would have left it pitted and it would show blue marks.

W. M. Dickerson, an electrical lineman for Harrison-Wright Company also examined Exhibit 8. Without objection, he testified as follows: "That was the same kind used at the Teague place. You can tell whether or not a short has been made on that spool. You can tell by pitted marks in the metal or in the spool there will be sort of flash burn. I do not see any of that. I can tell whether an electrical burn has been made on the spool by the same way. I do not see any of that."

Over plaintiffs' objection, defendants' witness, H. K. Davis, the district manager of Duke Power Company, thirty-five years with the company, gave the same testimony.

Joe F. Connor, for sixteen years an electrical construction superintendent for Harrison-Wright Construction Company testified to the same effect — over objection on direct examination, and in answer to specific questions by plaintiffs' counsel on cross-examination. Plaintiffs' assignments of error 7 through 13 and 37 through 38 are to the admission of this evidence.

Exhibit 8 was properly introduced in evidence. The jury examined it, and it was proper for the electricians to interpret the condition for them. However, the record contains no specific finding by the judge that Davis, Dickerson, and Connor were electrical experts, and plaintiffs contend that their testimony "invaded the province of the jury."

These assignments of error cannot be sustained.

Weeks, an adjudicated expert, had given the same testimony and Dickerson's evidence went in without objection. *In re Will of Knight,* 250 N.C. 634, 109 S.E. 2d 470. Nevertheless, the rule with us is that the failure of the trial judge to specifically find that the witness is an expert before allowing him to give expert testimony will not sustain a general objection to his opinion evidence if it is in response to an otherwise competent question, and if there is evidence in the record on which the court could have based a finding that the witness had expert qualifications. In such a case, it will be assumed that the court found the witness to be an expert; otherwise, it would not have permitted him to answer the question. Stansbury, Evidence, Section 133; *State v. Coal Co.,* 210 N.C. 742, 188 S.E. 412; *Summerlin v. R.R.,* 133 N.C. 551, 45 S.E. 898; *Brewer v. Ring and Valk,* 177 N.C. 476, 486, 99 S.E. 358.

When the opinion of a witness is called for before the court has made a specific finding that he is an expert, if counsel wish to question

the witness' qualifications, they should object specifically on this ground. If they confined themselves to a general objection it will be considered as applying only to the competency of the particular question; but the rule is otherwise if there is no evidence of the witness' special knowledge or expert qualifications. *State v. Secrest,* 80 N.C. 450; *Bivings v. Gosnell,* 141 N.C. 341, 53 S.E. 861.

Plaintiffs argue that the testimony of the electricians amounted to positive statements rather than expressions of opinion. However, we think that the testimony of each was a statement of his opinion and that the jury could only have considered it as such. Some positive statements can, in the nature of things, be only expressions of opinion. A man who comes upon a piece of plank beside the ashes of a dead bonfire and says, "This piece of wood did not get in the fire," is necessarily expressing an opinion based on the present condition of the plank he then sees since he was not there at the time that the fire was burning.

Connor also testified, over objection, that contact with metal or another live wire was necessary to cause a short circuit. Plaintiffs' assignments of error 26 and 27 refer to this evidence. In giving this testimony Connor was not giving an opinion; he was merely stating a more generally known fact about electricity.

All of plaintiffs' assignments of error have been considered and plaintiffs have failed to show prejudicial error. The charge, when read contextually, fairly presents the case to the jury under the applicable principles of law. The jury found the facts in accordance with the evidence of defendants and on plaintiffs' appeal we find no error.

The defendants' appeal is dismissed. Only a party aggrieved may appeal from the Superior Court to the Supreme Court. G.S. 1-271. Since the judgment of the Superior Court in their favor remains undisturbed, defendants cannot be called parties aggrieved. *Starnes v. Tyson,* 226 N.C. 395, 38 S.E. 2d 211.

No error.

THOMAS HERMAN TAYLOE, BY HIS NEXT FRIEND, CARROLL H. MATTHEWS, v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND Z. A. SNEEDEN'S SONS, INC.

AND

THOMAS E. TAYLOE v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND Z. A. SNEEDEN'S SONS, INC.

(Filed 27 February 1963.)

1. Negligence § 4—

The highest degree of care, commensurate with its inherent danger, is required of persons having possession and control of dynamite, and it is negligence to leave a dynamite cap where either a child or unversed adult can pick it up and cause it to explode. G.S. 14-284.1(c),(d).

2. Trial § 20—

When defendant introduces evidence he waives his motion to nonsuit made at the close of plaintiffs' evidence.

3. Trial § 21—

On motion to nonsuit, defendant's evidence may be considered only if it tends to explain plaintiffs' evidence and is not in conflict with it.

4. Trial § 22—

Evidence which raises no more than a possibility or conjecture of the fact in issue is insufficient to be submitted to the jury, but if an affirmative finding is a more reasonable probability on the evidence, motion to nonsuit should be denied.

5. Negligence § 24a— Evidence held insufficient to connect defendant with dynamite cap found by minor in trash pile.

The minor plaintiff, a 15 year old boy, was injured when a dynamite cap, which he had found near a telephone pole near the intersection of a highway and a rural road in a farming area some four miles from a municipality, exploded as he was attempting to dig out its white contents with a needle. The evidence favorable to plaintiffs tended to show that defendant had used dynamite in excavating to replace a smaller telephone pole with a larger one some 800 feet from the *locus*, and defendant's evidence tended to show that the cap causing the injury was a fuse cap, that defendant used only electric caps, that none of defendant's employees were ever at the telephone pole where plaintiff found the fuse cap. The evidence further tended to show that the minor plaintiff found the cap in the trash in the vicinity of the telephone pole, that the pole was in an unfenced, level clearing with automobile tire ruts leading from the highway, and that considerable blasting was done at a rock quarry some quarter of a mile distant. *Held:* The evidence raises a mere conjecture as to whether defendant ever had possession or control of the dynamite cap which injured the minor plaintiff, and nonsuit should have been sustained.

APPEAL by defendant from *Gwyn, J.*, March 19, 1962 Term of FORSYTH. This appeal was docketed in the Supreme Court as Case No. 381 and argued at the Fall Term 1962.

These two civil actions, instituted by a minor son and his father against the defendants, Southern Bell Telephone and Telegraph Company and Z. A. Sneeden's Sons, Inc., contractors, were consolidated for trial. In one, the minor, Herman Tayloe, seeks to recover for personal injuries allegedly caused by the negligence of both defendants; in the other, the father seeks to recover for loss of his son's services and earnings and for medical expenses necessitated by his injury. Defendants' motions for judgment as of nonsuit at the close of plaintiffs' evidence and at the close of all the evidence were overruled. The jury exonerated the Telephone Company and awarded damages in both cases against Sneeden's. From judgments entered on the verdict, only Sneeden's appealed. The crucial question is one of nonsuit. The facts are stated in the opinion.

White and Crumpler, Leslie G. Frye and Harrell Powell, Jr., for plaintiff appellees.

Hudson, Ferrell, Petree, Stockton, Stockton and Robinson by R. M. Stockton, Jr., and W. F. Maready for defendant appellant.

SHARP J. Herman Tayloe, the minor plaintiff, was injured on May 8, 1960 when a dynamite cap he had found near a telephone pole exploded in his hand. A description of the terrain adjacent to the pole, as it was in May 1960, is necessary to an understanding of the case.

Ebert Street Extension is a paved highway which runs southwardly from Winston-Salem. Fraternity Church Road runs generally east and west between U. S. No. 158 and Ebert Street Extension. Approximately four miles from Winston-Salem, in a farming area, Fraternity Church Road intersects Ebert Street Extension from the west to form a T intersection. Immediately north of the intersection both sides of Ebert Street Extension are wooded; immediately south of the intersection both sides are open fields. A line of the defendant Telephone Company runs from Winston-Salem along the west side of Ebert Street Extension to form a corner on the northwest side of its intersection with Fraternity Church Road.

A telephone pole (designated in the evidence as pole No. 1) is located ten to twenty feet from the northwest corner of the intersection on the right-of-way. Around this pole is a small, unfenced, level clearing into which an automobile could be driven. Ruts lead to the guy

wire supporting the pole. Tin cans, bottles, pieces of guy wire, one or two broken insulators, and debris of various kinds were scattered in the area. Farther down from the pole was a trash pile where assorted litter had been dumped. Boys played in this area, especially in the summertime. From pole No. 1, the telephone line runs westwardly with the Church Road for a short distance and then veers northwestwardly into a field to pole No. 6. The residence of the plaintiffs is on the south side of Church Road approximately two-tenths of a mile from the intersection. Between the Tayloe home and the intersection are several other homes on the south side of the Church Road but none on the north. There is a residence on the west side of Ebert Street Extension one to two hundred yards south of the intersection. The area in the neighborhood is rocky, and rocks occasionally protrude above the ground. On the north side of the road, about a quarter of a mile west of the residence of the plaintiffs, is the large rock quarry of W.E. Graham & Sons. Considerable blasting is done at the quarry which uses only electric caps and stores no dynamite. Trucks delivering dynamite on the day it is used enter the Church Road from Ebert Street Extension.

On May 8, 1960, Herman was fifteen years old, in the seventh grade at school, and employed as a laborer for a landscaping company. On the afternoon of May 8th, he rode his bicycle to the intersection of Ebert Street Extension and the Church Road and into the clearing around pole No. 1. He investigated the trash in the vicinity. On the edge of the wire and glass debris, he found a clean white box about one inch deep and two and a half to three inches long. There was no writing, weather stains, or dirt on the box. The bottom slipped out from the top, and inside he found a tarnished brass tube about the size of a pencil and about two and a half inches long. One end was closed; the other open, revealing white, cotton-looking material inside the cylinder. No wires were attached to the tube and it had no ring or crimp around the top. It was a fuse-type dynamite cap but Herman, who had seen sticks of dynamite, had never before seen a cap and did not know what it was. He took the box home, went down to the basement, and attempted to dig out the white contents of the tube with a needle, When he did, the cap exploded. He lost a part of two fingers on his right hand and sustained other less serious injuries.

To discard or leave a dynamite cap where either a child or an unversed adult might pick it up and cause it to explode is positive negligence. Both the common law and the statutes of North Carolina require persons having possession and control of dynamite to use the highest degree of care to keep the explosive safe and secure and to

guard others against injury from it. Only the highest degree of care is commensurate with the dangerous nature of dynamite. *Barnett v. Mills,* 167 N.C. 576, 83 S.E. 826; G.S. 14-284.1 (c) and (d).

The decisive question on this appeal is whether there is any evidence to connect the defendant Sneeden's with the dynamite cap which injured Herman Tayloe.

The question of nonsuit must be answered upon a consideration of all the evidence which tends to support plaintiffs' case. Defendant, having introduced evidence after the denial of his motion made at the close of plaintiffs' evidence, waived its exception to the refusal of that motion. Defendants' evidence may be considered only if it tends to explain plaintiffs' evidence and is not in conflict with it. Strong, N. C. Index, Trial, Sections 20 and 21.

The answer of the defendants discloses that sometime prior to May 8, 1960, under a contract with the Telephone Company, Sneeden's sank holes in the ground and erected telephone poles in the vicinity of the intersection of Ebert Street Extension and Fraternity Church Road. Both defendants denied ownership and responsibility for the cap which plaintiff found at pole No. 1.

The plaintiffs' evidence tended to show that during the week preceding Herman's injury "some men" were blasting in a field about 800 feet from the intersection where one telephone pole was removed and a larger one put in. Two blasts were set off about one hour apart. Thereafter, men then took down the telephone wire from the old pole and replaced it with a heavy cable on the new pole.

The preceding statement contains the substance of plaintiffs' evidence with reference to the use of dynamite by Sneeden's in the vicinity of the intersection.

The defendants' evidence tended to show the following facts:

During the week prior to May 8, 1960, Sneeden's, a Greensboro firm, was engaged in replacing some of the telephone poles on the Fraternity Church Road with larger ones, but the contract did not call for any work within 1,450 feet of the intersection. Pole No. 1 at the intersection and poles Nos. 2, 3, and 4 were not replaced. None of Sneeden's employees were ever at pole No. 1. Poles Nos. 5 and 6 were replaced, but dynamite was used only at pole No. 6 which was estimated to be about 1,500 feet from the intersection. On May 3, 1960, Sneeden's crew of three men took two electric caps to the site of pole No. 6 and used them to set off two blasts for a hole to replace that pole. For fifteen years Sneeden's had used only electric caps and its employees had no other kind. It purchased its dynamite and blasting caps from Southside Hardware in Greensboro, the only place where

such supplies could be obtained there. The records of the Southside Hardware, examined from 1957, showed that Sneeden's had purchased only electric caps. These caps came in a yellow box about eight inches long and four inches wide with printing on it. Electric caps have a little crimp around the top of the cylinder to which is attached wires from six to twelve feet in length. The fuse-type cap is smooth and without wires, and is detonated by igniting the fuse; an electric cap is set off by a battery or some other electrical connection.

Sneeden's crew worked from specifications furnished by the Telephone Company but its employees were not present while Sneeden's did its work. After Sneeden's had installed the new poles and anchors, a telephone crew put up the guy wires, took down the old line, and replaced it with a cable. Sneeden's did not handle any insulators or wire, but it removed the old pole after the Telephone Company had taken the wire from it. When Sneeden's finished its work on Fraternity Church Road it left no dynamite caps in the area. The Telephone Company has not used any explosives for twenty-two years.

"To hold a defendant liable for injury caused by dynamite there must be evidence, direct or circumstantial, sufficient to support a finding that it was his property, or property he had abandoned. . .; otherwise, the verdict is a mere guess, which cannot be permitted." *Long v. Frock,* 304 Pa. 355, 156 A 88. If the evidence does no more than raise a possibility or conjecture of a fact, a motion for a judgment of nonsuit should be allowed, but if the more reasonable probability is in favor of the plaintiffs' contention the question ought to be submitted to the jury. *Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767.

The record in this case contains no evidence that employees of Sneeden's were ever closer than 800 feet to pole No. 1 where Herman Tayloe picked up the cap. However, it does contain positive evidence that they were never there. The clearing in which pole No. 1 stood adjoins a paved public road and was therefore easily accessible to the general public. Ruts made by automobiles going into it led to a trash pile in which tin cans, bottles, and pieces of old automobiles had been discarded in addition to pieces of guy wire and broken insulators. The cap which Herman picked up in this area was a fuse type. There was no evidence that Sneeden's had ever used fuse caps; there was positive evidence that for the past fifteen years it had used only electric caps. The box which contained the fuse cap was white and clean. The electric caps which Sneeden's used came in yellow boxes with printing on the outside.

Who left the cap which Herman found at the pole? Was it a Sneeden's employee, a quarry truck, a telephone linesman, a farmer in

the vicinity, a road crew, or a criminal operator passing by on the highway? The evidence does not give us the answer. One guess is as good as another, and speculation is limited only by the wingspread of one's fancy. The evidence is as consistent with the absence of negligence on the part of Sneeden's employees as it is with its existence. The record contains no evidence which directly, or by reasonable inference from established facts, connects Sneeden's with the deposit of this fuse cap at the base of the telephone pole in the clearing adjacent to the highway.

Plaintiffs rely on *Barnett v. Mills, supra,* which is easily distinguishable from the case at hand. In *Barnett,* defendant was in the process of digging a well fifteen or twenty steps from the post office at Cliffside when the minor plaintiff picked up the dynamite cap from a whole box of caps inside the well. He was later injured when he exploded it with a hammer.

Injuries resulting to children from discarded or carelessly guarded dynamite caps are numerous. We have examined all such cases cited by the plaintiff from other jurisdictions. In each there was evidence that defendant had done work or stored supplies at the site where the cap which caused injury was found.

In the instant case we hold that the evidence is insufficient to support the verdict and that the motions for nonsuit should have been allowed. The record discloses that after verdict the very able judge who tried this case came to the conclusion that the motions for nonsuit should have been allowed. However, he was then powerless to grant the motion under the rule in this State which forbids dismissal of an action after verdict by judgment as of nonsuit for insufficiency of evidence. *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257; *Temple v. Temple,* 246 N.C. 334, 98 S.E. 2d 314.

Reversed.

EASTERN CAROLINA FEED & SEED COMPANY, INC. v. JOHN REX MANN.

(Filed 27 February 1963.)

1. Sales §§ 6, 14c—

A counterclaim alleging that plaintiff furnished defendant feed under contract, with knowledge that it was to be used to feed chickens for the production of eggs, that the feed contained deleterious substances that

caused defendant's chickens to lay fewer eggs and caused a substantial part of those laid to be unfit for human consumption, and alleging loss of profits, states a cause of action, and plaintiff's demurrer thereto should be overruled, since ordinarily there is an implied warranty that feed is reasonably fit for the use contemplated by both the purchaser and seller.

2. Trial § 33—

Even when the parties waive a recapitulation of the evidence, it is the duty of the trial court, in a complicated case with conflicting evidence on crucial aspects, to state the evidence to the extent necessary to enable the court to apply the law to the varying factual situations presented by the evidence, and a statement of the evidence by the court only in the form of the contentions of the parties is insufficient. G.S. 1-180.

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

This action was instituted on 18 July 1962, the plaintiff in its original complaint alleging that the parties entered into a written contract on 24 April 1959, whereby the defendant was to construct a chicken house on his farm and the plaintiff was to furnish the chickens, feed and medical supplies and would in turn reimburse the defendant for caring for the chickens.

The plaintiff also alleged in the original complaint that the parties to this action entered into another written agreement on 4 May 1959, whereby, *inter alia*, plaintiff agreed to furnish defendant poultry feed necessary to properly feed and care for 1,200 pullets and to extend credit for such purchases not to exceed $2,600. Plaintiff alleged that under this 4 May 1959 agreement the defendant was indebted to it in the sum of $3,048.06, and prayed judgment in said amount.

The defendant filed an answer to the original complaint, setting out that the agreement entered into on 24 April 1959 was partly written and partly oral, pursuant to which defendant was to raise young chickens for the plaintiff from the age of about one day old until just before they became laying pullets, and that the plaintiff furnished no chickens whatsoever under said agreement; that the defendant incurred an indebtedness of approximately $4,700 in the erection of the aforesaid chicken house, which is of no value to him; that the chicken house was erected in reliance upon plaintiff's promise that the defendant would be paid for his services not less than $50.00 per week and for such period of time as would enable him to pay for the chicken house from the amounts paid him.

The defendant set up a counterclaim in which he denied the execution of the paper writing dated 4 May 1959, alleging that the only papers he signed were in blank regarding the erection of a chicken house

and the loan to be secured in connection therewith; that the plaintiff in November 1958 placed 1,200 white Leghorn day-old chickens with the defendant; that these were the only chickens ever delivered by the plaintiff to the defendant (and this is admitted); that the plaintiff was to furnish the necessary feed, medical and other necessary supplies for raising said chickens and the defendant was to furnish only the area where the chickens were to be raised and the labor incident thereto and incident to the delivery to the plaintiff of the eggs to be derived from said poultry. That after the payment of fees and other advancements to be made by the plaintiff, the balance was to be paid to the defendant for his services. He alleged that many of the eggs became unmarketable because of deleterious substance or substances in the feed furnished by the plaintiff, causing the chickens to lay fewer eggs and a substantial part of those laid to be unfit for human consumption, resulting in a loss of profit to the defendant of not less than $500.00; that the defendant expended $400.00 in buying extra feed in an effort to make the eggs marketable; that this additional feed was purchased with the knowledge of the plaintiff and that he is entitled to be reimbursed therefor.

A second counterclaim was set up alleging damages in the sum of $4,714.60, resulting from the failure of the plaintiff to furnish chickens, feed and medical supplies for the operation of the newly constructed chicken house as it contracted to do.

When the case was called for trial at the October Term 1962, plaintiff moved for leave to file an amended complaint, whereby plaintiff might sue defendant on open account. The motion was allowed and plaintiff required to submit a bill of particulars as to said open account.

Defendant filed answer to the amended complaint and set up both counterclaims as alleged in his original answer.

When the case was again called for trial, the plaintiff filed a written demurrer to the defendant's first counterclaim. The demurrer was sustained as to the alleged profits in the sum of $500.00 to which ruling the defendant excepted. The court overruled the demurrer as to the alleged balance owing the defendant for moneys expended in the sum of $400.00 in plaintiff's behalf.

Both parties offered evidence in support of their respective allegations.

The jury answered the issues submitted as follows:

"(1) Is the defendant indebted to the plaintiff because of any matters and things alleged in the amended complaint?

"ANSWER: Yes.

"(2) If so, in what amount?

"ANSWER: $2,600.00.

"(3) In what amount, if any, is the plaintiff indebted to the defendant because of the matters and things alleged in defendant's first counterclaim as to advancements made by him?

"ANSWER: $ No.

"(4) Did the plaintiff contract and agree with the defendant as alleged in the defendant's second counterclaim?

"ANSWER: No.

"(5) If so, did the plaintiff breach said contract, as alleged in said counterclaim?

"ANSWER: No.

"(6) What amount of damages, if any, is the defendant entitled to recover of the plaintiff on said counterclaim?

"ANSWER: $ No."

The defendant appeals, assigning error.

LeRoy, Wells & Shaw for plaintiff appellee.
W. C. Morse, Jr., and John H. Hall for plaintiff appellant.

DENNY, C.J. Ordinarily, there is an implied warranty that feed is reasonably fit for the use contemplated by both the seller and the purchaser. *Jones v. Mills, Inc.*, 250 N.C. 527, 108 S.E. 2d 917; *Keith v. Gregg*, 210 N.C. 802, 188 S.E. 849; *Poovey v. Sugar Co.*, 191 N.C. 722, 133 S.E. 12.

There can be no denial of the fact that the plaintiff knew for what purpose the feed furnished or sold by it was being used by the defendant. Therefore, in our opinion, the ruling sustaining the demurrer to the defendant's first counterclaim on the ground that no cause of action is stated with respect to the loss of profits or damages growing out of the sale of chicken feed to the defendant, which it is alleged contained deleterious substance or substances that caused the chickens involved to lay fewer eggs and a substantial part of those laid to be unfit for human consumption, was erroneous, and the defendant's exception and assignment of error challenging said ruling will be upheld on authority of *Jones v. Mills, Inc., supra,* and *Perkins v. Langdon,* 237 N.C. 159, 74 S.E. 2d 634, and cited cases.

The defendant assigns as error the failure of the court in its charge "to declare and explain the law arising on the evidence upon the first and second issues in that the court did not state the evidence on behalf

of defendant to the extent necessary to explain the application of the law thereto, especially his evidence tending to show that as to a part of said account he had paid the same in full, and that as to the remainder of said account it was understood and agreed between the parties that the chickens were the property of the plaintiff and that the sole source of the payment for the feed and supplies was to be the eggs produced from the original 1200 pullets and from the sale of the pullets themselves, and that he, the defendant, was not to be liable for any monetary payment with respect to the feed and other items supplied by the plaintiff for and on account of said 1200 chicks or pullets."

Other similar assignments of error to the charge of the court bearing on the first and second issues, as well as other issues submitted, have been preserved and in our opinion are well taken and must be sustained.

The parties hereto waived a recapitulation of the evidence, whereupon the trial judge in his charge stated the evidence only in the form of contentions. We have repeatedly held that in a complicated case where the evidence is conflicting this is not a sufficient compliance with the requirements of G.S. 1-180.

In *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196, the parties waived a recapitulation of the evidence by the court and the jury was so informed. Even so, we said: " * * * (S)uch waiver did not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. *Mack v. Marshall Field & Co.,* 218 N.C. 697, 12 S.E. 2d 235. It is not sufficient for the court to read a statute or to state the applicable law bearing on an issue in controversy, and leave the jury unaided to apply the law to the facts. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484, and cited cases.

"It is the duty of the court to state the evidence 'to the extent necessary to explain the application of the law' arising thereon. G.S. 1-180. In both civil and criminal cases, it is imperative, in the charge to the jury, that the law be declared, explained and applied to the evidence bearing on the substantial and essential features of the case without any request for special instructions. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331; *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323; *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558; *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522; *Chambers v. Allen, supra; Flying Service v. Martin,* 233 N.C. 17, 62 S.E. 2d 528; *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375; *Ryals v. Contracting Co.,* 219 N.C. 479, 14 S.E. 2d 531; *Mack v. Marshall Field & Co., supra; Spencer v.*

Brown, 214 N.C. 114, 198 S.E. 630; *Williams v. Coach Co.,* 197 N.C. 12, 147 S.E. 435.

"The court in the charge under consideration did not state the evidence to the extent necessary to explain the application of the law arising thereon as required by G.S. 1-180. In fact, no evidence was stated except in the form of contentions, which does not meet the requirements of the statute. *Bank v. Phillips, supra; Howard v. Carman, supra; Mack v. Marshall Field & Co., supra,* * * *" *Sugg v. Baker,* 258 N.C. 333, 128 S.E. 2d 595; *Bulluck v. Long,* 256 N.C. 577, 124 S.E. 2d 716; *S. v. King,* 256 N.C. 236, 123 S.E. 2d 486.

In the case of *S. v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751, Barnhill, J., later C.J., in considering a question similar to that now before us, said: "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved. *Bird v. U.S.,* 180 U.S. 356, 45 L. Ed. 570. The judge should segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. *S. v. Rogers,* 93 N.C. 523; *S. v. Jones,* 87 N.C. 547; *Guyes v. Council,* 213 N.C. 654, 197 S.E. 121. A failure to do so must be held for reversible error."

In light of the foregoing decisions and authorities herein cited, we hold the defendant is entitled to a new trial, and it is so ordered.

New trial.

JAMES R. SANDERS, ADMINISTRATOR, OF THE ESTATE OF WILLIE HILL, DECEASED v. AARON GEORGE.

AND

JOHN W. TILLERY, ADMINISTRATOR OF THE ESTATE OF SUSIE GREEN, DECEASED v. AARON GEORGE.

(Filed 27 February 1963.)

1. Automobiles § 41; Negligence § 22—

In actions for wrongful deaths, evidence of defendant's injuries in the same accident causing intestates' deaths is incompetent.

2. Evidence § 15—

Evidence of circumstances which are entirely irrelevant to the controverted facts in issue is incompetent.

3. Death § 6—

Evidence of prior bad and questionable conduct on the part of intestates which has no reasonable relationship to the crucial question of the fair and just compensation for the pecuniary injuries resulting from the deaths, is incompetent.

APPEAL by plaintiffs from *Copeland, S. J.*, August-September Term, 1962, CARTERET Superior Court.

The two civil actions entitled above were instituted in the Superior Court to recover damages for the wrongful death of the intestates who were killed while riding as guest passengers in the Buick automobile driven by the defendant. The cases were consolidated and tried together. Each plaintiff alleged, among others, negligent acts of speed of 80 miles per hour proximately causing the wreck and the death of Willie Hill and Susie Green.

A witness in the defendant's automobile at the trial fixed the speed at 65-70 miles per hour. The investigating officer who interrogated the witness after the wreck, said he fixed the speed as high as 80 miles per hour. The defendant testified the speedometer to his Buick was broken. However, he did not give any testimony as to his speed. The evidence indicated the vehicle came to rest 560 feet from the point where it first turned over. For the final 410 feet, marks were on the shoulder of the road.

Issues of negligence and damages were submitted to the jury. In each case the jury answered the issue of negligence, yes; and the issue of damages, none. From judgments that the plaintiffs recover nothing, they appealed.

Harvey Hamilton, Jr., for plaintiffs, appellants.
Wheatly & Bennett by Thomas S. Bennett for defendant appellee.

HIGGINS, J. The trial took place 20 months after the accident. The defendant testified as a witness in his own behalf. He was permitted to testify, over objection, that he was seriously injured in the accident, his hip was dislocated, his ribs and an arm were crushed; that he is still undergoing treatment by his doctor; and that he lost his job by reason of the injuries sustained in the accident.

The evidence of the defendant's injuries was inadmissible and should have been excluded. His injuries did not excuse his negligence and did not satisfy or tend to diminish the pecuniary loss to the estates of those who were killed as a result of his negligence. "There is a fundamental postulate of evidence that circumstances which are irrelevant to the existence or nonexistence of the disputed facts are not

admissible." *Godfrey v. Power Co.*, 190 N.C. 24, 128 S.E. 485; North Carolina Law of Evidence by Stansbury, §22, p. 138.

The plaintiff introduced evidence that Willie Hill was about 70 years of age; that his health was good for a man of that age. Although retired, he recieved two checks each month from the government. The amount was not given. There was evidence Susie Green was about 35 years old, in good health; that she did housework and received approximately $25.00 per week. Her daughter testified: "During tobacco season, . . . she . . . made around $35.00 or $40.00 a week. My mother bought food and groceries for us."

Since the cases must go back for a new trial, we call attention to the extreme length the court permitted defense counsel to go in exposing to the jury in detail the many shortcomings of the intestates. For example: a police officer was permitted to testify he saw Susie Green between Beaufort and Morehead City about two o'clock at night during a snowstorm; that she was drunk and claimed to be looking for her daughter. The details of bad and questionable conduct on the part of the intestates were paraded before the jury. The inquiry covered court proceedings as well as private behavior. The result seems to have carried the jury too far from the critical question involved; that is, the fair and just compensation for the pecuniary injuries resulting from death. *Rea v. Simowitz*, 226 N.C. 379, 38 S.E. 2d 194.

For the reasons assigned, the plaintiffs are entitled to go before another jury on all issues.

New trial.

MRS. RAVEN P. NOLAND v. CANIE N. BROWN AND HIS GUARDIAN, FIRST UNION NATIONAL BANK AND TRUST COMPANY OF NORTH CAROLINA.

(Filed 27 February 1963.)

1. Contracts § 27; Quasi-Contracts § 1—

Where, in an action against an incompetent and his guardian for personal services rendered the incompetent in nursing him prior to the time he was declared incompetent, plaintiff acknowledges payment in a specified amount for each day's service but declares upon an express contract that an additional amount per day would be paid later because of services in excess of an ordinary working day, nonsuit is properly entered upon failure of evidence of the express contract, since in such instance there is no question of recovery on *quantum meruit*.

2. Trial § 26—

Nonsuit is properly entered when there is a material variance between the allegation and proof.

APPEAL by plaintiff from *Martin, S.J.*, November 1962 Civil Term of BUNCOMBE.

This action on contract was instituted December 15, 1961. Plaintiff is a registered nurse licensed by the North Carolina Board of Nurse Registration and Nursing Education. In her complaint she alleges that during the entire year 1960 and until August 19, 1961, she was employed by the defendant, Canie N. Brown, at twenty-two dollars per day to do twenty-hour daily nursing duty and to supervise the operation of his household; that during this entire period of time "plaintiff was performing more than twenty-hour duty per day as a registered nurse for the defendant, Canie N. Brown" and, during time in excess of the twenty-hour nursing duty, she supervised and operated the defendant's household; that the services she rendered him were reasonably worth twenty-two dollars a day but he only paid her sixteen dollars a day. She prays for judgment in the amount of $3,444.00.

On January 24, 1962, defendant was declared incompetent, and the First Union National Bank and Trust Company of North Carolina was duly appointed his guardian. The guardian's answer is a general denial of all the material allegations of the complaint. Plaintiff's evidence tended to show the following facts:

The usual and customary pay of registered nurses in the area was sixteen dollars per day for eight-hour duty and twenty-two dollars for twenty-hour duty.

Prior to her death in 1959, plaintiff nursed the wife of the defendant for seven and a half years. Thereafter, from January 6, 1959 until August 1961 when Mr. Brown was taken to a mental institution, plaintiff remained with him as his nurse and lived at the Brown home at 12 Stuyvesant Road, Biltmore Forest. In addition to performing an *eight-hour* duty as a registered nurse, she was in charge of the house and its servants who were a maid-cook, a yard man, and a house man who came once a week. Mr. Brown's three daughters lived elsewhere. Plaintiff ordered the groceries, supervised the meals, drove defendant's car, and took him to and from his office when he was able to go. At times during this period she was assisted by another registered nurse, Mrs. Alma Palmer. A short time before Mr. Brown was taken away, the two of them were assisted by a licensed practical nurse who was also on eight-hour duty.

To establish the contract upon which she sued, plaintiff relied on the evidence of Mrs. Palmer who testified, *inter alia,* as follows:

"Mr. Brown said that he was paying Mrs. Noland for 8 hour duty, and that he had had so much inheritance tax to pay that he wasn't paying her for 20 hour duty, but he was later. . . (H)e said he wanted to get it paid before anything happened to him because the children wouldn't want to pay it. . . (H)e had asked Mrs. Noland, you know, to wait for the twenty hour duty. He had paid her for . . . eight hours, then he was going to pay for twenty hour duty."

At the beginning of the trial, counsel for plaintiff stated that he was proceeding on a special contract but he did not care to make an election. At the close of the plaintiff's evidence, upon defendant's motion, the action was dismissed by a judgment of nonsuit and plaintiff appealed.

Don C. Young for plaintiff appellant.

Van Winkle, Walton, Buck and Wall by Herbert L. Hyde for defendant appellees.

PER CURIAM. The plaintiff has alleged a single indivisible contract. She avers that she agreed to render twenty-hour nursing service and to supervise defendant's household in consideration of his promise to pay her twenty-two dollars a day (the customary charge for twenty-hour nursing service) for these services. Apparently the supervision of the household was to be an incident to this duty. Plaintiff offered no evidence of the value of the services she actually rendered, no evidence that defendant agreed to pay her twenty-two dollars a day for them, and no evidence that he knew the nursing fee schedule for the area. Plaintiff concedes that she was paid sixteen dollars for each day she lived at the Brown home. She now seeks to recover a balance due under the alleged contract. Therefore, this is not a case for nominal damages. *Gales v. Smith,* 249 N.C. 263, 106 S.E. 2d 164; *Robbins v. Trading Post, Inc.,* 251 N.C. 663, 111 S.E. 2d 884. If plaintiff is to recover she must prove not only the special contract she has alleged but performance of her obligations under it. *Seed Co. v. Jennette Bros. Co.,* 195 N.C. 173, 141 S.E. 542; *Barron v. Cain,* 216 N.C. 282, 4 S.E. 2d 618. Proof of both is lacking. Furthermore, plaintiff alleged that her contract specified, and that she *performed,* twenty-hour nursing service. Her proof showed only eight hours. Nonsuit is proper where there is a material variance between the allegation and proof. *Lucas v. White,* 248 N.C. 38, 102 S.E. 2d 387.

Affirmed.

J. R. JUSTICE, ADMINISTRATOR OF THE ESTATE OF JOHN KENNETH JUSTICE v. JOHN L. PRESCOTT AND WIFE, LUCILLE H. PRESCOTT.

(Filed 27 February 1963.)

Negligence § 37b—

Evidence that the body of a nine year old boy was taken from waist-deep water at a public swimming pool, that artificial respiration was unsuccessful and produced no appreciable amount of water from the body, that a lifeguard was within less than 30 feet from the place the body was found and other bathers were nearby, without evidence of any outcry by the boy, held insufficient to overrule nonsuit, the cause of the death being left in conjecture.

APPEAL by plaintiff from *Huskins, J.*, August, 1962 Term, HENDERSON Superior Court.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate.

The plaintiff offered evidence tending to show that his son, John Kenneth Justice, age 9, and a companion, James Edward Bane, of approximately the same age, both of whom were good swimmers, paid the required fee for admission to Laural Park Bathing Beach operated by the defendants in Henderson County. At about 3:30 in the afternoon of June 18, 1960, young Justice and Bane entered the swimming area covering about one-quarter acre at a time when 25 to 30 other bathers were in the water.

After remaining in the water for some time, young Bane left his companion, went to the bath house for a cold drink. As he returned after ten or fifteen minutes, he saw a young man lift John Kenneth's body from the water.

The rescue squad and participating doctors administered artificial respiration which proved unsuccessful. There were no marks on the body and nothing to indicate the cause of death other than the presence of the body in the shallow water. The efforts attending the artificial respiration produced no significant amount of water from the body. There was no evidence of any outcry or struggle, although other bathers were within a few feet of the place where the body was recovered. Two life guards were on duty within 30 feet.

At the close of the plaintiff's evidence, the court entered judgment of compulsory nonsuit from which the plaintiff appealed.

M. F. Toms, Arthur J. Redden for plaintiff appellant.

Redden, Redden & Redden for defendant, appellees.

PER CURIAM. The evidence disclosed that two life guards were on duty at the time the boy's body was removed from the water. One was stationed within less than 30 feet of the spot. Twenty-five to thirty other bathers were within the one-quarter acre which constituted the swimming area. No one heard or observed any signal of distress. The water was only up to the boy's waist. What caused his death — whether strangulation, apoplexy, heart attack, or otherwise — is left to conjecture. Evidence of actionable negligence is lacking.

The judgment of nonsuit for failure of proof is

Affirmed.

RONNIE BURLESON, BY HIS NEXT FRIEND EARLE BURLESON v. JOHNNY HELTON

AND

EARL BURLESON v. JOHNNY HELTON.

AND

MRS. GRACE BURLESON v. JOHNNY HELTON.

AND

DIANA WHITTEMORE, BY HER NEXT FRIEND, VANCE WHITTEMORE v. JOHNNY HELTON.

AND

VERONA WHITTEMORE, BY HER NEXT FRIEND, VANCE WHITTEMORE v. JOHNNY HELTON.

(Filed 27 February 1963.)

APPEAL by defendant from *Martin, S.J.,* November 1962 Regular Civil Term of BUNCOMBE.

Actions to recover damages for personal injuries.

Plaintiffs' evidence tends to establish the following facts: The five plaintiffs and three other persons were passengers in an automobile owned and being operated by defendant. The accident occurred about 1:30 P.M., 10 June 1962, in Yancey County on Highway 197, a mountain road known as the Ivy Gap Road. The weather was clear and the road was dry. But the road was rough and unpaved and had many curves and narrow places. They were proceeding down the mountainside, and were meeting two jeeps. There was a narrow place in the road about equally distant from the jeeps and defendant's car. One of the plaintiffs warned defendant that there was a narrow place in the road and that he would be unable to pass the jeeps at the narrow point, and asked defendant to stop. Defendant did not heed the warn-

ing. The jeeps stopped one behind the other against the mountain at the narrow place in the road. Defendant continued forward and started around the jeeps. There was not room to pass. Defendant "cut" his car "off the road"; the earth began to "crumble" at the edge of the bank, he gave "it a lot of gas" and "tried to come back in against the jeep" but there wasn't enough room; and the car went off the bank, down the mountainside, turned over three or four times, landed on "some big rocks" and lodged against a tree. Plaintiffs were injured.

Defendant offered no evidence. The jury found that plaintiffs were injured by reason of defendant's negligence and awarded damages in each case. From judgments in conformity with the verdicts defendant appeals.

James S. Howell for plaintiffs.
Horner & Gilbert for defendant.

PER CURIAM. The court in its discretion consolidated the five cases for trial. In this no prejudicial error appears. "A discretionary order consolidating actions for trial will not be disturbed on appeal in the absence of a showing of injury or prejudice to the appealing party." 4 Strong: N. C. Index, Trial, s. 8, p. 294. The trial court properly denied defendant's motion for nonsuit, and defendant's exceptions to the admission of evidence are not sustained. Considered contextually the charge is adequate. A new trial will not be awarded for mere technical error when it appears that the jury could not have been misled thereby.

No error.

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL

§ 4. Procedure to Raise Question of Pendency of Prior Action.

Where defendant pleads a prior action pending between the same parties involving the same subject matter, but offers nothing in support of the plea in abatement, the plea is properly disregarded. *Frye v. Crooks*, 199.

§ 8. Identity of Actions.

The pendency of a claim under the State Tort Claims Act to recover for injuries resulting from the negligence of a State employee in the performance of his duties, is not ground for abatement of an action later instituted by the injured party against the State employee in his individual capacity to recover for injuries resulting from the same act of negligence, since the requisite identity of parties does not exist. *Wirth v. Bracey*, 505.

§ 14. Death and Survival of Actions — Action Relating to Legal Relationships.

The marriage of a person incapable of contracting for want of understanding may not be declared void after the death of either party to the marriage when the marriage is followed by cohabitation and the birth of issue, but when there is no issue, such marriage may be declared void in an action instituted after the death of the incompetent by a person or persons whose legal rights depend upon whether the marriage is valid or void. *Ivery v. Ivery*, 721.

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§ 8. Distinctions between Actions on Contract and in Tort.

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ADMINISTRATIVE LAW

§ 3. Duties, Authority and Hearings of Administrative Boards.

While a hearing of a municipal administrative board in determining a claim of legal right upon controverted questions of fact may be informal, such hearing must be governed by established rules of procedure applicable generally to administrative tribunals, and no essential element of a fair trial can be dispensed with, and the board may not over the objection of petitioner base its findings upon hearsay evidence or the unsworn statements of witnesses. *Jarrell v. Board of Adjustment*, 476.

An order of an administrative board on findings supported only by incompleted evidence cannot stand, and is properly vacated. *Thomas v. Board of Alcoholic Control*, 513.

§ 4. Appeal, Certiorari and Review.

When a licensee to sell beer does not request a hearing by the State Board after a hearing by an examiner for the Board, his application for judicial review must be dismissed for failure to exhaust available administrative remedies. *Sinodis v. Board of Alcoholic Control*, 282. Statutory provision for

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review must be equal to those provided by G.S. 143-307. *Jarrell v. Board of Adjustment*, 476.

When the findings of an administrative board are supported by the evidence and it is apparent that the board considered all the evidence relating to the determinative factors, the appellate court may not remand. *In re Pine Raleigh Corp.*, 398. But when the findings of an administrative board are not based on competent evidence the proceedings must be remanded. *Jarrell v. Board of Adjustment*, 476.

Upon appeal from the Board of Review to the Superior Court in a controversy between a contractor and the State Highway Commission as to the amount of liquidated damages which the Commission was entitled to withhold for delay in fulfilling the Contract, the Board's findings are conclusive and the Superior Court is limited to the questions of whether the findings are supported by evidence and, if so, whether the findings support the legal conclusions. *Paving Co. v. Highway Comm.*, 691.

ADVERSE POSSESSION

§ 2. Hostile and Permissive Use in General.

In order to be adverse, possession must be continuous, open, and notorious so as to put the true owner on notice of the adverse claim, and therefore must be sufficient to subject the occupant to an action in ejectment as distinguished from a mere trespass *quare clausum fregit*. *Bowers v. Mitchell*, 80.

The giving of permission to hunt on the land, which authority is not exercised, is evidence of an adverse claim but does not amount to adverse possession. *Ibid.*

§ 6. Tacking Possession.

Where plaintiff offers no evidence of actual possession by his predecessors in title, deed to such predecessors is without significance in determining plaintiff's claim of title by adverse possession under color. *Bowers v. Mitchell*, 80.

Where plaintiff claims as devisee of his father but fails to introduce his father's will in evidence, he is not entitled to tack his father's possession. *Ibid.*

The possession of the ancestor may be tacked to the possession of the heir where there is no *hiatus* or interruption in the possession. *Paper Co. v. Jacobs*, 439.

The possession of the husband of an heir and the possession of a widower of an heir, when not adverse to the heir but in recognition of the heir's right, inures to the benefit of subsequent heirs and prevents a *hiatus*, since their possession is in privity with them. *Ibid.*

§ 16. Presumption Possession to Outermost Boundaries of Deed.

Where plaintiff claims under separate deeds to separate tracts of land, even though the tracts are contiguous and comprise collectively the *locus in quo*, plaintiff's possession of a single tract is not constructively extended to the entire area. *Bowers v. Mitchell*, 80.

§ 20. Presumption of Possession by Holder of Legal Title.

The provision of G.S. 1-42 does not declare that one who claims title, relying merely on a paper writing more than thirty years old, thereby acquires

ADVERSE POSSESSION—*Continued.*

title to land described in that instrument, nor does it establish title *prima facie*. *Bowers v. Mitchell*, 80.

§ 23. Sufficiency of Evidence, Nonsuit and Directed Verdict.

The introduction in evidence by plaintiff of deeds executed more than seven years prior to the institution of the action, conveying the land to him, with testimony that plaintiff had had the land surveyed and given to others an unexercised permission to hunt, and had executed timber deeds granting the right to cut timber therefrom for a period not exceeding three years, but without evidence that plaintiff or his predecessors in title had been in the actual, hostile, exclusive and continuous possession of the land for a period of seven years, *is held* insufficient to overrule nonsuit. *Bowers v. Mitchell*, 80.

Evidence of defendants' actual hostile, open, and notorious adverse possession of the area in dispute by themselves and those in privity with them, in subjecting the land to its reasonable uses in the character of owner, *held* sufficient to take the issue to the jury. *Paper Co. v. Jacobs*, 439.

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

The Supreme Court will not pass upon a constitutional question which was not raised and passed upon in the court below. *Lane v. Ins. Co.*, 318.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court will take notice of the failure of a pleading to state a cause of action *ex mero motu*. *Redevelopment Com. v. Hagins*, 220.

The Supreme Court has the power to allow *certiorari* to bring up the entire record for review in the exercise of its supervisory jurisdiction, irrespective of any appeal procedures, in order to insure the orderly administration of justice. *S. v. Moore*, 300.

§ 3. Judgments Appealable.

The appointment of an umpire by a judge of the Superior Court upon application of a party to an insurance contract pursuant to the "appraisal" clause of the policy, G.S. 58-176, is a ministerial and not a judicial act, and no appeal will lie from the refusal of the judge to vacate the order, since the validity of the appointment may be adjudicated only when the question is raised in a properly instituted civil action. *In re Roberts Co.*, 184.

The court has discretionary authority to order the joinder of proper parties, and its order doing so is not appealable unless it adversely affects a substantial right which appellant might lose if the order is not reviewed before final judgment. *Simon v. Board of Education*, 381.

Where the verdict fixes liability of the original defendant and exculpates the additional defendant, joined for contribution, the original defendant may pay the judgment in favor of plaintiff and, without appealing therefrom, appeal from the judgment denying it the right to contribution. *Pearsall v. Power Co.*, 639.

The allowance of cost of administration and attorney's fees affects a substantial right of the creditors in that assets available for payment of their

APPEAL AND ERROR—*Continued.*

claims are reduced *pro tonto*, and such allowance is reviewable by the Supreme Court. *King v. Premo & King, Inc.*, 701.

§ 4. Parties who May Appeal — Parties Aggrieved.

Executors are not parties aggrieved by a judgment construing the dispositive provisions of a will and therefore may not appeal therefrom, but may appeal from the construction of the will and codicil as to the designation of the executors. *Yount v. Yount*, 236.

Where both plaintiffs and defendants appeal from judgment in favor of defendants, defendants' appeal will not be considered when no error is found on plaintiffs' appeal, since in such instance defendants are not the parties aggrieved by the judgment. *Teague v. Power Co.*, 759.

§ 6. Moot Questions and Advisory Opinions.

Plaintiff was denied the right to file as a candidate of his political party for nomination to a public office because a plaintiff's refusal to subscribe to the pledge as prescribed by G.S. 163-119. Plaintiff asserted that the requirement of the statute that he pledge himself to support all candidates of his party in the next general election was unconstitutional, and sought mandamus against the election officials to require them to place his name on the ballot. *Held:* The primary election having been held at the time of the hearing of the appeal, the appeal must be dismissed as academic. *Ratcliff v. Rodman*, 60.

§ 7. Demurrers and Motions in Supreme Court.

A party may demur *ore tenus* in the Superior Court for failure of the pleading to state a cause of action, and even in the absence of demurrer, the Supreme Court will take notice of such defect *ex mero motu*. *Redevelopment Com. v. Hagins*, 220.

§ 15.1. Abandonment of Appeals.

The Superior Court has the discretionary power to deny the motion of the petitioner in condemnation proceedings to withdraw its appeal from the order of the clerk confirming the report of the commissioners. *Davidson v. Stough*, 23.

§ 16. Certiorari as Method of Review.

When *certiorari* is allowed, the Supreme Court will examine the record proper to determine whether there is error of law appearing thereon adversely affecting legal rights as between appellant and appellees who are parties to the appeal, notwithstanding that appellant has preserved no exception or assignment of error. *Furniture Co. v. Herman*, 733.

§ 19. Form and Necessity of Objections, Exceptions and Assignments of Error in General.

An assignment of error should clearly present the error relied on without the necessity of going beyond the assignment itself to learn what the question is. *Jenks v. Morrison*, 96.

§ 21. Exceptions and Assignments of Error to Judgment or to Signing of Judgment.

Exceptions to the judgment or order of the court presents the question whether the facts found by the court are sufficient to support the conclusions

APPEAL AND ERROR—*Continued.*

of law and whether error of law appears on the face of the record. *Schloss v. Jamison*, 271.

§ 22. Exceptions and Assignments of Error to Findings of Fact.

A single exception to the findings of fact and conclusions of law of the lower court presents for review only whether the court's conclusion of law is supported by the findings. *High v. Ridgeway's Opticians*, 626.

§ 38. Abandonment of Exceptions by Failure to Discuss in the Brief.

Ordinarily, exceptions not set out in the brief or in support of which no reason or argument is stated or authority cited will be taken as abandoned. *Sandy v. Stackhouse*, 194; *Bass v. Mecklenburg County*, 226.

§ 39. Presumptions and Burden of Showing Error.

The judgment of the lower court is presumed correct and the burden is upon appellant to show error amounting to the denial of some substantial right. *Key v. Woodlief*, 291.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

If judgment of nonsuit would have to be sustained even though certain of plaintiff's evidence had been admitted, the exclusion of such evidence, even if competent, cannot be prejudicial. *Montgomery v. Tel. Co.*, 172.

Ordinarily, a party waives objection to admission of evidence when other evidence of the same import is admitted without objection, or when the objecting party first introduces evidence in regard to the matter. *Rushing v. Polk*, 256.

The admission of evidence over objection cannot be held prejudicial when evidence of the same import is thereafter admitted without objection. *King v. Ins. Co.*, 432; *Teague v. Power Co.*, 759.

The rule that a party waives his objection to the admission of evidence when he thereafter introduces evidence of like import does not preclude a party from cross-examining the witness in regard to the matter objected to in an attempt to explain or destroy the probative value of the evidence objected to, or even contradicting it with other evidence. *McGinnis v. Robinson*, 264.

Where the jury answers the issue of negligence in the negative and does not answer the issue of contributory negligence and damages, the admission of incompetent evidence to the effect that plaintiff was intoxicated at the time will not be held for prejudicial error, since such evidence relates only to the unanswered issue of contributory negligence and cannot have affected the answer to the determinative issue of negligence, there being ample evidence, tending to show the absence of negligence on the part of defendant and defendant not having argued or contended that the plaintiff was under the influence of liquor at the time. *Key v. Woodlief*, 291.

The exclusion of evidence relating to a subordinate matter which could not possibly affect the ultimate rights of the parties will not be held prejudicial. *Chappel v. Winslow*, 617.

§ 42. Harmless and Prejudicial Error in Instructions.

An exception to an excerpt from the charge is not ground for a new trial when it is apparent that the misstatement contained therein, when considered

in connection with the pleadings, evidence, issues and the entire charge, could not have misled or confused the jury. *Pickens v. Pickens*, 84.

Where incompetent evidence is admitted without objection, the fact that the court charges the jury upon the evidence so admitted will not be held for error, certainly when the instruction relating to such evidence could not have prejudiced appellant. *Redding v. Braddy*, 154.

An instruction which presents an erroneous view of the law upon a substantive phase of the cause must be held for prejudicial error even though the misstatement is made in stating the contentions. *Parker v. Bruce*, 341.

An erroneous instruction may not be held harmless under the rule of contextual construction when it is apparent from the record that the jury was confused and did not understand the court's charge. *Widenhouse v. Yow*, 599.

§ 43. Harmless and Prejudicial Error in Course and Conduct of Trial.

Where the court's remarks during the interrogation of a witness, when considered in context and in light of the evidence, could not have affected the result, any error in the statement cannot be held prejudicial. *Pickens v. Pickens*, 84.

§ 44. Invited Error.

If the president of plaintiff corporation testifies voluntarily on cross-examination that plaintiff carried liability insurance, and the question asked the witness did not necessarily call for such information plaintiff may not complain of the error it thus induced. *Ins. Co. v. O'Neill*, 169.

An erroneous instruction embodied in a party's prayer for instructions is invited error and cannot entitle such party to a new trial even though the party be represented by different counsel on the appeal. *Chappel v. Dean*, 412.

§ 45. Error Cured by Verdict.

Where the rights of the parties are determined by the jury's answer to certain of the issues, any error relating to another issue which was submitted but was not raised by the pleadings, cannot be held prejudicial. *Pickens v. Pickens*, 84.

Where the issues are inter-related so that the answer to one issue affects the answer to the other, a new trial must be awarded as to both issues for prejudicial error relating to one, even though appellant is not in a position to press his exceptions relating to the other. *Chappel v. Dean*, 412.

§ 49. Review of Findings or Judgments on Findings of Fact.

Where there are no exceptions to the findings of fact, it will be presumed on appeal that the findings are supported by competent evidence and are therefore binding. *Schloss v. Jamison*, 271.

The trial court's findings of fact which are supported by competent evidence are conclusive notwithstanding that incompetent evidence may also have been admitted, since it will be presumed that the court disregarded the incompetent evidence in making its findings. *Riverie Lingerie v. McCain*, 353; *Chappel v. Winslow*, 617.

A judgment by the court on findings of fact will not be disturbed because a particular finding was not supported by evidence when such finding is immaterial to the ultimate rights of the parties, or because of a conclusion of the court which does not affect the result. *King v. Ins. Co.*, 432.

APPEAL AND ERROR—*Continued.*

The findings of fact of the trial court which are supported by competent evidence are binding on appeal even though there be competent evidence to the contrary. *Chappel v. Winslow*, 617.

In a trial by the court under agreement of the parties the findings of the court are conclusive if supported by competent evidence, but when all of the evidence tends to show the facts to be otherwise than found by the court, the findings must be set aside and the cause remanded. *Priddy v. Lumber Co.*, 653.

§ 51. Review of Judgments on Motions to Nonsuit.

Judgment of nonsuit entered in a negligence action must be sustained if the evidence fails to show defendant's negligence or affirmatively shows plaintiff's contributory negligence as a matter of law. *Jenkins v. R.R.*, 58.

In determining the sufficiency of the evidence to sustain the lower court's denial of nonsuit, incompetent evidence admitted by the trial court, as well as competent evidence, must be considered. *Widenhouse v. Yow*, 599.

When a defendant offers evidence, the only motion for judgment of nonsuit to be considered on appeal is that made at the close of all the evidence. *Ibid*; *Ivery v. Ivery*, 721; *Tayloe v. Tel. Co.*, 766.

Where it is held on appeal that defendants' motions for judgment of nonsuit were properly everruled, but a new trial is awarded for error in the course of the trial, the Supreme Court will refrain from discussing the evidence except to the extent necessary to show the reasons for the conclusions reached. *Widenhouse v. Yow*, 599.

§ 54. Partial New Trial.

Where error relating to one issue affects the answer to other issues, a new trial as to all issues must be awarded. *Widenhouse v. Yow*, 599.

§ 55. Remand.

Where an order is entered under a misapprehension of law, the cause must be remanded. *Allen v. Allen*, 305.

§ 59. Force and Effect of Decision of Supreme Court in General.

A decision of the Supreme Court must be read in the light of the facts of the particular case in which it is written. *Allen v. Allen*, 305; *Indemnity Co. v. Motors, Inc.*, 647.

§ 60. Law of the Case.

Where notice of petition for *certiorari* is not served on some of the parties and they are not parties to the appeal, the adjudication of their rights in the lower court is the law of the case and the Supreme Court will not undertake to determine whether there was error in the judgment of the lower court in respect to their rights. *Furniture Co. v. Herman*, 733.

APPEARANCE

§ 2. Effect of Appearance.

Where certain of defendants, while in this State in connection with a criminal prosecution against them, are served with process in a civil action, in which civil action they are arrested, the acts of such defendants in pro-

APPEARANCE—*Continued.*

curing the reduction of the civil arrest bond by consent order invokes the power of the court in the civil action, and such acts constitute a general appearance waiving any defect in the service of process. *Reverie Lingerie v. McCain*, 353.

ASSAULT AND BATTERY

§ 3. Actions for Civil Assault.

Complaint must allege facts constituting assualt in law, and mere allegation that defendants committed an assault on plaintiff is insufficient. *Gillispie v. Service Stores*, 487. All parties sought to be held liable for an assault arising out of a single transaction may be joined in a single action. *Ibid.*

§ 5. Assault with Deadly Weapon.

"Serious injury" as used in G.S. 14-32 prescribing the punishment for an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, means physical or bodily injury and is not synonymous with "serious damage done", and therefore an instruction that if the jury should find beyond a reasonable doubt that the assault was made with a gun under such circumstances as would tend to create a breach of the peace that would outrage the sensibilities of the community, the assault would be assault with a deadly weapon inflicting serious injury, must be held for prejudicial error. *S. v. Jones*, 89.

§ 8. Self-Defense and Defense of Property.

The proprietor, or person in possession of a store, is not under duty to retreat in the face of a threat by another to take property from the store, and is justified in using such force in defense of the property as the violence of the attack warrants, but the necessity of using such force need not be actual, it being sufficient if the danger be such as to induce a reasonable man to believe that force is necessary, since the right to use force in defense of property obtains upon necessity either real or apparent. *S. v. Lee*, 44.

§ 11. Indictment and Warrant.

A warrant charging defendant with assault with a deadly weapon, to wit, a blackjack or some blunt instrument, is disapproved, since the nature of the weapon is charged disjunctively. *S. v. Lee*, 44.

§ 14. Sufficiency of Evidence and Nonsuit.

Evidence that defendant shot his victim in the back with a shotgun and that the victim went to the hospital and had 17 shot removed from his body, *held* sufficient to be submitted to the jury on the question of serious injury in a prosecution under G.S. 14-32. *S. v. Jones*, 89.

§ 15. Instructions.

Where defendant's evidence is to the effect that while he was in his store waiting on customers a patron in an intoxicated condition entered and requested beer, and after being told that it was after hours for the sale of beer, stated that he was going to have some beer anyway and started around the counter toward defendant, when defendant hit him with a stick, an instruction to the effect that defendant's plea as to defense of property had to rest upon real necessity, rather than necessity, real or apparent, must be held for prejudicial error. *S. v. Lee*, 44.

ASSIGNMENTS

§ 4. Operation and Effect of Assignment.

Where a factor contends that prior to the receivership it had paid full consideration for all accounts assigned to it by the account creditor prior to insolvency and that actual notice of the assignment was given to the account debtors on the face of the original invoices, G.S. 44-80(2), the receiver's report should find the facts with regard to the factor's contentions in order to determine the factor's right to proceeds of the accounts receivable free from the costs of the receivership and the claims of other creditors, and when the receiver has made no findings in respect thereto the cause must be remanded. *King v. Premo & King, Inc.*, 701.

ASSOCIATIONS

§ 3. Rules and Regulations.

Claimant held entitled to assessment for retirement benefits. *Bray v. Benefit Association*, 419.

An amendment to the rules of a beneficial association requiring that a notice of change in employment status should be given in writing can have no retroactive effect, and when the status of a member does not change subsequent to the adoption of the amendment, he cannot be under duty to give written notice. *Ibid.*

Plaintiff member was entitled to have defendant association assess its members on a particular date for retirement benefits. *Held:* The Superior Court, in adjudging that plaintiff was entitled to the benefits, should order the association to forthwith assess all of its presently assessable members who were subject to the assessment on the date the assessment should have been made, and should order that ensuing annual assessment should include a sufficient sum to pay any deficiency arising from the non-assessability of such members because of death, retirement, or disability. *Ibid.*

§ 5. Right to Sue and Be Sued.

Evidence that a nonresident labor union, over a period of years, was active in this State through its agent in organizing or attempting to organize employees into a local of the union and in calling a strike, and that the union, during the strike, filed a complaint for unfair labor practices with the NLRB, *held* sufficient to support a finding that the union was doing business in this State for the purpose of service of process upon it by service upon the Secretary of State. *Reverie Lingerie v. McCain*, 353.

ATTORNEY AND CLIENT

§ 3. Scope of Authority of Attorney.

Service of a motion in the cause to restrain defendant from removing property from the State so as to defeat a prior judgment for support may be served on the attorney of record for the husband. *Hinnant v. Hinnant*, 509.

AUTOMOBILES

§ 4. Title, Certificate of Title, Sale and Transfer of Title.

Where the owner of a registered vehicle transfers ownership to a nondealer, it is the duty of the vendor to endorse the certificate of title to the

AUTOMOBILES—*Continued.*

transferee with a statement of all liens and encumbrances verified by oath, and these papers must be transferred to the Department of Motor Vehicles; but when an owner sells to a dealer, the dealer is not required to transmit the certificate of title to the Department of Motor Vehicles until the dealer resells. G.S. 20-75 as amended. *Indemnity Co. v. Motors, Inc.*, 647.

§ 7. Attention to Road, Look-out and Due Care in General.

A motorist is under duty to maintain a proper lookout in the direction of travel and is charged with the duty of seeing what he should see in the exercise of reasonable care in this respect. *Ennis v. Dupree*, 141.

A motorist is required to exercise reasonable care to avoid injury to persons or property, and when the failure to observe such care is the proximate cause of injury, liability attaches. *Scarlett v. Grindstaff*, 159.

§ 8. Turning and Turning Signals.

The failure of a motorist to pass to the right of the center of an intersection in making a left turn at the intersection is negligence *per se* and is actionable if it proximately causes injury to another. *Pearsall v. Power Co.*, 639.

§ 9. Stopping, Parking, Signals and Lights.

The stopping of a vehicle on a highway after an accident is not negligence, since a motorist is required by statute to stop after an accident. *Punch v. Landis*, 114.

§ 11. Lights.

The operator of a wrecker towing another vehicle at night is responsible for having the lights required by statute on the back of the towed vehicle. *Punch v. Landis*, 114.

By the terms of G.S. 20-129(g) the requirement of a stop lamp on the back of vehicles does not apply to vehicles manufactured prior to 31 December 1955. *Ibid.*

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

The "no-passing" yellow line in the center of a highway relates primarily to avoidance of danger from on-coming traffic but, even in the absence of on-coming traffic, the presence or nearness of such line may be relevant if it tends to explain the speed obtained by a driver, in response to the implied hazard, while passing a vehicle traveling in the same direction. *Rushing v. Polk*, 256.

§ 17. Right of Way at Intersection.

A motorist faced with a green traffic signal does not have the unqualified right-of-way but remains under duty to maintain a proper lookout and may be negligent in striking another car entering the intersection in disobedience of the signal if he could and should have seen such other car in time to have avoided the collision, or if he enters the intersection at excessive speed in consideration of his obstructive view and the attendant circumstances. *Faircloth v. Bennett*, 516.

An intersection is an area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundry lines of two or more highways

AUTOMOBILES—*Continued.*

which join one another at any angle, G.S. 20-38(1), and the center line of an intersection is the meeting point of the medial lines of the highways intersecting one another. *Pearsall v. Power Co.*, 639.

§ 23.1. Towing Vehicles.

The operator of a wrecker is responsible for having the lights required by statute on the back of the towed vehicle. *Punch v. Landis*, 114.

Where one automobile tows another on the highway, the operator of each vehicle is under duty to exercise more than ordinary alertness and caution. *Scarlett v. Grindstaff*, 159.

§ 34. Children on or Near Highway.

A motorist is not an insurer of the safety of children along the highway and may not be held liable for striking a child whose presence in the motorist's line of travel could not have reasonably been foreseen, but a motorist may be held liable if his speed or failure to maintain a reasonable lookout prevents him from avoiding injury to a child suddenly running in his path of travel. *Ennis v. Dupree*, 141.

§ 35. Pleadings and Parties.

Allegation that defendant, in passing a preceding vehicle, was driving at excessive speed under the circumstances is sufficient predicate for the introduction of evidence that defendant crossed the "no-passing" yellow line in the center of the highway, since the crossing of such line is an evidentiary and not an ultimate fact. *Rushing v. Polk*, 256.

§ 37. Relevancy and Competency of Evidence in General.

Ordinarily, evidence of the conditions and circumstances leading up to and surrounding an automobile accident is competent when such evidence tends to throw light upon the conduct of the parties and the care, or lack of care, exercised by them. *Rushing v. Polk*, 256.

An officer may not testify from his investigation after the accident as to which occupant was driving at the time of the accident. *McGinnis v. Robinson*, 264.

In competent opinion evidence may not be admitted under the guise of corroborative evidence. *Ibid.*

In actions for wrongful deaths, evidence of defendant's injuries in the same accident causing intestates' deaths is incompetent. *Sanders v. George*, 776.

§ 38. Opinion Evidence as to Speed.

Where a witness testifies that he saw the lights of an approaching vehicle but does not state that he had observed the movement of the lights for any length of time or that he had more than a fleeting glance at them, the witness fails to qualify himself to testify as to the speed of the approaching vehicle, and his testimony as to speed is without probative force and is incompetent. *Key v. Woodlief*, 291.

§ 39. Physical Facts at Scene.

The physical facts at the scene of the accident may be such as to indicate excessive speed unquestionably. *Punch v. Landis*, 114.

Evidence of physical conditions existing at the scene of an accident is ordinarily admissible. *Rushing v. Polk*, 256.

AUTOMOBILES—*Continued.*

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

Negligence must be the proximate cause of damage or injury in order to be actionable. *Punch v. Landis*, 114.

Where the direct testimony and the physical facts at the scene disclose that plaintiff passenger received no injury when the car in which he was riding collided with the rear of another vehicle in a fog, and that within 10 seconds of this slight impact another car collided with the rear of the car in which plaintiff was riding with a tremendous impact which caused extensive damage to the vehicles and was the sole cause of plaintiff's injury, motion to nonsuit made by the administratrix of the driver of the car in which plaintiff was riding should be allowed. *Ibid.*

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Highway in Passing Vehicle Traveling in Opposite Direction.

Allegations and evidence on counterclaim of one defendant that plaintiff drove his vehicle to his left of the center of a highway and collided head-on with the vehicle in which the defendant asserting the counterclaim was riding, which vehicle was then on its right of the center line of the highway, *is held* sufficient to take such defendant's counterclaim to the jury. *McGinnis v. Robinson*, 264.

§ 41d. Sufficiency of Evidence of Negligence in Passing Cars Traveling in Same Direction.

Plaintiff passenger's evidence that defendants were both traveling north on a three-lane highway and that as the following vehicle was attempting to pass in a passing zone for northbound traffic, the driver of the preceding vehicle turned from a direct line of travel without first seeing that such movement could be made in safety and without giving the required signal, and collided with the right front of the following vehicle, *is held* sufficient to be submitted to the jury on the issue of such defendant's negligence. *Queen v. Jarrett*, 405.

§ 41e. Sufficiency of Evidence of Negligence in Stopping without Signal or Lights.

Evidence tending to show that the driver of a wrecker towing another vehicle had burning on the back of the towed vehicle lights sufficient to warn following motorists, that upon suddenly encountering fog, which covered the road for only a few hundred feet, he slowed to 10 or 15 miles per hour, that upon feeling a slight impact from a car hitting the rear of the towed vehicle, he came to a stop, and, that as he came to a stop another car hit the rear of the first car with tremendous impact, the second impact occurring some 5 to 10 seconds after the first, *is held* insufficient to be submitted to the jury on the issue of negligence on the part of the driver of the wrecker. *Punch v. Landis*, 114.

Evidence that the additional defendant, driving a car along a four-lane highway, was proceeding in the left lane for travel in his direction, and slowed to turn left at a crossover in the median, and that plaintiff, driving a following car, also slowed his vehicle and was hit from the rear by a third vehicle driven by an original defendant, is insufficient to support a finding that the negligence of the additional defendant, if any, was a proximate cause of plaintiff's injuries, and such additional defendant's motion to nonsuit the

AUTOMOBILES—*Continued.*

cross action of the original defendants was properly allowed. *Massengill v. Womble & Sons, Inc.*, 181.

§ 41f. Sufficiency of Evidence of Negligence in Hitting Vehicle Stopped or Parked on Highway.

Evidence tending to show that an automobile struck the rear of a van which was being towed by a wrecker, that the impact occurred shortly after the vehicles had entered a fog and were being driven at a very slow speed, the impact being very slight, and that within ten seconds after the impact the driver of another car hit the rear of the automobile, with such force as to drive it under the van, shearing off the top more than half way back, and driving the heavy van upon the rear of the wrecker, *is held* sufficient to be submitted to the jury on the issue of negligence of the driver of the second car, since the physical evidence discloses that the second car was being driven at excessive speed. *Punch v. Landis*, 114.

Evidence that plaintiff gave the statutory signal for a left turn preparatory to entering a side road from the highway, that plaintiff slowed down and had to stop before attempting a left turn because of on-coming traffic, and that about a minute after he had stopped defendant crashed his vehicle into the rear of plaintiff's vehicle, *is held* to take the issue of defendant's negligence to the jury. *Parker v. Bruce*, 341.

While the relative duties of drivers traveling in the same direction must ordinarily be governed by the circumstances of each particular case, the mere fact of a rear-end collision ordinarily affords some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout. *Ibid.*

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Allegations to the effect that a defendant failed to keep a proper lookout and observe traffic conditions and drove his vehicle to the left of the center of the highway as a following vehicle was attempting to pull around him to pass, *is held* sufficient, with supporting evidence, to present the question of such defendant's negligence in violating G.S. 20-154, notwithstanding the failure of the complaint to refer to the statute. *Queen v. Jarrett*, 405.

Evidence that one defendant, in turning left at an intersection "cut the corner" and failed to pass to the right of the center of the intersection, so that the driver of a bus approaching the intersection from such defendant's left, upon having his attention called by the sounding of defendant's horn to the presence of such defendant's vehicle in a place where it had no right to be, stopped so suddenly to avoid collision that a passenger in the bus was thrown to her injury, *is held* sufficient to be submitted to the jury on the issue of such defendant's negligence. *Pearsall v. Power Co.*, 639.

§ 41i. Sufficiency of Evidence of Negligence in Entering Highway.

Evidence that defendant entered highway from roadside park so closely in front of plaintiff's vehicle that plaintiff ran off road to avoid collision *held* to take issue of negligence to jury. *Transportation Co. v. Petroleum Co.*, 209.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children.

Evidence of negligence in striking children running into street held sufficient to overrule nonsuit. *Walker v. Byrd*, 62.

AUTOMOBILES—*Continued.*

Evidence of negligence in striking child on bicycle on highway held sufficient to be submitted to jury. *Ennis v. Dupree*, 141; *Miscnheimer v. Carter*, 204.

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of negligence of the driver of a motor vehicle in striking a child upon a highway. *Wolfe v. Cooperative Exchange*, 176.

§ 41p. Sufficiency of Evidence of Identity of Driver of Car.

In this case the evidence as to the identity of the driver of the car was incompetent as hearsay. *McGinnis v. Robinson*, 264.

§ 41u. Sufficiency of Evidence of Negligence in Towing Operations.

Evidence of negligence of each driver involved in towing operation held for jury. *Scarlett v. Grindstaff*, 159.

§ 42e. Nonsuit for Contributory Negligence in Following or Passing Vehicle Traveling in Same Direction.

Evidence *held* not to show contributory negligence as matter of law on part of plaintiff in running off highway to avoid collision with vehicle entering highway immediately in front of plaintiff. *Transportation Co. v. Petroleum Co.*, 209.

Evidence tending to show that plaintiffs' automobile collided with the rear of the automobile owned by one defendant after defendant's vehicle had entered the highway from a private driveway from plaintiffs' left and turned left, angling across the highway, blocking both lanes, and that it did so when plaintiff's vehicle was only some 200 feet away and traveling some sixty miles per hour in a sixty mile per hour speed zone, *is held* insufficient to show contributory negligence as a matter of law. *Widenhouse v. Yow*, 599.

§ 42h. Contributory Negligence in Turning.

Evidence that plaintiff gave the statutory signal for a left turn preparatory to turning into an intersecting road from the highway and that plaintiff was forced to stop before attempting the turn because of on-coming traffic does not disclose contributory negligence as a matter of law in plaintiff's action to recover for damages resulting from defendant's crashing into the rear of his car. *Parker v. Bruce*, 341.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

Evidence that plaintiff, driving along a four-lane highway in the left lane for traffic traveling in his direction, decreased speed when the preceding vehicle slowed down to make a left turn at a crossover in the median, and was struck from the rear by defendant's vehicle, *is held* insufficient to warrant the submission of the issue of contributory negligence to the jury. *Massengill v. Womble & Sons, Inc.*, 181.

§ 45. Sufficiency of Evidence to Raise Issue of Last Clear Chance.

Evidence that plaintiff turned his vehicle to the left to enter a filling station on his left side of the highway when defendant's oncoming car was some 100 feet distant, but that when the cars were approximately 60 feet apart plaintiff stopped his car, blocking defendant's lane of travel, and that defendant did not then have time to avoid collision, *is held* not to raise the issue of

last clear chance, since this doctrine arises only when there is a sufficient time for defendant to avoid the accident after defendant should have discovered plaintiff's perilous position. *Hatcher v. Gwaltney*, 527.

§ 46. Instructions in Auto Accident Cases.

Where plaintiff pedestrian's evidence is to the effect that defendant's car skidded 45 feet before striking him, and that plaintiff did not see or hear defendant's automobile until about the time it struck him, the omission of the court to charge with reference to the failure of defendant to sound his horn, G.S. 20-174(e), will not be held for prejudicial error, there being no evidence as to whether plaintiff did or did not sound his horn except the negative testimony of plaintiff that he heard nothing, not even the sound of the tires skidding a distance of 45 feet. *Jinks v. Morrison*, 96.

In this action to recover for the wrongful death of a child, plaintiff alleged that defendant failed to keep a reasonable lookout and violated the reckless driving statute. An instruction of the court on plaintiff's evidence of defendant's failure to keep a proper lookout, that plaintiff contended that defendant violated the reckless driving statute, which the court then read to the jury, *is held* prejudicial as permitting the conclusion that the jury could not find that defendant was negligent under the rule of an ordinarily prudent man in failing to keep a reasonable lookout unless the jury also found that defendant was guilty of reckless driving as defined by statute. *Sugg v. Baker*, 333.

The evidence tended to show that plaintiff gave the statutory signal preparatory to making a left turn from the highway and slowed and stopped his vehicle because of on-coming traffic, and that defendant's following vehicle crashed into his rear. *Held:* An instruction, not supported by allegation, evidence, or contention by plaintiff that defendant was negligent in failing to give the statutory signal for a left turn, must be held for prejudicial error, the rule regarding the signal for a left turn not being applicable to a following vehicle. *Parker v. Bruce*, 341.

In plaintiff passenger's action to recover for injuries received in a collision between two vehicles traveling in the same direction as one attempted to pass the other, plaintiff's allegations that the collision resulted from each driver turning from a direct line, without reference to speed as a proximate cause of the accident, do not present the question of liability on the ground of excessive speed, and therefore extended instructions as to the statutory provisions relating to speed and speed zones are not applicable and constitute prejudicial error. *Queen v. Jarrett*, 405.

An instruction on an abstract principle not presented by the evidence is error. *Chappel v. Dean*, 412.

Where there is no evidence that either driver stopped, an instruction that, if either was confronted by an emergency created by the stopping of the other, the driver confronted with the emergency should not be held to the prudence ordinarily required, must be held for prejudicial error as tending to confuse the jury by instructions on a principle of law not presented by the evidence. *Faircloth v. Bennett*, 516.

Where one party relies upon several acts or omissions of another as constituting actionable negligence, it is prejudicial error for the court to charge the jury conjunctively that if it found such other party was guilty of negli-

AUTOMOBILES—*Continued.*

gence in all the respects relied upon it should answer the issue in the affirmative, since negligence in any one of the respects warrants an affirmative answer if such negligence is a proximate cause of the injury. *Widenhouse v. Yow*, 599.

Where defendant introduces evidence at the trial that the driver of plaintiffs' car was driving at excessive speed and contends that such excessive speed made it impossible for the driver to avoid collision after he saw or should have seen the defendant's vehicle on the highway in front of him, an instruction on the issue of contributory negligence predicated upon the negligence of the driver of plaintiffs' car in failing to keep a proper lookout, with only incidental reference to speed, must be held for prejudicial error in failing to explain the law arising on the evidence as required by G.S. 1-180. *Ibid.*

§ 48. Right of Passenger to Sue Jointly and Severally Tort-Feasors Causing Injury.

If a passenger in a vehicle is injured as a result of concurring negligence on the part of both drivers involved in the collision, the passenger may recover from either one or both. *Faircloth v. Bennett*, 516.

Where the wife is injured in an accident occurring in a state which does not permit the wife to sue her husband or his estate for tortious injury, the wife may not maintain an action in this State on such cause of action, since the *lex loci* controls, nor do our statutes alter this rule, since it was not the legislative intent that the statutes giving the wife such right of action should apply to actions arising outside the borders of this State. *Shaw v. Lee*, 609.

§ 49. Contributory Negligence of Guest or Passenger.

The evidence tended to show that plaintiff with her three small children were riding in a car driven by plaintiff's husband on a long trip, that in returning home the car had motor trouble and the driver of another car undertook to tow the disabled car. *Held:* Whether plaintiff was contributorily negligent in riding in the towed vehicle is a question for the jury to be determined in the light of plaintiff's situation, and plaintiff cannot be held contributorily negligent as a matter of law. *Scarlett v. Grindstaff*, 159.

A passenger may not be held contributorily negligent as a matter of law in voluntarily riding in an automobile driven by a person who had drunk some intoxicating beverage when divergent inferences may be drawn from the evidence as to the quantity of liquor drunk, and it does not appear from the evidence that any incapacity of the driver was obvious. *Cooper v. Kiser*, 175.

Where defendant driver contends that plaintiff passenger was contributorily negligent in consenting to ride in the car driven by defendant after defendant had drunk some beer, the decisive question is what was defendant's condition at the time of and within a reasonable time prior to the accident, and the court properly excludes interrogatories as to whether plaintiff knew of convictions of defendant some years prior to the occasion in suit for drunkenness, driving without a license, and operating an automobile while intoxicated, etc. *Whitman v. Whitman*, 201.

§ 52. Liability of Owner for Driver's Negligence in General.

One co-owner who is not present in the vehicle at the time is not liable, nothing else appearing, for the negligent operation of the vehicle by the

other co-owner, and the fact that the co-owners are husband and wife does not affect this principle. *Rushing v. Polk*, 256.

The fact that one co-owner accepts pay from passengers riding with her to and from work does not make the operation of the car a partnership affair between the co-owners when there is no evidence that the money received was placed in a joint account. *Ibid.*

Where the uncontradicted evidence is to the effect that the owner of an automobile was riding therein, such owner cannot be entitled to nonsuit in an action to recover for the negligent operation of the car for failure of plaintiffs' evidence to show that the owner was the actual driver. *Widenhouse v. Yow*, 599.

§ 54f. Sufficiency of Evidence and Nonsuit on Issue of Respondeat Superior.

Where there is sufficient evidence of negligence of the operator of a motor vehicle to be submitted to the jury on that issue, evidence that the vehicle was registered in the name of the other defendant takes the issue of such other defendant's liability to the jury. *Ennis v. Duprce*, 141.

Proof of registration of a vehicle constitutes *prima facie* evidence of agency but raises no presumption and does not shift the burden of proof. *Chappel v. Dean*, 412.

Where the president of plaintiff corporation testifies that he was authorized to use plaintiff's vehicle in going to and from his home, plaintiff may not make a contrary contention that its president, in driving to his home on the occasion of the accident in suit was on a purely personal mission. *Ins. Co. v. O'Neill*, 169.

If at the time of trial the one-year limitation of G.S. 20-71.1 has been removed by statute, the limitation does not apply. *Ibid.*

In this action to recover for injuries sustained as a result of the alleged negligent operation of a newspaper delivery truck, the evidence *is held* sufficient to be submitted to the jury on the question of whether the person driving the truck, while engaged in the delivery of the newspapers to subscribers, was an employer or an independent contractor of the newspaper publishing company. *Cooper v. Publishing Co.*, 578.

Evidence that the vehicle operated by the wife was registered in the name of the husband is *prima facie* evidence that she was driving as his agent, G.S. 20-71.1, but even so, parol evidence is competent to show that the husband and wife were in fact co-owners, and when there is such evidence it is error for the court to peremptorily instruct the jury to answer the issue of agency in the affirmative. *Rushing v. Polk*, 256.

Where the registered owner is sought to be held liable solely under the provisions of G.S. 20-71.1, and all the evidence is to the effect that the operator of the vehicle was on a purely personal mission and not on business for the registered owner, it is the duty of the trial judge, even if there is evidence that the registered owner gave the operator permission to use the vehicle, to instruct the jury that if they believe all of the evidence to answer the issue of agency in the negative, even in the absence of a request for special instructions. *Chappel v. Dean*, 412.

AUTOMOBILES—*Continued.*

§ 54h. Issues and Verdict on Respondeat Superior.

The issue of liability under the doctrine of *respondeat superior* should be directed to the question of agency and not whether plaintiff was injured as a result of the alleged principal's negligence. *Chappel v. Dean*, 412.

The vehicle in question was registered in the name of a deceased owner and was in the possession and control of the executor. The accident occurred while the vehicle was being operated by the executor's son. The executor was sought to be held liable individually under the family purpose doctrine and in his representative capacity. The evidence disclosed that at the time of the accident the son was on a single mission. *Held:* The executor could not be liable in both his representative and individual capacities, and the court should instruct the jury that they might answer both issues in the negative, or either one in the affirmative and the other in the negative. *Ibid.*

§ 55. Family Purpose Doctrine.

The family purpose doctrine does not apply to the operation by the wife of a vehicle owned in common by the husband and wife. *Rushing v. Polk*, 256.

Evidence that the father had the possession and control of a motor vehicle which he kept at his residence, that he permitted his minor son, who lived in the household, to drive the vehicle, and exercised control over the occasions when and the manner in which the son operated the vehicle, is sufficient to be submitted to the jury on the question of the father's liability under the family purpose doctrine, notwithstanding that the father was not the owner of the vehicle. *Chappel v. Dean*, 412.

An instruction under the family purpose doctrine that the parent would be liable under the doctrine even if the parent actually forbade use of the truck by the son on the occasion in question, is prejudicial error, since there can be no liability under the doctrine in the absence of the parent's consent, express or implied. *Ibid.*

§ 57. Proximate Cause and Contributory Negligence in Homicide Prosecutions.

Contributory negligence of person killed is material solely on question of proximate cause of defendant's negligence. *S. v. Ward*, 330.

§ 59. Sufficiency of Evidence of Culpable Negligence and Nonsuit.

Evidence of speed and want of due care after seeing aged pedestrian on highway held sufficient to take issue of culpable negligence to jury. *S. v. Ward*, 330.

§ 64. Reckless Driving.

Failure to keep a proper lookout may be, but is not necessarily, a component of reckless driving, and does not alone constitute reckless driving. *Sugg v. Baker*, 333.

BANKRUPTCY

§ 5. Liens and Transfers Valid as to Trustee.

Perfected liens for labor and materials are not impaired by the fact that the owner of the property is adjudged bankrupt within four months thereafter. *Glass Co. v. Forbes*, 426.

BILLS AND NOTES

§ 15. Limitations.

Where the holder of a note exercises the acceleration clause therein contained by instituting an action against two of the comakers on the note for the entire indebtedness after default in the payment of an installment, the exercise of the acceleration clause is effective as to a third comaker, even though he is not made a party to the action, and action on the note against the third comaker is barred after the elapse of more than three years from the exercise of the acceleration clause, the note not being under seal. *Shoenterprise Corp. v. Willingham*, 36.

§ 17. Defenses.

An action on a note may not be defeated by showing that the note was given to cover the amount of drafts forged by an employer of the drawer, since the money deposited to the drawer's account in reliance on the genuineness of the forged drafts is consideration for the drawer's note. *Trust Co. v. Smith Crossroads, Inc.*, 696.

§ 18. Presumptions and Burden of Proof.

A negotiable note is *prima facie* issued for valuable consideration, G.S. 25-29, and when the note is also under seal, there is a rebuttable presumption of consideration, with the burden upon the maker and endorser to prove their defense of want of consideration. *Trust Co. v. Smith Crossroads, Inc.*, 696.

BOUNDARIES

§ 5. Junior and Senior Deeds.

Where a grant calls for the corners of senior grant, the senior grant controls, and those claiming under the junior grant may not establish their lines by a survey of the junior description but must do so by locating the corners of the senior grant. *Day v. Godwin*, 465.

§ 8. Processioning Proceedings.

Neither a party nor his surveyor may testify as to the location of a line or boundary solely from a map or aerial photograph when neither has made an actual survey or gone upon the ground, and therefore has no actual knowledge of the facts testified to. *Day v. Godwin*, 465.

BROKERS AND FACTORS

§ 6. Right to Commissions.

Plaintiff broker's evidence to the effect that he was given a nonexclusive listing of defendant's property, that he contacted a prospective buyer but was never able to get an unqualified offer from the prospect for the price stipulated, that the seller thereafter gave the exclusive listing to another broker, and that the prospect thereafter purchased through such other broker, to whom the seller paid the full commission, *is held* insufficient to be submitted to the jury in plaintiff's action to recover commissions. *Sparks v. Purser*, 55.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that a grocery store was broken into and certain articles stolen therefrom, together with evidence that defendants broke into

BURGLARY AND UNLAWFUL BREAKING—*Continued.*

and robbed a filling station, without evidence connecting the two, either as to time or place, is insufficient to be submitted to the jury. *S. v. Harrington*, 529.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Evidence that a physician treated the decedent for more than two years prior to her death, that a short time before her death and while she was in very serious condition, the physician, treating her at her home, waited for her to dress and then took her in his car to a notary public where she signed and acknowledged the deed attached is sufficient to be submitted to the jury in an action to cancel the deed for fraud and undue influence, notwithstanding conflicting evidence on the part of defendant tending to show that the transaction was *bona fides*. *Hewitt v. Bullard*, 347.

COMPROMISE AND SETTLEMENT

A compromise is an adjustment and settlement of differences, and if there are no differences or uncertainties there is no reason for compromise. *Caudill v. Mfg. Co.*, 99.

Uncertainties relating to consequences of known injury, as distinguished from mistake as to extent of injuries, is subject of compromise settlement and is precluded thereby. *Ibid.*

CONSPIRACY

§ 3. Nature and Elements of Criminal Conspiracy.

A conspiracy to do an unlawful act or to do a lawful act in an unlawful manner is a distinct and separate offense from the criminal acts committed pursuant to the unlawful design. *S. v. Brewer*, 533.

Therefore one defendant may be convicted of the overt act and acquitted of the conspiracy while other defendants are convicted of the conspiracy. *Ibid.*

A conspiracy to commit a misdemeanor is a misdemeanor. *Ibid.* A conspiracy is a continuing offense while overt acts in furtherance thereof are being committed. *Ibid.*

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions, Waiver and Estoppel.

In a suit to permanently restrain the enforcement of an ordinance, the conclusion of the court, on the hearing of the order to show cause, that the ordinance is unconstitutional as applied to plaintiff is solely for the purpose of determining whether plaintiff had established *prima facie* his primary equity, and such holding is not *res judicata* upon the question and may not be considered upon the final hearing, since the constitutionality of an ordinance or statute may not be decided upon the issuance of a temporary order but only upon the final hearing on the merits when all the facts can be shown. *Schloss v. Jamison*, 271.

CONSTITUTIONAL LAW—*Continued.*

§ 14. Police Power — Morals and Public Welfare.

G.S. 14-353 making it a misdemeanor for a person to offer an employee a gift or gratuity with intent to influence such employee's conduct in relation to his employer's business, and making it a misdemeanor for an employee to accept such gift or gratuity with the understanding that he would act in a certain manner in respect to his employer's business is a valid exercise of the police power of the State for the purpose of suppressing "commercial bribery." *S. v. Brewer*, 533.

§ 24. Requisites of Due Process.

No valid judgment can be entered disposing of one's property unless he has been given notice of the action seeking to accomplish that purpose and has been afforded an opportunity to assert his defense. *Sutton v. Davenport*, 27.

The hearing provided by statute before an examiner of The State Alcoholic Control Board before the revocation of license to sell beer meets the requirements of due process of law, the licensee having notice and an opportunity to be heard. *Sinodis v. Board of Alcoholic Control*, 282.

§ 28. Necessity for and Sufficiency of Indictment.

A valid warrant or indictment returned by a legally constituted grand jury is an essential of jurisdiction. *S. v. Covington*, 501.

§ 29. Right to Jury Trial.

The intentional exclusion of members of defendant's race from the grand jury is a violation of due process of law, and is ground for quashal. *S. v. Covington*, 495; *S. v. Arnold*, 563. A subsequent plea of guilty does not waive this constitutional right. *S. v. Covington*, 501.

Evidence held insufficient to show discrimination. *S. v. Arnold*, 563.

§ 30. Due Process in Criminal Cases in General.

The statute making it a misdemeanor to offer or accept a commercial bribe is sufficiently definite to apprize a person of ordinary intelligence of the conduct proscribed, and is constitutional. *S. v. Brewer*, 533.

§ 31. Right of Confrontation and Time to Prepare Defense.

Denial of motion for continuance held denial of constitutional right of confrontation upon the facts of this case. *S. v. Lane*, 349.

Where defendant aptly moves to quash the indictments on the ground that members of his race were intentionally excluded from the grand jury, and moves that process issue to require certain named officials to appear and testify with respect to selection of the grand jury and to bring with them pertinent books and records, the act of the court in finding the facts and denying the motions amounts to a denial of defendant's constitutional right to an opportunity to procure evidence, if he can, in support of his motion to quash. *S. v. Covington*, 495.

On defendant's motion to quash the indictments for the intentional exclusion of members of his race from the grand jury which returned the indictments, the court's finding that a Negro served on the grand jury which returned the indictments is not conclusive, the question being whether any person was intentionally excluded from the grand jury because of race. *Ibid.*

CONTRACTS

§ 1. Nature and Essentials of Contracts in General.

A contract between parties is their mutual agreement as ascertained by the reasonable meaning of their words and acts; and the undisclosed intent on the part of one of them alone is immaterial in the absence of mistake, fraud, and the like. *Howell v. Smith*, 150.

§ 7. Contracts in Restraint of Trade.

A contract not to engage in business in competition with the employer after termination of the employment is valid and enforceable if the contract is in writing and is entered into as part of the contract of employment, is based upon valuable consideration, is reasonable as to time and territory, is fair to the parties, and is not against public policy. *Exterminating Co. v. Griffin*, 179.

§ 12. General Rules of Construction.

Ambiguity in a contract will be construed against the party who prepared the instrument. *Trust Co. v. Medford*, 146.

§ 14. Parties Liable and Third Party Beneficiaries.

Evidence *held* for jury on question of whether corporate officer entered into contract in his individual capacity or as agent for his corporation. *Howell v. Smith*, 150.

§ 21. Performance, Substantial Performance and Breach.

If the seller delivers goods in accordance with the specifications, the purchaser is liable for the contract price regardless of whether the goods are useable and irrespective of whether the purchaser likes the goods or not. *Yates v. Body Co.*, 16.

§ 23. Waiver of Breach.

If the catalogs purchased by defendant were not printed in accordance with the specifications, the fact that the purchaser uses a portion of the catalogs in an emergency does not preclude the purchaser from rejecting the remainder of the catalogs. *Yates v. Body Co.*, 16.

§ 25. Pleadings, Issues and Burden of Proof.

Allegations of an express contract and the delivery of goods thereunder of a stipulated reasonable value support recovery upon an express or an implied contract, but issues as to liability upon each theory should be separately submitted. *Yates v. Body Co.*, 16.

§ 26. Competency and Relevancy of Evidence.

The mutual agreement of the parties is the contract and the unexpressed intention of either in entering into the agreement is immaterial, and therefore evidence of the unexpressed intent of one party alone is properly excluded. *Howell v. Smith*, 150.

§ 27. Sufficiency of Evidence and Nonsuit.

Evidence that the purchaser with knowledge of alleged defect used a part of the goods precludes nonsuit regardless of asserted breach of warranty, since the seller may recover at least the reasonable value of the goods used. *Yates v. Body Co.*, 16.

CONTRACTS—*Continued.*

But when no recovery may be had on *quantum meruit*, nonsuit is proper upon failure of evidence of the express contract declared on. *Noland v. Brown*, 778.

§ 30. Forfeitures and Penalties under the Terms of the Agreement.

Where a contract specifies that time is of the essence and provides liquidated damages in a specified amount for each day over the specified number of working days it should take the contractor to complete the project, the liquidated damages must be computed on the basis of the number of working days taken to complete the contract and not whether the contractee was damaged or inconvenienced by the delay. *Paving Co. v. Highway Comm.*, 691.

CORPORATIONS

§ 12. Liability of Officers and Agents to Third Persons.

Evidence *held* for jury on question whether corporate officer entered into contract in his individual capacity or as agent for corporation. *Howell v. Smith*, 150.

COURTS

§ 6. Appeals to Superior Court from Clerk.

The Superior Court has the discretionary power to deny the motion of petitioner in condemnation to withdraw its appeal from order of the clerk confirming the report of the commissioners. *Davidson v. Stough*, 23.

§ 9. Jurisdiction of Superior Court Judge after Orders or Judgments of Another Judge.

Where one Superior Court judge, upon the hearing of a motion to remove, orders a special venire to be drawn from another county, another Superior Court judge may not thereafter, in the absence of motion, affidavit or hearing, order that the cause be removed to another county of the district. *S. v. Moore*, 300.

The denial of a motion of one tort-feasor to dismiss on the ground of a release given by plaintiff to another tort-feasor, but permitting the movant to amend his answer to allege the release, is not a denial of the motion on the merits and therefore does not preclude another Superior Court judge from finding the facts and ruling that plaintiff executed a release extinguishing the cause of action. *Simpson v. Plyler*, 390.

§ 20. Conflict of Laws.

Where the accident resulting in injury to the wife occurs in a state which does not permit one spouse to sue the other in tort, the wife may not maintain an action in this State to recover for such injuries. *Shaw v. Lee*, 609.

CRIMINAL LAW

§ 1. Nature and Elements of Crime in General.

The General Assembly, except as limited by provisions of the Federal or State Constitutions, has inherent power to provide that the commission of any specified act should be a crime, and a statute creating a criminal offense will

CRIMINAL LAW—*Continued.*

be upheld, subject to such limitations, provided it has some substantial relation to the evils sought to be suppressed and defines the proscribed acts with sufficient certainty and definiteness to apprize a person of ordinary intelligence of the conduct forbidden. *S. v. Brewer*, 533.

§ 4. Distinction between Crimes and Misdemeanors.

A conspiracy to commit a misdemeanor is a misdemeanor; violation of G.S. 14-353 is not a malicious misdemeanor. *S. v. Brewer*, 533.

§ 8. Limitations.

Even though conspiracy to commit a misdemeanor is formed more than two years prior to prosecution, the prosecution is not barred when overt acts in furtherence of the conspiracy are committed less than two years prior thereto. *S. v. Brewer*, 533.

§ 15. Venue.

The discretionary power of a judge of the Superior Court to remove a cause to an adjacent county for trial on the ground that a fair trial cannot be had in the county in which the action or prosecution is pending may be exercised only if the judge is satisfied, after hearing all the testimony offered by both sides by affidavit, that the ends of justice so required; upon the hearing of the motion for removal the judge may, instead of ordering a removal, order that a special venire be summoned from another county. *S. v. Moore*, 300.

Order for a special venire is tantamount to a denial of the motion to remove, and another judge may not thereafter grant the motion to remove. *Ibid.*

§ 29. Suggestion of Mental Incapacity to Plead.

The fact that report of mental capacity to stand trial is made less than thirty days from the court's order of commitment for observation for a period of thirty days does not entitle defendant to a further examination or a continuance. *S. v. Arnold*, 563.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

The general rule excluding evidence of defendant's guilt of other offenses is subject to the exception that proof of other offenses is competent when such proof tends to show *quo animo*, intent, design guilty knowledge or make out the *res gestae*, or to exhibit a chain of circumstances with respect to the offense in issue, and is so connected with the offense charged as to throw light upon one or more of these questions. *S. v. Christopher*, 249.

In prosecution for homicide committed during robbery, State may introduce evidence that defendant had stolen car and committed the robbery to pay the repair bill to get the car out of the garage. *Ibid.*

In a prosecution for assault with intent to commit rape, evidence that defendant committed a like offense approximately two years prior to the offense charged is incompetent and its admission is prejudicial error, there being no connection between the two offenses. *S. v. Gammons*, 522.

§ 38. Experimental Evidence.

Result of experiment is incompetent in evidence in absence of showing that experiment was carried out under substantially similar circumstances as those surrounding the occasion in question. *S. v. Foust*, 453.

CRIMINAL LAW—*Continued.*

§ 42. Articles Found Near Scene of Crime or in Defendant's Possession.

The admission in evidence of the boots of defendant, properly identified, and a gun, identified as the one connected with the commission of the crime, is not error. *S. v. Arnold*, 563.

§ 53. Medical Expert Testimony.

It is competent for a physician found by the court to be an expert to testify from his personal examination of the deceased as to the cause of death. *S. v. Arnold*, 563.

§ 71. Confessions.

Where the court finds, upon supporting evidence, that the confession of each of defendants was voluntarily made an allows the confessions to be introduced in evidence under instructions to the jury that the confession of the one was not to be considered against the other, no error is made to appear. *S. v. Arnold*, 563.

§ 82. Direct Examination of Witnesses — Leading Questions.

The trial judge has the discretionary power to permit the solicitor to ask leading questions of a 14 year old witness testifying in a prosecution for rape. *S. v. Pearson*, 188.

§ 85. Rule that Party May Not Discredit Own Witness.

The introduction in evidence by the State of a declaration or admission by defendant does not preclude the State from showing that the facts are other than as related in defendant's declaration. *S. v. Mitchum*, 337.

§ 86. Time of Trial and Continuance.

Denial of motion for continuance held denial of constitutional right of confrontation on facts of this case. *S. v. Lane*, 249.

A motion for continuance is addressed to the sound discretion of the trial judge, and the denial of the motion will not be disturbed in the absence of a showing of abuse. *S. v. Arnold*, 563.

§ 90. Admission of Evidence Competent for Restricted Purpose.

Where evidence competent for the purpose of corroboration is admitted over the general objection of defendant without request that its admission be restricted, exception to the admission of the evidence cannot be sustained. *S. v. Pearson*, 188.

§ 97. Argument and Conduct of Counsel.

While the solicitor, in his argument to the jury, is not entitled to travel outside of the record, and should not be permitted to characterize defendant in a manner calculated to prejudice the jury against him, wide latitude must be afforded counsel in the argument, and what constitutes abuse of this privilege must ordinarily be left to the sound discretion of the trial judge. *S. v. Christopher*, 249.

Argument of the solicitor that in light of the circumstances of the homicide the jury should not recommend life imprisonment *held* permissible under G.S. 15-176.1. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 98. Function of Court and Jury in General.

The jury may believe a part and reject a part of defendant's statements introduced in evidence by the State. *S. v. Mitchum*, 337.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

Testimony that a witness for the State had made statements prior to the trial at variance in certain respects with the testimony of the witness, does not justify nonsuit, since such conflicts and discrepancies bear only upon the credibility of the witness and to the weight the jury should give his testimony. *S. v. King*, 532.

When evidence offered by the State is contradictory, some tending to inculpate and some tending to exculpate defendant, the conflicting evidence carries the issue to the jury. *S. v. Mitchum*, 337.

The burden is on the State in a criminal prosecution to prove the *corpus delicti* and that defendant is the person who committed the offense. *S. v. Langlois*, 493.

In order to be sufficient to overrule nonsuit, the State's evidence must raise more than a conjecture of defendant's guilt, and evidence which merely establishes the possibility that defendant committed the offense is insufficient. *Ibid.*

§ 102. Nonsuit for Variance.

A fatal variance between the indictment and proof is properly raised by motion for judgment as of nonsuit. *S. v. Keziah*, 52.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

Where defendant introduces evidence of an alibi, it is prejudicial error for the court to fail to charge the law applicable thereto. *S. v. Gammons*, 522.

§ 112. Charge on Contentions of Parties.

The fact that the court, in stating the contentions of the State that defendant robbed and killed deceased, states also that the State contended that defendant "was a killer" will not be held for prejudicial error, no objections to the statement of the contentions having been brought to the court's attention in time to afford opportunity for correction. *S. v. Christopher*, 249.

§ 114. Instructions on Right of Jury to Recommend Life Imprisonment.

The fact that the court, after fully charging the jury that if the jury should find defendant guilty of murder in the first degree it had the unbridled discretion to recommend life imprisonment, further states that the jury had the right to recommend life imprisonment if the jury so desired, will not be held for prejudicial error. *S. v. Christopher*, 249.

§ 139. Nature and Grounds of Appellate Jurisdiction of Supreme Court.

The Supreme Court has the power to allow *certiorari* to bring up the entire record for review in the exercise of its supervisory jurisdiction, irrespective of any appeal procedures, in order to insure the orderly administration of justice. *S. v. Moore*, 300.

CRIMINAL LAW—*Continued.*

§ 154. Necessity for, Form and Requisites of Exceptions and Assignments of Error in General.

It is the duty of appellant to make timely exception to asserted error in order to present the matter for review, and to group his exceptions which relate to a particular question to avoid a dismissal of the appeal. *S. v. Rorie*, 162.

An assignment of error must disclose within itself the question sought to be presented without the necessity of going through the record to find the asserted error or ascertain the precise question involved. *S. v. Pearson*, 188.

§ 159. The Brief.

An assignment of error in support of which no reason or argument is stated and no authority cited in the brief will be deemed abandoned. *S. v. Pearson*, 188.

§ 161. Harmless and Prejudicial Error in Instructions.

Where the court repeatedly instructs the jury that the burden was on the State to prove defendants' guilt beyond a reasonable doubt, and that members of defendants' race were drawn for jury duty, and defendants offer evidence only as to the ratio between the races on the grand jury and among the inhabitants of the county, without any evidence that any person was excluded from grand jury service solely because of race, the denial of defendants' motion to quash will not be disturbed, defendants having failed to carry the burden of showing facts which would permit a reasonable inference of racial discrimination. *S. v. Arnold*, 563.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The State's evidence tended to show that defendant killed deceased and robbed him to get money to pay a repair bill to get a car, which defendant had stolen, out of a garage. Evidence was admitted that defendant was apprehended and convicted of "improper registration" of a car. *Held:* Even though the evidence of defendant's conviction of "improper registration" may be technically incompetent, the admission of such evidence does not justify a new trial, since its admission could not have affected the result or prejudiced defendant. *S. v. Christopher*, 249.

§ 168. Review of Judgments on Motions to Nonsuit.

In passing upon the sufficiency of the evidence to overrule nonsuit, the Supreme Court has no jurisdiction to weigh the evidence. *S. v. Rorie*, 162.

DAMAGES

§ 1. Nominal Damages.

Nominal damage is a trivial sum awarded in recognition of a technical injury which has caused no substantial damage, and an award of $900 cannot be denominated nominal damage. *Paving Co. v. Highway Comm.*, 691.

§ 2. Compensatory Damages.

The burden is on plaintiff to establish facts furnishing a reasonable basis for the assessment of damages according to some definite and legal rule. *Cline v. Cline*, 295.

DAMAGES—*Continued.*

§ 12. Competency and Relevancy of Evidence on Issue of Damages.

Where the issue is the difference between the market value of plaintiffs' trailer immediately before and immediately after defendant's negligence, testimony as to the value of the trailer three years thereafter when repairs had been attempted and the trailer had been moved several times, *held* incompetent as being too remote. *Peele v. Hartsell*, 680.

§ 15. Instructions on Measure of Damages.

The court must give the jury some definite instructions upon the method of computing the amount of damages recoverable. *Cline v. Cline*, 295.

DEATH

§ 4. Time within Which Action for Wrongful Death Must Be Instituted.

The two year statute of limitations applies to an action to recover for wrongful death. *Hardbarger v. Deal*, 31.

Where the date which is two years from the death of intestate is Easter Monday, which is a holiday for county employees in the county in which the action is instituted, the cause of the action is not barred if instituted on the day following Easter Monday. *Ibid.*

§ 6. Expectancy of Life and Damages.

Evidence of prior bad and questionable conduct on the part of intestates which has no reasonable relationship to the crucial question of the fair and just compensation for the pecuniary injuries resulting from the deaths, is incompetent. *Sanders v. George*, 776.

DECLARATORY JUDGEMENT ACT

§ 1. Nature and Grounds of Remedy.

Where there is an actual and existing controversy between insured and insurer as to whether the insurance contract covered a loss which had been sustained, the dispute is justiciable under the Declaratory Judgment Act, and defendant's contention to the contrary on the ground that the question involved could not be made the subject of a civil action at the time the proceeding was instituted, is untenable. *Ins. Co. v. Simmons*, 69.

Adjudication of the clerk in probating a will that the designation of the executors opposite the names of the subscribing witnesses constituted a part of the will cannot be questioned in a proceeding under the Act, but the construction of the will as to whom are named executors therein may be adjudicated under the Act. *Yount v. Yount*, 236.

§ 2. Proceedings under the Act.

Where the pleadings in an action under the Declaratory Judgment Act raise an issue of fact, such issue may be determined by a jury. *Ins. Co. v. Simmons*, 69.

DEDICATION

§ 1. Acts Constituting Dedication.

The owners of a subdivision sold the entire tract and thereafter a map of the subdivision showing streets was recorded. The grantor then sold

DEDICATION—*Continued.*

to plaintiff a lot adjacent to the subdivision, bounded on one side by a public road and on the other by a street of the subdivision, and the deed referred to the street. *Held:* At the time of the deed to plaintiff the grantor had no interest in the subdivision and could not convey to plaintiff any right or easement with respect to the streets therein, and plaintiff's right to use the street was solely that of a member of the public generally, and if the public has no rights therein, plaintiff has none. *Owens v. Elliott*, 314.

Mere permissive use of a way over land does not imply a dedication. *Ibid.*

§ 2. Acceptance of Dedication.

While the sale of lots in a subdivision with reference to a map showing the streets constitutes a dedication of such streets to the purchasers of the lots, as to the public it is but an offer of dedication which does not constitute such streets public ways unless and until the offer of dedication is accepted in some recognized legal manner by the proper public authorities. *Owens v. Elliott*, 314.

DEEDS

§ 12. Estates Created by Construction of Instrument in General.

A deed must be construed to ascertain the intent of the grantor as gathered from the whole instrument without regard to its technical divisions, and every part must be given effect unless it cannot be reconciled, is contrary to public policy, or runs counter to some rule of law. *Lackey v. Board of Education*, 460.

§ 15. Estates upon Special Limitation and Defeasible Fees.

Immediately following the description in the deed in question was inserted a paragraph stipulating that in the event the property should not be used for school purposes it should revert to the grantors or their heirs, and the *habendum* stipulated that the grantees and their successors and assigns should hold the property to their only use and behoof forever, "for school purposes." *Held:* The reverter clause and the *habendum* are not repugnant, and the deed conveys a fee upon special limitation, it being apparent that grantors intended to convey an estate of less dignity than the fee simple absolute. *Lackey v. Board of Education*, 460.

§ 24. Effect of Judgment in Proceedings under Torrens Act.

Judgment in a proceeding under the Torrens Act cannot have the effect of adjudicating the respective boundaries of the defendants *inter se*, there being no adversary position in the proceeding between defendants, actually or by privity. *Day v. Godwin*, 465.

DESCENT AND DISTRIBUTION

§ 10. Suit for Distributive Share.

The next of kin may not sue a debtor of the estate for their distributive share in the absence of allegation of request upon and refusal of the personal representative to sue, or fraud and collusion, etc. *Spivey v. Godfrey*, 676.

DIVORCE AND ALIMONY

§ 13. Divorce on Ground of Separation.

In the husband's action for divorce on the ground that he and his wife had lived separate and apart continuously for a period of two years next preceeding the institution of the action, the husband is not required to establish as a constituent element of his cause of action that he is the injured party, G.S. 50-6, and the sole defense to the husband's right to divorce on such ground is that the separation was caused by the husband's misconduct amounting to his wilful abandonment of her, which defense the wife must allege and prove, and in the absence of such allegations by her such defense is not presented. *Pickens v. Pickens*, 84.

Decree of alimony without divorce legalizes separation and husband may sue for divorce on ground of separation two years thereafter. *Rouse v. Rouse*, 520.

§ 16. Alimony without Divorce.

A final order for alimony without divorce ordinarily terminates an order for subsistence *pendente lite* and renders the findings supporting the temporary order inapposite, nevertheless, the court may order that the payments previously allowed as subsistence *pendente lite* should be continued as permanent alimony when the final order is based on independant findings supported by evidence at the final hearing. *Harris v. Harris*, 121.

In determining the amount of permanent alimony, the court properly disregards the fact that the husband is financially irresponsible and had spent money in excess of his earnings for a number of years, and properly bases his order upon the husband's actual earnings or earning capacity and the needs of the wife and children of the marriage. *Ibid.*

In awarding alimony without divorce under G.S. 50-16 the court is not limited to a one-third part of the husband's net annual income, and the amount allowed by the trial court will not be disturbed in the absence of error of law or abuse of discretion. *Ibid.*

A valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside without the consent of the parties except as to the provisions for the custody and support of the minor children of the marriage, and therefore in an action for alimony without divorce after the execution of a valid separation agreement by the parties, the court is without power to award alimony or counsel fees to the wife in the absence of an attack on the validity of the separation agreement, or prayer that the payments therein stipulated should be sanctioned by order of the court. *Kiger v. Kiger*, 126.

§ 22. Jurisdiction to Award Custody of Children.

Upon denial of divorce on verdict of jury, court in its equity jurisdiction may hear evidence and award custody of child of marriage. *Bunn v. Bunn*, 445.

§ 23. Enforcing Payment of Support.

Where consent judgment for separation and support of the wife and children of the marriage is entered after personal service upon the husband, service of a subsequent motion in the cause relating to support may be made upon the attorney of record for the husband. *Hinnant v. Hinnant*, 511.

Where judgment for divorce *a mensa et thoro* provides for the payment of subsistence to the wife and children of the marriage and retains the cause

DIVORCE AND ALIMONY—*Continued.*

for further orders, jurisdiction of the court continues and the action remains pending until the death of the husband or wife or the majority of the children, whichever first occurs, and the court may properly restrain the husband from removing specifically described property from this State until he should give security for the continued compliance with the order for support. *Ibid.*

ELECTION OF REMEDIES

§ 1. When Election Is Required.

There is no inconsistency between proceedings under the State Tort Claims Act to recover damages inflicted as a result of negligence of a State employee and an action at common law against the employee individually to recover damages resulting from the same act of negligence, and therefore the doctrine of election of remedies does not apply. *Wirth v. Bracey*, 505.

ELECTRICITY

§ 2. Service to Customers.

The court will take judicial notice that a contract between a power company and an electric membership corporation is in the form approved by the Utilities Commission and therefore equivalent to an order of the Commission subject to its right to review, revoke, or remand. *Membership Corp. v. Power Co.*, 278.

The right of a person seeking electrical service to choose between competing vendors should not be denied except for some cogent reason. *Ibid.*

Plaintiff membership corporation and defendant power company had constructed their respective transmission lines, one approaching the other at a 45 degree angle and terminating 350 feet from the other. *Held:* Under the provisions of the contract between the parties that neither should furnish electricity to premises capable of being served by secondary lines not exceeding 300 feet from existing transmission lines of the other, except if ordered by duly constituted authority, the owners of premises within 300 feet of the existing transmission lines of both are entitled to select either vendor, regardless of which transmission line was first constructed. *Ibid.*

EMBEZZLEMENT

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence of embezzlement by broker of funds entrusted to him by purchaser to make mortgage payments on house purchased *held* sufficient to overrule nonsuit. *S. v. Helsabeck*, 107.

Fraudulent intent, constituting a necessary element of embezzlement, may be shown by direct evidence or by evidence of facts and circumstances from which it may be reasonably inferred. *Ibid.*

EMINENT DOMAIN

§ 1. Nature and Extent of Power.

The power of eminent domain as limited by constitutional safeguards is inherent in sovereignty. *Redevelopment Comm. v. Hagins*, 220.

EMINENT DOMAIN—*Continued.*

§ 3. What is "Public Purpose" within Power of Eminent Domain.

The condemnation of land for a municipal housing project is for a public purpose. *Redevelopment Comm. v. Hagins*, 220.

§ 4. Delegation of Power.

Municipal corporations have been given authority to condemn rights-of-way for water lines if unable to acquire the needed property rights through negotiation. *Davidson v. Stough*, 23.

§ 5. Amount of Compensation.

Petitioner held to have acquired only intermittent right to use additional strip of land when necessary for repairs to water line, and land owner was not entitled to compensation on the basis that it had acquired continuous and exclusive easement. *Davidson v. Stough*, 23.

§ 7c. Proceedings to Condemn Land by Housing Authority.

The petition in proceedings by a housing authority to condemn land for a housing project must affirmatively show compliance with the statutory requirements, including the existence of a properly approved redevelopment plan, the boundaries of the project, existing uses, proposed uses, population density, proposed changes in zoning ordinances, street layouts, a feasible plan for the relocation of displaced families, and the estimated cost of the project and methods by which the authority may lawfully finance the entire project, and if the petition fails to allege any of these essentials it is fatally defective. *Redevelopment Comm. v. Hagins*, 220.

Condemnation of property is a proceeding *in rem*, and in condemning land for a housing project the authority may join in one preceeding all parties owning land in the area which the authority seeks to condemn, leaving only the question of just compensation due each respondent to be determined in a separate inquiry, but if the authority elects to institute separate proceedings it must allege in each instance all the facts necessary to justify the taking. *Ibid.*

In condemnation proceedings instituted by a housing authority each respondent is entitled to defend upon the ground that his property does not qualify for the purpose intended, or that its selection was the result of arbitrary or capricious conduct on the part of the authority. *Ibid.*

§ 9. Report of Appraisers, Confirmation, Exceptions and Trial upon Exceptions.

A motion by petitioner for leave to withdraw its appeal from an order of the clerk confirming the report of the commissioners in comdemnation proceeding is addressed to the discretion of the Superior Court, and the denial of the motion will not be disturbed in the absence of a showing of abuse. *Davidson v. Stough*, 23.

§ 12. Nature and Extent of Rights Acquired.

Extent of easement for municipal water mains. *Davidson v. Stough*, 23.

ESTOPPEL

§ 4. Equitable Estoppel.

The doctrine of equitable estoppel does not apply when no party has changed his position in reliance upon the acts of the party against whom the estoppel is asserted. *Priddy v. Lumber Co.*, 653.

EVIDENCE

§ 11. Transactions or Communications with Decedent.

A beneficiary may testify that he found the holographic will in a pigeon hole in a desk in his home used by decedent and that he knew of the will and had put it with other valuable papers of testatrix. *In re Will of Wilson*, 310.

In an action on a policy of insurance by the son of the deceased owner, testimony of insurer's agent that prior to his death the owner directed him to transfer the policy to the owner's son because the owner was giving the land to his son, *is held* not precluded by G.S. 8-51. *King v. Ins. Co.*, 432.

In actions by husband and wife to recover for personal services rendered decedent, each is competent to testify for the other as to transactions between the decedent and the other tending to establish an agreement that the decedent should pay for the services. *Smith v. Perdue*, 686.

§ 15. Relevancy and Competency of Evidence in General; Res Inter Alios Acta, Negative Evidence.

A witness is not competent to testify as to the nonexistence of a fact when his situation with respect to the matter is such that the fact might well have existed without the witness being aware of it. *S. v. Tedder*, 64.

Where plaintiff pedestrian's evidence is to the effect that defendant's car skidded 45 feet before striking him, and that plaintiff did not see or hear defendant's automobile until about the time it struck him, the omission of the court to charge with reference to the failure of defendant to sound his horn, G.S. 20-174(e), will not be held for prejudicial error, there being no evidence as to whether plaintiff did or did not sound his horn except the negative testimony of plaintiff that he heard nothing, not even the sound of the tires skidding a distance of 45 feet. *Jenks v. Morrison*, 96.

In order to be relevant it is not required that evidence bear directly on the issue or that the inference sought to be established thereby be the sole possible inference, it being sufficient if there is a reasonable connection between the evidence and the fact sought to be proven and not merely one which is remote or conjectural. *Redding v. Braddy*, 154.

A witness who testifies that he saw the lights of an approaching vehicle, but who does not state that he observed the lights for more than a fleeting glance, fails to qualify himself to testify as to the speed of the approaching car. *Key v. Woodlief*, 291.

Evidence of circumstances which are entirely irrelevant to the controverted facts in issue is incompetent. *Sanders v. George*, 776.

§ 19. Evidence at Former Trial or Proceeding.

An indictment charging one of the occupants of the car in question with assault with an automobile is incompetent in a subsequent civil action to prove that such occupant was driving the car. *McGinnis v. Robinson*, 264.

While certified copy of the transcript of testimony of certain witnesses in a hearing before the National Labor Relations Board in connection with a union charge of unfair labor practices is incompetent to show the disposition of the charges by the Board, such transcript is competent to show that the union was doing business in this State so as to render it amenable to process. *Reverie Lingerie v. McCain*, 353.

§ 24. Public Records and Documents.

A public record is proof only of the facts therein contained. *Thomas v. Board of Alcoholic Control*, 513.

EVIDENCE—*Continued.*

§ 28. Hearsay Evidence in General.

Testimony of a witness that physician, who had testified that he did not know whether plaintiff was intoxicated, had theretofore stated that plaintiff was intoxicated is hearsay and incompetent even for the purpose of impeaching the testimony of the physician, the testimony of the physician being to a collateral matter and binding. *Key v. Woodlief*, 291.

Testimony of an officer that a person who had bought beer from licensee had declared he was under 18 years of age is incompetent as hearsay. *Thomas v. Board of Alcoholic Control*, 513.

§ 29. Admissions and Declarations against Interest.

In an action to recover against the estate of husband and wife for personal services rendered them, it is competent for a witness to testify that the husband, after the death of his wife, stated that plaintiffs had cared for him and his wife in accordance with their agreement and that he was sure that plaintiffs would continue to care for him, and that he planned to pay them well for their services, the declaration being competent as an admission against interest as to both estates, her net estate belonging to him, there being no children. *Smith v. Perdue*, 686.

§ 30. Declarations Constituting Part of the Res Gestae.

A declaration is competent as an exception to the hearsay rule when the declaration is relevant, is not a narrative of past occurrences but is so spontaneous in character as to safeguard its trustworthiness and preclude the likelihood of fabrication, and made contemporaneously with the occurrence or so closely connected therewith as to be practically inseparable therefrom, and whether a declaration is a part of the *res gestae* and competent is a preliminary question to be determined by the trial court upon the facts of each particular case. *Hargett v. Ins. Co.*, 10.

The requirement that a declaration be contemporaneous with the occurrence in question in order to be competent as a part of the *res gestate* relates to the spontaneity of the utterance, and imports that the declaration be made under the influence of the occurrence and not be so remote as to permit declarant to reflect and fabricate his statement. *Ibid.*

In this action on a double indemnity clause in a life policy, a declaration of insured that he had been stung by a wasp *held* competent as part of the *res gestate* upon evidence disclosing that insured voluntarily made the statement some two minutes after the occurrence as soon as he had walked the fifty to one hundred yards to where the witnesses were sitting in a car along the highway, and that at the time insured was suffering severe pain, the explanation being consonant with the other facts in evidence and there being nothing to indicate that declarant thought he was going to die or had insurance benefits in mind. *Ibid.*

§ 31. Admissions and Declarations of Agents.

Evidence that an agent for defendants stated upon inspecting the premises after the fire in suit that he did not know why the workman ran "hot" wires in the manner indicated into plaintiff's house, *held* properly excluded as being testimony of a declaration by the agent after the occurrence, and therefore outside of the *res gestae*. *Teague v. Power Co.*, 759.

EVIDENCE—*Continued.*

§ 35. Opinion Evidence in General.

The opinion of an officer as to which occupant of the vehicle was driving at the time of the accident, which opinion is based upon his investigation some time after the occurrence of the accident, is incompetent, and therefore a warrant sworn out bythe officer charging a particular occupant with reckless driving on the occasion is likewise incompetent and may not be introduced in evidence under the guise of impeaching the credibility of the officer as a witness when the statement in the warrant does not tend to contradict any previous testimony of the officer. *McGinnis v. Robinson*, 264.

Persons who live and work in a locality of flat land with constant problems of drainage of surface waters may testify that the drainage of an additional specified acreage into a ditch would cause the ditch to overflow periodically, and may testify as to the size of ditches and culverts which would be necessary to carry such additional drainage, the testimony being testimony of common observers as to the results of their observation. *Chappel v. Winslow*, 617.

§ 39. Testimony as to Value.

It is competent for witnesses to testify as to the value of personal services rendered a decedent when the testimony is based on services which they themselves actually saw rendered. *Smith v. Perdue*, 686.

§ 43. Competency and Qualification of Experts.

The fact that a medical expert is not a specialist in the particular field upon which he gives his medical opinion does not disqualify his testimony, and the court may hold a medical expert specializing in the general practice of medicine, who had had psychiatric training, qualified to testify that the injured party's nervous condition caused the physical ailments he had observed in the injured party, notwithstanding the expert states he is not an expert of the mind and nervous system. *Seawell v. Brame*, 666.

Where there is sufficient evidence to support a finding that the witnesses in question were experts in their field, it will be presumed that the court, before admitting their expert testimony, found that they were experts notwithstanding the absence of a specific finding to this effect, and a general objection to their testimony without specific objection to their qualifications will be considered only as to the competency of the particular question. *Teague v. Power Co.*, 759.

§ 44. Medical Expert Testimony.

It is competent for a medical expert to testify upon proper hypothetical question based on the facts in evidence as to decedent's prior good health, his conduct at the time of the occurrence, the condition of his finger, his suffering, his lapse into unconsciousness, and his death shortly thereafter, coupled with relevant physiological facts established by the expert, that in the witness' opinion death resulted from the sting of an insect. *Hargett v. Ins. Co.*, 10.

A medical expert may testify only in regard to facts within his personal knowledge or upon an assumed state of facts supported by evidence and recited in a hypothetical question, and it is error to permit an expert to give his opinion based upon unsworn statements made by the injured person's wife and others. *Seawell v. Brame*, 666.

EVIDENCE—*Continued.*

§ 49. Expert Testimony in Regard to Electricity.

Witnesses found by the court to be experts in their field may testify from hypothetical facts in evidence that wires installed in the manner indicated could not have caused fire. *Teague v. Power Co.*, 759.

Electrical experts may testify from their observation of a piece of electrical equipment taken from the scene as to what physical changes would have been apparent had it been subject to an electrical arc and that such condition was not apparent on the equipment in evidence. *Ibid.*

The statement of a witness that contact with metal or another live wire is necessary to cause a short circuit is not objectional as opinion testimony, since the statement is not of an opinion but of a generally known fact about electricity. *Ibid.*

§ 51. Examination of Experts.

The fact that the testimony of experts is in the form of a positive statement is not ground for objection when in the nature of things the statement necessarily relates to an opinion. *Teague v. Power Co.*, 759.

§ 54. Rule that Party May Not Impeach Own Witness and Is Bound by Own Evidence.

When a party elicits testimony from a physician that he did not know whether plaintiff was intoxicated or not, and the intoxication of plaintiff relates to a colaterial matter, the party is bound by the physician's answer, and testimony of another witness that the physician had made a statement to the effect that plaintiff was intoxicated at the time is incompetent as hearsay. *Key v. Woodlief*, 291.

§ 55. Evidence Competent for Purpose of Corroboration.

Incompetent opinion evidence may not be admitted under the guise of corroborative evidence. *McGinnis v. Robinson*, 264.

§ 56. Evidence Competent to Impeach or Discredit Witness.

Plaintiff testified to the effect that the accident in suit caused injury to his neck and that a subsequent, unconnected accident caused injury only to his back. *Held:* Testimony of a settlement for injuries received in the second accident with evidence tending to show that the treatment for that injury related to injury to plaintiff's neck as well as his back, is competent as bearing upon the credibility of plaintiff's testimony to the effect that the only injury he sustained in the second accident was a back injury. *Redding v. Braddy*, 154.

Incompetent evidence may not be admitted as impeaching evidence when it does not tend to contradict the testimony of the witness upon the trial. *McGinnis v. Robinson*, 264.

EXECUTION

§ 13. Confirmation, Title and Rights of Purchaser.

Prior to confirmation, judgment debtor has no rights, and court may relieve bidder of his obligation for fraud or mistake. *Glass Co. v. Forbes*, 426; *Priddy v. Lumber Co.*, 653.

EXECUTORS AND ADMINISTRATORS

§ 1. Appointment of Executors.

The rule that a will must be construed as a whole to effectuate the intent of the testator applies to its provisions appointing an executor as well as to any other provisions of the instrument. *Yount v. Yount*, 236.

The will designated P and V executors and the codicil designated V and M as executors. *Held:* V and M are the sole executors. *Ibid.*

§ 8. Collection of Assets.

Title to personal property of an intestate vests in his administrator and not his next of kin, and the next of kin may not sue a debtor of the estate for their distributive share in the absence of allegations of request upon and refusal of the personal representative to sue, collusion between the debtor and the personal representative, insolvency of the personal representative, or other like circumstance, even though the personal representative is made a party defendant and the next of kin allege that the proceeds of the debt are not necessary to pay the cost of administration or obligations of the estate. *Spivey v. Godfrey*, 676.

§ 24a. Right of Action for Personal Services Rendered Decedent.

Where personal services are rendered without an express contract to pay, the law will imply a promise to pay the reasonable value of the services unless they were rendered gratuitously or in discharge of some obligation. *Cline v. Cline*, 295; *Smith v. Perdue*, 686.

In actions by husband and wife to recover for personal services rendered decedent, each is competent to testify for the other as to transactions between the decedent and the other tending to establish an agreement that the decedent should pay for the services. *Smith v. Perdue*, 686.

The evidence in this case *is held* sufficient as to each plaintiff to show that each rendered personal services to each decedent upon an express contract that decedent would pay for such services either during his lifetime or in his will. *Ibid.*

It is competent for witnesses to testify as to the value of personal services rendered a decedent when the testimony is based on services which they themselves actually saw rendered. *Ibid.*

§ 24c. Presumption that Services were Gratuitous.

The relationship of mother-in-law and daughter-in-law does not raise a presumption that personal services rendered by the one to the other were gratuitous. *Cline v. Cline*, 295.

Evidence that a daughter-in-law rendered personal services to her mother-in-law in caring for her in her old age and last illness, that the mother-in-law made repeated statements that she intended to pay or reward her daughter-in-law for such services by testamentary disposition, and that the daughter-in-law expected payment for the services is held sufficient to overrule nonsuit in an action against the estate of the mother-in-law to recover for such services for the three years prior to the mother-in-law's death. *Ibid.*

§ 24d. Amount of Recovery and Evidence of Value.

The fact that the husband files claim against the estate of his mother for rent and for personal services rendered by his wife to his mother is incompe-

EXECUTORS AND ADMINISTRATORS—*Continued.*

tent for the wife's action to recover for the services rendered by her in the absence of evidence that the wife authorized the husband to file a claim in her behalf or fix the amount owing her for such services. *Cline v. Cline*, 295.

Decedent lived in the home of her son and his wife. The wife brought action against the estate to recover for personal services rendered decedent during the last three years of her life. Testimony of commissioners who partitioned the land to the son that they recommended that the decedent be given the right to occupy part of the dwelling as her dower *is held* irrelevant in the action to recover for the services, there being no claim for rent or suggestion that decedent was wrongfully in the home. *Ibid.*

The damages recoverable on an implied contract to pay for personal services rendered decedent is the reasonable market value of such services, without considering the financial condition of the recipient or the value of such services to him, with the burden upon plaintiff to establish by evidence facts furnishing a reasonable basis for the assessment of the damages according to some definite and legal rule. *Ibid.*

FORGERY

§ 2. Prosecution and Punishment.

Conflicting evidence as to whether the signature on the check in question was that of the maker or whether defendant signed the name of the purported maker, *held* to take the issue to the jury. *S. v. Lanier*, 183.

FRAUD

§ 2. Constructive or Legal Fraud.

Long treatment of very ill patient may establish confidential relationship which raises presumption of fraud in transfer of property by patient to physician. *Hewitt v. Bullard*, 347.

Constructive fraud does not require any fraudulent intent and exists when there is a breach of legal or equitable duty which tends to deceive others or violates public or private confidence. *Priddy v. Lumber Co.*, 653.

The acts of the owner and material furnisher in ordering and supplying small items after completion of the contract for the sole purpose of extending the time within which the materialman might file his lien constitutes constructive fraud as to persons acquiring subsequent liens long after the expiration of the time apparently required for the filing of materialmen's liens. *Ibid.*

§ 3. Misrepresentation of Past or Subsisting Fact.

Fraud must be based upon a false representation of fact with knowledge of its falsity, or reckless indifference as to its truth or falsity, with intent to deceive, and cannot be based upon a mere recommendation or opinion. *Myrtle Apartments v. Casualty Co.*, 49.

§ 5. Reliance on Misrepresentation and Deception.

Evidence that plaintiff knew nothing of the details of the tobacco allotment program, that the male defendant stated his lands had a tobacco allotment in

FRAUD—*Continued.*

a large amount and that an allotment in a specified amount would be transferred with the part of the land plaintiffs were buying, *held* to raise a question for the jury as to whether plaintiffs reasonably relied upon such representation without making inquiry in the ASC office as to whether defendant could legally transfer the amount of tobacco allotment represented. *Whitaker v. Wood*, 524.

§ 8. Pleadings.

Allegations that defendant insurer stated certain facts with respect to the condition of plaintiff insured's boiler and recommended upon such facts that the boiler be replaced, together with allegations that plaintiff did not have sufficient knowledge to form a belief as to the facts relating to the condition of the boiler, are insufficient to state a cause of action for fraud, plaintiff's conclusion that it was induced to install a new boiler by the false representations of defendant not being supported by allegation of the predicate facts. *Myrtle Apartments v. Casualty Co.*, 49.

GRAND JURY

§ 1. Selection and Qualification.

The intentional exclusion of members of defendant's race from the grand jury is a violation of due process of law. *S. v. Covington*, 495; *S. v. Arnold*, 563. The burden is on defendant to establish his assertion of racial discrimination in the selection of the grand jury, defendant is entitled to an opportunity to procure evidence, and the denial of his motion to quash after denying his motion that process issue to require certain named officials to appear and testify is a denial of defendant's constitutional rights. *S. v. Covington*, 495.Defendant's subsequent pleas of guilty, standing alone, are insufficient to consitute a waiver by defendant of his rights. *S. v. Covington*, 501. Evidence in this case held not to show discrimination. *S. v. Arnold*, 563.

HABEAS CORPUS

§ 3. To Determine Right to Custody of Infants.

Where both the husband's suit for divorce from bed and board, G.S. 50-7, and the wife's action for alimony without divorce, G.S. 50-16, put in issue the right to the custody and support of the minor son of the marriage, and both the action and cross action are properly dismissed upon the verdict of the jury, the court in its equity jurisdiction may proceed to hear evidence and determine the question of custody and support of the child, and need not remit the parties to proceedings in *habeas corpus*. *Bunn v. Bunn*, 445.

HIGHWAYS

§ 4. Ways that are State Highways or Public Roads.

Mere use of a way over land by the public does not constitute it a highway. *Owens v. Elliott*, 314.

HOLIDAYS

Construing G.S. 1-304, G.S. 1-305, and G.S. 2-24 *in pari materia*, where the county commissioners have stipulated by resolution, that Easter Monday

should be a holiday observed by the Court House and county employees, Easter Monday is a legal holiday in such county, notwithstanding it is not designated a State-wide holiday by G.S. 1-304. *Hardbarger v. Deal*, 31.

HOMICIDE

§ 5. Murder in the Second Degree.

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *S. v. Foust*, 453. Malice as an essential element of murder in the second degree may be either express or implied, and need not amount to hatred, ill-will, or spite, but is sufficient if there is an intentional taking of the life of another without just cause, excuse, or justification. *Ibid.*

§ 6. Manslaughter.

Manslaughter is the unlawful killing of a human being without intention to kill or inflict serious bodily injury, and without malice, either express or implied, and without exception every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms amounts to involuntary manslaughter, at least. *S. v. Foust*, 453.

Contributory negligence, as such, is no defense to a charge of manslaughter, but defendant is entitled to show, if he can, that deceased met her death wholly as a result of her own negligence or misconduct. *Ibid.*

§ 14. Relevancy and Competency of Evidence.

The State contended that defendant killed deceased in a robbery to obtain money to pay a repair bill to get his car out of a garage, and evidence that defendant had stolen two automobiles on the night of the crime was admitted without objection. *Held:* The admission of that part of defendant's confession that a month before the killing he had stolen the car which was then in a garage for repairs was neither erroneous nor prejudicial in light of the facts of the case. *S. v. Christopher*, 249.

Where defendant contends that his gun accidentally fired during playful scuffling between him and deceased, testimony of a nonexpert of firearms as to experiments he made with the gun and that the gun could not be fired unless the hammer was pulled completely back and the trigger pulled, *is held* in competent in the absence of evidence that his expriments were carried out under substantially similar circumstances as those which surrounded the firing of the gun when deceased was killed. *S. v. Faust*, 453.

§ 20. Sufficiency of Evidence and Nonsuit.

The State introduced in evidence statements by defendant tending to show that deceased had made an unprovoked attack upon defendant with a knife, and that during the assault defendant took a knife from his pocket and cut deceased, inflicting the fatal wounds. Other evidence offered by the State tended to show that deceased was unarmed and also tended to contradict certain portions of defendant's statements in regard to the conduct of deceased immediately after the infliction of the fatal wounds. *Held:* The State is not precluded by defendant's statements tending to establish self-defense, since the jury was entitled to accept part of defendant's statements and re-

ject other parts, and the evidence is sufficient to sustain a verdict of guilty of manslaughter. *S. v. Mitchum*, 337.

Evidence tending to show that defendant and deceased were playfully scuffling with defendant's loaded gun when the gun accidentally fired, inflicting mortal injury, *held* sufficient to be submitted to the jury on the question of defendant's guilt of involuntary manslaughter. *S. v. Faust*, 453. But not of murder in second degree. *Ibid.*

Evidence that defendant's child died from peritonitis caused by some sharp or severe blow to the abdomen, that defendant had been seen on several occasions to punish the child severly, that the body of the child was covered with bruises and lacerations, with some evidence of defendant's silence in the face of accusations with respect to mistreatment of the child, but no evidence of any accusations made in the presence of defendant that defendant struck the particular blow causing the death, *is held* insufficient to be submitted to the jury, since it raises a mere conjecture as to whether defendant is the person who committed the offense. *S. v. Langlois*, 491.

§ 28. Instructions on Possible Verdicts.

Even though all the evidence tends to show murder committed in the perpetration of a robbery, it does not amount to prejudicial error that the court, in its preliminary statement upon the law of homicide, instructed the jury that the law of homicide in the case is divided into the three degrees of murder in the first degree, murder in the second degree, and manslaughter. *S. v. Christopher*, 249.

Where all of the evidence tends to show that deceased was killed in the perpetration of a robbery from his person by both defendants, G.S. 14-17 there is no evidence of guilt of murder in the second degree or manslaughter, and the court properly limits the jury to a verdict of guilty as to both defendants 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 to both defendants, the court having previously charged the jury that they had the unbridled discretion in rendering their verdict to recommend that the punishment for both defendants, or either one of them, should be imprisonment for life. *S. v. Arnold*, 563.

HUSBAND AND WIFE

§ 3. One Spouse as Agent for the Other.

The marital relationship alone creates no presumption that the husband or wife is acting as the agent of the other. *Rushing v. Polk*, 256.

The fact that the husband files claim against the estate of his mother for rent and for personal services rendered by his wife to his mother is incompetent in the wife's action to recover for the services rendered by her in the absence of evidence that the wife authorized the husband to file a claim in her behalf or fix the amount owing her for such services. *Cline v. Cline*, 295.

§ 9. Right to Maintain Action in Tort against Spouse.

The common law rule that one spouse cannot sue the other for personal injuries negligently inflicted has been modified in this State so as to permit such action. *Shaw v. Lee*, 609.

HUSBAND AND WIFE—*Continued.*

Where the wife is injured in an accident occurring in a State not permitting such action, she may not maintain action in this State, since the *lex loci* controls. *Ibid.*

§ 10. Requisites and Validity of Deeds of Separation.

The right of a married woman to support and maintenance is a property right which she may release by contract executed in conformity with the statute, and therefore a separation agreement executed in accordance with statute which is fair, just, and reasonable to the wife with regard to the conditions and circumstances of the parties at the time the agreement is made, is valid, and the certificate of the officer made pursuant to G.S. 52-12(b) is conclusive of the facts therein stated and may be impeached only for fraud. *Kiger v. Kiger*, 126.

§ 17. Termination of Estates by Entireties and Survivorship.

Where husband and wife convey lands held by the entireties to a trustee, who in turn reconveys to them as tenants in common, but the deed to the trustee is void because of failure to comply with the requirements of G.S. 52-12, the estate by entireties is not disturbed notwithstanding the misconception of the parties as to the nature of their title, and upon prior death of the husband, nothing else appearing, the wife becomes the sole owner as surviving tenant. *Walston v. College*, 130.

INDICTMENT AND WARRANT

§ 14. Time of Objection and Waiver of Defects.

Objection that persons of defendant's race had been arbitrarily excluded from the grand jury returning the indictment must be timely made by plea in abatement or motion to quash, and defendant loses his right to present the question when he makes no objection until after the trial jury is sworn and impaneled. *S. v. Rorie*, 162. But a motion to quash made before plea is made in apt time and must be determined in accordance with due process of law. *S. v. Covington*, 495.

§ 15. Grounds for Quashal.

The constitutionality of a statute under which defendants are prosecuted may be challenged by motion to quash. *S. v. Brewer*, 533.

§ 16. Effect of Quashal.

The quashal of indictments on the ground that defendant was denied his right to an opportunity to procure evidence of racial discrimination in the selection of the grand jury does not entitle defendant to his discharge, but defendant should be held until indictments against him can be found by an unexceptional grand jury. *S. v. Covington*, 495.

INJUNCTIONS

§ 5. Injunction to Restrain Enforcement of Ordinance or Statute.

The enforcement of an ordinance may be enjoined on the ground that the ordinance is unconstitutional when plaintiff shows that enforcement would result in irreparable injury to him, but the constitutionality of the ordinance may not be determined on the hearing of the motion to show cause except for

the purpose of establishing plaintiff's *prima facie* equity. *Schloss v. Jamison*, 271.

§ 13. Continuance of Temporary Orders.

Where, upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, there is no request for findings of fact and the court continues the temporary order without setting forth his findings, it will be presumed for the purpose of the order that the court found facts sufficient to support it. *Exterminating Co. v. Griffin*, 179.

Where plaintiff makes out a *prima facie* showing of right to the final injunctive relief demanded, a temporary order entered in the cause should ordinarily be continued to the hearing when reasonably necessary to protect plaintiff's rights and prevent irreparable injury. *Ibid.*

In an action for a permanent injunction to restrain the enforcement of a municipal ordinance on the ground of its unconstitutionality, a temporary order issued in the cause is properly continued to the hearing upon a *prima facie* showing of the primary equity, and that plaintiff would suffer irreparable damage if the order were not continued to the hearing, and that injury to defendant would be inconsequential in comparison, even though defendant should prevail upon the hearing on the merits. *Schloss v. Jamison*, 271.

The order continuing the restraining order does not adjudicate the constitutionality of the ordinance on the merits. *Ibid.*

§ 14. Judgment on Merits.

Where the court properly enters a restraining order against defendants, provision of the order that the injunction should terminate if defendants took specified action which would obviate injury to plaintiffs, *is held* not subject to objection on the part of defendants, since such provision is inserted for defendants' benefit and they are not compelled to comply. *Chappel v. Winslow*, 617.

INSANE PERSONS.

§ 8. Validity of Contracts and Conveyances of Incompetent.

The marriage of an incompetent is not void *ipso facto*, but when declared void in a proper proceeding is void *ab initio*; mental capacity to contract marriage. *Ivery v. Ivery*, 721.

INSURANCE

§ 2. Brokers and Agents.

Insurance agency forwarding application for assigned risk policy is not agent for insurer to whom risk is assigned. *Underwood v. Liability Co.*, 211.

§ 3. Construction and Operation of Policies in General.

While ambiguity in a policy of insurance must be construed against insurer, if the terms of a policy are plain and unambiguous the court must give effect to such language and may not buy interpretation enlarge the meaning of its terms. *Skillman v. Ins. Co.*, 1; *Setzer v. Ins. Co.*, 66.

INSURANCE—*Continued.*

§ 5. Modification and Waiver of Policy Provisions.

Insurer may waive provisions inserted in the contract for its benefit, and a course of action on its part, with knowledge of the existence of the grounds for forfeiture, which lead insurer honestly to believe that forfeiture would not be invoked, together with the continued payment of the premiums in reliance thereon, will estop insurer from insisting on the forfeiture. *Bray v. Benefit Asso.*, 419.

§ 25. Amount Due under Life Policies.

The plain and unambiguous terms of the supplemental agreement for additional insurance in this case *held* to provide a lump sum which should be the maximum amount to be paid under the entire contract, with schedule of decrease in the amount for each year insured should live after the execution of the supplement agreement, and not to provide for payments of the maximum amounts stipulated in the supplement in addition to the face amount of the original policy. *Whaley v. Ins. Co.*, 68.

§ 34. Death or Injury by Accident or Accidental Means.

In order to be entitled to recover under the usual double indemnity clause in a policy of insurance, claimant must show that death of insured resulted directly and independently of all other causes from bodily injury inflicted solely through external and accidental means, and if an existing disease or illness cooperated or contributed to the accident resulting in death, insurer is not liable under the double indemnity clause. *Skillman v. Ins. Co.*, 1.

There is a distinct difference between "accidental death" and "death by external, accidental means"; the first describes a death which is unexpected, unusual, and unforeseen, and therefore fortuitous, the second describes a death in which the causual factor is accidental. *Ibid.*

The evidence tended to show that insured was suffering from hypertension and that while driving his car along a straight highway he ran off the road and into the waters of a river. There was expert testimony that insured died from a coronary occclusion and not from drowning. *Held:* It was not error for the court to instruct the jury to the effect that if the disease was the cause or a contributing cause of the accident, insurer would not be liable under a clause of the policy providing double indemnity for death resulting solely through external, violent, and accidental means, not contributed to directly or indirectly by physical or mental infirmity or disease. *Ibid.*

The evidence in this case tending to show that insured died as a result of the sting of an insect, *held* sufficient to be submitted to the jury in this action on a clause of a policy providing double indemnity if insured died as the result of bodily injuries effected solely through external, violent, and accidental means. *Hargett v. Ins. Co.*, 10.

§ 48b. Automobile Insurance — Risks Covered by Collision and upset Policies.

A policy providing indemnity for injury by accident while riding in or on a vehicle, and excluding liability if injury results while insured is repairing or working on a vehicle unless such injury results from collision with another vehicle, *held* not to cover an injury sustained by insured when he lost his balance and fell into a harvester after he had stopped the tractor drawing

the harvester and had climbed on the harvester to dislodge silage from its head, even though insured lost his balance when the tractor and harvester rolled forward when insured stepped on the wheel of the tractor. *Setzer v. Ins. Co.*, 66.

§ 53.1. Contracts to Procure Liability Insurance.

If an insurance agency agrees to procure and maintain continuous liability insurance and breaches such agreement with insured, the person injured as a result of the neglect operation of the vehicle may recover on the agreement as the third party beneficiary. *Underwood v. Liability Co.*, 211.

§ 54. Vehicles Insured under Liability Policies.

The North Carolina Financial Responsibility Act makes no requirement that upon transfer of title to an insured vehicle the insurance should follow the vehicle. *Underwood v. Liability Co.*, 211.

Where insured requests insurer to substitute another vehicle for the vehicle insured, and insurer in compliance with the request endorses the policy and issues form FS-1, there is no cancellation of the policy but the policy does not thereafter cover the original vehicle, and no liability can attach to insurer for any injuries inflicted in the negligent operation of the original vehicle by insured or by another with insured's permission. *Levinson v. Indemnity Co.*, 672.

§ 57. Drivers Insured under Liability Policies.

Where the holder of record title to an automobile for the exclusive use of her minor son transfers title to her sister-in-law, the car continuing to be used exclusively by the son, the son cannot be held to use the car with the permission of the original owner, and is not covered by the omnibus clause of the policy in which his mother is named the insured. *Underwood v. Liability Co.*, 211.

Garage liability policy held not to cover negligence of purchaser to whom dealer had endorsed certificate, even though purchaser's mortgagee fails to send papers to Department of Motor Vehicle. *Indemnity Co. v. Motors, Inc.*, 647.

§ 58. Exclusion of Liability for Injuries to Spouse.

The Automobile Financial Responsibility Act cannot have the effect of permitting wife to sue her husband or his estate for tortious injury resulting from an accident occurring in a state which does not recognize such cause of action, since the existence of liability insurance cannot create a cause of action where none exists otherwise. *Shaw v. Lee*, 609.

§ 60. Notice of Accident to Insurer in Liability Policy.

The right of an injured party, after recovery of unsatisfied judgment against insured, to recover against insurer in an assigned risk liability policy may not be defeated by the failure of insured to notify insurer of the accident or failure of insured to file an accident report with the Department of Motor Vehicles as required by statute. *Lane v. Ins. Co.*, 318.

§ 61. Whether Liability Policy is in Force at Time of Accident — Cancellation.

Where insurer has given notice to insured of cancellation of an assigned risk policy for nonpayment of premium, specifying the date such cancellation

would be effective, the notice being in strict conformity with G.S. 20-310, a passenger injured in an accident while the vehicle was being operated by insured after the effective date of the cancellation may not hold insurer liable, notwithstanding that notice of the cancellation is not given to the Commissioner of Motor Vehicles until after the date of the accident causing the injury. *Nixon v. Ins. Co.*, 41.

The fact that insurer, after notice to insured of the effective date of cancellation for non payment of premium, gives to the Commissioner of Motor Vehicles notice of cancellation effective as of a different date, does not constitute a waiver and does not estop insurer from asserting cancellation as a defense to an action on the policy. *Ibid.*

Where cancellation of liability insurance is made by insured, insurer is not required to give notice thereof to insured. *Underwood v. Liability Co.*, 211.

The owner of the record title to an automobile purchased for the exclusive use of her son transferred title to the car to her sister-in-law- *Held:* Her insurer under an assigned risk policy issued pursuant to G.S. 20-279.21 had the right to decline to endorse the policy over to the new record owner of title, notwithstanding that the vehicle continued to be for the exclusive use of the original owner's minor son, and insurer had the right to cancel the policy and advise that new coverage should be applied for in the name of the sister-in-law. *Ibid.*

Notice to insured of the cancellation of an assigned risk automobile liability policy is not required when the policy is cancelled by insured or his duly authorized agent, G.S. 20-310, nor does provision in the policy for notice if insurer cancels the policy require notice in such instance. *Daniels v. Ins. Co.*, 660.

Insured may authorize his agent to cancel a policy of automobile liability insurance and may confer such authority on his agent at the time a policy is issued, and nothing in the Vehicle Financial Responsibility Act, expressly or impliedly, forbids the cancellation of such policy by insured through a duly authorized agent. *Ibid.*

Insured may authorize the company financing the premium to cancel the policy for default in payment of an installment. *Ibid.*

If insured requests insurer to substitute another vehicle for the vehicle insured, the operation of the original vehicle thereafter by insured, or under insured's authority, is unlawful, G.S. 20-313, and under the rules of the Commissioner of Insurance in conformity with statute insurer properly uses Form FS-1, and Form FS-4 is not required. *Levinson v. Indemnity Co.*, 672.

§ 64. Rights of Injured Party against Insurer.

Where defendant's counsel brings before the jury the requirement of the financial responsibility act, but no issue is raised in the action as to any collusion between the parties in regard to insurance, defendant may not complain of an instruction to the jury that whether defendant had or did not have liability insurance was entirely immaterial and that the jury should decide the issues upon the facts in evidence. *Whitman v. Whitman*, 201.

Injured party may not recover against insurer cancelling policy at request of insured's agent prior to accident. *Daniels v. Ins. Co.*, 660.

If insurer fails to give insured 15 days notice in conformity with statute of insurer's cancellation of an assigned risk policy of automobile liability in-

surance, the contract remains in force as to injured third persons; if insurer gives notice in conformity with statute, insurer's obligation ends at the time fixed, notwithstanding insurer fails to notify the Commissioner of Insurance. *Levinson v. Indemnity Co.*, 672.

Where an insurance agency agrees to procure and maintain continuous liability insurance coverage with respect to the operation of an automobile, and breaches the agreement to do so, the administrator of the person killed as a result of the negligent operation of the vehicle, who has recovered judgment against the administrator of the deceased driver and obtained an assignment of the cause of action, may maintain a suit against the agency for the loss sustained by reason of the breach of the agreement. *Underwood v. Liability Co.*, 212.

Where insurer in an assigned risk policy refuses to endorse the policy to another insured and cancels the policy, the insurer cannot be held liable under the policy by an injured third person. *Ibid.*

§ 65.1. Liability of Insurer to Party Secondarily Liable.

Where the tort-feasor secondarily liable is entitled to indemnity against insured, who is primarily liable, the obligation of insured for indemnity ordinarily comes within the coverage of a policy of public liability insurance. *Ingram v. Ins. Co.*, 633.

The trustee to whom a judgment is assigned for the benefit of one of the tort-feasors paying the injured party, may not sue the insurer in a policy of public liability insurance issued to the other tort-feasor unless he alleges that his *cestui que* trust is entitled to indemnity and that the right to indemnity had been determined according to the provisions of the policy, and a complaint failing to set forth such right of indemnity fails to state a cause of action against insurer. *Ibid.*

§ 68. Insurable Interest in Property.

A person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against. *King v. Ins. Co.*, 432.

§ 80. Fire Insurance — Waiver of Conditions.

The knowledge of insurer's agent at the time of the application for a policy as to ownership of the property is imputed to the insurer. *King v. Ins. Co.*, 432.

§ 93. Accidental Damages to Property, Burglary and Theft Insurance.

Under the terms of a policy of insurance indemnifying insured for sums insured might be obligated to pay for injury to or destruction of property caused by accident, the word "accident", when not defined in the policy, must be given its usual, ordinary, or popular meaning, and imports an unforeseen, unexpected, and undesigned occurrence, and does not exclude an occurrence resulting from negligence. *Ins. Co. v. Simmons*, 69.

Whether water damage from rain seeping under water-proof covering placed on roof during re-roofing of building resulted from "accident" within coverage of policy *held* for jury. *Ibid.*

INTOXICATING LIQUOR

§ 2. Beer and Wine Licenses.

The State Board of Alcoholic Control exercises sole discretionary power in determining the fitness of a applicant for a permit to sell wine, and the places where wine may be sold, and the State and local taxing authorities in issuing licenses are relieved of responsibility in regard thereto. *Staley v. Winston-Salem*, 244.

Hearing by examiner for State Board of Alcoholic Control satisfies requirements of due process. *Sinodis v. Board of Alcoholic Control*, 282.

The holder of a permit to sell malt beverages is entitled to a copy of the findings and recommendations of the examiner for the State Alcoholic Control Board only upon his request, and in the absence of such request, the State is not under duty to serve respondent with such copy. *Ibid.*

The holder of a permit to sell malt beverages is entitled, after a hearing by an examiner for the Board of charges of violations of law warranting a revocation of permit, to request a hearing by the Board, and when he does not request such hearing after notice of the date the Board would consider the matter, his application for judicial review under G.S. 143-307 must be dismissed for failure to exhaust available administrative remedies. *Ibid.*

Testimony of officers that a person who had bought beer from licensee had declared he was under 18 years of age is incompetent as hearsay, and a certified copy of a birth certificate without testimony of any person having knowledge thereof that it was the record of the purchaser of the beer is incompetent to prove the age of such purchaser, and therefore such evidence is insufficient to support findings by the Alcoholic Beverage Control Board that the licensee sold beer to a person under 18 years of age or that he failed to give the licensed premises proper supervision, G.S. 18-78.1; G.S. 18-90.1, and the Board's order of suspension of license based on such findings is properly vacated in the Superior Court. *Thomas v. Board of Alcoholic Control*, 513.

JUDGMENTS

§ 1. Nature and Requisites of Judgments in General.

No valid judgment can be entered disposing of one's property unless he has been given notice of the action seeking to accomplish that purpose and has been afforded an opportunity to assert his defense. *Sutton v. Davenport*, 27.

Jurisdiction is prerequisite to a valid judgment. *Letterlough v. Atkins*, 166.

§ 19. Void Judgments.

A void judgment is a nullity and may be attacked at any time. *Letterlough v. Atkins*, 166.

§ 29. Conclusiveness of Adjudication — Parties Concluded.

Ordinarily a judgment does not bar the rights of plaintiffs or of the defendants *inter se* when there is no hostile or conflicting claim brought in issue as between the co-parties. *Day v. Godwin*, 465.

§ 38. Plea of Bar, Hearings and Determination.

A motion to dismiss on the ground of the bar of a prior judgment, which motion alleges the facts constituting the basis of the estoppel, may be treated

JUDGMENTS—*Continued.*

as an answer, which is the proper procedure to raise such plea, and the parties may consent that the judge find the facts upon the plea prior to trial on the merits. *Sutton v. Davenport*, 27.

§ 45. Right to Assign and Validity of Assignment.

If a tort-feasor secondarily liable pays the judgment and has it cancelled of record or has it assigned to himself, the judgment is extinguished; but if he has the judgment assigned to a trustee, he is subrogated to the rights of the judgment creditor, and the trustee may maintain an action for indemnity without joining his *cestui que* trust. *Ingram v. Ins. Co.*, 633.

JUDICIAL SALES

§ 4. Confirmation.

Prior to confirmation, the purchaser at a judicial sale acquires no title or rights, and neither the judgment debtor nor the judgment creditor, or those claiming under them, may seek to compel him to comply with his bid. *Glass Co. v. Forbes*, 426.

While *caveat emptor* applies to a judicial sale, the court has the power in its equity jurisdiction to protect the purchaser from imposition because of fraud or mistake, and may relieve him of his obligation when ends of justice so require. *Ibid.*

§ 5. Validity and Attack of Sale and Title of Purchaser.

A purchaser at a judicial sale acquires the property subject to liens having priority over the judgment under which the sale is held. *Glass Co. v. Forbes*, 426.

JURY

§ 2. Special Venires.

Upon motion to remove a cause for prejudice, the judge may, instead of ordering a removal, order that a special venire be summoned from another county, and the judges order for a special venire is tantamount to a refusal of the motion to remove, and another judge may not thereafter grant the motion to remove. *S. v. Moore*, 300.

§ 3. Selection, Examination and Disqualifications.

Where a special venire is ordered and counsel for one defendant advises that he cannot be present when the jurors for the special venire are drawn, but counsel for the other defendant is present pursuant to a request by the court that he represent both of defendants, motion of counsel for the other defendant to quash on the ground that neither he nor the defendant represented by him were present when the jury was drawn is properly denied. *S. v. Arnold*, 563.

Objections that the finding of the judge as to the ration of people of defendants' race on the trial jury was based upon the unsworn statement in open court of the sheriff, is untenable when it is made to appear that the jury panel was in the courtroom and in view of the court, counsel, and all other persons present. *Ibid.*

JURY—*Continued.*

In a prosecution for a capital crime the court has discretionary power to allow the State to challenge the jurors for cause on the ground of conscientious scruples against capital punishment. *Ibid.*

§ 4. Challenges to Jury.

A defendant may challenge the array before pleading to the indictment or, after plea, may challenge individual jurors for cause or peremptorily, but after the jury has returned its verdict, he may not challenge the competency of the jury to determine the question of his guilt. *S. v. Rorie*, 162.

LABORERS' AND MATERIALMEN'S LIENS

§ 5. Filing of Claim.

A material furnisher must file his lien within six months after the final furnishing of the materials, and where the time for filing lien has begun to run the material furnisher cannot thereafter extend the time by furnishing small additional items not contemplated in the original contract when such items are furnished successively just prior to the expiration of the time limited for the sole purpose of keeping the lien alive. *Priddy v. Lumber Co.*, 653.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that a grocery store was broken into and certain articles stolen therefrom, together with evidence that defendants broke into and robbed a filling station, without evidence connecting the two, either as to time or place, is insufficient to be submitted to the jury. *S. v. Harrington*, 529.

LIMITATION OF ACTIONS

§ 3. Statutory Changes in Period of Limitation.

If the action is not barred at the time of a statutory repeal of a limitation, the bar of the statute cannot apply, since rules relating to the remedy are at all times subject to legislative control. *Ins. Co. v. O'Neill*, 169.

§ 4. Computation of Time.

In computing the time in which an act may or must be performed, the first day must be excluded and the last day included, and if the last day is a Sunday or a legal holiday the time is extended to the next secular day, G.S. 1-193, regardless of whether the limitation is expressed in months, years, or days. *Hardbarger v. Deal*, 31.

Where acceleration clause is invoked against one maker it starts the statute running against the whole debt as to all comakers. *Schoenterprise Corp. v. Willingham*, 36.

Action for damages resulting from dangerous defect in machinery accrues at time of sale and not time substantial damage occurs. *Motor Lines v. General Motors Corp.*, 323.

MARRIAGE

§ 2. Validity and Attack.

The marriage of an incompetent is not void *ipso facto*, but when declared void in a proper proceeding is void *ab initio*; the test of mental capacity is

MARRIAGE—*Continued.*

is the ability to understand the special nature of the contract and not knowledge of its effect upon inheritance. *Ivery v. Ivery*, 721.

MASTER AND SERVANT

§ 3. Distinction between Employee and Independent Contractor.

A person who exercises an independent employment and contracts to do certain work according to his own judgment and method without being subject to control except as to the result of his work, is an independent contractor; if the employer has the right to control the worker with respect to the manner and method of doing the work, the worker is an employee regardless of whether the employer exercises the right of control or not. *Cooper v. Publishing Co.*, 578.

The fact that the written contract between the parties designates the worker as an independent contractor is not controlling. *Ibid.*

Evidence *held* for jury on question whether person driving truck, while engaged in the delivery of newspapers to subscribers, was an employee or independent contractor of publishing company. *Ibid.*

§ 13.1. Commercial Bribery.

G.S. 14-353 making it a misdemeanor to offer, give or promise to an agent or employee a gift or gratuity with intent to influence such agent's or employee's actions in relation to his superior, and making it a misdemeanor for an agent or employee to request or accept such gift or gratuity with an understanding that he should act in a particular way in relation to his superior's business, is constitutional and valid; but the violation of the statute is not a malicious misdemeanor. *S. v. Brewer*, 533. One defendant may be convicted of an overt act in violation of the statute and acquitted of conspiracy to violate the statute, while other defendants are convicted of conspiracy to violate the statute. *Ibid.*

§ 53. Injuries Compensable in General.

Whether an accident arises out of the employment is a mixed question of law and fact. *Sandy v. Stackhouse*, 194; *Bass v. Mecklenburg County*, 226.

The Workmen's Compensation Act provides for recovery for injuries by accident arising out of and in the course of employment, irrespective of any negligence on the part of the employee, and while the intentional violation of an approved safety rule of which the employee had prior notice warrants reduction of the amount of the award, the only complete defense is that the accident resulted from the intoxication of the employee or an injury intentionally self-inflicted. *Hartley v. Prison Department*, 287.

The evidence tended to show that claimant, in the performance of his duty to go to a guard tower outside a high wire fence, elected to climb over the fence rather than go around by the gate, which would require approximately 200 yards of travel, and was injured when he jumped from the top of the fence to avoid falling therefrom. *Held:* The evidence sustains the award of compensation, and the contention that claimant climbed the fence for his own convenience rather than as a part of his duties is untenable, since the mere fact that an employee selected the more hazardous route in the performance of his duties does not defeat recovery. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 54. Causal Relation between Employment and Injury in General.

As used in the Workmen's Compensation Act, the words "out of" refer to the cause of an accident, while the words "in the course of" refer to the time, place and circumstances under which it occurred, and in order to arise out of the employment there must be some causal relation between the employment and the accident so that the accident arises from a hazard incidental to the employment to which the workmen would not have been equally exposed apart from the employment. *Sandy v. Stackhouse*, 194.

Ordinarily when an employee is off duty the relationship of master and servant is suspended and therefore there is no causal relationship between the employment and an accident which happens during such time. *Ibid.*

The evidence disclosed that the employee was temporarily assigned to a distant town in another state for emergency work in repairing power lines, with board and room furnished by the power company, that the employee and members of his crew were dismissed at six o'clock in the evening, with no duties to perform until six o'clock the following morning, that the employee left the motel about nine o'clock that night on a personal mission to a restaurant some quarter mile from the motel, and was hit and killed by an automobile while returning to the motel. *Held:* The evidence supports the finding of the Industrial Commission that the injury did not arise out of and in the course of employment. *Ibid.*

The evidence in this case held sufficient to support the finding of the Industrial Commission that the death of a traveling salesman occurring at 2:40 a.m., after the salesman had left on a trip begun about midnight, did not arise out of and in the course of his employment, there being no evidence that the trip in question had any connection with the employment. *Thornton v. Richardson Co.*, 207.

Evidence *held* sufficient to sustain finding that suicide resulted from mental disorder caused by accidental injury to brain. *Painter v. Mead Corp.*, 741.

§ 56. Wilful Act of Employee.

Evidence *held* sufficient to support finding that suicide resulted from mental condition of employee and not his wilful act. *Painter v. Mead Corp.*, 741.

§ 60. Injuries While on the Way to or from Work.

While injuries to an employee while going to and from his work ordinarily do not arise out of and in the course of the employment, where the employer provides board and room upon the premises as an incident of the employment, an injury by accident which occurs while the employee is on the premise and going directly from his room to his work may arise out of and in the course of the employment when such injury can fairly be traced to the employment as a contributing proximate cause. *Bass v. Mecklenburg County*, 226.

Evidence held to support findings and conclusions that injury to practical nurse while going from her room on the premises to her work on the premises arose out of and in the course of her employment. *Ibid.*

§ 65. Heart Disease and Heart Failure.

Evidence that plaintiff suffered a coronary occlusion while rolling a heavy rope net in the course of his employment, which medical expert testimony that the exercise could not be the cause of the condition although the attack

might have been excelerated or precipitated by the exertion, *is held* insufficient to sustain a finding that the coronary occlusion and resulting myocardial infraction arose out of and in the course of the employment. *Bellamy v. Stevedoring Co.*, 327.

§ 67. Amount of Compensation for Injuries in General.

Compromise settlements of claims under the Workmen's Compensation Act are permitted provided they are submitted to and approved by the Industrial Commission. *Caudill v. Mfg. Co.*, 99.

Mistake as to consequences of known injury, as distinguished from mistake as to extent of injury, is not ground for setting aside compromise settlement. *Ibid.*

§ 73. Medical and Hospital Expenses.

An exception on the ground that the Industrial Commission failed to impose the limitations prescribed by G.S. 97-25, and G.S. 97-26 in ordering defendant to pay all medical and doctors bills which should be submitted to and approved by the Commission presents a moot question; such challenge will lie only after bills or parts of bills beyond the limitations prescribed by the statute have been submitted to and approved by the Commission. *Bass v. Mecklenburg County*, 226.

§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.

The Industrial Commission is not a court of general jurisdiction but is an administrative board with quasi-judicial functions, and has only that jurisdiction conferred by statute, which judisdiction may not be enlarged by waiver or extended by act or consent of the parties. *Letterlough v. Atkins*, 166.

While the Industrial Commission may not institute a proceeding *ex mero motu*, if its jurisdiction is invoked by the filing of claim or the submission of a voluntary settlement for its approval, the Commission has authority and must, as the first order of business, determine the jurisdictional facts from the admissions of the parties, facts agreed, stipulations noted at the hearing, or evidence offered in open court after all parties have been given opportunity to be heard, and it may not find such facts from records, files, evidence, or data not thus presented. *Ibid.*

The parties submitted to the Industrial Commission a voluntary settlement for the approval of the Commission, but the employer insisted at every stage of the proceeding that he did not have as many as five employees and was not subject to the Act. *Held:* An award of the Commission entered without a finding of the jurisdictional facts is void and must be set aside, but the proceeding should not be dismissed but should be remanded to the Industrial Commission for the finding of facts determinative of whether it had jurisdiction to proceed. *Ibid.*

Challenge to the jurisdiction may be made at any time, since a judgment entered without jurisdiction is void and may be treated as a nullity. *Ibid.*

§ 91. Findings and Award of Commission.

The failure of the Industrial Commission to find specific facts requested by defendant will not be held for prejudicial error when such findings, if made, would not alter the rights of the parties. *Bass v. Mecklenburg County*, 226.

MASTER AND SERVANT—*Continued.*

§ 93. Review of Award in the Superior Court.

The findings of fact by the Industrial Commission are conclusive on appeal when they are supported by competent evidence, even though there is evidence that will support a finding to the contrary. *Sandy v. Stackhouse*, 194; ***Painter v. Mead Corp.***, 741.

§ 94. Judgment of Superior Court and Appeal to Supreme Court.

The evidence in this case *is held* to support the findings of the Industrial Commission in regard to the time, place, and circumstances under which claimant suffered an injury by accident, and to support the finding that claimant was furnished board and room on the premises as an incident of her employment in order that she might be available in emergencies at times other than her regular working hours. *Bass v. Mecklenburg County*, 226.

The review of the judgment of the Superior Court affirming the award of the Industrial Commission is limited to matters of law. *Ibid.*

§ 96. Costs and Attorneys' Fees.

Where the ruling of the Industrial Commission awarding compensation is affirmed, the Commission's approval of additional fees for claimant's counsel, in affirming the Hearing Commissioner's findings of fact, conclusions, and award, will not be disturbed. *Bass v. Mecklenburg County*, 226.

MORTGAGES

§ 6. Construction and Operation in General.

Where a mortgage and the note secured thereby contain references to each other the instruments will be construed together and the note may supply the maturity date of the mortgage. *Frye v. Crooks*, 199.

§ 19. Right to Foreclose and Defenses.

The fact that the mortgage specifies no date for payment does not preclude foreclosure when the note secured thereby does specify the date, and foreclosure after the maturity date of the note cannot be held premature. *Frye v. Crooks*, 199.

MUNICIPAL CORPORATIONS

§ 24. Nature and Extent of Municipal Police Power in General.

Local ordinances cannot override statutes applicable to the entire State. *Staley v. Winston-Salem*, 244.

§ 25. Zoning Ordinances and Building Permits.

Where an applicant for a municipal license to sell wines on the premises is operating a business permitted by the municipality's zoning ordinances under its provisions relating to pre-existing nonconforming uses, and has complied with all of the requirements of the Alcoholic Beverage Control laws and the regulations of the State Board of Alcoholic Control adopted thereunder, the municipality is without power to refuse applicant a license to sell wine in connection with its business. *Staley v. Winston-Salem*, 244.

Where a zoning ordinance permits in the zone in question commercial uses incidental to the needs of the local residential neighborhood, including

MUNICIPAL CORPORATION—*Continued.*

service stations, an applicant is entitled as a matter of right to a permit to operate a car-wash service in the zone, since cars are commonly washed at gasoline service stations and the whole includes all of its parts. *In re Couch*, 345.

Zoning ordinances are in derogation of the rights of private property and should be liberally construed in favor of the property owner. *Ibid.*

§ 26. Review of Orders of Municipal Zoning Boards.

Provisions for review of decision of a municipal board of adjustment denying petitioner's claim of right as a matter of law to continue a nonconforming use under the provisions of the municipal zoning ordinance, G.S. 160-178, must be equal to that provided by G.S. 143-307 in order to constitute adequate provision for judicial review. *Jarrell v. Board of Adjustment*, 476.

Where the findings of fact of an administrative board in a hearing upon a claim of right to use property for certain uses under the zoning ordinance of a city are not based on competent evidence, the proceeding must be remanded. *Ibid.*

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence in General.

Where a person perpetrates a practical joke on another with the intention of subjecting the victim to fright, and the circumstances are such that injurious consequences are reasonably foreseeable to the victim in his natural attempt to flee, the person perpetrating the joke may be held liable for such injuries notwithstanding that injury was not intended and notwithstanding the absence of hostility. *Langford v. Shu*, 135.

Action held for negligence in moving trailer in negligent manner in performance of contract to move the trailer. *Peele v. Hartsell*, 680.

§ 4. Dangerous Substances and Instrumentalities.

The highest degree of care, commensurate with its inherent danger, is required of persons having possession and control of dynamite, and it is negligence to leave a dynamite cap where either a child or unversed adult can pick it up and cause it to explode. *Tayloe v. Tel. Co.*, 766.

§ 9. Primary and Secondary Liability and Indemnity.

Where one of two tort-feasors is liable to the injured party for the active negligence of the other solely by reason of constructive or technical fault imposed by law, as under the doctrine of *respondeat superior*, the tort-feasor whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to indemnity against the primary wrongdoer. *Ingram v. Ins. Co.*, 632.

§ 10. Last Clear Chance.

Where the jury answers the issue of contributory negligence in the negative, the issue of last clear chance is eliminated from the case. *Russ v. Smith*, 210.

§ 16. Contributory Negligence of Minors.

An eight year old boy is rebuttably presumed incapable of contributory negligence. *Ennis v. Dupree*, 141.

NEGLIGENCE—*Continued.*

§ 20. Pleadings.

Allegations that defendant's engineer inspected plaintiff's boiler "in a negligent and careless manner" *held* a mere conclusion and insufficient to raise the issue of negligence. *Myrtle Apartments v. Casualty Co.*, 49.

§ 22. Competency and Relevancy of Evidence.

Evidence of defendant's injuries in the same accident is incompetent. *Sanders v. George*, 776.

§ 24a. Sufficiency of Evidence of Negligence and Nonsuit in General.

The evidence disclosed that two small boys possessed a box labeled, "Danger, African Mongoose, Live Snake Eater," which box was so contrived that a fox tail would be released by a spring when the lid was opened, that when plaintiff, a neighbor, came to visit, the boys induced her near the box and suddenly released the fox tail therefrom, causing plaintiff, in attempting to escape what she thought was a live animal, to stumble against a brick wall, resulting in personal injury. *Held:* Whether injury to plaintiff was reasonably foreseeable under the circumstances is a question for the jury. *Langford v. Shu*, 135.

Nonsuit on the issue of negligence is proper only when no legitimate inference of actionable negligence is permissible from the evidence. *Misenheimer v. Carter*, 204.

Evidence that defendant's employee, in the performance of defendant's contract to move plaintiffs' heavy trailer, elected to pull the trailer forward over marshy ground where it became stuck, that defendant then ordered his employee to unhook the tractor and leave the trailer, but, upon the *feme* plaintiff's insistence that he perform the contract, defendant directed that the trailer be pulled sideways through the mud, resulting in damage to the trailer, *is held* sufficient to overrule nonsuit on the issue of defendant's negligence, since defendant should have foreseen that damage to the trailer would likely ensue from the method by which he elected to perform the contract. *Peele v. Hartsell*, 680.

Evidence held insufficient to connect defendant with dynamite cap found by minor in trash pile. *Tayloe v. Tel Co.*, 766.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit may not be entered on the ground of contributory negligence of an eight-year-old boy. *Ennis v. Dupree*, 141.

§ 28. Instructions in Negligence Actions.

It is error for the court to charge the several acts of negligence relied on conjunctively. *Widenhouse v. Yow*, 599.

The court must charge on each act of negligence alleged and presented by the evidence. *Ibid.*

§ 32. Contributory Negligence as Affecting Culpable Negligence.

Contributory negligence of the person injured and killed is no defense in a prosecution for manslaughter, but is relevant and material solely on the question of whether defendant's negligence was a proximate cause of the injury and death, and defendant is not exculpated by contributory negligence if the

NEGLIGENCE—*Continued.*

injury and death resulted directly and naturally from his culpable negligence. *S. v. Ward*, 330; *S. v. Faust*, 453.

§ 33. Negligence in Plan of Construction, Maintenance and Use of Lands and Buildings in General.

Where a visitor is injured as a result of a practical joke, liability for such injury is predicated upon the positive acts of defendant in perpetrating the joke, irrespective of the locale, and therefore the law relating to the condition and use of premises and liability to a licensee or invitee is inapposite. *Langford v. Shu*, 135.

§ 37f. Sufficiency of Evidence of Negligent Injury to Invitees.

Evidence that the body of a nine year old boy was taken from waist-deep water at a public swimming pool, that artificial respiration produced no appreciable amount of water from the body, that a lifeguard was within less than 30 feet from the place the body was found and other bathers were nearby, without evidence of any outcry by the boy, *held* insufficient to overrule nonsuit, the cause of the death being left in conjecture. *Justice v. Prescott*, 781.

PARENT AND CHILD

§ 1. The Relationship.

A child born in wedlock is presumed legitimate regardless of the length of time between the date of the marriage and the date of the child's birth, which presumption can be rebutted only by proof that it was impossible that the husband could have been the child's father, and a witness is not competent to testify as to nonaccess when under the circumstances access could well have existed without knowledge of the witness. *S. v. Tedder*, 64.

§ 7. Liability of Parent for Torts of Child.

A parent is not liable for the torts of the child solely by reason of the relationship, but where the parent participates with the child in the commission of the tort or fails to exercise control over the child under circumstances from which it is reasonably foreseeable that the child will likely inflict injury, the parent may be liable. *Langford v. Shu*, 135.

Evidence held sufficient to show that parent encouraged or participated in practical joke perpetrated by children and resulting in foreseeable injury to victim. *Ibid.*

PARTIES

§ 4. Proper Parties.

In action by the contractor for the balance alleged to be due on the contract price, the owner alleged breach of contract and asserted he had incurred expenses for architectural supervision in completing the contract for which the contractor was liable. *Held:* Whether the owner was entitled to assert the architects' fee as an offset against the contract price would have to be litigated in the action between the contractor and the owner, and the architects were proper, although not necessary, parties, and therefore no prejudice re-

PARTIES—*Continued.*

sulted to the contractor by the discretionary order of the court making the architects additional parties. *Simon v. Board of Education*, 381.

§ 7. Interpleaders.

Plaintiff may not interplead party whose claim to fund does not arise from common source. *Simon v. Board of Education*, 381.

PARTITION

§ 7. Actual Partition.

On appeal from order of the clerk confirming the report of the commissioners actually partitioning the lands, the judge may confirm the report or he may vacate it and enter appropriate interlocutory orders, but he may not adjudge a partition different from that made by the commissioners. *Allen v. Allen*, 305.

PARTNERSHIP

§ 1. Nature, Requisites and Distinctions.

Where husband and wife are co-owners of an automobile and the wife drives the vehicle to and from her work, the husband not being present, the fact that the wife transports passengers who share the expenses of the transportation does not constitute the wife a carrier for hire, nor does it establish a partnership or joint enterprise by the husband and wife in the absence of evidence that the money the wife received from the passengers was placed in their joint account. *Rushing v. Polk*, 256.

PERJURY

§ 5. Sufficiency of Evidence and Nonsuit.

Where the indictment charges defendant with having falsely sworn that he did not buy whiskey from named persons, but the State's evidence is to the effect that defendant testified at that trial that he did not buy whiskey in a specified house, there is a fatal variance between the indictment and proof and nonsuit should be allowed, notwithstanding evidence of defendant's false swearing in other particulars not set forth in the indictment. *S. v. Kiziah*, 52.

PHYSICIANS AND SURGEONS

§ 4. Licensing and Regulation of Opticians and Oculists.

A dispensing optician, G.S. 90-235, does not engage in the unlawful practice of optometry, G.S. 90-114, in using a keratometer in measuring the curvature of the cornea and in fabricating, fitting, and inserting contact lenses onto the eyes of a patient so long as the refraction of the lenses is controlled by the prescription of an examining physician or oculist and the optician requires the patient to return to the examining physician or oculist for verification. *High v. Ridgeway's Opticions*, 626.

§ 8. Creation of Relationship and Reciprocal Duties in General.

Where a physician regularly treats a chronically ill person for a period of years, a confidential relation is established which raises a presumption that

PHYSICIANS AND SURGEONS—*Continued.*

financial dealings between the physician and patient are tainted with fraud. *Hewitt v. Bullard*, 347.

PLEADINGS

§ 2. Statement of Cause of Action in General.

Plaintiff has the burden of stating the facts constituting his cause of action, which he may do either upon actual knowledge or upon information and belief, but plaintiff may not alleged that he does not have sufficient information to form a belief concerning certain facts, and then allege such facts upon information and belief, since the averments nullify each other, G.S. 1-145. *Myrtle Apartments v. Casualty Co.*, 49.

Plaintiff must allege the facts constituting the basis of his cause of action, and allegations amounting to mere conclusions must be ignored. *Ibid.*

The complaint should state the utimate facts constituting the cause of action but not the evidence to prove them. *Rushing v. Polk*, 256.

The complaint must allege the ultimate and issuable facts and not merely the legal conclusions of the pleader; thus, allegations that defendants committed a trespass and assaulted plaintiff are insufficient. *Gillespie v. Service Stores*, 487.

§ 4. Prayer for Relief.

The relief is determined by the facts alleged and not the prayer for relief. *Chappel v. Winslow*, 617; *Peele v. Hartsell*, 680.

§ 10. Office and Necessity for Reply.

A reply is solely a defensive pleading and its allegations cannot be held to aid the complaint. *Howell v. Smith*, 150.

§ 12. Office and Effect of Demurrer.

A demurrer does not admit the pleader's conclusions of law. *Gillespie v. Service Stores*, 487.

§ 19. Demurrer for Failure of Pleading to State Cause of Action or Defense.

Upon sustaining a demurrer for failure of the complaint to allege sufficient facts to constitute a cause of action, the action should not be dismissed since plaintiff must be given opportunity to amend. *Myrtle Apartments v. Causalty Co.*, 49; *Ingram v. Ins. Co.*, 632.

§ 24. Motions to be Allowed to Amend.

Motion to amend after the beginning of trial is addressed to the discretion of the trial court and is not appealable. *Chappel v. Winslow*, 617.

§ 28. Variance between Allegations and Proof.

Plaintiff's recovery must be based on the cause of action alleged in the complaint unaffected by allegations of the reply, since a reply is solely a defensive pleading. *Howell v. Smith*, 150.

Plaintiff must recover, if at all, in accordance with the allegations of the complaint, and plaintiff's proof must correspond substantially thereto. *Montgomery v. Tel Co.*, 172; *Underwood v. Liability Co.*, 211; *Queen v. Jarrett*, 405.

PLEADINGS—*Continued.*

§ 30. Motions for Judgment on Pleadings.

Judgment on the pleadings is proper only when the pleading of the opposite party is so fatally deficient as to present no material issue of fact. *Ins. Co. v. Simmons*, 69.

Plaintiffs' motion for judgment on the pleadings is in effect a dmurrer to the answer and admits for the purpose of the motion the truth of all facts well pleaded in the answer and the untruth of plaintiffs' allegations so far as they are controverted in the answer. *Sale v. Johnson*, 749.

On plaintiffs' motion for judgment on the pleadings, defendant's answer will be liberally construed and the motion denied if the facts alleged in the answer constitute a defense or if the answer is good in any respect or to any extent. *Ibid.*

In passing upon plaintiffs' motion for judgment on the pleading, an exhibit attached to the answer and made a part thereof is to be considered. *Ibid.*

PRINCIPAL AND AGENT

§ 4. Proof of Agency.

Evidence that person represented and acted as agent for period of years to alleged principal's knowledge and that principal ratified his acts held sufficient for jury on the issue. *Reverie Lingerie v. McCain*, 353.

PROCESS

§ 7. Personal Services on Nonresident Individuals in this State.

Persons in this State sequent to extradition or waiver thereof may not be served with civil process, but person voluntarily entering the State for trial may be served. *Reverie Lingerie v. McCain*, 353.

§ 9. Service by Publication.

Service by publication upon "any and all unknown heirs" of a deceased widow and all other persons having any interest in her estate, *held* insufficient to give the court jurisdiction of persons claiming as heirs of the deceased husband of the widow. *Sutton v. Davenport*, 27.

§ 13. Service on Foregin Corporation or Association by Service on Secretary of State.

Evidence held sufficient to show that labor union was doing business in this State for purpose of service on Secretary of State. *Reverie Lingerie v. McCain*, 353.

QUASI — CONTRACTS

§ 1. Elements and Essentials of Right of Action.

If the purchaser uses any part of goods delivered under an express contract, he is liable for the reasonable value of the goods used notwithstanding that the goods failed to meet the specifications set out in the contract. *Yates v. Body Co.*, 16.

Where personal services are rendered by one party to another without an express contract to pay for such services, the law implies a promise to

QUASI-CONTRACTS—*Continued.*

pay fair compensation therefor unless the services are rendered gratuitously or in discharge of some obligation, and failure to establish the express contract alleged does not defeat recovery on an implied promise to pay. *Cline v. Cline*, 295.But where there can be no recovery on an implied agreement, nonsuit is proper upon failure of the express agreement. *Noland v. Brown*, 778.

§ 2. Actions on Implied Contract.

Allegations of delivery of goods under an express contract of a stipulated reasonable value support recovery on an express and on an implied contract but liability on the two theories should be submitted under separate issues. *Yates v. Body Co.*, 16.

RAILROADS

§ 5. Crossing Accidents — Injuries to Drivers.

Plaintiff's evidence tending to show that he drove his tandem, 10-wheel truck into the side of defendant's diesel engine at a railroad crossing, without stopping before entering upon the track, *is held* to disclose contributory negligence barring recovery as a matter of law, notwithstanding evidence of defendant's negligence in failing to give warning of the train's approach by bell or whistle, since plaintiff was not justified under the circumstances in relying solely upon the absence of signal by bell or whistle. *Jenkins v. R.R.*, 58.

Evidence held to show that sole proximate cause of crossing accident was negligence of driver of car. *Owens v. R.R.*, 92.

§ 6. Crossing Accidents — Injury to Passengers.

Evidence held to show that sole proximate cause of crossing accident was negligence of driver of car and railroad was not liable to passenger in car. *Owens v. R.R.*, 92.

§ 12. Damages to Property Along Right of Way by Collision.

Evidence held sufficient on issue of negligence of railroad company in driving locomotive into overhead ramp. *Safie Brothers Co. v. R.R.*, 471.

RAPE

§ 14. Competency and Relevancy of Evidence.

Whether the solicitor should be permitted to ask leading questions, particularly of a prosecutrix of tender years in a trial of a defendant charged with rape, carnal abuse, and other cases involving inquiry into delicate subjects of a sexual nature, rests in the sound discretion of the trial court, and since the trial court, from his observation of the witness and knowledge of the circumstances of the particular case, is in a better position to decide the course of conduct necessary to establish the truth and yet safeguard the rights of defendant, the exercise of his discretion will not be disturbed in absence of manifest abuse. *S. v. Pearson*, 188.

In a prosecution for assualt with intent to commit rape, evidence that defendant committed a like offense approximately two years prior to the offense charged is incompetent and its admission is prejudicial error, there being no connection between the two offenses. *S. v. Gammons*, 522.

RECEIVERS

§ 5. Title to and Control of Property.

Where a factor contends that prior to the receivership it had paid full consideration for all accounts assigned to it by the account creditor prior to insolvency and that actual notice of the assignment was given to the account debtors on the face of the original invoices, G.S. 44-80(2), the receiver's report should find the facts with regard to the factor's contentions in order to determine the factor's right to proceeds of the accounts receivable free from the costs of the receivership and the claims of other creditors, and when the receiver has made no findings in respect thereto the cause must be remanded. *King v. Premo & King, Inc.*, 701.

§ 12. Priorities and Payment.

Where the insolvent is indebted to creditors on interest-bearing obligations secured by a lien on specific chattels, and the chattels are sold for a sum in excess of the principal of the debt secured, the creditor is entitled, as far as his security sufficies, to interest to the time of the order of disbursement, and not merely to the date of the appointment of the receiver. *King v. Premo & King, Inc.*, 701.

R.S. 3466, 31 U.S.C.A. 191, does not create a lien upon the debtor's property in favor of the United States but merely gives it the right to priority of payment, which attaches upon the appointment of a voluntary or involuntary receiver or assignment by the debtor for the benefit of creditors, and the statute does not give the Government priority over liens against specific property of the debtor created prior to insolvency and prior to the filing of any notice by the collector, 26 U.S.C.A. 6323. *Furniture Co. v. Herman*, 731.

Where the receiver sells property subject to the lien of a deed of trust executed by the debtor prior to insolvency, municipal and county *ad valorem* taxes then constituting a line against the property are properly given priority of payment out of the proceeds of the sale, G.S. 105-376, and then the balance due on the deed of trust should be paid prior to the payment of Federal taxes, R.S. 3466, 31 U.S.C.A. 191, and the contention of the United States that although the lien of the deed of trust was prior to its claim, its claim should have priority over the county and municipal taxes, is untenable. *Ibid.*

§ 13. Costs of Receivership and Fees.

The allowance by the lower court of fees to the attorney for the receiver is *prima facie* correct, and the Supreme Court will not alter or modify the same unless the allowance is based on wrongful principle or is clearly inadequate or excessive. *King v. Premo & King, Inc.*, 701.

A receiver is not entitled to five per cent upon receipts and disbursements but is entitled to a reasonabe compensation not to exceed five per cent. *Ibid.*

An amount allowed as fees to an attorney for a receiver may not be enlarged to cover compensation for ministerial functions required to be performed by the receiver in contacting purchasers, showing property for sale, accounting and bookeeping, etc., but such allowance must be based upon services requiring special legal skill performed by the attorney. *Ibid.*

In consideration of the moderate amounts derived from the liquidation of the assets of the insolvent, the inadequacy of the assets to pay even secured creditors in full, and the absence of indication of any litigation or dispute in the collection of the assets, or the amount of professional time necessarily re-

RECEIVERS—*Continued.*

quired for the services of the receiver's counsel, the allowance by the Superior Court of counsel fees to the receiver's attorney in this case *is held* excessive and is reduced by order of the Supreme Court. *Ibid.*

Where the receiver sells the insolvent's real property which is subject to a deed of trust, it is error for the receiver to charge the *cestui* only with the cost of selling the real property and the amount necessary to pay tax liens against the land, but the costs of sale and the tax liens should be included in the cost of administration and then the *pro rata* share of the administrative expenses should be charged against the *cestui*, and order of the lower court approving the receiver's disproportionate charge of administrative expenses will be reversed on appeal of another creditor even though the order will inure *pro tonto* to the benefit of creditors who did not appeal. *Ibid.*

SALES

§ 6. Implied Warranties.

There is an implied warranty that feed sold for laying hens is reasonably fit for the use contemplated by both the purchaser and seller. *Seed Co. v. Mann*, 771.

STATE

§ 5a. Nature and Construction of Tort Claims Act in General.

The pendency of a claim under the Tort Claims Act is not ground for abatement of an action later instituted by the injured party against the State employee in his individual capacity to recover for the injuries resulting from the same act of negligence. *Wirth v. Bracey*, 505.

STATUTES

§ 5. General Rules of Construction.

As a general rule, statutes *in pari materia* are to be construed together and harmonize, if possible, so as to give effect to each as a part of a harmonious body of legislation. *Hardbarger v. Deal*, 31.

G.S. 105-164.13(37) which, in providing exemptions from sales and use tax, uses the word "or" between its specifications of wrapping paper, containers, and like articles exempt from the tax and its limitation on exemptions "when such articles constitute a part of the sale of tangible personal property and are delivered with it to the purchaser" is ambiguous and therefore subject to judicial construction, since the word "or" is popularly used in the sense of "and" and may be so construed when necessary to give effect to the Legislative intent. *Sale v. Johnson*, 749.

Where a statute is ambiguous its legislative history may be considered in connection with the object, purpose, and language of the statute in order to arrive at its true meaning. *Ibid.*

TAXATION

§ 6. Necessity for Vote.

The condemnation of land by a housing authority for a housing project is for a public purpose. Whether it is for a necessary purpose, *quaere*? *Redevelopment Comm. v. Hagins*, 220.

TAXATION—*Continued.*

§ 19. Exemption of Property and Transactions from Taxation in General.

The power to tax and to exempt from taxation is an essential attribute of sovereignty, and as a general rule exemption from taxation is never presumed and statutes providing exemptions are to be strictly construed. *Sale v. Johnson*, 749.

§ 23. Construction of Taxing Statutes in General.

Regulations of the Commissioner of Revenue interpreting a tax statute will be held *prima facie* correct, and although not controlling on the courts, will be given due and careful consideration. *Sale v. Johnson*, 749.

§ 25. Listing, Levy and Assessment of Property for Ad Valorum Taxes.

Board of Assessment properly uses property's fair earning capacity and not return under long term lease as factor in fixing tax value. *Pine Raleigh Corp., In re*, 398.

§ 29. Sales and Use Taxes.

G.S. 105-164.13(37) which, in providing exemptions from sales and use tax, specifies wrapping paper, containers, coops, etc., when used for packaging or delivering tangible personal property "or" when such articles constitute a part of the sale and are delivered to the customer, *is held* to exempt the enumerated articles from taxation only when such articles constitute a part of the sale and are delivered to the customer, the word "or" being construed "and" to effect Legislative intent as ascertained from a consideration of the history of the enactment, the presumption against exemption from taxation, the rule of strict construction of statutory exemptions, and the administrative regulations of the Department of Revenue. *Sale v. Johnson*, 749.

TELEPHONE COMPANIES

§ 4. Negligent Injury to Customers.

Where plaintiff's allegations are to the effect that she was injured while talking on the telephone by electricity from a bolt of lightning traveling over telephone wires, and that the injury occurred because of defendant telephone company's negligence in improperly installing the telephone equipment, but plaintiff introduces no competent evidence of any electrical storm or any lightning anywhere or any lightning being inducted over the telephone wires, nonsuit is proper. *Montgomery v. Tel. Co.*, 172.

TIME

In computing the time in which an act may or must be performed, the first day must be excluded and the last day included, and if the last day is a Sunday or a legal holiday the time is extended to the next secular day, G.S. 1-193, regardless of whether the limitation is expressed in months, years, or days. *Hardbarger v. Deal*, 31.

TORTS

§ 1. Nature and Elements of Tort.

The fact that no injury was intended and that there was an absence of hostility does not affect liability for the injury if it results from negligent default. *Langford v. Shu*, 135.

TORTS—*Continued.*

A person injured by the negligence of joint tort-feasors has a single and indivisible cause of action for all resulting damages, which action he may bring against any one or more of the tort-feasors or all of them together. *Simpson v. Plyler*, 390.

§ 2. Joint Torts.

Joint tort-feasors are persons who act together in committing a wrong, or persons who, independently and without concert of action or unity of purpose, commit separate acts which concur as to time and place and unite in proximately causing injury. *Simpson v. Plyler*, 390.

§ 6. Judgments against Tort Feasors, Payment and Subrogation.

Where one of two tort-feasors is liable to the injured party for the active negligence of the other solely by reason of constructive or technical fault imposed by law, as under the doctrine of *respondeat superior*, the tort-feasor whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to indemnity against the primary wrongdoer. *Ingram v. Ins. Co.*, 633.

Where the verdict fixes liability of the original defendant and exculpates the additional defendant, joined for contribution, the original defendant may pay the judgment in favor of plaintiff and, without appealing therefrom, appeal from the judgment denying it the right to contribution. *Pearsall v. Power Co.*, 639.

§ 7. Release from Liability and Covenants not to Sue.

A release executed by the injured party for a vauable consideration is a complete defense to an action by the injured party to recover damages for the injury, and the burden is upon the injured party, if he seeks to set the release aside for fraud, mistake, or other vitiating element, to prove the matters in avoidance. *Caudill v. Mfg. Co.*, 99.

A release from liability for personal injury may be set aside for mutual mistake based upon error in diagnosis, since such mistake relates to mistake of existing fact as to the extent of a known injury, but a release may not be set aside for mistake in prognosis, since such mistake relates to error in judgment or opinion as to the future course or consequences of a known injury, and is not a mistake of existing fact. *Ibid.*

Consent judgment terminating action against one joint tort-feasor is a release discharging other tort-feasor. *Simpson v. Plyler*, 390.

TRESPASS

§ 5. Pleadings and Parties.

The complaint must allege the facts constituting a trespass in law, and mere allegation that defendant committed a trespass is insufficient. *Gillespie v. Service Stores*, 487. All parties sought to be held liable for a trespass arising out of a single transaction may be joined in a single action. *Ibid.*

TRESPASS TO TRY TITLE

§ 2. Presumptions and Burden of Proof.

Defendant's denial of plaintiff's allegations of title and trespass places the burden on plaintiff to establish each of these allegations. *Bowers v. Mitchell*, 80; *Day v. Godwin*, 465.

TRESPASS TO TRY TITLE—*Continued.*

§ 4. Sufficiency of Evidence and Nonsuit.

In plaintiff's action for trespass to try title, nonsuit cannot be allowed if plaintiff's evidence is sufficient to establish *prima facie* his title and defendant's trespass as to any part of the land claimed, but nonsuit is proper if plaintiff fails to establish title to any portion of the tract. *Bowers v. Mitchell*, 80.

Where plaintiff's claim of title to two tracts of land by adverse possesion under color is based upon deeds executed to him by his brother and his sister, conveying land formerly owned by his father, the deeds being executed less than seven years prior to the institution of the action, and plaintiff's evidence shows that his father died testate, presumably disposing of all his property, but plaintiff fails to introduce his father's will in evidence, there is a *hiatus* in plaintiff's chain of title, and plaintiff's evidence fails to show possession under color for the requisite time. *Ibid.*

It is not sufficient for plaintiff, in an action for trespass in which title to a specific area is in dispute, to introduce evidence of good paper title, but he must show also that the area claimed is embraced within the descriptions in his instruments. *Paper Co. v. Jacobs*, 439.

A jury may not be allowed to locate a boundary upon mere hypothetical evidence. *Day v. Godwin*, 465.

In an action involving title to land plaintiff must fit the descriptions in his chain of title to the land claimed, and show that the land is embraced within the descriptions, and in the absence of competent evidence on this aspect nonsuit is properly entered. *Ibid.*

§ 5. Instructions, Issues and Verdict.

Where plaintiff introduces some evidence that the disputed area was embraced within the description in the instruments constituting his chain of title, the question is properly submitted to the jury, and the jury's negative answer to the issue is conclusive in the absence of error of law. *Paper Co. v. Jacobs*, 439.

Where plaintiff claims under good paper title and also that it had obtained title by adverse possession, instructions that plaintiff had shown a good paper title, and further that plaintiff's instruments constituted color of title, with a correct definition of color of title, are not erroneous as inferring that plaintiff's instruments were in fact defective, since if the descriptions in plaintiff's instruments do not embrace the area in dispute, as to such area they could be only color of title. *Ibid.*

TRIAL

§ 16. Withdrawal of Evidence.

When the trial court withdraws incompetent evidence theretofore admitted and instructs the jury not to consider it, error in its admission is ordinarily cured. *Smith v. Perdue*, 686.

§ 18. Province of Court and Jury in General.

Issues of law may be tried by the judge, but issues of fact must be tried by a jury unless trial by jury is waived. *Ins. Co. v. Simmons*, 69.

TRIAL—*Continued.*

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiffs' evidence is to be taken as true and all the evidence considered in the light most favorable to plaintiffs, giving them the benefit of every fact and inference of fact pertaining to the issues which may be reasonable deduced from the evidence. *Peele v. Hartsell*, 680.

Whether the evidence of the other defendant or plaintiff's evidence introduced after plaintiff had rested her case against the first defendant should be considered in passing on the first defendant's motion to nonsuit, quaere? *Queen v. Jarrett*, 405.

On motion to nonsuit, defendant's evidence may be considered only if it tends to explain plaintiffs' evidence and is not in conflict with it.*Tayloe v. Tel Co.*, 766.

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

Evidence which raises no more than a possibility or conjecture of the fact in issue is insufficient to be submitted to the jury, but if an affirmative finding is a more reasonable probability on the evidence, motion to nonsuit should be denied. *Tayloe v. Tel. Co.*, 766.

§ 26. Nonsuit for Variance.

Nonsuit will not be allowed for a variance which is not material and which does not contain an element of surprise to the adverse party, the pleadings being liberally construed. *Chappel v .Winslow*, 617.

Nonsuit is properly entered when there is a material variance between the allegation and proof. *Noland v. Brown*, 778.

§ 32. Form and Sufficiency of Instructions in General.

One of the most important purposes of the charge is the elimination of irrelevant matters and causes of action or allegations as to which no evidence has been offered, and thereby to let the jury understand and appreciate the precise facts that are material and determinative. *Sugg v. Baker*, 333.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

It is error for the court to fail to apply the law to the various aspects of the case presented by the evidence.*Yates v. Body Co.*, 16; *Seed Co. v. Mann*, 771.

Even though the parties waive a recapitulation of the evidence, the court is required by statute to give a summary of the evidence sufficient to bring into focus the controlling legal principles and to apply the law to the evidence, and an instruction which leaves the application of the law to the evidence entirely to the jury does not meet the requirements of the statute. *Sugg v. Baker*, 333.

It is error for the court to instruct the jury upon a principle of law even though alleged in the pleading, when there is no evidence presenting the matter. *Ibid; Chappell v. Dean*, 412.

Where the instruction of the court on a material aspect of the case is incomplete and unclear, it is prejudicial error for the court to refuse to give further instructions upon the point in response to interrogation of a juror, even though the juror's question is not clearly phrased, it being the duty

TRIAL—*Continued.*

of the court to apply the law to the evidence on a material aspect even in the absence of a special request. *Pearsall v. Power Co.*, 639.

§ 37. Instructions — Statement of Contentions.

The Court is not required to state the contentions of the parties at all. *In re Will of Wilson*, 310.

§ 40. Form and Sufficiency of Issues.

If the pleading and evidence raise several issues, the submission of the single issue as to the amount, if any, plaintiff is entitled to recover, is not good practice. *Yates v. Body Co.*, 16.

§ 42. Form and Sufficiency of Verdict.

A verdict will be interpreted with reference to the pleadings, the evidence, and the judge's charge. *Widenhouse v. Yow*, 599.

§ 54.1. Effect of Order of Mistrial or Order Setting Aside the Verdict.

An order of the court setting the verdict aside and ordering a new trial vacates all rulings made during the course of the trial, and therefore a ruling made during the course of the trial cannot preclude another Superior Court judge from thereafter making a contrary ruling in regard to the matter. *Simpson v. Plyler*, 390.

TRUSTS

§ 3. Merger of Legal and Equitable Titles.

Where property is left in trust for the purpose of providing for the support of the beneficiaries, the trust is an active trust and the legal and equitable titles do not merge. *Poindexter v. Trust Co.*, 371.

VENDOR AND PURCHASER

§ 2. Duration of Option and Time of Performance or Tender.

As a general rule time is of the essence of an option to purchase, and acceptance and tender must be made within the time fixed for the exercise of the right. *Trust Co. v. Medford*, 146.

Provision for extension of time for investigation of title held to apply only if purchaser within the life of the option obligated himself to buy. *Ibid.*

VENUE

§ 8. Removal for Convenience of Parties and Witnesses, or Prejudice.

The judge has the discretionary power to remove to another county for prejudice only if the judge is satisfied, after hearing all the testimony offered by both sides by affidavit, that the ends of justice so require; instead of removing the cause the court may order a special venire from another county. *S. v. Moore*, 300.

WATERS AND WATER COURSES

§ 1. Surface Waters.

Where the evidence discloses that the area was constantly subject to drainage problems, that defendants were cutting ditches to divert surface waters

WATER AND WATER COURSES—*Continued.*

on their lands into a canal flowing by the lands of lower proprietors, and that such additional waters would cause an overflow of such ditch in each recurring heavy rain, rendering plaintiffs' plumbing facilities useless and creating a hazard to health, defendants may be restrained from opening such ditches, even prior to the occurrence of actual injury, injunction being a preventive remedy. *Chappel v. Winslow*, 617.

WILLS

§ 4. Holographic Wills.

The fact that person "finding" will knew of its location prior to testatrix's death is immaterial. *In re Will of Wilson*, 310.

§ 7. Revocation of Wills.

Where husband and wife own land by the entireties, but mistakenly believe that they own the land in question as tenants in common, and execute a joint will under which the husband devises a life estate in one-half of the land to the wife with remainder to a college, and the wife devises a life estate in one-half of the land to the husband with remainder to certain of her kin, and the husband thereafter dies, *held*, the wife obtains title to the entire land as survivor and may revoke or change her devise of the property, since the reciprocal provisions with regard to a life estate do not amount to a contractual agreement precluding revocation. *Walston v. College*, 130.

The word "divorce" is used in G.S. 31-5.4 in its general and comprehensive sense, and the statute effects a revocation of all provisions of a will in favor of testator's spouse upon the dissolution of the marriage either by absolute divorce or by annulment. *Ivery v. Ivery*, 721.

§ 8. Probate in Common Form.

It is not required that the husband's probated will leaving his property to his wife be first set aside in a caveat proceeding in order for the husband's next of kin to maintain an action to have the marriage declared void for mental incapacity of the husband to contract the marriage, since the provisions of the will in favor of the wife are revoked by statute if the marriage is annuled. *Ivery v. Ivery*, 721.

§ 27. General Rules of Construction.

The rule of contexual construction to effect intent of testator applies to its provisions appointing an executor. *Yount v. Yount*, 236.

The intent of testatrix is her will and must be carried out unless some rule of law forbids it. *Poindexter v. Trust Co.*, 371; *Trust Co. v. Bryant*, 482.

Where there is a latent ambiguity as to the object of a devise or bequest, a former will is admissible as hearing upon the intention of testatrix. *Poindexter v. Trust Co.*, 371.

The presumption that technical words are used in their technical sense does not obtain over testatrix's intent as gathered from the entire instrument and the attendant circumstances. *Ibid.*

Where a provision of a will is susceptible to two constructions, one of which would be valid and operative and the other invalid, the former must be preferred. *Ibid.*

WILLS—*Continued.*

The presumption that a testator did not intend to die intestate will be employed as an aid in ascertaining his intent. *Ibid.*

Expressions in a will must be considered with a view to the context and the circumstances of their use. *Ibid.*

Where there is an irreconcilable conflict between two clauses of a will, the second clause ordinarily prevails over the first. *Ibid.*

The rule that a will speaks as of the time of testator's death relates to the subject matter of disposition only, and the persons who are to take under the will are to be determined in accordance with the intent of testator as ascertained from the language of the instrument considered in the light of the conditions and circumstances existing at the time the will was made. *Thomas v. Thomas*, 590.

§ 28. Construction of Codicils.

The will and the codicil thereto must be construed together as a single instrument taking effect at the time of testator's death, and as a general rule provisions of the codicil will not be construed to revoke provisions of the will relating to the same subject matter unless they are so inconsistent as to exclude any legitimate inference other than that testator had changed his intention, construing both instruments as a whole to ascertain such intent. *Yount v. Yount*, 236.

§ 30. Transmittible Estate.

A vested estate is transmittible, a contingent estate is not. *Poindexter v. Trust Co.*, 371.

§ 33. Fees, Life Estates and Remainders.

The will designated the home place together with all equipment and furnishings to testator's daughter "providing that my wife *** have a dowry right as long as she lives, together with co-ownership and co-management of the home place." *Held:* The wife takes a life estate in common with the daughter in the home place and its equipment and furnishings, and the daughter takes the fee in remainder. *Yount v. Yount*, 236.

The will gave testator's wife a life estate in his home place and its furnishings in common with testator's daughter and provided "(A)lso life insurance", stock in corporations and money in banks or elsewhere. *Held:* The wife was the sole owner of the insurance, stock and money. *Ibid.*

Where testatrix's son is given the entire beneficial interest of a trust with limitations over to others in the event the son should die leaving no issue, the son ordinarily takes a fee defeasible in trust, but when it is apparent from the will, construed in its entirety in the light of the attendant circumstances, that the testatrix intended to provide for the support of her son for his life only, with limitation over in the event the son should die with issue him surviving as well as in the event he should die without surviving issue, such intent will be given effect and the son takes only a life estate in trust. *Poindexter v. Trust Co.*, 371.

Where the testamentary trust provides that testatrix's grandchildren should receive the income from the trust indefinitely, and there is no limitation over, the grandchildren take the fee, subject to the trust, in the absence of plain and express language indicating testatrix's intention to convey an estate of less dignity. *Ibid.*

WILLS—*Continued.*

§ 36. Future Interests in Personalty.

A bequest of personal property to testatrix's son to be used by him as long as he should live and by his issue also and then to testatrix's brothers and sisters "the same as the other property," *is held* to give the son absolutely the personal property consumed in its use, but as to personal property permanent in its nature, it transfers only a life estate to the son with the same future interests in such personalty as were provided for the other property. G.S. 29-6.3. *Poindexter v. Trust Co.*, 371.

§ 40. Rule against Perpetuities.

A devise to a person and his issue violates the rule against perpetuities when the word "issue" is used in its technical sense to designate a perpetual succession of lineal descendants. *Poindexter v. Trust Co.*, 371.

Testatrix left property in trust for the benefit of her son for life with limitation over to his issue. *Held:* It being apparent from the will and the attendant circumstances that testatrix used the word "issue" to mean issue living at the time of the son's death, the provision does not violate the rule against perpetuities. *Ibid.*

Where the beneficial interest vests within the time specified by the rule against perpetuities, the fact that the trust may not terminate until thereafter does not violate the rule. *Ibid.*

§ 42. "Issue", "Heirs" and "Children".

A limiation over to the "issue" of the life tenant will be construed to mean "children" or issue living at the death of the life tenant when such intent is apparent from the entire instrument and the attendant circumstances, and the fact that at the time of the execution of the will testatrix had a son but no grandchildren may in proper instances indicate that testatrix did not intend more remote issue as the object of her bounty. *Poindexter v. Trust Co.*, 372.

As a general rule, a devise in remainder to the child or children of the life tenant does not include a child adopted by the life tenant does not include a child adopted by the life tenant unless it appears from the instrument itself or the attendant circumstances that testator meant to include adopted children within the class. *Thomas v. Thomas*, 590.

§ 43. Representation and Per Capita and Per Stirpes Distribution.

A devise or bequest to a class requires a *per capita* and not *per stirpes* distribution unless a contrary intent appears from the will construed as a whole. *Trust Co. v. Bryant*, 482.

The will in suit bequeathed property, after a life estate, to testator's nephews and nieces, with further provision that "the child or children of any deceased nephew or niece to receive the share the parent would have taken, the said distribution to be *per stirpes* and not *per capita*." *Held:* Testator's nephews and nieces take *per capita*, there being no reference in the will to testator's deceased brothers, and the provision for *per stirpes* distribution relates solely to children of nephews and nieces. *Ibid.*

§ 54. Whether Gift Is of Personalty or Realty.

While the term "personal property" includes in its broadest sense all of testator's property except land or interests in land, the meaning of the term

WILLS—*Continued.*

varies according to the subject matter and context, and when to construe it in its technical sense would result in an irreconcilable conflict with a prior provision and defeat the obvious intent of testatrix, the term will be construed in its popular sense as embracing only tangible goods and chattels. *Poindexter v. Trust Co.*, 371.

§ 59. Renunciation.

Husband and wife were killed in an accident, the husband surviving the wife a short time. The father and mother of the husband filed a renunciation of their right to any share in the estate of the wife to which the husband might otherwise be entitled. The husband's father was also administrator for his son's estate, and the administrators of both the husband and wife had respectively filed suits against third persons for the wrongful deaths. *Held:* The renunciation was within the purview of G.S. 29-10, but such renunciation may not be allowed to affect adversely any rights or defenses in the actions for wrongful death. *In re Estate of Glenn*, 351.

§ 63. Doctrine of Election.

Where husband and wife own land by the entireties and the husband bequeaths her certain personalty and devises one-half of the land to a named beneficiary after a life estate to the wife, and it is apparent that the devise was made under the mistaken belief that they owned the land as tenants in common, the wife is not put to her election, since in such instance there is no intention on his part to devise to another property which belonged to her, and thus put her to her election. *Walston v. College*, 130.

§ 65. Lapsed Legacies.

Testatrix left property in trust to her son for life with remainder over to his issue, and in the event the son should leave no issue, to testatrix's brothers and sisters. All except one of testatrix's brothers and sisters predeceased her, and the sister who survived her died during the lifetime of the son. *Held:* The limitation over to the brothers and sisters of testatrix lapsed, since the children of the brothers and sisters of testatrix who predecease testatrix do not qualify under, G.S. 31-42, and no transmittible estate vested in the sister of testatrix who died during the lifetime of textatrix's son. *Poindexter v. Trust Co.*, 371.

§ 70. Property out of which Inheritance and Estate Taxes and Costs Should be Paid.

There is no statute in this State which directs the method of computing the portion of estate and inheritance taxes as between the testamentary and the trust estates in those instances in which testator creates a trust which must be included in the gross estate in computing the tax, and herefore the court must look to the equity of the situation upon the facts of each particular case. *Cornwell v. Huffman*, 363.

§ 71. Actions to Construe Wills.

Provisions of the judgment to which no exception is taken is the law of the case. *Poindexter v. Trust Co.*, 371.

GENERAL STATUTES, SECTIONS OF, CONSTRUED

G.S.

1-42. Statute does not declare that one claiming title on paper more than thirty years old establishes title *prima facie*. *Bowers v. Mitchell*, 80.

1-53(4); 28-173. Two-year statute of limitations applies to action for wrongful death. *Hardbarger v. Deal*, 31.

1-63. If tort-feasor secondarily liable pays judgment and has it assigned to himself, the judgment is extinguished; but if he has it assigned to a trustee he is subrogated to the rights of the judgment creditor, and trustee may sue without joinder of *cestui*. *Ingram v. Insurance Co.*, 632.

1-73(3). The right to interplead. *Simon v. Board of Education*, 381.

1-84; 1-86. Order for special venire is tantamount to denial of motion to remove to another county for trial, and one Superior Court judge may not thereafter allow motion for removal. *S. v. Moore*, 300.

1-97(6); 1-69.1. Evidence that nonresident was doing business in this State for purpose of service of process held sufficient. *Reviere Lingerie, Inc. v. McCain*, 353.

1-122. Complaint must allege predicate facts and not mere legal conclusions, *Gillispie v. Service Stores*, 487.

1-127(3). Injured party may sue State under Tort Claims Act and sue negligent State employee individually at common law. *Wirth v. Bracey*, 505.

1-131. Upon demurrer to complaint defectively stating good cause of action defendant should be given opportunity to amend. *Ingram v. Insurance Co.*, 632.

1-145. Plaintiff may not allege lack of sufficient information to form a belief concerning a certain matter and then allege such facts upon information and belief. *Myrtle Apartments v. Casualty Co.*, 49.

1-151. Pleadings will be liberally construed on motion for judgment on the pleadings. *Sale v. Johnson*, 749.

1-172. Issues of law may be tried by judge, but issues of fact must be tried by jury. *Insurance Co. v. Simmons, Inc.*, 69.

1-180. An instruction which leaves application of law to the evidence entirely to the jury does not meet requirements of the statute. *Sugg v. Baker*, 333; *Pearsall v. Power Co.*, 639; *Seed Co. v. Mann*, 771. Charge held prejudicial in failing to explain law arising on evidence. *Widenhouse v. Yow*, 599.

1-240; 1-277. Original defendant may pay judgment against him and appeal from judgment denying him the right of contribution against additional defendant. *Pearsall v. Power Co.*, 639.

GENERAL STATUTES CONSTRUED—*Continued.*

1, Art. 26. Existing controversy may be subject of proceeding although matter could not have been the subject of a civil action at the time. *Insurance Co. v. Simmons, Inc.*, 69.

1-261. Issue of fact may be submitted to jury in proceeding under Declaratory Judgment Act. *Insurance Co. v. Simmons, Inc.*, 69.

1-271. Successful party is not party aggrieved. *Teague v. Power Co.*, 759.

1-339.68(b). Perfected liens for labor and materials are not imparied by adjudged bankruptcy within four months. *Glass Company v. Forbes*, 426.

1-339.67. Mortgagee purchasing property at execution sale is not precluded, prior to confirmation, from asserting priority of his lien over lien for materials. *Priddy v. Lumber Co.*, 653.

1-593. In computing time, first day must be excluded and last day included. *Hardbarger v. Deal*, 31.

8-51. Beneficiary may testify as to finding will. *In re Will of Wilson*, 310.

8-51. In action by husband and wife to recover for personal services rendered decedent, each is competent to testify for the other as to transactions with decedent, *Smith v. Perdue*, 686.

8-51. Insurer's agent may testify that insured, before his death, directed him to transfer policy to his son because he was giving the land to his son. *King v. Insurance Co.*, 432.

9-2; 9-3; 9-24. Evidence held insufficient to show that members of defendant's race were arbitrarily excluded from jury. *S. v. Arnold*, 563.

9-26. Motion to quash indictment for racial discrimination in selection of grand jury must be made before a jury is sworn and impaneled. *S. v. Rorie*, 163. Motion to quash indictment for racial discrimination in selection of grand jury is aptly made when made prior to plea. *S. v. Covington*, 495.

14-32. "Serious injury" as used in the statute means physical or bodily injury and is not synonymous with "serious damage done." *S. v. Jones*, 89.

14-90. Evidence held sufficient to overrule nonsuit in this prosecution of real estate agent for embezzlement. *S. v. Helsabeck*, 107.

14-284.1(c), (d). Evidence held insufficient to connect defendant with dynamite cap found by minor in trash pile. *Tayloe v. Telephone Co.*, 766.

14-353. Is constitutional but its violation is not a malicious misdemeanor. *S. v. Brewer*, 533.

15-1. Offense of conspiracy continues until consumated or abandoned, and therefore when acts in furtherance thereof are committed within two years, prosecution is not barred. *S. v. Brewer*, 533.

GENERAL STATUTES CONSTRUED—*Continued.*

15-79. Persons in this State sequent to their arrest in another state and waiver of extradition are immune to service in civil action arising out of same facts as criminal prosecution. *Reverie Lingerie, Inc., v. McCain*, 353; but a person voluntarily coming into this State and posting bond in a criminal prosecution is not immune to service, *ibid.*

15-176.1. Solicitor may argue that jury should not recommend life imprisonment. *S. v. Christopher*, 249.

18-78.1; 18-90.1. Copy of birth certificate without testimony of any person that it was record of the party in question is incompetent to prove the age of such party. *Thomas v. Board of Alcoholic Control*, 513.

18-135; 18-137; 18-138; 143.306. Hearing by examiner for State Alcoholic Control Board held sufficient to meet requirements of due process of law. *Sinodis v. Board of Alcoholic Control*, 282.

20-38(1). Definition of intersection. *Pearsall v. Power Co.*, 639.

20-71.1. Where all of the evidence shows the driver was on purely personal mission court may instruct jury to answer issue of respondeat superior in the negative notwithstanding evidence of registration of vehicle. *Chappell v. Dean*, 412.

20-71.1(b). Evidence that vehicle was registered in the name of defendant sufficient upon issue of respondeat superior. *Ennis v. Dupree*, 141; *Rushing v. Polk*, 256. Even though at the time of the accident the one-year limitation is in effect, when the limitation has been revoked the presumption of the statute may be invoked. *Insurance Co. v. O'Neill*, 169.

20-75. When owner sells to a dealer, the dealer is not required to transmit the certificate of title to Department of Motor Vehicle until he resells. *Indemnity Co. v. Motors, Inc.*, 647.

20-129(g). Stop light on back of vehicles not required for those manufactured prior to 31 December 1955. *Punch v. Landis*, 114.

20-140. Failure to keep proper lookout alone does not constitute reckless driving. *Sugg v. Baker*, 333.

20-148. Evidence that motorist drove vehicle to left of center of highway and collided head-on with approaching vehicle takes issue of negligence to jury. *McGinnis v. Robinson*, 264.

20-153(a). Failure of motorist to pass to right of center of intersection in making left turn is negligence *per se*. *Pearsall v. Power Co.*, 639.

20-154. Evidence that motorists turned into path of plaintiff's car held sufficient to take issue of negligence to jury. *Queen v. Jarrett*, 405.

20-166(b). Stopping a vehicle on highway after accident cannot be negligence. *Punch v. Landis*, 114.

GENERAL STATUTES CONSTRUED—*Continued.*

20-174(e). In action by pedestrian, failure to charge duty of motorist to sound horn is not prejudicial when evidence discloses that pedestrian would not have heard horn had it been sounded. *Jenks v. Morrison*, 96.

20-279.21. Insurer, under an assigned risk policy, has the right to decline to endorse the policy over to new owner. *Underwood v. Liability Co.*, 211.

20-310. If insurer fails to give insured 15 days notice of cancellation of policy, the contract remains in force as to injured third persons; but if insurer gives notice, insurer's obligation ends notwithstanding insurer fails to notify Commissioner of Motor Vehicles. *Levinson v. Indemnity Co.*, 672. When cancellation of policy is made by insured, insurer is not required to give notice. *Underwood v. Liability Co.*, 211.

20-310; 20-314. Injured party may not recover against insurer cancelling policy at request of insured's agent prior to accident. *Daniels v. Insurance Co.*, 660.

20-313; 20-315. If insured substitutes another vehicle for the vehicle insured, the operation of the original vehicle is thereafter unlawful and insurer properly uses Form FS-1 and not Form FS-4. *Levinson v. Indemnity Co.*, 672.

25-28. Monies deposited to drawer's account in reliance on genuineness of forged drafts is consideration for drawer's note. *Trust Co. v. Smith Crossroads, Inc.*, 696.

29-10. Renunciation of father and mother of husband's right to share in estate of wife held within the purview of the statute in action by the husband's father as administrator to recover against third person for wrongful death of husband and wife. *In re Estate of Glenn*, 351.

29-14(4). In an action against the estate of husband and wife for personal services rendered them, declaration of husband after wife's death that plaintiff had cared for him and his wife held competent as admission against interest. *Smith v. Perdue*, 686.

31-5.4. Statute embraces annulment of marriage as well as divorce. *Ivery v. Ivery*, 721.

31-42. Contingent limitation over to brother and sister lapses when they predecease testatrix. *Poindexter v. Trust Co.*, 371.

39-1. Deed held to convey a fee upon special limitation and not fee simple absolute. *Lackey v. Board of Education*, 460.

39-6.3. Future interest in personalty may be created by will. *Poindexter v. Trust Co.*, 371.

GENERAL STATUTES CONSTRUED—*Continued.*

41-7. Property left in trust for purpose of providing support for beneficiaries is active trust. *Poindexter v. Trust Co.*, 371.

44-39. Material furnisher may not extend time for filing lien by furnishing additional items not contemplated in the original contract. *Priddy v. Lumber Co.*, 653.

44-80(2). Assignee for full value takes choses assigned free from claim of receivership. *King v. Premo & King, Inc.*, 701.

46-7; 46-10; 1-276. A judge may confirm or vacate a report for partition but may not adjudge a different partition. *Allen v. Allen*, 305.

48-23. Adopted child does not take as member of class when there is nothing to indicate that testator so intended. *Thomas v. Thomas*, 590.

50-6. Party may obtain divorce for two years' separation without showing he was the injured party. *Pickens v. Pickens*, 84.

50-7; 50-16; 17-39.1. Where right to custody is put in issue both in the husband's suit for divorce from bed and board and the wife's action for alimony without divorce, court may adjudicate right to custody even though actions for divorce are dismissed. *Bunn v. Bunn*, 445.

50-16. In awarding alimony without divorce, the court is not limited to one-third of husband's annual income. *Harris v. Harris*, 121.

51-3; 50-4. Where there is no issue of the marriage of an incompetent, marriage may be declared void in action after death of incompetent by person whose legal rights depend thereon. *Ivery v. Ivery*, 721.

52-10. Wife's earnings are her separate estate and unauthorized claim against third party entered by husband in regard to her earnings does not bind her. *Cline v. Cline*, 295.

52-10.1. Where wife is injured in accident in state not permitting wife to sue husband in tort, she may not institute such suit in this State, *Shaw v. Lee*, 609.

52-12. Where husband and wife convey land to trustee who in turn reconveys to them as tenants in common, the husband and wife continue to hold the lands by the entireties when the deed to the trustee failed to meet requirements of the statute. *Walston v. College*, 130.

52-12(b). Separation agreement properly executed is valid, and court may not award alimony in excess thereof in absence of attack on the validity of the agreement. *Kiger v. Kiger*, 126.

58-176. The appointment of an umpire by the Superior Court upon application of a party to an insurance contract pursuant to the appraisal clause of the policy is a ministerial and not a judicial act, and no appeal will lie from the judge's order in regard thereto. *In re Roberts Co.*, 184.

GENERAL STATUTES CONSTRUED—*Continued.*

75-4. A contract not to engage in business after termination of employment in competition with employer held valid. *Exterminating Co. v. Griffin*, 179.

90-235; 90-114. A dispensing optician may fabricate and fit contact lenses so long as refraction is controlled by prescription. *High v. Ridgeway's Opticians*, 626.

97-2(6). Fall of aged employee solely because of idiopathic condition is not compensable. *Cole v. Guilford County*, 724.

97-12. Negligence of injured employee does not preclude recovery under Workmen's Compensation Act., *Hartley v. Prison Department*, 287.

97-17. Compromise settlements are permitted under Workmen's Compensation Act when they are approved by Industrial Commission. *Caudill v. Manufacturing Co.*, 99.

97-25; 97-26. Employer may not object until he has paid bills beyond the limitations prescribed by statute. *Bass v. Mecklenburg County*, 226.

97-38; 97-12. Evidence held to support finding that suicide was result of mental condition and not wilful intent of employee, and therefore was compensable. *Painter v. Mead Corporation*, 741.

97-88. When ruling of Industrial Commission is affirmed, its allowance of additional fees in affirming the Hearing Commissioner is authorized. *Bass v. Mecklenburg*, 227.

103-4; 103-5; 2-24. Where county commissioners have stipulated Easter Monday to be a holiday, it is a legal holiday in such county. *Hardbarger v. Deal*, 31.

105-2(3), (7),(8). Court must look to equity of the situation in apportioning estate taxes between testamentary and trust estates, *Cornwell v. Huffman*, 363.

105-164.13(37). "Or" construed as "and", and wrapping paper, containers, coops, etc., are exempt from taxation only when such articles constitute a part of the sale. *Sale v. Johnson*, 749.

105-295. Failure of taxpayer to seek reduction of tax valuation for particular year does not preclude him from seeking reduction for same reason in subsequent year. *In re Pine Raleigh Corp.*, 398.

105-376. City and county taxes have priority in proceeds of sale under deed of trust prior to payment of Federal taxes. *Furniture Co. v. Herman*, 733.

136-29. On appeal from award of Board of Review, Superior Court may remand but may not make additional findings. *Paving Co. v. Highway Commission*, 691.

GENERAL STATUTES CONSTRUED—*Continued.*

143-307. Holder of permit to sell malt beverages must request hearing by the Board of Examiners before he is entitled to judicial review. *Sinodis v. Board of Alcoholic Control*, 282.

160-178; 143-307. Statutory provision for review of order of administrative board must be equal to that provided by general statute in order to constitute adequate provision for judicial review. *Jarrell v. Board of Adjustments*, 476.

160-204; 160-205; 160-255 *et sec.* Municipality has power to condemn right-of-way for water line. *Davidson v. Stough*, 23.

160-463. Petition for condemnation of land for housing authority must affirmatively show compliance with all statutory requirements. *Redevelopment Commission v. Hagins*, 220.

163-119. Whether candidate for political office must sign pledge prescribed by statute, *quaere*? *Ratcliff v. Rodman*, 60.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED

ARTICLE

I, §7. Eminent domain as limited by constitution safeguards is inherent in sovereignty. *Redevelopment Commission v. Hagins*, 220.

1, §11; 1, §17. Denial of motion for continuance held deprivation of constitutional right of confrontation. *S. v. Lane*, 349.

I, §17. Statute defining commercial bribery held constitutional, *S. v. Brewer v.* 533. Hearing by examiner for State Alcoholic Control Board held sufficient to meet requirements of due process of law. *Sinodis v. Board of Alcoholic Control*, 282. Exclusion of persons of defendant's race from jury solely because of race is a denial of due process. *S. v. Arnold*, 563. Defendant is deprived of constitutional right if he is tried on indictment by grand jury from which members of his race were arbitrarily excluded. *S. v. Covington*, 495.

IV, §8. Supreme Court may allow *certiorari* to bring up entire record for review in exercise of its supervisory jurisdiction. *S. v. Moore*, 300.

VII, §7. Condemnation of land for housing authority is for public purpose. *Redevelopment Commission v. Hagins*, 220.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

Fourteenth Amendment. Eminent domain as limited by constitutional safeguards is inherent in sovereignty. *Redevelopment Commission v. Hagins*, 220. Statute defining commercial bribery held constitutional, *S. v. Brewer*, 533. Defendant is deprived of constitutional right if he is tried on indictment by grand jury from which members of his race were arbitrarily excluded. *S. v. Covington*, 495; *S. v. Arnold*, 563. Denial of motion for continuance held deprivation of constitutional right of confrontation. *S. v. Lane*, 349.